No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JICARILLA APACHE NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS CURIAE BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between government officials and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

AMICUS CURIAE BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT

The Navajo Nation and the Pueblo of Laguna ("*Amici*") respectfully submit this *amicus curiae* brief in support of Respondent, the Jicarilla Apache Nation ("Jicarilla").[1]

INTEREST OF *AMICI CURIAE*

Amici hold beneficial title to funds that by statute expressly are held in trust and invested for their best interests in the full and exclusive control of the United States. *Amici* also are plaintiffs in trust fund mismanagement cases pending before the same Court of Federal Claims judge as this case. *Amici* have an interest in obtaining the documents that are the subject of the mandamus privilege ruling under review here because the same documents are relevant to discovery requests in *Amici*'s cases. In addition, *Amici* have an interest in ensuring that the United States does not disregard or misrepresent rulings in prior cases involving them and other tribes in an unwarranted effort to eviscerate its long-standing and strict fiduciary duties over tribal trust fund management.

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel has made a monetary contribution in preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case readily warrants affirmance under Federal Rules of Evidence 501 and 502. The United States cannot establish clear and indisputable entitlement to mandamus relief because the prior use and ready availability of privilege nonwaiver orders under Rule 502 confirms the lack of any material burden, injury, or novelty from the production order at issue here. In addition, the United States cannot meet its burden of establishing privilege under Rule 501 because there is an undisputed fiduciary relationship between the United States and Indian tribes, under which federal administration of tribal trust funds is subject to the most exacting fiduciary standards, including duties of loyalty and disclosure. The United States' misrepresentation of and disregard for existing case law recognizing that fiduciary relationship should be summarily rejected.

If further consideration of this case is required, the United States cannot evade the fiduciary exception and duties of loyalty and disclosure here based on speculative allegations of preclusive conflicts of interest and potential harms from disclosure in other contexts. The allegations are legally meritless because the decision below expressly reserved ruling on statutory conflicts, which cannot exist for tribal trust fund management, and only disclosure here will further the purpose of the attorney-client privilege by deterring federal officials from violating recognized trust duties. In turn, contemporaneous federal policies and available disputed documents themselves readily refute the government's post-hoc factual allegations.

ARGUMENT

The decision below should be affirmed because Federal Rules of Evidence 501 and 502 preclude the United States from establishing either privilege or entitlement to mandamus relief. Also, the effort to repudiate enforceable federal-tribal fiduciary duties is wholly unwarranted by existing law. Even if further consideration of this case is warranted, the claimed preclusive conflicts of interest and potential harms from disclosure here are legally meritless and factually unfounded.

I. The Mandamus Decision Below Should Be Affirmed Under Federal Rules of Evidence 501 and 502.

The decision below is a mandamus ruling. Pet. App. 1a. "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation" of the "extraordinary remedy of mandamus." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (citations and quotations omitted). For this, the party seeking mandamus must establish there is "'no other adequate means to attain the relief he desires'" and that the "'right to issuance of the writ is clear and indisputable.'" *Id.* at 380–81 (quotations omitted). Accordingly, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege" absent "a particularly injurious or novel privilege ruling." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606, 607 (2009). For example, interlocutory appellate review is unavailable for discovery orders absent overly broad and burdensome discovery requests that disrupt executive

branch functioning at its highest level concerning constitutional prerogatives. *See Cheney*, 542 U.S. at 381–89. Under these strict standards, application of Federal Rules of Evidence 501 and 502 here readily precludes mandamus relief.

A. The ready availability and prior use of Rule 502(d) privilege nonwaiver orders in this case confirms the lack of any material burden, injury, or novelty required for mandamus relief.

Unlike *Cheney*, the mandamus petition here does not involve overly broad or burdensome discovery or constitutional prerogatives, since it only concerns about 51 materially different documents (not including waiver, duplicates, and apparent multiple versions), all of which are potentially relevant to Jicarilla's trust fund claims under statutorily based duties. *Compare* App. (chart listing apparently distinct disputed documents) *with* Pet. App. 30a-31a (duties), 51a (relevance), 54a (waiver), 62a (noting similar but not identical documents), 71a-84a (production list with apparent multiple versions). Also, there can be no claim of a particularly injurious or novel privilege ruling in this case since four prior decisions over the last nine years "discredit many of the apparently well-rehearsed arguments that defendant raises here." Pet. App. 45a (concerning three prior rulings); *see id.* at 14a (citations), 44a-46a (discussion), 85a-90a (one prior decision); *see also Cobell v. Norton*, 377 F. Supp. 2d 4 (D.D.C. 2005) (denying motion to strike). Moreover, the United States' failure to resist all three prior fiduciary exception production orders in Indian trust cases "give[s] its claims of dire circumstances here a somewhat hollow ring." *Jicarilla*

Apache Nation v. United States (*"Jicarilla IV"*), 91 Fed. Cl. 489, 494 n.8 (2010).

