No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MISCELLANEOUS DOCKET NO. 908

IN RE UNITED STATES, PETITIONER

Dec. 30, 2009

On Petition for Writ of Mandamus to the United States Court of Federal Claims in case no. 02-25L, Judge Francis M. Allegra

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ORDER

Before: LOURIE, FRIEDMAN, and GAJARSA, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

The United States petitions for a writ of mandamus to direct the Court of Federal Claims ("trial court") to vacate its orders requiring the United States to produce documents that it asserts are protected by the attorney-client privilege. Jicarilla Apache Nation ("Jicarilla") opposes. We hold that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications

concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications. Accordingly, we adopt the fiduciary exception in tribal trust cases. Under the fiduciary exception, a fiduciary may not block a beneficiary from discovering information protected under the attorney-client privilege when the information relates to fiduciary matters, including trust management. Because we find that the trial court correctly applied the fiduciary exception to the United States' privileged communications, we deny the United States' petition for a writ of mandamus.

BACKGROUND

Jicarilla sued the United States in the Court of Federal Claims for a breach of fiduciary duties, alleging that the United States mismanaged the tribe's trust assets and other funds. *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 4 (2009). The trial court divided the case into phases. The first phase only concerns the government's management of Jicarilla trust accounts from 1972 to 1992. *Id.* During this phase, the tribe moved to compel discovery of documents related to the management of the trust funds that the United States asserted were protected by the attorney-client privilege, the work-product doctrine, and the deliberative process privilege. *Id.* In response, the United States "agreed to produce 71 of the 226 documents listed in its privilege log based, in part, upon withdrawing any deliberative process privilege claims," but maintained its privilege claims over the remaining 155 documents. *Id.* Per court order, the trial court reviewed the remaining 155 documents *in camera*. *Id.*

The trial court held that the United States could not deny Jicarilla's request to discover communications between the United States and its attorneys based on the attorney-client privilege because those communications were subject to the fiduciary exception. *Id.* at 11-12. The trial court explained that under the fiduciary exception, "fiduciaries may not shield from their beneficiaries communications between them and their attorneys that relate to fiduciary matters, including the administration of trusts." *Id.* at 10. According to the trial court, the fiduciary exception applied to the "'general trust relationship between the United States and the Indian people,' which comprises a 'distinctive obligation of trust incumbent upon the Government.'" *Id.* at 6 (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1982)). The trial court opined that "basic trust principles are readily transferable to" the United States' fiduciary relationship with Indian tribes. *Id.* at 11-12. The trial court noted that Congress had enacted legislation appointing the United States as trustee over "56 million acres of land and billions of dollars in tribal assets" and created an Office of Special Trustee "to ensure that each tribe received as complete a trust fund accounting as soon as possible." *Id.* at 5 (citing 25 U.S.C. §§ 4041-44 (2006)). Though statutes undoubtedly "delimit somewhat the government's obligations," the trial court explained that the U.S. Supreme Court had evaluated the fiduciary relationship using principles of common law and had judged tribal trust cases with the "'most exacting fiduciary standards.'" *Id.* at 6 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

With these principles in mind, the trial court applied the fiduciary exception, requiring the United States to produce many of the documents that were not otherwise

protected as work product. *Id.* at 13-19. The trial court organized the documents that Jicarilla requested into five categories, including (1) Department of the Interior ("Interior") personnel requests for advice from the Interior Solicitor's Office ("Solicitor's Office") on administration of tribal trusts, (2) Solicitor's Office advice to Interior and Department of the Treasury ("Treasury") personnel, (3) accounting firm Arthur Andersen LLP documents generated under contracts with Interior, (4) Interior documents concerning litigation with tribes other than Jicarilla, and (5) miscellaneous documents such as cover sheets and other documents not falling into the other categories. *Id.* at 6. The court applied the fiduciary exception to all the documents in the first category except for duplicates because the "documents involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla." *Id.* at 14. With few exceptions, the trial court also applied the fiduciary exception to documents in the second category because the documents contained "legal advice relating to trust administration." *Id.* at 16. In contrast to the first two categories, the trial court allowed the United States to withhold most of the documents in the third category from production as attorney work product. *Id.* at 17-18. As to the fourth category, the trial court allowed the United States to withhold most of the documents as work product, but required the government to produce four documents with the exception of two footnotes. *Id.* at 18. According to the trial court, those documents either did not constitute attorney work product at all or, if privileged, were subject to the fiduciary exception. *Id.* Finally, the trial court required the United States to produce two documents that fell under the fiduciary excep-

tion in the fifth category because the documents concerned trust management and various cover sheets that did not appear to be protected by either the attorney-client privilege or the work-product doctrine. *Id.* at 19.

The United States now petitions for a writ of mandamus to vacate the trial court's order requiring production of the above documents under the fiduciary exception. We have jurisdiction pursuant to 28 U.S.C. § 1651(a).

DISCUSSION

This court has the authority to issue a writ of mandamus against a lower court under common law as codified in the All Writs Act. "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). Mandamus is available only in extraordinary cases to correct a lower court's usurpation of judicial power or clear abuse of discretion. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *see also In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996). A party seeking a writ of mandamus bears the burden of proving that it has no other means of attaining the relief desired, *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989), and that its "right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899)). Accordingly, the writ is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)).

Notwithstanding the extraordinary nature of mandamus, this court has issued the writ in appropriate cases "to prevent the wrongful exposure of privileged communications." *Regents*, 101 F.3d at 1387; *see also Mohawk Indus., Inc. v. Carpenter*, 78 U.S.L.W. 4019, 4022 (U.S. Dec. 8, 2009) (noting that an appellate court may grant a writ of mandamus to correct a "particularly injurious or novel privilege ruling"). "Specifically, 'mandamus review may be granted of discovery orders that turn on claims of privilege when (1) there is raised an important issue of first impression, (2) the privilege would be lost if review were denied until final judgment, and (3) immediate resolution would avoid the development of doctrine that would undermine the privilege.'" *In re Seagate Tech., LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (quoting *Regents*, 101 F.3d at 1388). Accordingly, mandamus may be appropriate to correct a lower court that ordered a party to produce documents in violation of the attorney-client privilege. *See id.* at 1375-76 (granting mandamus to correct a district court that held a party had waived the attorney-client privilege protecting trial counsel's client communications and work product by asserting the advice-of-counsel defense in patent infringement suit); *Regents*, 101 F.3d at 1390-91 (granting mandamus to correct a district court that misconstrued the community of interest doctrine by ordering patent licensee's in-house counsel to testify about advice given to patentee during prosecution when licensee and patentee entered into an exclusive option contract and in-house counsel assumed responsibility for patent prosecution).

As a matter of first impression, the United States petitions for a writ of mandamus, asserting, inter alia, that the fiduciary exception does not apply to it because

its relationship to the tribe is different than a traditional fiduciary relationship. The United States explains that the fiduciary exception is based on two primary rationales, including (1) the fiduciary's duty of loyalty to the beneficiaries and (2) the fiduciary's duty to provide information to beneficiaries. Based on these rationales, the United States argues the following: First, it argues that the fiduciary exception's rationales should not apply to its duties to tribes because the United States has competing interests to consider when administering the trust. Second, the United States argues that the attorney-client privilege should protect the documents here because the payment for the legal services did not come from the trust corpus. Third, the United States argues that applying the exception to the attorney-client privilege would improperly impair its ability to seek confidential legal advice. Finally, the United States argues that it does not have a fiduciary duty to disclose information to beneficiaries.

The United States' petition for mandamus thus asks us to interpret the bounds of the attorney-client privilege. This court interprets privileges on a case-by-case basis according to "principles of the common law" when federal law is at issue. Fed. R. Evid. 501; *see also Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). Accordingly, we will begin with a summary of the attorney-client privilege and the fiduciary exception before examining how the privilege should apply in this case.

I. The Attorney-Client Privilege and the Development of the Fiduciary Exception

The attorney-client privilege is the client's right to refuse to disclose confidential "communications between attorney and client made for the purpose of obtaining legal advice." *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *Black's Law Dictionary* 1235 (8th ed. 2004). The privilege "encourag[es] full and frank communication between attorneys and their clients" and "recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But the privilege "belongs to the client, who alone may waive it." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (en banc). An attorney may not assert the privilege against the client's wishes or against the client himself. *See Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987) ("The privilege is that of the client, not that of the attorney.").

While "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," *Upjohn*, 449 U.S. at 389, it is not "an ironclad veil of secrecy," *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970). The Supreme Court has recognized exceptions to the privilege, for example, holding that it does not protect communications made in the furtherance of a crime or fraud. *See United States v. Zolin*, 491 U.S. 554, 562-63 (1989) ("[T]he purpose of the crime-fraud exception to the attorney-client privi-

lege [is] to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." (internal quotation marks omitted)); *see also In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000) (discussing the crime-fraud exception). Moreover, we have recognized the joint client or community of interest doctrine: "When the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege." *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996). Under this doctrine, "communications between a client and the attorney may be privileged as to outsiders, [but] they are not privileged" between clients in a community of interest relationship. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007). Several courts have recognized another limitation on the attorney-client privilege, known as the fiduciary exception.

As early as 1855, English courts required a trustee to produce legal advice to a beneficiary when the beneficiary sued the trustee for mismanagement and the advice related to trust administration. *Devaynes v. Robinson*, 20 Beav. 42, 43, 52 Eng. Rep. 518, 518 (1855) ("[C]ases and opinions taken by the . . . trustees must be produced" to the beneficiaries as long as the trustee did not obtain them in contemplation of litigation); Recent Cases, *In re Whitworth*, 1 Ch. 320 (1919), 33 Harv. L. Rev. 120 (1919). However, the attorney-client privilege still applied to advice that the trustee sought in anticipation of litigation. *Id.* After *Devaynes*, English courts have followed the so-called exception to the attorney-client privilege in beneficiary suits against a trustee for trust mismanagement. *See, e.g.*, *Talbot v.*

Marshfield, 2 Dr. & Sm. 549, 551 62 Eng. Rep. 728, 729 (1865) ("[I]f a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any [beneficiary] a right to see the case and opinion."); *Wynne v. Humbertson*, 27 Beav. 421, 423, 54 Eng. Rep. 165, 166 (1858) ("[T]he rule is that, where the relation of trustee and [beneficiary] is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defense in any litigation . . . , must be produced to the [beneficiary]."); *In re Mason*, 22 Ch. D. 609, 609 (1883) (holding that the trustees must produce documents containing "communications by and to the trustees and their solicitors in relation to the trust estate, made before the action was brought"). These English courts reasoned that a beneficiary was entitled to access the advice of counsel because the trustee sought the advice on how to execute the trust for the beneficiary's benefit and because the trust fund paid for the advice. *See Wynne*, 27 Beav. at 423-24, 54 Eng. Rep. at 166; *Talbot*, 2 Dr. & Sm. at 550-51, 62 Eng. Rep. at 729.

Though much later, courts in the United States also adopted the fiduciary exception. In 1970, the Fifth Circuit held that shareholders could pierce a corporation's attorney-client privilege to discover legal advice given to corporate management in a suit for breach of fiduciary duty upon a showing of good cause. *Garner*, 430 F.2d at 1103-04. The Fifth Circuit identified nine factors courts should consider in finding good cause. *Id.* at 1104.[1] In

[1] The nine *Garner* factors are as follows:

[1] [T]he number of shareholders and the percentage of stock they

reaching its conclusion, the court recognized that a corporation or its managers may sometimes have conflicting interests with shareholders and that shareholders may have conflicting interests among themselves. *Id*. at 1101 & n.17. "But when all is said and done management is not managing for itself," rather it "has duties which run to the benefit ultimately of the stockholders." *Id*. at 1101. Analogizing to the crime-fraud exception and the community of interest doctrine, the Fifth Circuit reasoned that the attorney-client privilege had limits when the person seeking legal advice had a superseding obligation to shareholders or some other client was entitled to the advice. *Id*. at 1103.

Since *Garner*, U.S. courts have applied the fiduciary exception in contexts other than derivative shareholder actions. For example, courts have applied the exception in trust cases when trustees assert the attorney-client privilege against beneficiaries, as in the leading American case *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976). Courts have also relied on

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> represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104.

the exception in other fiduciary relationships, such as when employers managing plans regulated under the Employee Retirement Income Security Act (ERISA) have asserted privilege against plan beneficiaries and when unions have asserted privilege against union members. *See Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271-72 (2d Cir. 1997) (employer acting as an ERISA fiduciary asserting privilege against plan beneficiaries); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679-81 (D. Kan. 1986) (union asserting privilege against union members).

The fiduciary exception to the attorney-client privilege is now well established among our sister circuits. At least five circuits recognize some form of the exception, including the Second, Fifth, Sixth, Ninth, and D.C. Circuits. *See, e.g.*, *United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999); *In re Lindsey*, 158 F.3d 1263, 1276-79 (D.C. Cir. 1998); *Becher*, 129 F.3d at 272 (recognizing the fiduciary exception in the Second Circuit); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992); *cf. Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 352 (4th Cir. 1992), *vacated*, No. 91-1873(L), 1993 WL 524680 (4th Cir. Apr. 7, 1993). Though we are aware of some state courts that have expressly rejected the fiduciary exception, no federal court of appeals has rejected the principle, but have only declined to apply the exception in cases where the facts did not justify its application. *Compare Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591, 594-96 (Cal. 2000) (rejecting the fiduciary exception in a trustee-beneficiary case because statutory attorney-client privilege did not permit judicially created exceptions), *and Huie v. DeShazo*, 922 S.W.2d 920, 922-25 (Tex. 1996) (rejecting the fiduciary exception in

a trustee-beneficiary case), *with Wachtel*, 482 F.3d at 236-37 (declining to apply the fiduciary exception to an insurer who sells, but does not manage, insurance to ERISA-regulated parties), *and Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 788-89 (7th Cir. 2005) (declining to apply the fiduciary exception to an employer amending or terminating an ERISA plan), *and Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415-16 (11th Cir. 1994) (declining to apply the *Garner* doctrine to a union in a suit brought by union members because only a tiny percentage of union members were members of the class and the union class members' interests conflicted with union members not in the class).

