NO. 04-35210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU, et al., Plaintiff-Appellants,	)
v.	)
BLACKFEET HOUSING AUTHORITY, and its Board Members, et al. and HUD, Defendants-Appellees.	)

On Appeal From the United States District Court
for the District of Montana, Great Falls Division
D.C. No. CV 02-00073-GF-SEH

Confederated Salish and Kootenai Tribes' and the Salish Kootenai Housing Authority's *Amicus Curiae* Brief in Support of Blackfeet Housing Authority's Petition for Rehearing *En Banc*

John T. Harrison
Ranald McDonald
CONFEDERATED SALISH AND KOOTENAI TRIBES
Tribal Legal Department
P.O. Box 278
Pablo, Montana 59855
Telephone: (406) 675-2700
Fax: (406) 675-4665
ATTORNEYS FOR CONFEDERATED SALISH AND KOOTENAI TRIBES

NO. 04-35210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU, et al.,
Plaintiff-Appellants,

v.

BLACKFEET HOUSING AUTHORITY,
and its Board Members, et al, and HUD,
Defendants-Appellees.

On Appeal From the United States District Court
for the District of Montana, Great Falls Division
D.C. No. CV 02-00073-GF-SEH

Confederated Salish and Kootenai Tribes' and the Salish Kootenai Housing Authority's *Amicus Curiae* Brief in Support of Blackfeet Housing Authority's Petition for Rehearing *En Banc*

John T. Harrison
Ranald McDonald
CONFEDERATED SALISH AND KOOTENAI TRIBES
Tribal Legal Department
P.O. Box 278
Pablo, Montana 59855
Telephone: (406) 675-2700
Fax: (406) 675-4665
ATTORNEYS FOR CONFEDERATED SALISH AND KOOTENAI TRIBES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST.

The Confederated Salish and Kootenai Tribes of the Flathead Reservation, together with the Salish and Kootenai Housing Authority (filing jointly as Amicus CSKT) respectfully submit this Brief in Support of the Blackfeet Housing Authority's (BHA) Petition for Rehearing *En Banc* of the Amended Opinion issued in *Marceau v. Blackfeet Housing Authority and HUD,* 519 F.3d 838 (2008)(*Marceau II*). While Amicus CSKT is directly impacted by all the holdings in this case, this brief focuses specifically on the federal trust obligation to Indian tribes and their members.

First, rehearing *en banc* is necessary because this case involves an issue of exceptional importance - how this Circuit interprets a key element of federal Indian law, the federal-tribal trust relationship. Specifically, the Amended Opinion's overly narrow approach to the *Mitchell* doctrine misapplies Supreme Court caselaw and conflicts with the Federal Circuit's exhaustive examination of this doctrine after remand from *United States v. Navajo Nation,* 537 U.S. 488 (2003). The Federal Circuit's analysis of the federal trust obligation to Indian tribes was issued after this Circuit's rehearing of *Marceau v. Blackfeet Housing Authority and HUD,* 455 F.3d 974 (2006)(*Marceau I*) and thus the Panel Majority may not have had an opportunity to consider the Federal Circuit's decision. The

Amended Opinion should be heard *en banc* in order to give this Circuit an opportunity to consider the logic of the Federal Circuit and maintain uniformity in an area of law that has national importance.

Second, rehearing *en banc* is necessary because the practical impact of the Amended Opinion excuses the United States government from any liability for breaches of the federal trust obligation, requiring instead that a tribal entity such as the BHA assume liability for a federal agency's failures. Not only does the Amended Opinion run counter to basic federal Indian law, such an inversion of the trust obligation creates a threshold question of federal court jurisdiction if all the parties are tribal members or tribal entities and the litigation stems from a reservation-based project.

II. *EN BANC* REHEARING IS NECESSARY TO CORRECT THE PANEL MAJORITY'S *MITCHELL* ANALYSIS AND MAINTAIN UNIFORMITY BETWEEN THE CIRCUITS.