This lack of any material burden, injury, or novelty required for mandamus relief is confirmed by the fact that the United States readily possesses adequate alternative means under Federal Rule of Evidence 502 to protect against privilege waiver or document dissemination. Specifically, Rule 502(d) provides the following: "A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding." Consistent with that Rule, more than three years before alternative dispute resolution ("ADR") efforts in this case ended and Jicarilla moved to compel production of fiduciary exception documents, the parties jointly moved for, and the trial court entered, an ADR Confidentiality Agreement and Protective Order ("CAPO") that expressly provided for the parties to produce documents without privilege review and preserved privilege claims. *See* ADR CAPO, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. April 4, 2005) (ECF No. 100). As noted below, the United States produced "many thousands of documents to Jicarilla" during the five and a half years of ADR proceedings in this case. Pet. App. 25a.

Moreover, after the fiduciary exception mandamus ruling by the Federal Circuit here, the trial court specifically recognized that "[i]f defendant truly is concerned that the production here would occasion a waiver of the privilege in other cases, it can easily remedy that matter by formally seeking relief under this rule [502]. But, to date, it has skirted

this issue." *Jicarilla IV*, 91 Fed. Cl. at 494. And since that ruling, the United States has twice sought and obtained orders under Rule 502(d) in this case. The first order, sought by the United States unopposed, pending final review of the Federal Circuit ruling, provides for production of all fiduciary exception documents in the case per Rule 502(d). Pet. App. 93a-97a. The second, stipulated and published Rule 502(d) order applies for the duration of the case regardless of this appeal and concerns over a million pages of documents not subject to the pending appeal in pending discovery from a certain repository. *Jicarilla Apache Nation v. United States* ("*Jicarilla V*"), 93 Fed. Cl. 219, 219–20 (2010).

The United States therefore already has availed itself three times in this case of orders preserving claimed attorney-client privilege regardless of the fiduciary exception. Also, it can easily address that concern for the duration of this case for the relatively few documents at issue here and any similar documents identified later simply by seeking such relief under Rule 502(d), as invited by the trial court. Consequently, that readily applicable rule provides more than adequate means to provide privilege protection here, and so precludes mandamus relief in this case.

B. The United States cannot establish clear and indisputable entitlement to privilege under Rule 501 because the fiduciary exception and exacting fiduciary duties for federal management of Indian trust funds are well-established.

Even if this Court reaches the fiduciary exception, the United States cannot meet its burden of establishing "clear and indisputable" entitlement to privilege for each document at issue as required to warrant mandamus relief. *See Cheney*, 542 U.S. at 381 (mandamus); *In re Grand Jury Subpoena: Under Seal* ("*Under Seal*"), 415 F.3d 333, 338-39 (4th Cir. 2005) (privilege proof burden); *United States v. Legal Services for N.Y.C.*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001) (same); *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (same). This analysis must proceed under the congressionally enacted Federal Rule of Evidence 501, which provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Pub. L. 93-595, § 1, 88 Stat. 1926, 1933 (1975) (codified at Fed. R. Evid. 501). Unlike the United States' effort to assert privilege here without reference to Rule 501, a proper analysis under that rule is straightforward and outcome determinative.

The United States does not dispute the general existence of a common-law fiduciary exception to the common-law attorney-client privilege, which dates back to 1855 and is well established in this country, including by at least five federal circuits. *See* Pet.

App. 9a-13a. Under that precedent, the doctrine "has been applied in a panoply of fiduciary settings, including cases involving shareholders, bank depositors, and union members," as well as under the Employee Retirement Income and Security Act (ERISA). Pet. App. 43a-44a. The United States also does not dispute the two general rationales for the fiduciary exception—namely, "the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary" and "the fiduciary has a duty to disclose all information related to trust management to the beneficiary." Pet. App. 13a (citing authorities).