As developed in the United States, courts have based the fiduciary exception on two justifications. *See Riggs*, 355 A.2d at 712-14. First, the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary. *See, e.g.*, *Mett*, 178 F.3d at 1063 ("[A]t least as to advice regarding plan administration, a trustee is not the real client and thus never enjoyed the privilege in the first place." (internal quotation marks omitted)); *Riggs*, 355 A.2d at 713 ("As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served."). Under this justification, the fiduciary exception is but a logical extension of the client's control of the attorney-client privilege. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary. *See e.g.*, *Becher*, 129 F.3d at 72 ("[An] ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Riggs*, 355 A.2d at 714 ("[T]rustees . . . cannot subordinate the fiduciary obli-

gations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege."). Under this second justification, "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 duty to disclose. *Mett*, 178 F.3d at 1063.

No federal court of appeals has addressed whether the fiduciary exception applies to the United States as trustee over tribal assets and funds. However, federal trial courts have previously applied the fiduciary exception to the United States in at least three tribal trust cases—twice in the Court of Federal Claims and once in a district court. *See Osage Nation v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002); *Shoshone Indian Tribe of Wind River Reservation, Wy. v. United States*, Nos. 458-79 and 459-79 (Fed. Cl. May 16, 2002), *attached at Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 35 (2009). With this background in mind, we now turn to the question that the United States raises in its petition.

II. The Fiduciary Exception Applied to Indian Trusts

The United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception. Therefore, we hold that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications.

The United States' general assertion that the Secretary of the Interior's other statutory obligations "may occasionally be in tension with interests regarding tribal lands or other non-monetary assets," does not diminish its exacting responsibilities as a trustee so as to warrant shielding the trust beneficiary from legal advice on trust management. Accordingly, we adopt the fiduciary exception in tribal trust cases. We do not address whether the fiduciary exception applies when the government or its attorneys considered a specific competing interest in those communications, such as statutes governing endangered species or natural resources. Nor do we address whether the fiduciary exception applies to documents privileged as attorney work product. In the case before us, however, both justifications for the fiduciary exception support its application.

A. Identity of the Client

As the Court of Federal Claims described, the attorney-client communications at issue here were for the benefit of Jicarilla and other Indian tribes. *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 6, 13-19 (2009). Interior was seeking advice on behalf of the tribes on how to manage trust funds and other tribal assets, and the attorneys were giving advice on trust management ultimately for the benefit of the tribes. Accordingly, Interior was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes.

Jicarilla's status as the "real client" stems from its trust relationship with the United States. *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976). The Supreme Court has affirmed "the undis-

puted existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *see also Cherokee Nation v. Ga.*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing the relationship of the Indian tribes to the United States as "ward to his guardian" and clearly establishing the now longstanding and accepted basis of the trust relationship between the United States and Indian tribes). "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id*. This general trust relationship rests on a long history of asset management and statutory mandates to Interior. As the trial court noted, "'Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.'" *Jicarilla*, 88 Fed. Cl. at 5 (quoting Felix Cohen, *Handbook of Federal Indian Law* § 5.04(4)(a) (2005)). We think that the statutes that the trial court cites amply demonstrate that relationship. *See id.*; *see also* 25 U.S.C. § 162(a) (2006) (trust investment); § 450j (contract administration); § 458cc (funding agreements); § 3120 (forest resources); § 3303 (education); § 3701 (agricultural resources); § 4021 (trust fund management); §§ 4041-43 (special trustee). Indeed, like the fiduciary duties in other statutory trusts, the United States' trust duties to tribes "draw much of their content from the common law of trusts." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (comparing fiduciary duties under ERISA to the common law of trusts). Accordingly, common law trust principles should generally apply to the United States when it acts as trustee over tribal assets. *See United States v. White Mtn. Apache Tribe*, 537 U.S.

465, 475 (2003) (applying the common law principle that a trustee must preserve the trust corpus to the United States as trustee of tribal assets); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (applying the common law principle of trustee repudiation to the United States as trustee of tribal assets). Moreover, the general trust relationship justifies straightforward application of the fiduciary exception in this case, instead of the multifactor balancing test that courts apply in derivative shareholder actions. *Compare Wynne v. Humbertson*, 27 Beav. 421, 423, 54 Eng. Rep. 165, 166 (1858) (fiduciary exception applied in trust case), *and Riggs*, 355 A.2d at 712-14 (same), *with Garner*, 430 F.2d at 1104 (shareholder derivative action identifying nine factors for good cause to pierce attorney-client privilege). We find the government's arguments to the contrary unpersuasive and address each in turn.

1. Duty of Loyalty to the Tribes

The United States relies primarily on *Nevada v. United States*, 463 U.S. 110 (1983) for its argument that its relationship with the tribes is very different from a traditional fiduciary's relationship to beneficiaries.

In *Nevada*, the Supreme Court held that res judicata barred an action by the United States in 1973 seeking additional water rights on behalf of the Pyramid Lake Indian Reservation because the United States had already sued in 1913 to adjudicate those same water rights. *Id.* at 143. The Court also addressed the United States' obligations to the reservation and its obligation to comply with the Reclamation Act of 1902. The Reclamation Act "required the Secretary of the Interior to

assume substantial obligations with respect to the reclamation of arid lands in the western part of the United States." *Id.* at 128. The Court explained that the United States would not violate its trust obligations to a tribe by performing another task also required in the Reclamation Act. The Court noted that Congress delegated to the Secretary of the Interior "both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands." *Id.* Based on this dual responsibility, the Court wrote that "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well." *Id.* The Court thus reasoned that this dual responsibility altered the government's duties as a fiduciary: "[T]he 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." *Id.*

The United States' reliance on *Nevada* and its argument that other statutory duties undermine application of the fiduciary exception are not relevant in this case. To be sure, *Nevada* recognizes that the Secretary of the Interior may at times be required to balance fiduciary duties with other statutory duties. However, the government does not argue in its petition that it in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here. We note that this is the trust *funds* phase of the case. According to the parties, this phase involves only the management of accounts, not of other assets such as land or mineral rights, where the Secretary of the Interior might have

other statutory duties. The Navajo Nation and Pueblo of Laguna, as amici curiae, correctly note that "[s]ince the documents at issue relate only to trust *funds*, potential privilege claims for unspecified documents regarding other types of trust assets based on other statutory regimes are beyond the scope of the petition." Thus, we do not reach the issue whether the fiduciary exception applies when the government or its attorneys considered a specific competing interest in those communications.

2. Source of Payment for Legal Advice

The United States also argues that because its attorneys are paid "out of congressional appropriations, not the trust corpus," their relationship with the tribes should not allow application of the fiduciary exception. The United States explains that "[w]hile the source of payment [for legal advice] may not, by itself, determine whether the fiduciary exception applies, it does serve as another factor counseling against application of the exception in this context."

The United States correctly identifies the source of payment as one factor in determining whether a beneficiary can access attorney-client privileged information. *See, e.g.*, *Wachtel v. Health Net, Inc.*, 482 F.2d 225, 235-36 (3d Cir. 2007) ("[W]hen a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries' status as the true clients."); *Riggs*, 355 A.2d at 712 ("[W]hen the beneficiaries desire to inspect opinions of counsel for which they have paid out of trust funds effectively belonging to them, the duty of the trustees to allow them to examine those opinions becomes even more compelling."). In contrast to a private trust case, we do

not think the source of payment is helpful when the trustee imposes the trust on the beneficiaries. The fact that the United States does not use trust funds to pay for legal advice on how to manage a trust it imposed on the Indian tribes does not suggest that the tribes should be barred from accessing that advice. Moreover, the government's fiduciary duties of providing Jicarilla "with complete and accurate information overrides any implication that must arise from the fact that the [g]overnment pays its own legal fees." *Osage Nation v. United States*, 66 Fed. Cl. 244, 249 (2005) (internal quotation marks omitted) (alterations in the original).

3. Secretary of the Interior's Ability to Obtain Confidential Legal Advice

The United States also argues that applying the fiduciary duty in this case would impair the Secretary of the Interior's ability to obtain confidential legal advice. Because this phase of the litigation involves only the United States' duties regarding trust fund accounts, we disagree with the government's position. Of course, the basic concern could be stated by any trustee. The trustee may feel that its ability to obtain legal advice is impaired because the advice is not shielded from its beneficiary. But the exception applies because the fiduciary is not the exclusive client of the attorney rendering advice and because a fiduciary has a duty to keep the beneficiary informed of issues related to trust administration. Though the United States argues that it would not be able to obtain legal advice about other statutes that may require it to take action related to property that is not a trust fund account, those arguments are not relevant in this case and it has failed to allege any actual conflict.

B. Duty of Disclosure

The fiduciary exception's second justification also supports applying the doctrine in this case. As a general trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds. *See* Restatement (Third) of Trusts § 82(2) (2007) ("[A] trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings."); Restatement (Second) of Trusts § 173 (1959) ("The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust."). In addition to that basic duty, Congress has created an Office of Special Trustee "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes." 25 U.S.C. § 4041(1) (2006).

The United States argues that it does not have a fiduciary's duty to disseminate information to the tribes because Congress has required Interior to provide only specific types of information to tribes. The United States cites the 1994 Indian Trust Fund Management Reform Act, which required, inter alia, that Interior must provide certain information to tribes, including

quarterly statements of performance and a letter reporting the results of an audit. The United States did not identify the pertinent language of the statute, which states that "proper discharge of the trust responsibilities of the United States *shall include (but are not limited to)* . . . [p]reparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis." 25 U.S.C. § 162a(d)(5) (emphasis added). Congress expressly recognized the possibility of trust responsibilities outside the statute. Therefore, the United States' arguments in this regard are completely without merit.

The D.C. Circuit came to a similar conclusion based on the United States' arguments that statutes have limited the United States' fiduciary duties to the tribes. That court wrote, "The fundamental problem with [the government's] claims is the premise that their duties are solely defined by the 1994 Act. The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them." *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

In sum, "the government has other trust responsibilities not enumerated in the 1994 Act." *Id*. Those other responsibilities include the common law duty to disclose information.

CONCLUSION

The United States has not shown that the Court of Federal Claims erred in determining that the government could not withhold documents related to the management of trust fund accounts from Jicarilla based on the attorney-client privilege. The United States' right

to issuance of the writ is far from "clear and indisputable," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (internal quotation marks omitted), because the government improperly asserted the attorney-client privilege as a trustee against the trust beneficiaries. We thus decline to grant a writ of mandamus. Instead of "avoid[ing] the development of doctrine that would undermine the [attorney-client] privilege," *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), the trial court correctly demarcated the privilege's limits.

Accordingly,

IT IS ORDERED THAT:

(1) The petition for a writ of mandamus is denied.

(2) The motion for leave to file a reply is granted.

(3) The motion for leave to file a shortened brief amicus curiae is granted. The original motion for leave to file a brief amicus curiae is moot.

(4) The temporary stay of the order of the Court of Federal Claims that required production is lifted.

FOR THE COURT

December 30, 2009 /s/ JAN HORBALY
Date JAN HORBALY
Clerk

cc: Brian C. Toth, Esq.
Steven D. Gordon, Esq.
Alan R. Taradash, Esq.
Judge, Court of Federal Claims
Clerk, Court of Federal Claims

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-25L

JICARILLA APACHE NATION, FORMERLY
JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

(Filed under seal: July 2, 2009)
Reissued: July 21, 2009[1]

Motion to compel production; Motion for protective order; Tribal trust fund case—fiduciary obligations; Attorney-client privilege; Work product doctrine; "Fiduciary exception;" Applicability to attorney-client privilege; Inapplicability to work product doctrine; Mixed-content documents; Requests for legal advice; Applicability of attorney-client privilege to advice received from agency counsel; RCFC 26(b)(5)(A)—waiver of privilege; RCFC 26(b)—relevancy; Tribal investment information not relevant to trust fund theories; Motions granted, in part, denied, in part

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[1] An unredacted version of this opinion was issued under seal on July 2, 2009. The parties were given an opportunity to propose redactions, but no such proposals were made.

ORDER

ALLEGRA, Judge:

Pending before the court, in this tribal trust case, are myriad discovery-related motions. Plaintiff seeks to compel the production of documents that defendant claims are privileged and, at the same time, seeks a protective order to prevent the discovery of investment information it claims is irrelevant to the subject case. Defendant resists both motions and, for its own part, has filed motions to compel the production of the information that plaintiff seeks to protect and to modify substantially the discovery plan in this case.

I.

A brief recitation of the underlying facts sets the context for this decision.

In this case, the Jicarilla Apache Nation (Jicarilla or plaintiff) seeks an accounting and to recover for monetary loss and damages relating to the government's breach of fiduciary duties in allegedly mismanaging the tribe's trust assets and other funds. Plaintiff, *inter alia*, avers that defendant 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. The parties participated in alternative dispute resolution from December 2002 to June 2008, during which time defendant produced many thousands of documents to Jicarilla. Defendant, however, also withheld a large number of documents as privileged. Ultimately, at

the plaintiff's request, the case was restored to the court's active docket. Following consultations with the parties, on October 7, 2008, the court issued an order confirming that trial on the first phase of the case would be limited to fiscal claims relating to defendant's management of certain Jicarilla trust accounts from 1972 to 1992 (the Andersen Period).

Discovery as to that phase of the case ensued. On November 25, 2008, plaintiff filed a motion to compel defendant to produce certain documents withheld from production based on claims of attorney-client privilege, attorney work-product, and the deliberative process privilege. On December 19, 2008, defendant filed its response to the motion and a privilege log. In those documents, defendant continued to assert attorney-client and work-product defenses, but agreed to produce 71 of the 226 documents listed in its privilege log based, in part, upon withdrawing any deliberative process privilege claims. Plaintiff filed its reply on January 5, 2009, and on January 16, 2009, defendant, per court order, submitted 155 documents for *en camera* review.[2]

On February 25, 2009, plaintiff filed a motion for a protective order to bar defendant from discovering information relating to the tribe's non-trust investments. Plaintiff vigorously asserted, *inter alia*, that the tribe's handling of its non-trust investments is irrelevant to this lawsuit. On March 5, 2009, defendant responded to the motion, asserting that the requested documents were reasonably calculated to lead to the discovery of admis-

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[2] The Supreme Court has recognized the important role that *en camera* inspection of disputed documents often plays in determining the existence of a privilege. *See United States v. Zolin*, 491 U.S. 554, 568-69 (1989); *see also United States v. Nixon*, 418 U.S. 683, 714 (1974).

sible evidence concerning the reasonableness of the government's investments as trustee, the tribe's investment directives and liquidity needs, the receipt and timing of trust disbursements, and potential damages calculations. On March 11, 2009, Pueblo of Laguna and Navajo Nation, which are plaintiffs in two similar cases pending before the court, filed an *amicus* brief in support of plaintiff's motion. Plaintiff filed its reply on March 13, 2009. Hoping to ensure production of the same information plaintiff seeks to protect, defendant filed a motion to compel on March 17, 2009. On March 19, 2009, it filed a response to the *amicus* brief. Plaintiff filed its response to defendant's motion to compel on April 3, 2009. On April 10, 2009, the *amici* filed a brief opposing defendant's motion, and defendant filed its reply.