A. The Panel Majority's Mitchell Analysis is Overly Narrow and Misapplies Supreme Court Precedent.

As explained in detail in the Amended Opinion, the Supreme Court's landmark decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*) form the *Mitchell* doctrine. Slip Op. at 2555-57; Dissent at 2575-76. This doctrine has been

followed by two recent Supreme Court decisions discussed in the Amended Opinion, *United States v. Navajo Nation,* 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003).

In *Mitchell I* the Supreme Court held that while the General Allotment Act was evidence of a trust relationship between the federal government and Indian tribes, that limited trust relationship did not impose a fiduciary duty on the federal government to manage the tribe's timber resources. *Mitchell I,* 445 U.S. at 544. The Court remanded the case to the Court of Claims for consideration of whether other statutes dealing with management of tribal timber resources could provide a basis for liability. *Id.* at 546. When the case returned to the Supreme Court three years later as *Mitchell II,* the Court held that the network of federal statutes examined by the Court of Claims did indeed indicate that the federal government had taken on a fiduciary obligation to manage the tribe's timber resources, the breach of which was actionable under the Tucker Act, 28 U.S.C. § 1491. *Mitchell II,* 463 U.S. at 228.

In summarizing the *Mitchell* doctrine the Supreme Court held:

> [W]here the Federal Government *takes on* or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless

> Congress has provided otherwise)[1] *even though nothing is said expressly in the authorizing or underlying statute about a trust fund, or a trust or fiduciary connection.*

Mitchell II, 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)) (emphasis added).

Here, however, the Panel Majority summarized the *Mitchell* Doctrine in a significantly more restrictive manner:

> Together, *Mitchell I* and *Mitchell II* form the *Mitchell* doctrine: To create an actionable fiduciary duty of the federal government towards Indian tribes, *a statute must give the government pervasive control* over the resource at issue.

Slip Op. at 2557 (emphasis added).

The Panel Majority's expression of the *Mitchell* doctrine diverges from the Supreme Court's plain language. The Supreme Court did not hold that a statute must give the government pervasive control over a trust asset in order to show a fiduciary obligation on the part of the government. Neither Congress nor a federal agency needs to codify such actual control for a fiduciary trust relationship to

---

[1] *See, e.g.* the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635. Compare Subsection (a) (no mention of government liability for leasing or management of lands), with Subsection (c) (expressly states that "the United States shall have no responsibility or liability" for management or use of reservation lands once title is transferred to Navajo Nation). The Panel Majority notes specific Indian trust language is absent from some of the housing statutes at issue in this case, however, none of those statutes contain the kind of language cited above that expressly refutes the federal government's trust obligation.

exist. All the *Mitchell* doctrine requires is a showing that the government has exercised actual control within its authority to take on supervision or control of a tribal trust asset. *Mitchell II,* 463 U.S. at 225; *White Mountain Apache Tribe,* 537 U.S. at 475 (holding that where the federal government exercised its statutorily granted discretionary authority to supervise and occupy the historic Fort Apache, the Court could infer that an obligation to preserve the property was incumbent on the United States as trustee). This is the logic that was followed by the Dissent, which concluded that the *Mitchell* doctrine, read together with the recent *Navajo Nation* and *White Mountain Apache* cases "demonstrate[s] that where statutes *and behavior* create pervasive government control over a tribal resource, a specific trust relationship and concomitant fiduciary duty are created." Dissent at 2581 (emphasis added).

Looking at the record of this case on appeal, the Panel Majority acknowledges that they must take as true the Plaintiff's allegations that the Department of Housing and Urban Development (HUD) managed virtually every aspect of the BHA housing operation, from contract approval to the requirement that the houses be built with substandard materials, including the requirement that the BHA use improper wooden foundations. Slip Op. at 2566, 2568-69. The Dissent also notes the pervasive federal control over housing on the Blackfeet

Reservation. Dissent at 2581.