Accordingly, while the United States characterizes the ruling below as "abrogating" the attorney-client privilege, the common law recognizes that "the fiduciary exception is not an 'exception' to the attorney-client privilege at all." *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). "Rather, it merely reflects the fact that," for trust administration advice, a trustee "never enjoyed the privilege in the first place" against the beneficiary. *Id.*; *cf.* Pet. App. 9a (discussing community of interest doctrine).

Therefore, since the fiduciary exception applies to the disputed documents, they are not subject to the attorney-client privilege. The fiduciary exception unquestionably applies here under Rule 501 because there is an "'undisputed . . . general trust relationship between the United States and the Indian people[,]'" *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983)). Also, statutes impose judicially enforceable fiduciary duties where they give the Government "'full responsibility'" to manage Indian assets "'for the benefit of

the Indians.'" *United States v. Navajo Nation* ("*Navajo II*"), 129 S.Ct. 1547, 1553-54 (2009) (quoting *Mitchell II*, 463 U.S. at 224). For example, duties apply where statutes require the United States to consider the "'best interests of the Indian'" and "enumerate[] specific factors to guide that decision-making." *Id.* at 1554 (quoting 25 U.S.C. § 406(a)).

For tribal trust funds, Congress has expressly provided three primary federal management options:

(i) "*deposit[] in the Treasury* of the United States" and "pay interest" as "prescribed by law" for "all sums . . . received . . . as . . . trustee of various Indian tribes" when "the best interests of the Indians will be promoted by such deposits, in lieu of investments;" 25 U.S.C. § 161 (emphases added);

(ii) "*deposit in banks* . . . funds of any Indian tribe which are held in trust . . . and on which the United States is not required by law to pay interest at higher rates than can be procured from the banks[,]" *id.* § 162a(a) (emphases added); or

(iii) (a) "[a]ll funds held in trust by the United States" for "tribes shall be *invested* . . . in public debt securities with maturities suitable to the needs of the fund involved . . . taking into consideration current market yields . . . [,]" *id.* § 161a(a) (emphases added); or
(b) "for the best interest of the Indians, . . . *invest* the trust funds of any tribe . . . in public debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States[,]" *id.* § 162a(a) (emphases added).

See generally Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390, 1393-94 (Ct. Cl. 1975) (discussing Indian trust fund management statute evolution since before 1880); *Chippewa Cree Tribe v. United States*, 69 Fed. Cl. 639, 656-59 (2006) (same).

In addition, Section 162a expressly and nonexclusively provides that "proper discharge of the trust responsibilities of the United States shall include (but is not limited to)" seven detailed facets of trust fund management. 25 U.S.C. §§ 162a(d)(1)-(7). Among other things, those responsibilities include establishing written policies and procedures, providing adequate controls, staffing, supervision, training, timely reconciliations, and accounting and reporting systems, and supplying account holders with account performance statements. *Id.* The United States has formally interpreted this statute as requiring a "high degree of skill, care, and loyalty" as well as "communicat[ing] with beneficial owners regarding the management and administration of Indian trust assets[.]" 303 U.S. Dep't of Interior Manual ("DOIM") §§ 2.7, 2.7(K).

The United States here overlooks 25 U.S.C. Section 161 and belittles 25 U.S.C. Sections 161a(a), 162a(a), 162a(d). *See* U.S. Br. 10, 33, 38. However, these statutes all "expressly and without qualification employ[] a term of art ('trust') commonly understood to entail certain fiduciary obligations" and "invest the United States with discretionary authority to make use of the trust corpus[,]" *White Mountain*, 537 U.S. at 480 (Ginsburg, J., conc.) (citation and alteration omitted). Moreover, the statutes give the Government full responsibility to manage trust funds for the benefit of tribes and each imposes con-

crete substantive obligations on the Government. Also two of the statues expressly require that the United States consider the "best interests of the Indians" like the timber statute quoted in *Navajo II* and addressed in *Mitchell II*, while the other statute provides for bank deposits only where the United States is not required to pay higher interest rates.