On March 31, 2009, defendant filed a motion to extend the discovery deadlines in this case by one year, claiming the extra time is needed given the breadth of the discovery requested and the vast size of the record depositories to be searched. Plaintiff filed its response opposing the request on April 14, 2009, alleging that most repositories have been canvassed, thousands of documents already produced, and the issues known for years. Defendant filed its reply on April 16, 2009. Oral argument on all the discovery motions was held on April 16, 2009. Following oral argument, and per court order, defendant filed the deposition transcript of a former tribal assistance officer, Mr. Gabriel Abeyta, and associated exhibits on April 22, 2009. The court permitted supplemental materials to be filed by *amici* on May 4, 2009; by plaintiff on May 5, 2009; and by defendant on May 4 and May 14, 2009.

II.

The Federal Circuit has instructed that "[q]uestions of the scope and conduct of discovery are . . . committed to the discretion of the trial court." *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 797 (Fed. Cir. 1984); *see also Stovall v. United States*, 85 Fed. Cl. 810, 813 (2009). In deciding either to compel or quash discovery, this court must balance potentially conflicting goals. On the one hand, it "'must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.'" *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986) (quoting Fed. R. Civ. P. 26(b)(1) advisory comm. notes (1983)); *see also Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (per curiam). As the Supreme Court once famously indicated, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). On the other hand, the Court in *Hickman* was quick to caution that "discovery, like all matters of procedure, has ultimate and necessary boundaries. . . . [L]imitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege." *Id.* at 507-08; *see also Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 126 (2007); *Vons Cos., Inc. v. United States*, 51 Fed. Cl. 1, 5 (2001). Encapsulating these considerations, RCFC 26(b)(1), like its Federal Rules counterpart, provides that a party may obtain discovery of any matter that: (I) is "non-privileged," and (ii) "is relevant to any party's claim or defense." *See also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1300 (Fed. Cir. 2006),

cert. denied, 549 U.S. 1096 (2006); *Evergreen Trading*, 80 Fed. Cl. at 126; *Vons*, 51 Fed. Cl. at 5.

The fiduciary relationship between the federal government and Indian tribes took form long ago, arising first under treaties and then under statutes. As early as 1831, Chief Justice Marshall described the relationship of the tribes with the United States as that of a "ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Early acts by Congress effectuated this view by specifically directing how the government would handle tribal trust funds. *See, e.g.*, Act of June 14, 1836, 5 Stat. 36 (rates of return); Act of Jan. 9, 1837, 5 Stat. 135 (interest on land proceeds). In the 1877 General Allotment Act, Congress appointed the United States, as trustee, to manage lands allotted for individual Native Americans and to deposit fees and royalties from use of those lands into trust accounts. 24 Stat. 388 (1887), *codified at*, 25 U.S.C. § 331, *et seq*. Although the Indian Reorganization Act of 1934 barred further allotments, federal trust obligations continued for previously allotted lands. 48 Stat. 984 (1934), *codified at*, 25 U.S.C. § 461, *et seq*. Through these and later enactments, the United States has come to manage 56 million acres of land and billions of dollars in tribal assets, collecting hundreds of millions of dollars annually on behalf of the tribes from leases, as well as mineral, timber, oil, and gas royalties. *See* Felix Cohen, Handbook of Federal Indian Law (Cohen) § 5.03(3)(b) (2005); Dep't of Interior, Fiduciary Obligations Compliance Plan, Jan. 6, 2003, http://www.doi.gov/news/fiduciaryobligations.pdf (as viewed on July 2, 2009); Robert McCarthy, "The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians," 19 BYU J. Pub. L. 1, 78 (2004).

Over the last century, Congress has seen fit periodically to reaffirm the importance of the government's fiduciary role in managing tribal assets. "Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government." Cohen, *supra* at §5.04(4)(a); *see e.g.*, 25 U.S.C. § 162a (trust investment), § 450j (contract administration), § 458cc (funding agreements), § 3120 (forest resources), § 3303 (education), § 3701 (agricultural resources), § 4021 (trust fund management) §§ 4041-43 (special trustee). When it has perceived deficiencies in the government's handling of trust assets, Congress has not hesitated to pass laws to bolster the protection of tribal investments, often by giving the tribes increased access to investment information. *See, e.g.*, American Indian Trust Fund Management Reform Act of 1994 (Trust Fund Reform Act), Pub. L. No. 103-412, 108 Stat. 4239 (1994), *codified at* 25 U.S.C. §§ 4001-61; *see also* Misplaced Trust: the Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (1992). Of particular importance in this regard is the Trust Fund Reform Act, which required that the Department of Interior (Interior) account for all Indian trust funds, report quarterly to account holders, and conduct annual audits. The act, *inter alia*, created an Office of Special Trustee to provide greater accountability in discharging trust responsibilities and to ensure that each tribe received as complete a trust fund accounting as soon as possible dating back to the earliest practicable date. 25 U.S.C. §§ 4041-44.

Commenting, from time to time, on various chapters of this history, the Supreme Court has noted the "distinctive obligation of trust incumbent upon the Govern-

ment in its dealings with these dependent and sometimes exploited people," *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and, more recently, the "undisputed existence of a general trust relationship between the United States and the Indian people," which compromises a "distinctive obligation of trust incumbent upon the Government," *United States v. Mitchell*, 463 U.S. 206, 225 (1982).[3] Though this relationship is currently founded in statutes that undoubtedly serve to delimit somewhat the government's obligations, it has, nevertheless, historically been measured and evaluated using principles typically applied to common law fiduciary relationships. *See*, *e.g.*, *White Mountain*, 537 U.S. at 475; *Shoshone*, 364 F.3d at 1348 (applying traditional trust principles). Indeed, a leitmotif oft sounded in tribal trust cases is that defendant's conduct must be judged by the "most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also Shoshone*, 364 F.3d at 1348; *Ak-Chin v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982); *Osage Tribe v. United States*, 72 Fed. Cl. 629, 643 (2006). Thus, defendant is obliged "to preserve and maintain trust assets," *White Mountain*, 537 U.S. at 475 (quoting *Central States, Southwest & Southwest Areas Pension Fund v. Central Transp. Inc.*, 472 U.S. 559, 572 (1985)), and to provide the beneficiaries

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[3] *See also id.* (noting that the relevant sources of substantive law create "[a]ll of the necessary elements of a common-law trust"); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 n.3 (2003); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 665-66 (7th Cir. 2004), cert denied, 543 U.S. 1051 (2005); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004), cert. denied, 544 U.S. 973 (2005).

with information regarding the management of their trusts, *see Navajo Tribe of Indians v. United States*, 624 F.2d 981, 989 (Ct. Cl. 1980); *Red Lake Band v. United States*, 17 Cl. Ct. 362, 373 (1989); *see also* Restatement (Third) Trusts §§ 82-83.

III.

With this background, we deal first with plaintiff's motion to compel. Pursuant to RCFC 37, plaintiff seeks an order compelling defendant to turn over a range of documents. These documents can be organized into five categories: (I) requests for legal advice from personnel in various Interior agencies to Interior's Office of the Solicitor (the Solicitor's Office), either directly or indirectly concerning Jicarilla's accounts; (ii) legal advice provided by the Solicitor's Office or other government legal offices, again either directly or indirectly concerning Jicarilla's accounts; (iii) documents created by or provided to the accounting firm of Arthur Andersen LLP under a series of contracts between that firm and Interior; (iv) documents generated by Interior personnel, including members of the Solicitor's Office, regarding pending or anticipated litigation involving other tribes; and (v) other miscellaneous documents or drafts (*e.g.*, cover sheets). Defendant contends that all or portions of these documents are protected by the attorney-client privilege, the work product doctrine or both. Plaintiff argues that the cited privileges are inapplicable to the wide majority of the documents requested and that, as to other documents, defendant has waived these privileges.

A.

Regarding the twin privileges raised by defendant, this court has recently explained:

> The symbiotic relationship between the attorney-client and work product privileges stems from shared pragmatic and systemic justifications and is reflected in principles common to both. Under Rule 501 of the Federal Rules of Evidence, both privileges are "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." Both also stand in tension with the desire to avoid suppressing probative evidence and, for that reason, have been narrowly construed—extended only as far as needed to effectuate their utilitarian purposes. *See, e.g.*, *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990); *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see generally Ullmann v. United States*, 350 U.S. 422, 438-40 (1956) (Frankfurter, J.) ("Once the reason for the privilege ceases, the privilege ceases."). . . . Lastly, parties claiming the benefit of either privilege bear the burden of establishing all the essential elements thereof, a burden that is not "discharged by mere conclusory or *ipse dixit* assertions." *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965).

Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 127 (2007) (alternate citations and footnotes omitted). "Yet while the attorney-client and work product privileges are similar and often invoked with respect to the same documents, they diverge in critical regards." *Id.* And, as it turns out, those differences ultimately

serve to inform the extent to which the privileges apply in the context of the fiduciary relationship involved here.

The attorney-client privilege "protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice." *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *see also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006); *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987). The privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).[4] The familiar Wigmorean definition of the privilege asserts that—

> [w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (McNaughton rev. 1961). "Breaking this definition into its component parts," this court recently observed, reveals that "'in order for the attorney-client

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[4] *See also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); *Evergreen Trading*, 80 Fed. Cl. at 128.

privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship.'" *Evergreen Trading*, 80 Fed. Cl. at 128 (quoting *United States v. BDO Seidman LLP*, 492 F.3d 806, 815 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1471 (2008)); *see also United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Stovall*, 85 Fed. Cl. at 814.[5] "'[A]n agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege.'" *Rein v. United States Patent and Trademark Office*, 553 F.3d 353, 376 (4th Cir. 2009) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir.

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[5] Although ultimately not adopted, the rule describing the attorney-client privilege promulgated by the Supreme Court in 1972 as part of the Proposed Federal Rules of Evidence has been recognized "as a source of general guidance regarding federal common law principles." *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir. 2005); *see also* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.02 (Joseph M. McLaughlin, ed., 2d ed. 2006). Proposed Rule 503 was particularly instructive in summarizing the types of communications that may be subject to the privilege—

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Proposed Fed. R. Evid. 503(b), 56 F.R.D. 183, 236 (1972); *see also BDO Seidman*, 492 F.3d at 814-15 (relying on this proposed rule).

1980)); *see also Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

While the attorney-client privilege has ancient Roman roots, the work product doctrine is a more recent creation, born sixty-two years ago in the Supreme Court's seminal decision in *Hickman*. There, Justice Murphy, writing on behalf of the majority, rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." 329 U.S. at 510. Noting that "it is essential that a lawyer work with a certain degree of privacy," he reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten." *Id.* at 510-11. "An attorney's thoughts, heretofore inviolate, would not be his own," Justice Murphy stated, and continued—

> Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511.[6] The "strong public policy" underlying this doctrine has often been reaffirmed by the Supreme Court, *see, e.g.*, *Upjohn Co.*, 449 U.S. at 398; *United*

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[6] *See also In re Seagate Tech., LLC*, 497 F.3d 1360, 1374-75 (Fed. Cir. 2007); *EchoStar*, 448 F.3d at 1301 (work product doctrine "encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor"); *Genentech*, 122 F.3d at 1415.

States v. Nobles, 422 U.S. 225, 236-40 (1975), and has found a home in Federal Rule of Civil Procedure 26(b)(3). That rule states that documents "prepared in anticipation of litigation or for trial" are discoverable only upon a showing of "substantial need" for the materials and cannot, without "undue hardship," obtain the "substantial equivalent by other means." *See also* RCFC 26(b)(3) (including the identical language). Even where this showing has been made, however, the rule provides that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Id.*; *see also United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998).[7]

But, this rule leaves a few issues unresolved. In particular, it "does not in so many words address the temporal scope of the work product immunity," *Fed. Trade Comm'n v. Groiler, Inc.*, 462 U.S. 19, 25 (1983), that is to say, "it does not precisely define when the privilege attaches," *Evergreen Trading*, 80 Fed. Cl. at 132. Certain dimensions of this timing question are reasonably established. For example, it is well-recognized that for the rule to apply, litigation need not already have commenced or be imminent; rather, there must merely be a real possibility of litigation at the time the documents in

[7] In the words of the Federal Circuit, this rule "only allows discovery of 'factual' or 'non-opinion' work product and requires a court to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." *EchoStar*, 448 F.3d at 1302 (internal quotations omitted); *see also Seagate Tech.*, 497 F.3d at 1374-75 ("Whereas factual work product can be discovered solely upon a showing of substantial need and undue hardship, mental process work product is afforded even greater, nearly absolute, protection."); *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 93 (2007).

question are prepared. *See, e.g.*, *Evergreen Trading*, 80 Fed. Cl. at 132; *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 445 (2007); *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481, 485 (2000); *see also Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987). Further, by way of guidance, the drafters of the rule stated that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided for by this subdivision." *See* Rule 26(b)(3) advisory comm. notes (1970); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000); *Evergreen Trading*, 80 Fed. Cl. at 132; *United States v. KPMG, LLP*, 237 F. Supp. 2d 35, 41 (D.D.C. 2002).