The Amended Opinion provides a detailed examination of the network of housing statutes and HUD regulations that allowed the federal government to pervasively regulate housing on the Blackfeet Reservation. The record indicates that HUD exercised the authority granted to it pursuant to that network of statutes and regulations, resulting in the damages alleged by the tribal Plaintiffs here. Regardless of the fact that HUD took on the duty to comprehensively regulate and manage housing on the Blackfeet Reservation, the Panel Majority ultimately held that there was no actionable fiduciary trust relationship because "[n]o *statute* has *imposed duties* on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so." Slip Op. at 2526 (emphasis added).

Amicus CSKT respectfully submits that the Dissent has supplied this Circuit with a clear, logical application of the *Mitchell* doctrine that is faithful to well established Supreme Court precedent. This case is proper for rehearing *en banc* in order to remedy the Panel Majority's overly narrow reading of the *Mitchell* doctrine and resulting misapplication of HUD's fiduciary trust obligation.

B. This Circuit Should Consider the Federal Circuit's Recent Decision on the Federal-Tribal Trust Obligation in Order to Maintain Circuit Uniformity.

In the period between the Panel rehearing of *Marceau I* and the Amended Opinion the Federal Circuit issued an opinion on the *Navajo Nation* case that had been remanded from the Supreme Court. The Navajo's claim is a well documented action involving allegations of improper acts on the part of the federal government during the tribe's leasing negotiations with the Peabody Coal Company. The Amended Opinion discusses the Supreme Court's 2003 *Navajo Nation* decision which held that by themselves, the Indian Mineral Leasing Act of 1938 and its regulations did not create an actionable federal fiduciary trust obligation. That case was subsequently remanded to the Court of Claims. *United States v. Navajo Nation,* 537 U.S. 514. Similar to the Supreme Court's instructions in the *Mitchell* cases, the Court of Claims was directed to consider whether the entire network of relevant treaties, statutes and regulations could produce a cognizable breach of trust claim against the federal government under the Indian Tucker Act, 28 U.S.C. § 1505. The Court of Federal Claims held that the network of other statutes and regulations failed to establish a money-mandating trust in the area of coal royalty rates. *Navajo Nation v. United States,* 68 Fed.Cl. 805 (2005). The Navajo appealed.

In *Navajo Nation v. United States*, 501 F.3d 1327 (Fed.Cir. 2007) the Federal Circuit provided an exhaustive analysis of the Navajo Nation's Indian Tucker Act claims against the federal government for a breach of trust in the leasing of the tribe's land for coal mining. The Federal Circuit reversed the Court of Claims. Citing the Supreme Court's 2003 *White Mountain Apache* decision, the Federal Circuit held that the network of treaties, statutes and regulations asserted by the Navajo created an Indian Tucker Act claim and established a "fair inference" that "the undisputed facts as determined by the Court of Federal Claims demonstrate that the government breached its trust duties...." *Navajo Nation v. United States*, 501 F.3d at 1330.

This recent Federal Circuit decision in *Navajo Nation* is important for several reasons. First, the Amended Opinion indicates that this Circuit did not have the opportunity to consider the Federal Circuit's interpretation of the tribal-federal trust obligation prior to issuing *Marceau II*. This case should be reheard *en banc* in order to give this Circuit a chance to examine and comport with the reasoning of another Circuit that has extensive experience in this area of law.

Second, the Federal Circuit's lengthy analysis of the federal government's trust obligation to Indian tribes mirrors that of the Dissent in this case, thereby rendering an Amended Opinion from this Circuit that directly conflicts with

another Circuit in a rule of national application.

Similar to the Dissent here, the Federal Circuit noted that although the treaties between the United States and Navajo Nation created a general trust relationship, a viable Indian Tucker Act claim also requires a showing of specific rights creating or duty imposing statutory or regulatory prescriptions. *Navajo Nation v. United States,* 501 F.3d at 1340. After finding the general trust relationship established the treaties, the Federal Circuit proceeded to examine the network of statutes and regulations asserted by the Navajo, eventually concluding that those statutes and regulations established "specific fiduciary or other duties that can fairly be interpreted as mandating compensation for damages sustained." *Id.* at 1341. The Federal Circuit findings echo those of the Dissent in this case:

> As *Mitchell II* held regarding the harvesting and management of timber, virtually every aspect of the coal located on the [Navajo] Nation's lands is under the federal government's control. It can fairly be interpreted from the government's comprehensive control of the [Navajo] Nation's coal that the [Navajo] Nation's asserted network establishes a breach of trust claim under the Indian Tucker Act.