In addition, *Mitchell II* recognized that Section 162a(a) of these Indian trust fund statutes, which vests the United States with authority to invest Indian trust funds "for the best interests of Indians[,]" imposes enforceable fiduciary duties because the government has assumed "elaborate control" over such tribal trust funds or monies, and all the necessary elements of a common-law trust are present. 463 U.S. at 222 & n.24, 225, *affirming Mitchell v. United States*, 66 F.2d 265, 274 (Ct. Cl. 1981) (en banc). This Court also has recognized that "the Government's fiduciary obligation" for tribal trust fund distribution is subject to "the most exacting fiduciary standards[,]" including "'undivided loyalty[,]'" *Seminole Nation v. United States*, 316 U.S. 286, 297 & n.12 (1942) (citation omitted). Given these decisions and the several additional governing statutes here, the most exacting fiduciary duties govern Indian trust fund management, including loyalty and disclosure. *See* 303 DOIM §§ 2.7, 2.7(K); *Navajo Tribe v. United States*, 364 F.2d 320, 324 (Ct. Cl. 1966) (en banc) (concerning loyalty); *Cobell*, 377 F. Supp. 2d at 12-13 (concerning disclosure). Under Rule 501, that is all that is necessary to apply the fiduciary exception, thereby warranting affirmance of the mandamus ruling below.

C. Existing law categorically precludes the assertion that no enforceable fiduciary duties apply beyond specific statutory or regulatory mandates.

Because the mandamus petition requires the United States to show clear and indisputable entitlement to privilege under the Federal Rules of Evidence, there is no occasion here to address the full scope of enforceable fiduciary duties for trust fund mismanagement claims. *Cf.* Pet. App. 66a (adjudicating relevancy dispute "without prejudging the precise standards that will ultimately govern liability in this case"). But even if resolution of this privilege mandamus petition required some material definition of the scope of enforceable fiduciary duties, the United States' assertion that *Navajo I* and *Navajo II* preclude any enforceable fiduciary duties beyond "a specific statutory or regulatory mandate[,]" U.S. Br. 31; *see id.* at 31-35, is meritless.

The *Navajo* decisions did not define a new standard on the scope of enforceable fiduciary duties, as they both followed the *Mitchell* decisions, *Navajo II* largely just followed *Navajo I*, and *Navajo I* expressly referred to the *Mitchell* decisions as "the path-marking precedents on the question[.]" *Navajo II*, 129 S.Ct. at 1552, 1554; *Navajo I*, 537 U.S. at 503-08. Moreover, *Mitchell II* and *White Mountain* both apply common-law fiduciary duties once "a further source of law . . . provide[s] focus for the trust relationship." *White Mountain*, 537 U.S. at 475, 477; *Mitchell II*, 463 U.S. at 224-26. Thus, statutes and regulations (and treaties or other foundational documents) "establish a fiduciary relationship and define the contours of the United States' fiduciary re-

sponsibilities[,]" *Mitchell II*, 463 U.S. at 224, "but the interstices must be filled in through reference to general trust law." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001); *see also id.* at 1099, 1104; *Cobell v. Salazar*, 573 F.3d 808, 812 (2009) (reiterating that common-law trusts apply).

The United States thus improperly disregards that "[t]oday the trust doctrine is one of the cornerstones of Indian law." Cohen's Handbook of Federal Indian Law § 5.04[4][a], at 419 (Nell Jessup Newton *et al.* eds. 2005 ed.) Indeed, the federal-tribal trust relationship necessarily arose from treaties and agreements under which Indians "surrendered claims to vast tracts of land" and the United States undertook "solemn obligations" that "continue[] to carry immense moral and legal force." President Richard M. Nixon, Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 565 (July 8, 1970) ("Nixon Message") (emphasis added); *see also Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); Pet. App. 29a.

Moreover, the United States' current unfounded assertion has been previously rejected numerous times. First, this Court heard, considered, and rejected that assertion in *White Mountain*, where this Court used common law to help define applicable enforceable fiduciary duties despite arguments that no statute or regulation imposed a duty to restore and maintain the building at issue, that common-law

trust duties are irrelevant, and that only specific fiduciary duties that are explicitly stated in a statute or regulation are enforceable. *Compare White Mountain*, 537 U.S. at 370, 476-77 *with* Brief for United States, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (No. 01-1067), at 11, 19 & n.8, 22, 26, 31, 37 & n.14, 38 n.15. Second, in *Mitchell II*, this Court similarly used common law to affirm the scope of enforceable fiduciary duties despite similar arguments there. *Compare Mitchell II*, 463 U.S. at 210 (listing claims), 225-26 (analysis) *with* Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748), at 19, 46-48; Reply Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748), at 2, 4, 8-9. Indeed, shortly before the Court decided *Mitchell II*, it acknowledged that "[i]t may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Nevada v. United States*, 463 U.S. 110, 142 (1983).