Yet, there is less agreement as to when litigation is "anticipated" for purposes of this rule. After carefully analyzing this issue, this court in *Evergreen Trading* adopted a simple causation test employed by no fewer than nine circuits, *to wit*, whether a given document was prepared or obtained "because of" the prospect for litigation. *Evergreen Trading*, 80 Fed. Cl. at 132-33.[8] As

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[8] *See also United States v. Roxworthy*, 457 F. 3d 590, 599 (6th Cir. 2006); *In re Grand Jury Subpoena*, 357 F.3d 900, 907-08 (9th Cir. 2004); *Maine v. Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *Adlman*, 134 F.3d at 1202; *E.E.O.C. v. Lutheran Social Servs.*,186 F.3d 959, 968 (D.C. Cir. 1999); *Martin v. Bally's Park Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983); Alan Wright, Arthur R. Miller & Richard L. Marcus (hereinafter "Wright, Miller & Marcus"), 8 Federal Practice & Procedure § 2024, at

the court noted, this test is preferable to other formulations as it closely tracks the language of the RCFC 26(b)(3), under which the doctrine is "triggered so long as anticipating litigation was one of the purposes for which the document was prepared." *Evergreen Trading*, 80 Fed. Cl. at 133. This approach allows courts to account more readily for "dual purpose" documents that, though generated in making business decisions, "reveal an attorney's litigating strategies and assessment of legal vulnerabilities—precisely the type of discovery that the Supreme Court refused to permit in *Hickman*." *Id.*; *see also Adlman*, 134 F.3d at 1202; *State of Maine*, 298 F.3d at 68-70; 8 Wright, Miller & Marcus, *supra* at § 2024. Nonetheless, the court in *Evergreen* noted that the work product doctrine would not cover documents that "'would have been generated in the normal course of business even if no litigation was anticipated.'" 80 Fed. Cl. at 133 n.16 (quoting *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002)); *see also Roxworthy*, 457 F.3d at 599 (work product doctrine does not attach if the documents "'would have been created in essentially similar form irrespective of the litigation'" (quoting *Adlman*, 134 F.3d at 1202)).

A final, but important, caveat about the work product doctrine bears mention—it is relatively well-established that the immunity from discovery provided by the doctrine extends into subsequent litigation. Thus, "[i]f information was created in anticipation of litigation with

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343 (1994); *cf. In Re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000), cert. denied, 532 U.S. 919 (2001) (applying a test focusing on the "primary motivating purpose behind the creation of the document").

respect to Case A and otherwise meets all of the work product criteria, it remains immune from discovery in Case B." Douglas R. Richmond, "The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era," 110 Penn. St. L. Rev. 381, 394 (2005). While the Supreme Court has recognized this principle only in *obiter dicta*, *see Groiler,* 462 U.S. at 25 ("the literal language of [Rule 26(b)(3)] protects materials prepared for ***any*** litigation or trial as long as they were prepared by or for a party to the subsequent litigation" (emphasis in original)),[9] it appears, nonetheless, that every circuit to address this issue has reached the same conclusion, all the more so where there is some factual or legal nexus between the two cases involved. *See, e.g.*, *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002); *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994). This court has likewise stated that "work product immunity applies to documents prepared in anticipation of unrelated terminated litigation." *Eagle-Picher Indus., Inc. v. United States*, 11 Cl. Ct. 452, 457 (1987). This rule makes eminent sense as applied to the government, which often handles clusters of cases involving the same issues—a perfect example being the dozens of tribal trust cases now pending before this court. To rule, in such circumstances, that work product from one case may be discovered in the next would be, as one court observed, "to elide the broad rationale of the Court's deci-

[9] The Federal Circuit has suggested that courts in this circuit are obliged to follow "explicit and carefully considered" *dicta* in Supreme Court opinions. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1350 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *see also Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001).

sion" in *Hickman* and invite a game of discovery leapfrog. *Duplan Corp. v. Moulinage et Retorderie et Chavanoz*, 487 F.2d 480, 483-84 (4th Cir. 1973); *see also In re Murphy*, 560 F.2d 326, 334-35 (8th Cir. 1977) ("[t]he work product privilege would be attenuated if it were limited to documents that were prepared for the case for which discovery is sought"). That this court will not do.

B.

So how do these privileges function when the party seeking the documents is in a fiduciary relationship with the party invoking the privilege?

Although the Federal Circuit has not yet addressed this issue, a "fiduciary exception" to the attorney-client privilege is "well established in [the] federal jurisprudence" of many circuits. *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 624 (E.D. Mo. 2000). Under this exception, fiduciaries may not shield from their beneficiaries communications between them and their attorneys that relate to fiduciary matters, including the administration of trusts. *See Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002). Rather, communications between the fiduciary and its attorney may be protected only if they concern the personal interests of the fiduciary or other non-fiduciary matters. The justification for this exception is two-fold. First, courts have reasoned that the fiduciary is not the exclusive client of the attorney rendering advice, but rather is obtaining that advice either as a proxy for the beneficiaries or jointly therewith.[10]

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[10] *See United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986) (per curiam); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 493 (M.D.N.C. 2008); *Cobell*, 212 F.R.D. at 27; *Washington-Baltimore*

These courts have concluded that it is inappropriate to prevent the beneficiary from obtaining information regarding the management of a trust provided to the fiduciary.[11] Indeed, so viewed, the exception really is no exception at all, but rather reflects the fact that "at least as to advice regarding . . . administration, a trustee is not the 'real client' and thus never enjoyed the privilege in the first place." *Mett*, 178 F.3d at 1063; *Evans*, 796 F.2d at 266. Other courts see the fiduciary exception more as deriving from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration. *See Mett*, 178 F.3d at 1063; *Long Island Lighting*, 129 F.3d at 271-72; *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991). These courts hold that this duty overrides the attorney-client privilege, particularly where the information sought by the beneficiary is relevant to an alleged breach of a fiduciary duty. *Bland v. Fiatallis North Am., Inc.*, 401 F.3d 779, 787-88 (7th Cir. 2005); *Washington-Baltimore Newspaper Guild*, 543 F. Supp. at 909.[12]

Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982).

[11] *See, e.g.*, *United Stats v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999); *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992) ("When an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator."); *Cobell*, 212 F.R.D. at 27; *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 607-08 (N.D. Cal. 2000).

[12] *See also* Restatement (Third) of The Law Governing Lawyers § 84 cmt. b (2000) ("In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communica-

Persuaded by at least one of these rationales, seven circuits (the Second, Fourth, Fifth, Sixth, Ninth, Eleventh and D.C.) have adopted some version of the "fiduciary exception" to the attorney-client privilege. *See Mett*, 178 F.3d at 1062 ("The Ninth Circuit . . . has joined a number of other courts in recognizing a 'fiduciary exception' to the attorney-client privilege."); *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998); *Long Island Lighting*, 129 F.3d at 272 ("[T]he ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415-16 (11th Cir. 1994) (recognizing the exception, though declining to apply it on the facts presented); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 348 (4th Cir. 1992), *vacated on other*

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tions with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties."); George G. Bogert, George T. Bogert & Amy M. Hess, The Law of Trusts and Trustees § 961 ("The beneficiary . . . has a right to obtain and review legal opinions given the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct."); 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 173 (4th ed. 1987) ("A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust"). Indeed, various cases have held that the privilege has little place where the substance of the advice is a primary focus of a lawsuit. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991). Notably, Proposed Rule 503(d) would have created an exception to the attorney-client privilege thereunder "[a]s to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." Proposed Fed. R. Evid. 503(d)(5), 56 F.R.D. at 237.

grounds, 1993 WL 524680 (4th Cir. Apr. 7, 1993); *Wildbur*, 974 F.2d at 645 ("[A]n ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration."); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992) (recognizing the exception). While many of these cases arise in the ERISA (Employee Retirement Income Security Act) context, that is not the only domain in which the exception functions, as defendant readily admits. Rather, it has been applied in a panoply of fiduciary settings, including cases involving shareholders, bank depositors and union members, to name but a few.[13] And, most importantly of course, it has been applied in tribal trust cases involving Interior and one or more tribes or other trust fund beneficiaries. *See Osage Nation and/or Tribe of Indians of Oklahoma v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *Cobell*, 212 F.R.D. at 27-29; Order of May 16, 2002, in *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458-79 and 459-79 (copy attached).

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[13] *See, e.g., Sandberg*, 979 F.2d 350-54 (shareholder derivative action); *Fausek*, 965 F.2d at 132-33 (applying the exception in a dispute between a corporation and its minority shareholders, and noting "[t]here is a mutuality of interests between a corporation and its shareholders that precludes use of the privilege by management to deprive shareholders of information relating to their investments in the corporation"); *Quintel Corp. v. Citibank*, 567 F. Supp. 1357, 1363 (S.D.N.Y. 1983) (bank and depositor); *Aquinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679-81 (D. Kan. 1986) (union and union members); *see also In re Omnicom Group, Inc. Sec. Litig.*, 233 F.R.D. 400, 410 (S.D.N.Y. 2006) ("a trustee may not withhold from the beneficiary any communications by the trustee with an attorney that were triggered by the trustee's need for advice on how to carry out his fiduciary responsibilities").

The latter cases are particularly instructive for, in holding that the fiduciary exception applies in tribal trust cases, they discredit many of the apparently well-rehearsed arguments that defendant raises here. Thus, contrary to defendant's claims, these cases conclude that there is nothing about the fiduciary relationship between the United States and the tribes, or the statutes and treaties from which that relationship springs, that somehow renders the "fiduciary exception" inoperable. To the contrary, courts have recognized that the tribal trust duties, like the fiduciary duties arising in other federal statutory contexts, "draw much of their content from the common law of trusts." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). The result, as courts have confirmed repeatedly, is that basic trust principles are readily transferable to the Indian trust context.[14] Nor has defendant identified anything about its sovereign status that would limit its fiduciary responsibilities here, so as to contradict the duties upon which the fiduciary exception is moored, among them, the obligation to keep the beneficiaries well-informed. *See Osage*, 66 Fed. Cl. at 248 (finding "defendant's argument that the government's sovereign interests somehow negate or offset its

[14] The Supreme Court and other courts have emphasized that the standards governing private fiduciaries and their beneficiaries provide effective analogies in the tribal context. *See Nevada v. United States*, 463 U.S. 110, 127 (1983); *Mitchell*, 463 U.S. at 224; *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1398-99 (8th Cir. 1987); *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 58 Fed. Cl. 542, 545 (2003); *Begay v. United States*, 16 Cl. Ct. 107, 127 n.17 (1987); *see also Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233 (3d Cir. 2007). Indeed, to the extent that some of these cases deviate from this analogy, it is only to emphasize that the government has even greater duties. *Nevada*, 463 U.S. at 127; *Begay*, 16 Cl. Ct. at 127 n.17.

obligations as trustee to be unpersuasive"); *see also Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001). That Interior is subject to Congressional oversight and specifically obliged by statute to make information available to the tribes hardly, as defendant intimates, belies the existence of a trust relationship—rather, if anything, it serves only to reaffirm it. *See Osage,* 66 Fed. Cl. at 250; *Cobell*, 213 F.R.D. at 11; *Shoshone Indian Tribe*, 58 Fed. Cl. at 545.[15] Finally, the aforementioned courts have made short shrift of defendant's contention that the "fiduciary exception" does not apply when the United States pays for legal advice out of its operating funds, rather than with trust funds. While the use of trust funds to pay for legal advice is an indication that the fiduciary exception may apply, the converse is not true—the absence of such an arrangement does not serve independently to negate the exception. *See* Restatement (Third) of Trusts § 182, cmt. f (noting that the current Restatement "diminishes the significance of who pays"). Rather, other factors may demonstrate the existence of the sort of fiduciary relationship upon which the fiduciary exception is founded. *See Osage*, 66 Fed. Cl. at 249; *Cobell*, 212 F.R.D. at 30.

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[15] As noted in *Osage*, that some information regarding the administration of a tribal trust is available from other sources, does not relieve "the [g]overnment of *its* obligation, as a fiduciary, to provide complete and accurate information." *Osage*, 66 Fed. Cl. at 250 (emphasis in original); *see also Cobell*, 212 F.R.D. at 28. Indeed, to the extent that Congress has mandated the release of information, a reasonable argument can be made that it has waived the privilege as to other information involving the same subject matter. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1445 (2008); *Stovall*, 85 Fed. Cl. at 816.

That said, the court agrees with defendant that there is no corollary "fiduciary exception" to the work product doctrine. True, as plaintiff notes, several decisions have held that such an exception exists, operating on the rationale that a trustee's fiduciary obligations to keep the beneficiary informed trumps the doctrine. *See Osage*, 66 Fed. Cl. at 250-52; *Cobell v. Norton*, 213 F.R.D. 1, 13 (2003). But, the court is hesitant to view the exception in such cardinal terms, particularly where core work-product is involved, and especially given the Supreme Court's admonition that such product is entitled to "special protection." *Upjohn*, 449 U.S. at 400-01. In refusing to apply the fiduciary exception to work product, other cases have observed that the exception, as applied to the attorney-client privilege, is based upon a mutuality of interest between the fiduciary and the beneficiaries. They have logically opined that "once there is sufficient anticipation of litigation to trigger the work product immunity, . . . this mutuality is destroyed," making it unreasonable "to indulge in the fiction that counsel, hired by [the fiduciary], is also constructively hired by the same party counsel is expected to defendant against." *In re Int'l Sys. and Control Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982); *see also Tatum*, 247 F.R.D. at 501; *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 1994 WL 6883, at *4 n.3 (E.D. Pa. 1994); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 620 (S.D. Oh. 1983). On the strength of this sound rationale, the court agrees with the wide majority of courts that have held that the fiduciary exception does not apply to work product immunity.[16] Indeed, this

[16] *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 385 (3d Cir. 2007); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir.

result makes particular sense given that "the work product belongs to the litigator not the litigant fiduciary and it is the lawyer's impressions, strategies, and theories, the law is attempting to guard." *Lugosch*, 219 F.R.D. at 243; *see also Donovan v. Fitzsimmons*, 90 F.R.D. 583, 588 (N.D. Ill. 1981) ("[B]eneficiaries . . . do not stand in the same position with respect to the attorney, for whom the work-product rule is designed to benefit, as they do to their own trustees.").