Id. at 1343 (citations omitted).

Further, when faced with arguments from the United States that the statutes and regulations relied upon by the Navajo failed to show specific statutory language imposing a trust duty on the government in the area of coal leasing, the

Federal Circuit responded:

> The government, however, cites no authority for the proposition that control over the greater (e.g., coal resources) does not imply control over the lesser (e.g., leasing of such coal) in the Indian Tucker Act context.

Id. The Federal Circuit followed by quoting the *Mitchell* doctrine's directive that where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists. With reasoning similar to the Dissent's analysis of HUD's pervasive regulatory role over Blackfeet housing, the Federal Circuit dismissed the federal government's arguments regarding any requirement of statutory specificity:

> In this case, the government exercised blanket control over the [Navajo] Nation's coal resources, which could not be developed without the clear and positive approval of the Secretary [of Interior]. The government's argument that specific control of coal leasing is required for a money mandating breach of trust claim is thus unpersuasive.

Id.

Here, the Panel Majority's holding in favor of HUD is based on the fact that the statutes and regulations at issue did not expressly impose a trust obligation onto the federal government. Clearly this holding is contradicted by the Federal Circuit's statements cited above. Moreover, the Panel Majority gave great weight to HUD's argument that the Blackfeet Tribe, not the federal government, was in

control of the housing project and therefore the federal government had no fiduciary trust obligation. Slip. Op. at 2566. Concluding that HUD supplied federal funding but held no property in trust, the Panel Majority held the "federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms." *Id.* However, as the record in this case makes clear, and the Dissent aptly recounts, every aspect of the housing on the Blackfeet Reservation was pervasively regulated by HUD. Mirroring the Dissent the Federal Circuit noted from the outset that regardless of the fact that the Navajo had elected to negotiate their coal leasing under a Self-Determination statute,

> this is not a case where the government had discretion to exercise control and did not do so. Rather, in this case, the government exerted actual and significant control over the determination of the increased royalty rate in the lease amendments because its approval was required by law....The [Navajo] Nation sought Secretarial approval precisely because the government exercised control over the leasing of coal resources.

Id. at 1336. The Federal Circuit then rejected the federal government's assertions that the Indian Mineral Leasing Act gave the Navajo, not the federal government, responsibility for coal leasing, stating:

> Faced with a claim for damages for this exercise of control, the government now takes the opposite stance, asserting that it had no control - statutory, regulatory, or otherwise - regarding the determination of the royalty rate in lease amendments. The law does not allow the government to have it both ways. That is, the

> government cannot assume comprehensive control over the [Navajo] Nation's coal, as it did here, *and* disclaim liability for exercising such control. (Emphasis in original).

Id. Clearly this Circuit should rehear this case *en banc* in order to reconcile the divergent opinions reflected in the Federal Circuit's analysis of the *Mitchell* doctrine and that of the Amended Opinion.

III. THE AMENDED OPINION IMPROPERLY SHIFTS THE FEDERAL TRUST BURDEN TO TRIBAL PROGRAMS AND CREATES AN UNWORKABLE JURISDICTIONAL PRECEDENT.