In addition, the United States' assertion here has been explicitly rejected at least four times by lower courts, including in one case whose analysis on this very point was substantially relied on in *Mitchell II*.[2]

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[2] *See Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain*, "once a statutory obligation is identified, the court may look to common law trust principals to particularize that obligation"); *Cobell*, 240 F.3d at 1100-01 (per *Mitchell II*, "the interstices [of government duties] must be filled in through reference to general trust law"); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (rejecting that "a federal trust must spell out specifically all the trust duties of

In contrast, the United States' reliance on lower court administrative law cases for this point, *e.g.*, U.S. Br. 33, improperly ignores that where the United States acts as a fiduciary, its "'actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.'" *Cobell*, 240 F.3d at 1104 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir. 1986), *supplemented*, 793 F.2d 1171 (10th Cir. 1986)).

In sum, "[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996). The current privilege mandamus petition thus provides no basis to repudiate an enduring cornerstone of Indian law expressly reaffirmed by Congress in 25 U.S.C. Section 162a(d). Consequently, this case should be affirmed under Federal Rule of Evidence 501.

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the Government"); *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . ."); *cf. Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987).

II. The Government's Asserted Conflicting Duties and Disclosure Concerns are Legally and Factually Unfounded.

A. Tribal trust fund management advice is not subject to any of the asserted conflicts or concerns and disclosure here will promote observance of law and not chill government communications.

The mandamus petition under review here concerns federal management of funds owned, held, and managed by the United States exclusively in trust for Jicarilla. Pet. App. 2a, 26a; *see* 25 U.S.C. §§ 161, 161a(a), 162a(a), 162a(d). Given this fact, the assertions that the United States must contend with a "host" of other asserted conflicting mandates here—such as regarding "public lands, threatened and endangered . . . species, and other natural resources"—has no basis in fact, law, or logic. *See* U.S. Br. 23-27, 41. Accordingly, the lower court correctly and necessarily concluded both that the United States "has failed to allege any actual conflict" and that "'potential privilege claims for unspecified documents regarding other types of trust assets based on other statutory regimes are beyond the scope of the petition.'" Pet. App. 19a (citation omitted), 20a.

In addition, this Court has recognized that "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Nevada*, 463 U.S. at 128; *see also id.* at 135 n.15. Moreover, any such "claimed conflict of interest" must be "actual" to affect the per-

formance of federal trust duties. *Arizona v. California*, 460 U.S. 605, 627 (1983). Indeed, even if some other statutory duties were considered in the documents at issue here, "privileged communication on non-fiduciary matters does not defeat the fiduciary exception . . . on fiduciary matters." *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2nd Cir. 1997). Consequently, none of the concerns about resource management and professional ethics have any relevance to disclosure of trust fund management advice.

The Government's other objections to discovery are similarly unfounded. For example, reliance on the Indian Claims Limitations Act, 28 U.S.C. 2415 note, improperly ignores that documents subject to the fiduciary exception are per se nonprivileged. *See Mett*, 178 F.3d at 1063. Also, the assertion of government ownership of records overlooks that other trustees may own records subject to the fiduciary exception, *see* Pet. App. 10a-12a (noting contexts where exception has been applied), and that the relevant records here are expressly (if not redundantly) defined and addressed as "Indian Fiduciary Trust Records" in an entire chapter of the Department of the Interior Manual. 303 DOIM ch. 6.

In turn, allowing discovery here will not improperly chill government legal advice. The lower court correctly noted that "the basic concern could be stated by any trustee." Pet. App. 20a. There also is a "lack of a discernable chill" because, "in deciding how freely to speak, clients and counsel . . . . must account for the possibility that they will later be required by law to disclose their communications . . . ." *Mohawk*, 130 S.Ct. at 607.

Finally, the attorney-client privilege ultimately "serves 'broader public interests in the observance of law and administration of justice.'" *Id.* at 606 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Thus, the privilege "applies only where necessary to achieve its purpose[,]" *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "[w]here this purpose ends, so too does the protection of the privilege." *Wachtel v. Health Net, Inc.*, 482 F.3d 255, 231 (3rd Cir. 2007). Likewise, because the attorney-client privilege interferes with "'the truth seeking mission of the legal process,'" it must be narrowly construed. *Under Seal*, 415 F.3d at 338 (citation omitted); *Evans*, 113 F.3d at 1487; *see Wachtel*, 482 F.3d at 231. Accordingly, the privilege should be recognized "'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Under Seal*, 415 F.3d at 338 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Given all this, the attorney-client privilege should not apply to the trust fund administration advice here, where allowing discovery will certainly help ascertain the truth and "deter federal officials from violating their trust duties[.]" *Mitchell II*, 463 U.S. at 227 (quotation and citation omitted).