The foregoing discussion begs several questions involving so-called mixed content documents—those in which both fiduciary and non-fiduciary matters are discussed, or in which the legal advice does not relate solely to the trustee's personal interests. Several courts have held that documents must be disclosed to the beneficiary unless the trustee shows that the document relates "solely" or "exclusively" to the trustee's nonfiduciary activities. *Osage*, 66 Fed. Cl. at 246-47; *Cobell*, 212 F.R.D. at 30; *see also Cobell v. Norton*, 377 F. Supp. 2d 4, 15 n.8 (D.D.C. 2005). But, there are several flaws with the notion that a document may be protected only if there is "not one drop" of information therein regarding trust administration. First, this exceedingly expansive view of the fiduciary exception and concomitantly cramped view of the privilege "threaten[s] to swallow the fiduciary's attorney-client privilege whole." *Mett*, 178 F.3d at 1065. As noted by the Ninth Circuit, under this expansive view of the exception, it would be the rare com-

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1994); *Sandberg*, 979 F.2d at 355 n.22 (the fiduciary exception "does not apply to the work product doctrine"); *Lugosch v. Congel*, 219 F.R.D. 220, 243 (N.D.N.Y. 2003); *Struogo v. BEA Assocs.*, 199 F.R.D. 515, 524 (S.D.N.Y. 2001); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 687 W.D. Mich. 1996); *Helt Metro. Dist. Comm'n*, 113 F.R.D. 7, 11-12 (D. Conn. 1986).

munication that would be protected and, in turn, the rarer trustee who would feel any comfort in obtaining legal advice as to his personal liability. *Id.*; *Fischel*, 191 F.R.D. at 609. Second, this broad view of the exception far exceeds its rationale. When fiduciaries seek legal advice for themselves, it makes little sense to pretend that they are actually seeking advice on behalf of the beneficiaries and thus obliged to reveal to the beneficiaries the substance of that advice. *Mett*, 178 F.3d at 1065. To the contrary, when a fiduciary retains counsel and seeks legal advice for its own protection against the beneficiaries, any notion that it is seeking advice on behalf of the beneficiaries evaporates, leaving the beneficiaries with no reasonable expectation that they will be kept informed of such matters. *See Mett*, 178 F.3d at 1065, *Geissal*, 192 F.R.D. at 624-25. Finally, the expansive view of the exception seemingly treats the release of a document as an all-or-nothing proposition, ignoring the distinct possibility that a document containing both protected and unprotected information might be redacted to exclude the former, thereby allowing the privilege and exception to reign supreme within their respective spheres. Redactions allow a fiduciary to obtain personal legal advice with less fear that having a mere "drop" of information regarding its fiduciary obligations will cause an entire communication to be revealed. Yet, at the same time, this approach prevents fiduciaries from shielding everything as involving personal legal advice.

C.

Fully armed with these legal principles, we return to the documents themselves. As noted at the outset, the documents sought by plaintiff can be grouped into five

categories. The court will consider these groups *seriatim*.

1.

We begin with the documents in which various Interior officials requested legal advice from the Solicitor's Office (Docs. 38, 45, 48, 50, 52, 56, 61, 67, 71-73, 75, 88, 98, 105, 106, 150, 156, 160 and 188). The advice requested generally involves what are acceptable investments for the trusts or the proper procedures for making those investments, questions that, in turn, required the interpretation of various federal statutes, among them 25 U.S.C. § 160 and the Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132. There is little doubt that, as against discovery by ordinary third parties, these documents would be protected by the attorney-client privilege as they were "made . . . for the purpose of obtaining legal advice or services." *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000). This would be so even though the degree to which they reveal "client" information in seeking that advice varies. *See id.* at 806 ("[i]t is enough that the overall tenor of the document indicates that it is a request for legal advice or services"); *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 315 (2002); *cf. Stovall*, 85 Fed. Cl. at 818 ("bare-bone" request for representation that contains no client information not protected by attorney-client privilege).

Ultimately, however, it appears that all these documents involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla. As such, in the court's view, they are subject to the fiduciary exception

to the attorney-client privilege and, on that basis, must be produced. *See Osage*, 66 Fed. Cl. at 252-53 (holding that the fiduciary exception applies to communications regarding trust administration "whether addressing specific tribes other than plaintiff's or Indians generally"). Six of the documents (Docs. 75, 88, 98, 150, 156 and 160), however, are exact duplicates of documents that are to be produced and the court, therefore, declines to order their production. *See Stovall*, 85 Fed. Cl. at 818 n.11; *Evergreen*, 80 Fed. Cl. at 137 n.23.

2.

Next, we consider various documents—by far, the largest group among our five—in which the Solicitor's Office (and other Federal legal offices) supplied legal advice to Interior and Treasury agency personnel (Docs. 9, 13-20, 26-31, 35-37, 39, 41-42, 44, 49, 51, 53-55, 60, 62-66, 69-70, 74, 76-82, 85-87, 89, 94-96, 100-04, 110, 112, 130-31, 151, 153-55, 157, 159, 167-68, 177-80, 182-87, 191-92, 202, 214-15, 217). These documents cover nearly a 75-year span, ranging from October 16, 1923, to April 10, 1996. They involve the legality or appropriateness of a variety of investments, investment strategies and other trust administration practices, again often by reference to specific statutes and regulations. Most of this information relates generally to trust administration. While only a handful of documents relate specifically to Jicarilla, all of them appear to be potentially relevant to plaintiff's claims regarding defendant's alleged breach of its fiduciary responsibilities in investing the trust corpus. In all but seven instances, defendant objects to the production of these documents based solely on the attorney-client privilege. With respect to documents 64,

76-77, 94, 112, 155 and 167, defendant also objects to production relying upon the work product doctrine.

As a threshold matter, there is some debate as to whether the legal advice provided by these government attorneys is protected under the attorney-client privilege. That privilege, of course, is primarily designed to protect client communications, not the resulting attorney advice. As this court recently noted, "[t]he question whether attorney communications are protected under the attorney-client privilege . . . has produced a spectrum of decisions." *Stovall*, 85 Fed. Cl. at 815. For its part, the Federal Circuit has suggested that the privilege ought to apply to "lawyer-to-client communications that reveal, directly or indirectly, the substance of a confidential communication by the client." *Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987); *see also Stovall*, 85 Fed. Cl. at 814-15.[17] Other circuits, however, have taken a broader view of the advice that is protected based upon perceived difficulties in sorting between advice based on representation and that which is not, while still other circuits have held that all advice provided by counsel to client is privileged. *See Stovall*, 85 Fed. Cl. at 814-15 (summarizing these cases). Depending upon which of these views prevails, a more or less compelling case can be made for protecting some or all of the advice at issue—certainly some of the advice in question reflects the substance of communications received from the personnel who had requested the legal advice. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.

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[17] *American Standard* is a patent case in which the Federal Circuit applied the law of the regional circuit, in that case the Seventh Circuit. *See In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1193 (1997).

1984); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *Stovall*, 85 Fed. Cl. at 815.

But, the court need not explore the outer reaches of this jurisprudence, as it finds that, with the exception of some duplicates,[18] virtually all the documents in question must be produced under the "fiduciary exception" to the attorney-client privilege. In arguing to the contrary, defendant asseverates that some of these documents do not discuss the legality of certain practices, but rather reflect "policy" decisions made by the agency in consultation with legal authorities. It is difficult to conceive how this point, if true, helps defendant much, for it would seem that, to the extent these documents are policy papers outside the fiduciary exception, they are also beyond the realm of the attorney-client privilege. They cannot be unrelated to the provision of legal advice for one purpose, but related for the other. *See* 8 Wright, Miller & Marcus, *supra*, at § 2017 ("The privilege will be denied if the communications were made for a purpose other than facilitating the rendition of professional legal services to the client."); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360-61 (2d Cir. 2005) (holding that legal advice that is incorporated into an agency's policy is not protected by the attorney-client privilege). Based on its *en camera* review, the court, in fact, believes that the advice provided in these documents is legal advice relating to trust administration

[18] The duplicate documents that need not be disclosed are documents 17-20, 26-27, 30-31, 78-79, 82, 85, 89, 95, 101-02, 130-31, 151, 153-54, 157, 159, 183, 185, 192, 214-15.

and, for that reason, must be disclosed under the "fiduciary exception."[19]

Again, there are a few exceptions. One is document 36, which was drafted by officials in the Solicitor's Office. It appears to be unrelated to general trust administration and thus seemingly has no relevance to the handling of Jicarilla's accounts. Rather, it incorporates legal advice with respect to several pending disputes. It thus is covered by the attorney-client privilege and not subject to the fiduciary exception.

The remaining documents in this set (28 and 29) present a bit of a quandary. In these documents (which are nearly, but not entirely, identical), the Solicitor's Office discusses the handling of "Indian moneys, process of labor" (IMPL) trust fund accounts—but does so while referring to several disputes regarding those funds. Defendant objects to the production of these documents on the basis of the attorney-client privilege. But, significant portions of the documents involve trust management issues and appear to be covered by the fiduciary exception. Accordingly, these portions of the documents seemingly are produceable. Those same portions, however, arguably are protected by the work product doctrine as the analysis in question appears to have been done in anticipation of litigation. Yet, in its several iter-

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[19] As to five of these documents (13-14, 55, 76, and 180), it also appears that defendant waived any applicable privilege when copies of these documents were provided to plaintiff by one or more government employees or otherwise were publicly made available (*e.g.*, during Congressional hearings). *See Evergreen*, 80 Fed. Cl. at 133; *Jade Trading, LLC v. United States*, 80 Fed. Cl. 11, 44 n.65 (2007). Defendant mounted no defense to this waiver argument in its briefs and, on that basis, the court declined to hear oral argument from defendant on this point.

ative privilege logs, defendant never objected to the production of the documents on work product grounds.

Does that mean that any work product objection as to these documents was waived? The answer may be found in RCFC 26(b)(5)(A) which, like its Federal Rule counterpart, states:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed —and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Under this rule, one who fails expressly to invoke a privilege as to a particular document may lose that objection. *See SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D. Pa. 2005); *Potter v. United States*, 2002 WL 31409613, at *8 (S.D. Cal. July 26, 2002). But, as the advisory committee notes to the analogous Federal Rule indicate, such a finding is in the nature of a sanction arising under RCFC 37. *See* Fed. R. Civ. P. 26(b)(5), advisory comm. notes (1993); *see also Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 560 F.3d 1291, 1302 (Fed. Cir. 2009). Various cases hold that, in deciding whether to impose such a sanction, a court should weigh, *inter alia*, the intent of the party producing the defective log, the harm caused by disclosure of what might otherwise be privileged documents, and the prejudice, if any, experienced by the requesting party if

the sanction is not imposed.[20] At least in a case such as this—where the documents are accurately described in the log; where their production could reveal core work product; where plaintiff would have still filed its motion to compel, was able to argue the work product issue in the context of other documents, and would not be otherwise prejudiced; and where the application of the privilege is obvious from the face of the documents in question—treating defendant as having waived the work product doctrine would be inappropriate.[21] Accordingly, the court concludes that documents 28 and 29 are protected by the work product doctrine and need not be produced.

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[20] *See also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for the District of Montana*, 408 F.3d 1142, 1149 (9th Cir. 2005), *cert. denied*, 546 U.S. 939 (2005) (indicating that in determining whether a privilege is waived courts should make a "case-by-case determination"); *Evergreen Trading*, 80 Fed. Cl. at 126 n.2 (listing some of the factors to be considered); *Universal City Development Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 695-96 (M.D. Fla. 2005) (applying a multi-factor approach in deciding whether the privilege is waived); *Cunningham v. Conn. Mut. Life Ins.*, 845 F. Supp. 1403, 1409 (S.D. Cal. 1994) (same); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (same); *see generally*, *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 2003 WL 41996, at *3 (S.D.N.Y. Jan. 6, 2003) (reaching the same result based on a local rule). Another reason that cuts against treating a privilege as being waived under RCFC 26(b)(5) if not specifically asserted in an itemized privilege log is the fact that various courts have construed the comparable Federal Rule as not always requiring such logs. *See In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (allowing for categorical objections).

[21] This is not to suggest that the court would never be within its rights to decide the availability of a privilege based upon the log actually filed by a party. Here, however, the court (and the parties) have gone well beyond that point.

3.

In the third category of documents implicated by plaintiff's motion to compel are those documents created by or provided to the accounting firm of Arthur Andersen LLP under a series of contracts between that firm and Interior (Docs. 111, 142-48, 171-72, 203-09, 213). Defendant objects to the production of these documents under the work product doctrine. Under RCFC 26(b)(3) and the standards outlined above, it is important to determine when defendant first anticipated that litigation regarding the tribal trusts would arise and whether the documents in question were prepared because of the prospect of such litigation. As noted, if the documents are protected work product for other cases, they remain so in this litigation.

Beginning in the 1950s, and accelerating in the 1980s, cases were filed in various courts, including this one, alleging that Interior's Bureau of Indian Affairs (BIA) had mishandled various matters involving tribal trust fund accounts. *See*, *e.g.*, *Navajo Tribe of Indians v. United States*, Complaint No. 49692 (file June 15, 1950); *Red Lake Band of Chippewa Indians v. United States*, Complaint No. 388-82L (filed August 6, 1982). Near the end of the 1980s, it appears that Arthur Andersen performed various work for the BIA, including financial and compliance audits of the BIA Office of Trust Funds Management for the fiscal years ending September 30, 1988, 1989 and 1990. Although this is unclear, the impetus for these audits may have been statutes Congress passed from 1987 to 1991 requiring audits

of tribal trust accounts.[22] On May 24, 1991, BIA and Arthur Andersen entered into a new contract "to assure that the accounting records and the accounting balances in the Tribal and Individual Indian Monies (IIM) accounts are reconciled as accurately as possible back to the earliest date practicable using available accounting records and transaction data." This contract anticipated the active involvement of the tribes in the reconciliation process and indicated that both the BIA and the relevant tribes would receive copies of the final reports and supporting documents.[23] This reconciliation process was apparently ongoing when, in 1994, Congress enacted the aforementioned Trust Fund Reform Act, requiring the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a); *see also Eastern Shawnee Tribe of Oklahoma v. United States*,

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[22] *See* Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of Nov. 5, 1990, Pub, L. No. 101-512, 104 Stat. 1915; Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701; Act of Sept. 27, 1988, Pub. L. No. 100-446, 102 Stat. 1774; Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329.