Amicus CSKT renews and reiterates its concerns regarding this issue as raised in Amicus CSKT's Brief in Support of BHA's initial Combined Petition for Rehearing and Rehearing *En Banc* (filed 9/14/06), but left unresolved by the Amended Opinion, as follows:

In its understandable desire to find a remedy for the Plaintiffs in this case, the Panel Majority has inadvertently turned the principle of the federal government's trust obligation to Indian tribes on its head. The Panel Majority's decision establishes the unprecedented rule that tribal programs that receive funding from the federal government but remain subject to unwaivable, pervasive federal regulation in carrying out program goals, are nonetheless singularly liable for the performance of a federal trust duty. The legal conclusions the Panel Majority draws would allow any federal agency to wash itself clean of trust

obligations by simply requiring tribes to create entities through which to funnel pervasively controlled federal funding. Moreover, the Panel Majority's reasoning would allow the federal government to pervasively regulate a tribal program while simultaneously remaining insulated from liability for breach of trust obligations. This directly contradicts the "consistently recognized" fundamental right of tribes and tribal members to sue the United States for breaches of the tribal-federal trust relationship. *Mitchell II,* 463 U.S. at 226. By affirming the dismissal of HUD for any breach of trust obligation, the Panel Majority has held that it is the *tribal program* that should stand as the sole defendant, simply because the federal housing funds passed through tribal hands. Clearly this needs to be reconsidered *en banc*.

Finally, the practical result of the Panel Majority's decision to excuse HUD from breach of trust damage claims creates a jurisdictional conundrum for future tribal litigants. In holding that federal agencies utilizing tribal programs to carry out trust responsibilities can not be held liable, the Panel Majority has inadvertently divested federal court jurisdiction over breach of trust claims similar to this case. Federal court jurisdiction is questionable where the plaintiffs are tribal members suing a tribal entity for actions that occurred on tribal trust land within a reservation. Such a rule further contorts federal Indian law trust

principles, inasmuch as federal courts will have no ability to hear a breach of trust claims raised by tribal members when, as here, the tribal program must stand as the defendant instead of the United States.

IV. CONCLUSION

For the reasons stated above, Amicus CSKT respectfully joins the BHA and all other amicus parties in respectfully requesting that this Circuit rehear this case *en banc*.

Respectfully submitted this 15th day of May, 2008.

John T. Harrison
Ranald McDonald
CONFEDERATED SALISH AND
KOOTENAI TRIBES
Tribal Legal Department
P.O. Box 278
Pablo, Montana 59855
Telephone: (406) 675-2700
Fax: (406) 675-4665
ATTORNEYS FOR CONFEDERATED SALISH
AND KOOTENAI TRIBES AND SALISH
KOOTENAI HOUSING AUTHORITY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing **"Confederated Salish and Kootenai Tribes' and the Salish Kootenai Housing Authority's *Amicus Curiae* Brief in Support of Blackfeet Housing Authority's Petition for Rehearing *En Banc*"** is not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5) and Ninth Circuit Rule 29-2(c)(2).

Dated this 15th day of May, 2008.

By: _____
John T. Harrison

CERTIFICATE OF SERVICE

I certify that the foregoing **"Confederated Salish and Kootenai Tribes' and the Salish Kootenai Housing Authority's *Amicus Curiae* Brief in Support of Blackfeet Housing Authority's Petition for Rehearing *En Banc*"** was mailed on this 13th day of May, 2008, via U.S. mail, postage pre-paid to the following counsel of record:

Thomas E. Towe
TOWE, BALL, ENRIGHT, MACKEY
and SOMMERFELD, PLLP
P.O. Box 30457
Billings, MT 59107-0457

Mary Ann Sutton
P.O. Box 7453
Missoula, MT 59807-7453

Jeffrey Simkovic
Simkovic Law Firm
P.O. Box 1077
Billings, MT 59103-1077

Timothy J. Cavan
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103

Stephen A. Doherty, Esq.
Patrick L.Smith, Esq
Heather L. Corson, Esq.
Smith & Doherty, P.C.
405 South First Street West
Missoula, MT 59802

The original and 50 copies of the **"Confederated Salish and Kootenai Tribes' and the Salish Kootenai Housing Authority's *Amicus Curiae* Brief in Support of Blackfeet Housing Authority's Petition for Rehearing *En Banc*"** was also sent Federal Express on the above date to:

Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

John T. Harrison