B. Executive Branch guidance actually makes clear that government attorneys do provide fiduciary advice for Indian tribes.

The Government's assertion that it only views itself as a sovereign and not a fiduciary regarding Indian trust management legal advice is unsupported

by the letter on which it relies and ignores the actual history surrounding that letter. The assertion relies on a statement in a 1979 letter from then Attorney General Bell to the Secretary of the Interior that "the Attorney General is attorney for the United States in these cases, not a particular tribe." Pet. App. 123a. But that statement and much of the related argument by the United States here only concerns "[t]he litigating position adopted by the Attorney General[.]" *Id.* at 124a. Such litigating positions are irrelevant here where the trial court ruled that there is no fiduciary exception to the work-product doctrine, *id.* at 47a, and that ruling has not been challenged by Jicarilla in appellate courts.

Moreover, other parts of the 1979 Bell Letter contravene the current assertion that the Executive Branch only acts as a sovereign and not a fiduciary for Indian tribes. For example, the letter recognizes that "[t]he Executive Branch and the Judicial Branch have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures." *Id.* at 122a. Also, when the Executive Branch brings a case to protect Indian property rights, it "vindicates <u>not only</u> the property interest of the tribe or individual Indian, . . . <u>but also</u> the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective." *Id.* at 123a (emphases added).

In addition, contrary to the United States' current assertions, "[t]here is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people

of the Nation," precisely because "the people as a whole benefit when the Executive Branch . . . protects Indian property rights . . . ." *Id.* Indeed, the people as a whole already have long benefited from "surrendered claims to vast tracts of land[.]" Nixon Message, *supra*, at 565. Finally, even when other statutory obligations are imposed in a case aside from those affecting Indians, the Executive Branch must take into account the "firmly established" rule of construction favoring the "special responsibilities of the government toward the Indians." Pet. App. 124a. The Bell Letter accordingly confirms that sovereign interests augment, rather than undermine, proprietary trust duties to Indians.

Furthermore, both before and after the 1979 Bell Letter, the Executive Branch has recognized the strong basis for and broad extent of federal fiduciary duties to Indians, which support application of the fiduciary exception here. For example, six months before the Bell Letter, the Department of the Interior—the primary agency charged with Indian affairs policy responsibility, *see* Pet. App. 122a, 124a; 25 U.S.C. § 2—"disagree[d] with the position taken by the Solicitor General in this litigation . . . ." *United States v. Mitchell,* 445 U.S. 535, 550 (1980) (White, J., diss.) ("*Mitchell I*") (citing Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Attorney General, U.S. Dep't of Justice re: *United States v. Maine* (Nov. 21, 1978) ("Krulitz Letter") in appendix filed with the Court). That letter recognized the following:

(i) it "is established beyond question" that "the United States stands in a fiduciary relationship to American Indian tribes[;]"

(ii) "[t]here is a legally enforceable trust obligation owed by the United States to American Indian tribes;

(iii) "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive"[,]" including "fiduciary duties of care and loyalty," "unless . . . Congress has expressly authorized a deviation from those standards[;]"

(iv) the "trust relationship was a significant part of the consideration offered by the United States" when "tribes ceded vast acreages of land and concluded conflicts[;]"

(v) "the trust obligation of the United States exists apart from specific statutes, treaties or agreements[;]"

(vi) "[g]eneral notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework[;]" and

(vii) Executive Branch officials "are not free to abandon Indian interests or to subordinate those interests to competing policy considerations."

Krulitz Letter, *supra*, at 2a, 3a-4a, 9a, 12a, 14a, 18a.

After the 1979 Bell Letter, the Executive Branch has remained committed "to ensure that every policy decision of the Interior and other Federal agencies and bureaus with an impact on the trust obligation of this Government has fully measured that decision in respect to carrying out its trust obligation." S. Hrg. No. 101-1011, at 11 (1990). Moreover, the Ex-

ecutive Branch has opposed legislation as "not . . . necessary to accomplish this goal[,]" and instead has worked on "accomplishing and institutionalizing this goal" within the Department of the Interior. *Id.* at 12, 65. In light of all this, the Bell Letter supports a broad, substantive understanding of federal trust duties to Indian tribes, consistent with prior and subsequent views of the Executive Branch. All this guidance supports application of the fiduciary exception for federal management of tribal trust funds.