[23] Under the contract, Arthur Andersen was expected to conduct an entrance conference with the tribe to identify "outstanding accountability issues or concerns related to the Tribe's accounts." Following the completion of the reconciliation work, it was also expected to conduct an exit conference with the tribe "to review any proposed adjusting entries relating to the Tribe's accounts," at which conference "[s]upporting documentation related to the adjustments will be made available to the Tribes." The contract also required that each trust account owner "be presented with a copy of the reconciled statements, a summary of any required adjusting entries relating to their account(s), and access to any supporting documentation related to those adjustments."

82 Fed. Cl. 322, 324 (2008). This statute also required the tribes to either accept or dispute the reconciled account balances, with that information to be included in a report to Congress from the Secretary of the Interior by May 31, 1996. 25 U.S.C. § 4044. On December 31, 1995, Arthur Andersen completed its reconciliation of tribal trust funds for the period July 1, 1972, through September 30, 1992, and, at or around that time, delivered reports and account statements to both the BIA and the tribal account owners. In a modification of the 1991 contract, dated March 5, 1996, BIA engaged Arthur Andersen to assist it in entering into "settlement discussions" with the tribes.

On June 10, 1996, the complaint was filed in *Cobell v. Babbit*, No. 96-1285, a class action involving approximately 300,000 Native American account holders. Two months later, on August 19, 1996, BIA entered into yet another contract with Arthur Andersen, under which the latter was to provide to BIA and the Indian account owners access to, as well as a presentation and interpretation of, the work performed under the 1991 contract, as amended. As indication of the growing disputes between BIA and the tribes, the Statement of Work for this contract cautions that "[t]he Department of Interior is expecting to develop a settlement mechanism, which may include proposing legislation, to settle with tribes concerning their trust account balances," adding that the reaching of such a settlement may require explanation or interpretation of Arthur Andersen's prior work. The contract provided that before any information was supplied to a tribe, the contracting office representative or his designee "may review the specific work papers a tribe requests to be copied." It further noted that "[a]ll communications between the Government and [Arthur

Andersen], as well as any materials or information developed or received by [Arthur Andersen] under this contract may be protected by applicable legal privileges and therefore must be treated as confidential by [Arthur Andersen]."

Most of the documents in this third category relate to the litigation referenced above and include communications between either the Solicitor's Office or the Department of Justice and Arthur Andersen that specifically discuss particular cases. These documents (148, 171, 172, 203-09 and 213) plainly are protected by the work product doctrine, which, for the reasons discussed above, applies even though these documents do not specifically reference Jicarilla or any matters involved with this litigation. This is true even though some of these documents were prepared by Arthur Andersen, as RCFC 26(b)(3) extends the work product protection to materials prepared "by or for [the] party's representative."[24] Nor has plaintiff remotely made any showing that would override the work product doctrine.

Several documents in this set, however, are different. Included within document 111 is a research paper that

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[24] In *Nobles*, the Supreme Court emphasized that the work product doctrine does not merely protect an attorney's thought processes because—

> attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

422 U.S. at 238-39; *see also In Re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (applying the doctrine to materials prepared by an investigator working for attorneys); *Evergreen*, 80 Fed. Cl. at 142 (applying the doctrine to materials produced by an accountant).

was forwarded to the National Archives in 1993, to which are attached a series of historical documents. While the first page of this document is work product, the remainder (from M50IRN341924 to M50IRN342083) is not, particularly since a hand-written notation on the paper indicates that it is "publicly-available" at the Archives. Accordingly, the indicated pages of document 111 shall be produced. The court also finds that documents 142-47, which are summary tables of reconciled disbursements for tribes, dated August 4, 1996, appear to stem from Arthur Andersen's reconciliation work under the 1991 contract, were not prepared in anticipation of litigation, and thus must also be produced.

4.

We consider next the fourth category of documents—those generated by Interior personnel, including members of the Solicitor's Office, regarding litigation involving other tribes (Docs. 32-34, 40, 43, 46-47, 58, 68, 83-84, 99, 107, 113-14, 120, 125-26, 158, 181, 189-90, 212, 216, 219). As is true with many of the Arthur Andersen documents, all but two of these documents discuss specific legal issues involving either pending or anticipated cases, including the *Cobell* litigation. Because these documents were prepared in anticipation of litigation, they are protected under the work product doctrine; and plaintiff has made no showing of "substantial need" or "undue hardship" as would override the work product doctrine under RCFC 26(b)(3). Indeed, as the substance therein does not involve trust management, they fall outside the "fiduciary exception" and are protected by the attorney-client privilege, as well.

Four documents in this set (Docs. 68, 189-90, and 212), however, stand on a different footing. They were drafted by the Solicitor's Office and recommend that particular strategies for investing tribal trust funds be adopted in response to litigation. Document 68 discusses the investment of trust funds while making a brief footnote reference to pending litigation. In the court's view, except for the footnote, this document is not protected by the work product doctrine as it would have been generated even if future litigation was not anticipated. And to the extent covered by the attorney-client privilege, this material is subject to the fiduciary exception thereto. The court will order the production of this document with footnote 1 redacted. Documents 189, 190 and 212 (which are similar, but not identical) describe the impact on trust administration of the Supreme Court's decision in *Mitchell*. Defendant claims that these memoranda are protected by the attorney-client privilege, but, in the court's view, these documents are indistinguishable from the other documents regarding trust administration ordered to be produced under the fiduciary exception. Hence, documents 189, 190 and 212 shall be produced, as well.[25]

5.

The last category of documents to be considered is admittedly a catch-all capturing things that do not readily fit into any of the other categories (Docs. 97, 109, 115-19, 173, 176). Two of these documents involve either a request for, or the provision of, legal advice—109 (an electronic message requesting clarification of a prior

[25] For the reasons previously described, defendant need not produce documents 99 and 158, which are essentially duplicates of document 68, or document 216 which is an exact duplicate of document 190.

conversation) and 116 (suggested edits to a draft letter to tribal leaders regarding the Arthur Andersen reconciliation reports)—and thus seemingly are protected under the attorney-client privilege. Document 116, however, also appears to fall within the fiduciary exception, as it relates to trust management and thus must be disclosed. Likewise, document 97, which describes a draft bill on tribal trust funds, also is subject to the fiduciary exception and must be produced. Three of the other documents in this set (115, 118 and 173) are cover sheets that reference associated materials, but, in fact, are not accompanied by attachments. Without the attachments and any other explanation from defendant as to the significance of these documents, the court believes that the cover sheets are protected neither by the attorney-client privilege nor the work product doctrine. They too must be produced. Finally, document 176, which is a letter recommending that a suit be initiated to collect on a promissory note, appears to be work product and thus need not be disclosed.[26]

* * * * *

This completes the court's consideration of plaintiff's motion to compel, with the results again summarized in the accompanying Appendix A.

III.

Not coincidentally, plaintiff's motion for a protective order and defendant's motion to compel both involve the same subject matter: requests for information (to be ob-

[26] For the reasons previously described, defendant need not produce documents 117 and 119, which are essentially duplicates of document 116.

tained through various means) concerning how Jicarilla managed and invested its own funds, *i.e.*, its non-trust investments.[27] The main bone of contention here is whether, under RCFC 26(b), the requested discovery "is relevant to the subject matter involved in the action." Consistent with the goal of promoting the "just and complete resolution of disputes," the Federal Circuit has stated, "[r]elevancy for purposes of Rule 26 is broadly construed." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); *see also Centurion Indus., Inc. v. Warren Steurer and Assocs.*, 665 F.2d 323, 326 (10th Cir. 1981); *Evergreen Trading*, 80 Fed. Cl. at 144. That said, "[t]he rule has boundaries," for "[d]iscovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is outside its scope." *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 742 (Fed. Cir. 1987) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978)).

Defendant argues that its discovery requests are for relevant information or at least are reasonably calculated to lead to the discovery of admissible evidence. It asserts that the information requested is relevant in assessing: (i) the reasonableness of the government's handling of Jicarilla's trust accounts; (ii) the tribe's liquidity needs over the period in question; (iii) the receipt and timing of trust fund disbursements; and (iv) the damages to which plaintiff may be owed. Plaintiff and *amici* argue that Jicarilla's handling of its non-trust funds is wholly irrelevant to this suit, in which the focal

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[27] RCFC 26(c)(1) provides that, "for good cause," the court may issue an order to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense," including provisions "forbidding the disclosure or discovery." *See also Vons*, 51 Fed. Cl. at 4.

point is whether defendant mismanaged plaintiff's trust funds. They note that defendant has not cited any authority in which evidence of the sort it seeks was considered relevant in resolving the issues defendant cites. Plaintiff and the *amici* assert that defendant's silence in this regard speaks volumes. And, to the court's ears, it most certainly does.

Given the volume of tribal trust litigation over the last thirty years, one would expect that, if defendant were right, there would be at least one confirming case in which evidence of a tribe's non-trust investment patterns was deemed relevant in determining whether the government had breached its fiduciary duties in mishandling tribal trust accounts. Or at least there would be some untried theory of liability under which such evidence might conceivably be relevant. But, defendant offers nothing of the sort—nothing. And, research, far from yielding that which defendant has omitted, instead sheds light on why no such authorities are encountered —it is because, as anyone familiar with a spendthrift trust knows, fiduciaries and beneficiaries are simply not judged by the same investment standards. Rather, fiduciaries are governed by standards that require them to exercise more skill and care than ordinary individuals are expected to exercise in handling their own private investments. This view is reflected in many cases involving the alleged misappropriation or mismanagement of tribal trusts, in which it is often observed that the duty of care owed by the United States "is not mere reasonableness, but the highest fiduciary standards." *Am. Indians Residing on the Maricopa-Ak Chin Reserva-*

tion v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981).[28] That view, as it turns out, has been a prominent feature of the trust law landscape for the last 180 years, from the time the "prudent man rule" was announced by Judge Putnam in *Harvard College v. Amony*, 26 Mass (9 Pick.) 446, 461 (1830), through the most recent edition of the Restatement on Trusts.[29] Accordingly, without prejudging the precise standards that will ultimately govern liability in this case, every current indication is that defendant's liability here does not depend in any way on how Jicarilla invested its own funds. As such, the court finds that the wide majority of the information sought by defendant does not meet the relevancy requirement in RCFC 26(b) and that plaintiff, therefore, is entitled essentially to the protective order that it seeks. The court will not allow defendant to throw out a broad net on the mere hope of catching relevant evidence. *See Vons Cos, Inc.*, 51 Fed. Cl. at 24-25 ("While . . . some degree of fishing is anticipated by the Federal discovery rules, those rules do not sanction a party to employ es-

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[28] *See also United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Shoshone Indian Tribe*, 364 F.3d at 1348; *Short v. United States*, 50 F.3d 994, 999 (Fed. Cir. 1995); *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 163 (Ct. Cl. 1980); *Red Lake Band*, 17 Cl. Ct. at 373.

[29] While the Restatement (Third) on Trusts § 90 has abandoned the "prudent man" standard in favor of the gender neutral "prudent investor," it continues to emphasize that an adaptable part of that standard requires "fiduciaries possessing special facilities and skills to make those advantages available to the trust and its beneficiaries." *Id.* at cmt. d; *see also id.* ("it follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill.").

sentially a purse seine that indiscriminately sweeps in not only relevant catch, but hosts of irrelevant and protected species of information.").

In a last ditch effort to avoid this result, defendant, at oral argument, cited deposition testimony that it claimed showed that BIA employees were making trust decisions based on Jicarilla's non-trust investments. The court ordered defendant to file that deposition testimony. A review of that document does not bear out defendant's claim.

The testimony in question is that of Mr. Gabriel Abeyta, who served as Jicarilla's chief accountant from 1958 to 1970, and as BIA's tribal assistance officer for Jicarilla from 1970 to 1986. Mr. Abeyta's deposition, to be sure, demonstrates that he knew about plaintiff's non-trust investments, information he no doubt gleaned during his dozen or so years as the tribe's top accountant. As part of his later job at BIA, Mr. Abeyta continued to advise Jicarilla regarding its outside investments. But there is no indication that the information Mr. Abeyta possessed regarding Jicarilla's non-trust assets ever was factored into the BIA's investment decisions regarding tribal trust funds. And it is doubtful that could have ever occurred given the limitations that 25 U.S.C. §§ 161(a) and 162(a) impose on the types of investments BIA could make with the tribal trust funds. Mr. Abeyta's testimony, in fact, highlights the latter point in explaining why the tribe invested in real estate and a film project in an effort to diversify its overall investments. Yet there is no indication that the reverse was true—that the BIA calibrated its investments to take into account Jicarilla's non-trust ventures. Contrary to defendant's claim, then, nothing in Mr. Abeyta's

deposition testimony suggests in the least that any information relevant to this case could be deduced by comparing Jicarilla's outside investments to BIA's investments of the trust funds.

Defendant likewise has provided virtually nothing to back up its claim that Jicarilla's investment records are needed to assess the tribe's periodic liquidity needs, the receipt and timing of trust fund disbursements and the damages plaintiff may be owed. The court is unwilling to order the production of what apparently are extensive records based upon such shallow and unsupported assertions, particularly given the thousands of documents that defendant might have mustered to back up its relevancy claims. *See United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 736 (6th Cir. 2006) ("the 'mere assertion of relevance' . . . will not necessarily satisfy the government's burden" in seeking documents, especially where the request seeks a "voluminous amount of . . . proprietary information.").[30] Nevertheless, as discussed with the parties at oral argument, the court believes that Jicarilla's account information might be relevant to the limited extent that there are questions regarding whether and when trust disbursements were made. Therefore, the order that follows will permit defendant to seek leave of court to file a revised discovery request for basic account information relating to the Jicarilla accounts into which disbursements from the trust funds would have ordinarily flowed. It is expected that this request, if it is made at all, will be narrowly

[30] Indeed, defendant never has explained why, if this information was so vital to the BIA's investment decisions, the agency never had it in the first place.

tailored and should not be viewed as an opportunity to reargue points rejected herein.

IV.

The court need go no further. Based on the foregoing, and as reflected in the attached Appendix A, the court orders as follows:

1. Plaintiff's motion to compel is **GRANTED**, in part, and **DENIED**, in part:

   a. On or before July 13, 2009, the following documents shall be produced by defendant to plaintiff: **9, 13-16, 35, 37-39, 41-42, 44-45, 48-56, 60-67, 68 (sans footnote 1), 69-74, 76-77, 80-81, 86-87, 94, 96-97, 100, 103-06, 110, 111 (from M50IRN341924 to M50IRN342083), 112, 115-16, 118, 142-47, 155, 167-68, 173, 177-80, 182, 184, 186-91, 202, 212, and 217.**

   b. The following documents shall not be produced: **17-20, 26-34, 36, 40, 43, 46-47, 58, 75, 78-79, 82-85, 88-89, 95, 98-99, 101-02, 107, 109, 113-14, 117, 119-20, 125-26, 130-31, 148, 150-51, 153-54, 156-60, 171-72, 176, 181, 183, 185, 192, 203-09, 213-16, and 219.**

2. Plaintiff's motion for a protective order is **GRANTED**, **in part**, and **DENIED**, **in part** and defendant's motion to compel is **DENIED**; as described above, defendant may seek leave from the court to refile more limited discovery requests regarding plaintiff's outside investment records, with the timing of such motion to be established in the court's revised discovery plan;

3. Because neither party has fully prevailed herein, the court will not order the payment of reasonable expenses, *see* RCFC 37(a)(5); and

4. In lieu of granting defendant's motion to revise the discovery plan herein, on or before July 15, 2009, the parties shall file a joint status report indicating how this case should proceed, with a proposed schedule, as appropriate.[31]

IT IS SO ORDERED.

/s/ FRANCIS M. ALLEGA
FRANCIS M. ALLEGA
Judge

[31] It is the court's intention to unseal and publish this opinion after July 13, 2009. On or before July 13, 2009, each party shall file proposed redactions to this opinion, with specific reasons therefore.

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[Attachment]

UNITED STATES COURT OF FEDERAL CLAIMS

No. 458a-79 L

THE SHOSHONE INDIAN TRIBES OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

No. 459a-79 L

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Filed: May 16, 2002]

ORDER

The court has before it Defendant's Motion for a Protective Order Preventing the Deposition and Testimony of Richard K. Aldrich (Def.'s Mot.); Plaintiffs' Opposition to Defendant's Motion for a Protective Order Preventing the Deposition and Testimony of Richard K. Aldrich (Pls.' Opp.); and Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion for a Protective Order

Preventing the Deposition and Testimony of Richard K. Aldrich (Def.'s Reply). For the following reasons, defendant's motion is DENIED.

Defendant seeks a protective order preventing the deposition and testimony of Richard Aldrich, the sometime Field Solicitor at the United States Department of the Interior's Billings, Montana Regional Office. Def.'s Mot. at 2; Def.'s Reply at 1.

Defendant asserts that Mr. Aldrich provided legal advice to components of the Department of the Interior and, therefore, his testimony is protected by the attorney-client privilege and work product doctrine.[1] Def.'s Mot. at 2-3.

I. Background

In the late 1980s, Mr. Aldrich issued opinions concerning the ownership of sand and gravel. Def.'s Mot. at 2. Plaintiffs provided to the court copies of three memos that Mr. Aldrich authored and provided to several officials within the United States Department of the Interior. *See* Exhibits 1-3 to Pls.' Opp. The first memo, dated October 1, 1975, was addressed to an Area Direc-

[1] In footnote 1 of its motion, defendant alludes to the deliberative process privilege. Defendant does not explain why the deliberative process privilege may apply to its set of facts. Because defendant bears the burden under United States Court of Federal Claims Rule 26(c) to show "good cause" for the entry of protective order, the court believes defendant's bare reference to the deliberative process privilege is insufficient to grant a protective order on that basis. The court agrees with plaintiff that defendant had an obligation to assert the privilege in its original motion (so that the plaintiff would have had an opportunity to respond in its opposition) and the failure to do so constituted a waiver of the right to assert the deliberative process privilege. *See* Pls.' Opp. at 8.

tor and opines that "mineral reservation or restoration [does] not include sand and gravel." *See* Exhibit 1 to Pls.' Opp. The second memo, dated September 17, 1980, revokes the opinion contained in the October 1, 1975 memo pending the outcome of the appeal of the district court's decision in *Western Nuclear, Inc. v. Andrus*. *See Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 334 (10th Cir. 1981), *rev'd*, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983). *See* Exhibit 2 to Pls.' Opp. The second memo advises that the sand and gravel within the Riverton Unit of plaintiffs' reservation should be treated as if owned by the Shoshone and Arapahoe Tribes of the Riverton Project. *See id*. The third memo from Mr. Aldrich is a transmittal dated June 18, 1987, attaching a letter from a private law firm, White & White. *See* Exhibit 3 to Pls.' Opp. The substance of the letter from the law firm is a general discussion of ownership of the sand and gravel deposits on plaintiffs' reservation. *Id*.

II. Discussion

The attorney-client privilege does not apply here. First, the mere fact that an individual is an attorney is insufficient to bar his testimony at deposition or trial. If an attorney has personal knowledge of facts underlying the litigation, his testimony will be permitted.[2] The

[2] There is wide support in the case law for the view that an attorney may testify when he has personal knowledge as a fact witness. *See, e.g.*, *Rainbow Investors Group, Inc. v. Fuji Trucolor Mo., Inc.*, 168 F.R.D. 34, 37 (W.D. La. 1996) (permitting deposition of attorney due to his involvement as a negotiator in business activity prior to litigation); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248-49 (D. Kan. 1995) (permitting attorney to be deposed because he was involved in underlying facts of litigation); *Kaiser v. Mutual Life Ins. Co.*

court agrees with plaintiffs that Mr. Aldrich, as an employee of the United States, was involved in determining the scope of the United States's trust responsibilities and is, therefore, a fact witness with personal knowledge relevant to the litigation. *See* Pls.' Opp. at 5.

Moreover, the fiduciary exception to the attorney-client privilege applies here. Under the fiduciary exception to the attorney-client privilege, the privilege does not apply to prevent disclosure to beneficiaries of communications between a trustee and its counsel concerning management and administration of the trust. *See In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554, 556 (9th Cir. 1998) (citing *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976); *Comegys v. Glassell*, 839 F. Supp. 447, 448-49 (E.D. Tex. 1993).

There are two distinct rationales for this exception. First, the exception derives from a trustee's duty to disclose all information about a plan's administration to the plan's beneficiaries, a rationale which has had particular force in the ERISA context. *See*, *e.g.*, *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997) (holding that "an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration"); *Wildbur v. ARCO Chemical Co.*, 974 F.2d

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of N.Y., 161 F.R.D. 378,382 (S.D. Ind. 1994) (finding deposition of attorney appropriate after determining that he was involved in underlying facts as either an actor or a witness); *Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (permitting deposition of opposing counsel because that attorney had concededly participated in disputed pre-litigation events which relate to the issues raised in litigation).

631, 645 (5th Cir. 1992) (holding that "an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration"); *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496-97 (D. Conn. 1985) (ERISA fiduciary may not raise attorney-client privilege against beneficiary.). Second, a trustee, as the representative for the beneficiaries of a trust, is not the "real client" when he seeks advice about the administration of that trust. *See United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986) Rather, the beneficiaries are the "real client" being served by the advice concerning trust administration. *Id*. at 266.

Defendant argues that the fiduciary exception does not apply when beneficiaries bring suit against the trustee. Def.'s Reply at 2. However, in *Riggs*, the leading case finding the fiduciary exception, the beneficiaries had brought suit against the estate trustees. *See Riggs*, 355 A.2d at 710. In *United States v. Mett*, 178 F.3d 1058 (9th Cir, 1999), the case on which defendant relies, the court appears to narrow the fiduciary exception. *Mett*, which the court finds inapposite here, was a criminal case in which the court reversed the embezzlement convictions of a trustee. *Id*. at 1060. In *Mett*, the court found that where it is clear that the trustee has sought legal advice for his own personal benefit, that is, to defend himself, the attorney-client privilege exists. *Id*. at 1064.

In this case, the memos at issue related to management of the trust. The United States did not seek this information to defend itself from liability, but rather to understand the scope of the assets it was under a duty to protect in the administration of the trust. In these

circumstances, the fiduciary exception applies, and the testimony of Mr. Aldrich is discoverable.

Finally, defendant attempts to prevent the deposition of Mr. Aldrich by invoking the work product doctrine. The work product doctrine applies to attorney work produced in anticipation of litigation or for on-going litigation. Although this suit had been filed at the time these memos were written, the suit was in abeyance at the time. Moreover, it is apparent from their, face that these documents were written in the ordinary course of business, that is, the business of managing the trust; they were not produced for the purposes of the litigation. No reference is made to this litigation; no attorney-work-product reference appears on the face of the documents; and the content of the documents is of a general, informative nature. Accordingly, the work product doctrine does not apply.

III. Conclusion

For the foregoing reasons, defendant's motion is DENIED.

IT IS SO ORDERED.

/s/ EMILY C. HEWITT
EMILY C. HEWITT
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2009-M908

IN RE UNITED STATES, PETITIONER

[Filed: Apr. 22, 2010]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and a response thereto having been invited by the court and filed by the Respondent,[*] and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

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[*] Amici Curiae, Navajo Nation and Pueblo of Laguna were granted leave to file a the Respondent's opposition to the Petitioner's combined petition for panel brief in support of rehearing and rehearing en banc.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 04/22/2010

cc: Brian C. Toth
Steven D. Gordon
Alan R. Taradash

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-25L

JICARILLA APACHE NATION, FORMERLY
JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Feb. 19, 2010

PROTECTIVE ORDER

This matter is before the court on Defendant's Unopposed Motion for a Protective Order. Upon consideration of the unopposed motion, the court finds that good cause exists for approval and entry of a protective order pursuant to RCFC 26(c) and Fed. R. Evid. 502(d). Entry of this order will accomplish the dual purposes of enabling discovery to proceed in this case while preserving defendant's claim of privilege over certain documents, pending any additional appellate review of this court's and the Federal Circuit's rulings on the applicability of the fiduciary exception to the attorney-client privilege in the case. *See* Docket Numbers ("Dkt. No.") 216, 225.

IT IS, THEREFORE, ORDERED:

1. **Scope**. This order shall govern the documents that, in the Order dated July 3, 2009, Dkt. Nos. 211, 216, this court has directed that defendant produce to plaintiff. Also, this Order shall govern all other documents hereinafter produced by defendant in this case in conformance with the decision in *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009), and that defendant claims to be protected from discovery by virtue of the attorney-client privilege, in the absence of the application of the fiduciary exception, as defined in *In re United States*. Further, this order shall govern any deposition testimony given hereinafter that defendant claims to be protected from discovery by virtue of the attorney-client privilege, in the absence of the application of the fiduciary exception, as defined in *In re United States*.

2. **Non Waiver**. Production of documents and records by defendant pursuant to this order shall not be deemed a waiver of any claim of privilege in this court, this case, or any other Federal or State proceeding.

3. **Term**. This order shall become effective immediately, and it shall remain so, until after defendant has exhausted all additional appellate remedies with respect to *In re United States*, or until after all deadlines to pursue additional appellate remedies with respect to *In re United States*, have expired. In particular, this order shall remain effective until the later of the following events:

   a. The expiration of defendant's time to seek rehearing of *In re United States*, with the Federal Circuit, including all extensions of deadlines granted by the Federal Circuit;

b. Final disposition and the issuance of a mandate (if any shall be issued) by the Federal Circuit upon rehearing of *In re United States*;

c. Expiration of defendant's time to petition for certiorari to the Supreme Court for review of the opinion in *In re United States*, or any opinion or decision issued by the Federal Circuit upon rehearing in *In re United States*, including all extensions of deadlines granted by the Supreme Court;

d. Denial of any petition for certiorari by the Supreme Court as described in subparagraph (c) above; or

e. Final disposition of any certiorari proceedings by the Supreme Court in response to a petition for certiorari as described in subparagraph (c) above, including and extending through any further action by this court in response to the disposition by the Supreme Court.

4. **Copying and Labeling**. Documents or records subject to this order shall be stamped or otherwise labeled with the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE," and, if practical and reasonable under the circumstances, copies of electronic data, documents, or records shall also include the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE" in the file name and in a conspicuous place on the exterior of the CD-ROM, DVD, diskette, or other medium containing the record copies.

5. **Depositions**. If documents or records subject to this order are used as exhibits at deposition, the parties shall, upon receipt of the transcript of the deposition,

designate any pages thereof quoting from or paraphrasing the documents or records subject to this order, and those pages shall be stamped with the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE" and shall themselves be deemed to be protected records for purposes of this order.

6. **Confidential Documents and Records.** Any document or record produced by defendant to plaintiff pursuant to this order shall be kept strictly confidential by plaintiff, and plaintiff may disclose or provide access to such document or record only pursuant to this order, upon further order of the court, or as otherwise agreed in writing by the parties. Plaintiff shall not use the documents or records subject to this order, or their contents, for any purpose other than this case or any related administrative proceedings before the United States Department of the Interior.

7. **Further Disclosure or Access.** Unless otherwise authorized under paragraph above, each party may disclose or provide access to any documents or records subject to this order only to the following: (a) attorneys of record in this case and attorneys, paralegals, and office support staff working with the attorneys of record in the course of representing the parties herein; (b) plaintiff's tribal officials, witnesses, and experts, consultants, contractors, court reporters, and copying or computer service personnel retained by the parties or the parties' attorneys to assist in this case, and persons in their employ, *provided that* those individuals execute an acknowledgment as defined in paragraph 6 of the Confidentiality Agreement and Protective Order, Dkt. No. 69, before they gain access to such documents or records subject to this order; and (c) the court or any settlement

judge to whom this case is referred by court order, and the settlement judge's staff, consistent with paragraph 8 below.

8. **Filings and Submissions**. The parties shall not file with the court, in this case and at any time, any motion, brief, pleading, or other filing or submission which attaches, quotes, or paraphrases any document or record that is subject to this order, unless the subject portion of such filing or submission is filed under seal. Filings under seal shall be done by CM/ECF and pursuant to the RCFC 5.2(d) and Appendix E, paragraph 11. In the event that the Federal Circuit's opinion in *In re United States*, is modified or reversed, any documents filed pursuant to this order shall not be unsealed by the Clerk upon termination of this action under RCFC 77.3(c).