C. Review of disclosed disputed documents refutes asserted conflicts and concerns and supports disclosure.

Privilege must be proven for each communication for which it is asserted, *Legal Services for N.Y.C.*, 249 F.3d at 1082, and *en camera* inspection is important in resolving privilege disputes, Pet. App. 26a n.2; *United States v. Zolin*, 491 U.S. 554, 568-69 (1989). In addition, the United States makes factual assertions about the disputed documents here. *E.g.*, U.S. Br. 10. Accordingly, a review of those documents is helpful for resolution of issues here if they cannot be resolved on purely legal grounds.

At least 22 of what appear to be 51 materially different documents that were ordered to be produced by the trial court here based solely on the fiduciary exception are already in tribes' possession. *Compare* App. (listing distinct fiduciary exception documents from trial court order with nonprivilege sources where applicable) *with* Pet. App. 54a n.19 (noting waiver for additional documents), 71a-84a (listing all documents). Eleven of these documents also were publicly filed as trial or summary judgment exhibits

by plaintiffs or the United States in *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). *See* App. 1a-2a. All those documents have been publicly available from the court or National Archives for at least about three decades. Four additional documents are duplicates of documents that were independently found in tribal repositories or obtained from a third party. *See* App. 2a-3a.

Review of these previously produced but still disputed documents sheds light on pending issues. For example, one document opposes private management of tribal trust funds. Several documents discuss the use of public-debt securities. Other documents discuss the use of a broker, classification of receipts, trust fund duties, collateral pledges, pooling, interest ownership, IRS levies, fund disposition, use of independent judgment, self-determination contracting, and application of *Mitchell II*. Nothing in any of these documents evidences any conflict of interest, anything for which disclosure would disrupt trust fund administration, or any other concerns asserted by the United States here. Also, these documents uniformly contradict the United States' current litigating position that it is only subject to duties expressly stated in statutes and regulations.

For example, one of the fiduciary exception documents includes a 1978 attorney memo on pooling tribal trust funds that was publicly filed as one of the United States' trial exhibits in *Cheyenne-Arapaho*. *See* Mem. from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Deputy Asst. Sec. —Indian Affairs ("ASIA") (Program Operations) (Jan. 24, 1978) ("Fredericks Memo"); *cf.* Pet. App. 54a n.19 (noting waiver for Docs. 13-14), 73a (listing

Docs. 13-15).[3] The memo reflects the United States' contemporaneous view that "[i]n general, the standards which govern private trustees govern the Secretary when he invests Indian trust funds[,]" particularly when "[n]o guidance is found in the statute with respect to present question." Fredericks Memo, *supra*, at 1. The memo quotes common-law trust treatises at length and concludes that pooling tribal trust funds is defensible "even in the absence of express statutory authority[.]" *Id.* at 2-5. This same point is reaffirmed in a 1986 attorney memo for which the fiduciary exception also is in dispute but which also has been previously disclosed. Mem. from Assoc. Solicitor, Div. of Indian Affairs to ASIA re: Pooling of Tribal Funds for Investment Purposes (Feb. 10, 1986; *cf.* Pet. App. 54a n.19 (noting waiver for Doc. 13), 73a (listing Docs. 13, 15-16).

In addition, a 1983 attorney memo discussed consequences of *Mitchell II*. Mem. from Tim Vollmann, Acting Assoc. Solicitor, Div. of Indian Affairs, to ASIA re: *United States v. Mitchell* (July 21, 1983) ("*Mitchell II* Memo"); *cf.* Pet. App. 83a (listing Docs. 189, 190, and 212); Pet. App. 62a (noting that these documents are "similar, but not identical"). The memo emphasizes that the United States must "make maximum productive investment of trust funds" and "exercise independent judgment" rather than "base a decision solely on the wishes of a tribe" even though there are no such express statutory duties. *Mitchell II* Memo, *supra*, at 3. Similar analysis

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[3] Per Supreme Court Rule 32.3, *Amici* have proposed lodging Krulitz Letter and three unprotected disputed documents that have not yet been filed of record before the Court in this case. A*mici* will submit material if so requested by the Clerk.

is provided in a 1985 attorney memo for which the fiduciary exception also remains in dispute but which also has been previously disclosed. Mem. from Assoc. Solicitor, Div. of Indian Affairs, to Deputy ASIA (May 13, 1985); *cf.* Pet. App. 78a (listing Doc. 168), 79a (listing Doc. 191).

Finally, a 1990 attorney memo that was apparently provided to tribes in the early 1990s but whose status is still disputed here discusses the contractibility of tribal trust fund investment under the Indian Self-Determination Act. *See* Mem. from William G. Lavell, Assoc. Solicitor, Div. of Indian Affairs, to ASIA (March 21, 1990) ("Lavell Memo"); *cf.* Pet. App. 74a (listing Doc. 44), 77a (listing Doc. 96). Among other things, the memo relies on "common law trust principle[s]" and recognizes non-delegable trust duties for tribal trust fund deposits and investment under 25 U.S.C. Section 162a that are "consistent with the common law trust duty owed by a private trustee[.]" Lavell Memo, *supra*, at 1-4.

In all these disputed documents, federal attorneys recognize the United States' common-law fiduciary relationship with Indian tribes and provide legal advice to facilitate trust administration, and there is no potential conflict or other concern that might warrant disregarding the fiduciary exception. In addition, disclosure of all these documents to the tribal trust fund beneficiary would further the purposes of the attorney-client privilege for observance of law and administration of justice. Specifically, applying the fiduciary exception to all the disputed documents will encourage sound legal advice for tribal trust fund management consistent with recog-

nized fiduciary duties and will advance the truth-seeking mission of the legal process.

This last point is highlighted by a motion for partial summary judgment that the United States has filed in this case after filing its opening brief here. *See* United States' Mot. For Partial Summ. J (as to "Pooling"-Related Claims), *Jicarilla Apache Nation v. United States*, No. 02-025 (filed March 18, 2011) (ECF No. 269). The United States argues there that claims based on pooling should be dismissed, even though all five of the specific disputed documents discussed above directly contradict assertions in the pending motion. The attorney-client privilege should not shield discovery of the United States' repeated acknowledgements of its enforceable fiduciary duties for Indian trust fund management. Rule 501 should not be understood or applied to subvert observance of law and administration of justice by precluding discovery of such communications that are directly relevant to the parties' claims and defenses.

CONCLUSION

For the reasons above, this Court should affirm.

Respectfully submitted,

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APPENDIX

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
1	41	10/16/1923	
2	70	4/8/1966	*Cheyenne-Arapaho*, Def.'s Ex. 3
3	217	9/30/1966	
4	63	10/7/1966	
5	64	10/22/1966	
6	66	1/10/1967	
7	65, 100	5/3/1968	*Cheyenne-Arapaho*, Pl.'s Ex. 1
8	69	12/30/1969	
9	68	12/14/1970	*Cheyenne-Arapaho*, Def.'s Ex. OE-1
10	67, 71	10/19/1971	
11	74	2/7/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
12	38, 73	3/6/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101; Pl.'s Ex. 125
13	39	7/17/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
14	48, 50	10/3/1972	*Cheyenne-Arapaho,* Pl.'s Ex. 511
15	72	10/27/1972	*Cheyenne-Arapaho*, Pl.'s Ex. 131
16	103	10/30/1972	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
17	104	11/1/1972	
18	42, 53	11/20/1972	*Cheyenne-Arapaho*, Def.'s Ex. 36
19	49, 51	4/19/1973	
20	94, 155	6/27/1973	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
21	54	10/10/1973	
22	52	4/29/1975	
23	97	5/15/1975	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
24	86	4/26/1976	Tribal Repository
25	186	6/17/1976	
26	184	10/00/1976	Produced under CAPO
27	105	00/00/1977	
28	188	5/1/1979	
29	106	4/14/1980	
30	187	6/9/1980	
31	179	1/7/1981	
32	45	3/5/1982	Produced under CAPO
33	182	8/16/1982	
34	37	11/23/1982	
35	189, 190, 212	7/21/1983	Third Party
36	178	1/16/1984	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
37	9	5/13/1985	Produced under CAPO
38	168, 191	5/13/1985	Produced under CAPO
39	112, 167	10/29/1986	Produced under CAPO
40	62	4/21/1988	
41	80	12/15/1988	Produced under CAPO
42	87	5/24/1989	Tribal Repository
43	61	10/13/1989	
44	77	2/13/1990	Produced under CAPO
45	44, 96	3/21/1990	Tribal Repository
46	60	11/21/1990	
47	110	6/1/1992	
48	116	12/28/1995	
49	35, 81, 177	4/10/1996	
50	56	Undated	
51	202	Undated	