IT IS SO ORDERED.

/s/ FRANCIS M. ALLEGRA
FRANCIS M. ALLEGRA
Judge

APPENDIX E

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-25L

JICARILLA APACHE NATION, FORMERLY JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 26, 2002]

FIRST AMENDED COMPLAINT

Plaintiff, by and through its undersigned attorney, for its complaint, hereby alleges as follows:

INTRODUCTION

1. Plaintiff the Jicarilla Apache Nation (formerly known as the Jicarilla Apache Tribe and hereinafter referred to as "Jicarilla"), a federally recognized Indian tribe situated within the State of New Mexico, brings this action to obtain compensation for loss and damages due to Defendant's breaches of duties arising under treaties, executive orders, statutes and federal regulations and contractual documents such as oil and gas leases authorized under such treaties, executive orders, statutes and federal regulations.

Theses duties include, *inter alia,* Defendant's failures in its exercise of supervision, control and management over Plaintiff's trust funds and other trust property. The Defendant's fiduciary duties arise under federal law, and are components of the fiduciary relationship created by treaties, executive orders, statutes, regulations, and other documents that give rise to a trust relationship between the Defendant and the Plaintiff regarding specific trust property.

The Plaintiff also seeks an accounting by Defendant, as required under federal law regarding Indian trust funds and other assets to aid the Court in quantifying the damages caused by Defendant's failures to manage those trust funds and resources in accordance with its fiduciary duties.

Plaintiff asserts rights under federal law, to recover damages from the Defendant caused by Defendant's numerous and repeated failures to fulfill a variety of fiduciary obligations that Defendant owes Plaintiff with regard to the proper management and accounting by Defendant of trust funds and other trust assets which were placed under Defendant's care, custody and control by various federal treaties, executive orders, statutes, and laws governing the management of, and accounting for, Indian trust funds and trust assets by the United States as a trustee for an Indian Tribe.

During the period covered by this Complaint (August 14, 1946, to the present, except as may be provided otherwise below), the Defendant has never provided the Plaintiff with a complete, accurate and acceptable accounting due to Plaintiff by Defendant detailing and accounting for transactions concerning Plaintiff's trust

funds and trust assets under the custody and control of Defendant.

Plaintiff asks this Court to require Defendant to provide Plaintiff with a complete and accurate accounting of all of Plaintiff's trust funds and other trust assets which were at any time relevant hereto in the custody or control of Defendant from August 1946, to the present; to further declare that Defendant has breached its fiduciary duties with regard to the management of, and the accounting for, such trust funds and assets; to enjoin the Defendant from failing to preserve any and all records relevant to such trust funds and trust assets; to award Plaintiff damages occasioned by Defendant's fiduciary failures in the amount of Three Hundred Million Dollars; to award Plaintiff prejudgment interest as the law may provide; and, to further award Plaintiff attorneys fees and costs against the Defendant as the law may provide.

JURISDICTION

2. This Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1491 and 8 U.S.C. § 1505, and because this is an action arising under the Constitution, treaties, and laws of the United States, *inter alia*:

a. The Act of December 22, 1987, Pub. L. No. 100-202 and the Act of September 27, 1988, Pub. L. No. 100-446, which require the Bureau of Indian Affairs ("the Bureau") to audit and reconcile tribal trust funds, and to provide tribes with an accounting of such funds.

b. The Act of October 23, 1989, Pub. L. No. 101-121, the Act of November 5, 1990, Pub. L. No.

101-512, and the Act of November 13, 1991, Pub. L. No. 102-154, all of which require the Bureau to audit, reconcile, and certify through an independent party the results of a reconciliation of tribal trust funds as the most complete reconciliation of such funds possible, and to provide tribes with an accounting of such funds.

c. The Act of October 25, 1994, (The American Indian Trust Fund Management Reform Act of 1994), Pub. L. No. 103-412, codified at 25 U.S.C. §§ 4001-4061 (1997), pertinent sections of which require:

(1) Section 101: charges the Secretary of Interior (Secretary) with a duty to provide periodic, timely reconciliations of tribal trust funds to assure the accuracy of accounts, and charges the Secretary with a duty to determine accurate cash balances of tribal trust funds.

(2) Section 102(c): requires the Secretary to cause an annual audit of all tribal trust funds to be conducted.

(3) Section 301: a Special Trustee for the American Indians is appointed to provide for more effective management of, and accountability for the proper discharge of trust responsibilities to Indian tribes, and to oversee and coordinate reforms within the Department of the Interior of practices relating to the management and discharge of such responsibilities.

(4) Section 303(b)(2)(A): charges the Special Trustee with a duty to monitor the reconciliation

of trust accounts to ensure that the Bureau provides account holders with a fair and accurate accounting of all trust funds.

(5) Section 303(d): charges the Special Trustee with a duty to provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems.

(6) Section 304(2)(A) and (B): charge the Secretary with a duty to report to Congress, identifying for each tribal trust fund a balance reconciled as of September 30, 1995. The Secretary's report must include an attestation by each tribe that the Secretary has provided the account holder with as full and complete an accounting as possible and that the tribe accepts the balance as reconciled by the Secretary, or that the tribe disputes the balance as reconciled, and if so, the report must provide an explanation why the tribe disputes the Secretary's balance.

(7) Section 304(3): charges the Secretary with a duty to provide a statement outlining the efforts the Secretary will undertake to resolve the tribe's dispute.

d. Other statutes describe specifically and generally the United States' duties as a fiduciary: in managing Plaintiff's trust funds (e.g., 25 U.S.C. §§ 161a, 161b, 162a), in leasing and accounting for the proper disposition of Plaintiff's trust mineral estate (e.g., the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 a-g, *et seq.*; the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.*), and in managing and contracting for the sale of

Plaintiff's timber (e.g., the Act of June 25, 1910, 36 Stat. 857, codified as amended at 25 U.S.C. §§ 406, 407; the Act of Mar. 1, 1907, 34 Stat. 1018, codified as amended at 25 U.S.C. § 405; section 6 of the Indian Reorganization Act of 1934, 48 Stat. 986, codified at 25 U.S.C. § 466; and the National Indian Forest Resources Management Act of 1990, codified at 25 U.S.C. § 3101 *et seq.*). Other relevant treaties, executive orders, statutes, and regulations form additional jurisdictional bases for Plaintiff's claims regarding the trust funds and trust property managed by the Defendant (e.g., the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, U.S.-Mex. (securing to Indians in the Mexican Cession area, including New Mexico, preexisting rights under Mexican and Spanish land grants and law to land, water; and other property)).

3. Court also has jurisdiction over the subject matter of this action under a well developed body of federal case law describing and defining the fiduciary relationship between the United States and Plaintiff, created by the statutes listed above and by other relevant federal law, including treaties and regulations.

PARTIES

4. Plaintiff is a federally recognized Indian tribe, recognized by the Secretary as a sovereign Indian Tribe with legal rights and responsibilities, eligible for the special programs and services provided by the United States to Indians because of its status as an Indian tribe, and recognized as possessing powers of limited self-government.

5. Defendant United States has numerous federal trust responsibilities owed to the Plaintiff, with respect to Plaintiff's trust assets and trust funds at issue herein. The Defendant employs various federal agencies to perform these fiduciary obligations owed to Plaintiff. The Bureau of Indian Affairs ("the Bureau") is the federal agency within the Department of the Interior most directly responsible for generally discharging the United States's Indian trust responsibilities. The Office of Trust Funds Management ("the OTFM"), currently headquartered in Albuquerque, New Mexico, is the office within the Bureau most directly responsible for specifically discharging the Secretary's and the Bureau's responsibilities with respect to Plaintiff's trust funds at issue herein. The Special Trustee for American Indians ("the Special Trustee"), duly appointed by the Secretary, is charged by Congress with the duties and responsibilities enumerated in the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001-4061 (1997).

BACKGROUND

ESTABLISHMENT AND ADMINISTRATION OF THE PLAINTIFF'S TRUST FUNDS

6. Historically, Plaintiff was recognized by the United States as the reservation titleholder of approximately 900,000 acres of land, and its subsurface, in the State of New Mexico. The reservation contained large deposits of oil and gas reserves which have had, and continue to have, great economic value. The reservation also contained lesser amounts of valuable timber, gravel, grazing lands, and other trust resources.

7. Upon information and belief. from the late 1800s until the present, the United States held in trust for Plaintiff proceeds derived from disposition of its reservation timber and gravel resources or leases of its lands or other uses of its lands (all under the direct supervision and control of the United States) which generated proceeds. These monies were held in trust and managed exclusively by the United States in the United States Treasury for Plaintiff's benefit.

8. Beginning in the early 1950's and continuing to the present, the United States as Plaintiff's trustee has authorized and managed hundreds of leases and agreements regarding oil and gas and other trust resources on Plaintiff's trust lands.

9. Pursuant to terms of 25 U.S.C. §§ 161a, 161h, and 162a, the United States deposited royalties, made disbursements, and accrued interest and investment income on undisbursed amounts of Plaintiff's Trust Accounts and engaged in all other aspects of its exclusive management of Plaintiff's trust funds.

10. Prior to August 14, 1951, the Plaintiff filed an action against the Defendant pursuant to the Indian Claims Commission Act, 60 Stat. 1049, codified at 25 U.S.C. § 70 *et seq.* (1976 ed.), now repealed and omitted. The Plaintiff filed a Second Amended Petition in that action stating claims for mismanagement of the Plaintiff's trust funds and resources, which additional claims were assigned to Docket No. 22-K. On February 21, 1974, the Indian Claims Commission entered judgment in the amount of seven million dollars ($7,000,000) in favor of the Plaintiff pursuant to a Stipulation for Final Judgment ("Stipulation") executed by the Plaintiff

and the Defendant and dated February 5, 1974. The Stipulation provided in part:

> Plaintiff shall be barred thereby from asserting any further rights, claims or demands against the defendant and any future action on said accounting claim or other claims for accounting of monies or properties of the Tribe up to and including the date of final award herein, *except claims for mismanagement of oil and gas resources and diversion of water rights arising since August 13, 1946, and not within the jurisdiction of the Indian claims Commission, as set forth in paragraph II below.*

(Emphasis added).

Plaintiff alleges that the Stipulation did not absolve the Defendant of its duties to manage properly and account for Plaintiff's trust funds and other assets prior to February 21, 1974, but recognizes that the Court may conclude that Stipulation restricts in some respects the time period for which damages may be recovered by Plaintiff in this action.

THE UNITED STATES' OBLIGATION TO RECONCILE, ACCOUNT AND AUDIT THE PLAINTIFF'S TRUST FUNDS

11. Throughout the entire approximate 200 year history of the United States' unilaterally imposed assumption of fiduciary duties as trustee of resources and monies belonging to tribes, the United States has never rendered an audit or accounting of trust funds to any such beneficiary tribes, including Plaintiff Tribe, pursuant to generally accepted audit standards or accounting principles. *See*, *Misplaced Trust: Bureau of Indian Affairs'*

Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499, 102d Cong., 2d Sess. (1992).

12. Throughout the period August 14, 1946, to the present, the United States has never provided Plaintiff an accounting or audit of the disposition of its trust funds, consistent with generally accepted accounting principles or audit standards.

13. Upon information and belief, in the mid-1980s, the United States entered into contract negotiations with the Mellon Bank, to have the latter take over from the Bureau and perform all deposit, crediting, disbursing, investment and other administrative activities of tribal and individual Indian trust funds, including Plaintiff's trust funds.

14. Upon information and belief, the terms of a contract with the Mellon Bank were never completed because pursuant to the Act of December 22, 1987, Pub. L. No. 100-202, Congress required of the Bureau, that before any of the United States' fiduciary duties as trustee for the administration of tribal and individual Indian trust funds could be transferred to another entity, the Bureau must audit and reconcile tribal trust funds, and provide tribes with an accounting of such funds.

15. By the Act of October 23, 1989, Pub. L. No. 101-121, the Act of November 5, 1990, Pub. L. No. 101-512, and the Act of November 3, 1991, Pub. L. No. 102-154, Congress reaffirmed the mandates of the Act of December 22, 1987. In the above-entitled statutes, Congress added the additional requirement that the Bureau must certify through an independent party the results of the reconciliation of tribal trust funds as the most complete reconciliation possible of such funds.

16. On October 25, 1994 Congress enacted the American Indian Trust Fund Management Reform Act, codified at 25 U.S.C. §§ 4001-4061 (1997) (herein "the Trust Fund Reform Act"). Among other responsibilities, Congress requires in the Trust Fund Reform Act the following:

a. The Secretary has a duty to provide periodic, timely reconciliations to assure the accuracy of tribal and individual Indian trust accounts.

b. The Secretary has a duty to determine accurate cash balances in tribal and individual Indian trust accounts.

c. The Secretary shall cause an annual audit of all trust funds to be conducted.

d. A Special Trustee for the American Indians (herein "the Special Trustee") is appointed to provide for more effective management of, and accountability for the proper discharge of trust responsibilities to Indian tribes, and to oversee and coordinate reforms with the Department of practices relating to the management and discharge of such responsibilities.

e. The Special Trustee has a duty to monitor the reconciliation of trust accounts to ensure that the Bureau provides account holders with a fair and accurate accounting of all trust accounts.

f. The Special Trustee has a duty to provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems.

THE "TRUST FUND RECONCILIATION PROJECT" AND THE RESULTS THEREFROM

17. On May 24, 1991, the United States, entered into a contract with Arthur Andersen, LLP ("the Bureau/Andersen Contract") for the latter to perform accounting activities to assure that the Bureau's accounting records and account balances in the tribal and individual trust accounts were reconciled as accurately as possible back to the earliest date practicable, using available accounting records and transaction data. The services actually performed by Andersen are herein referred to as "the Reconciliation Project."

18. The purpose of the Bureau/Andersen Contract was for the Bureau to fulfill its statutory obligation to provide tribes an audit, reconciliation, and accounting of all trust funds, as described above in paragraphs 14 and 15.

19. Upon information and belief, from 1991 to 1995 Andersen performed certain accounting procedures agreed upon between the Bureau and Andersen, purportedly to fulfill obligations of the Bureau/Andersen Contract described in paragraph 17, with respect to Plaintiff's trust funds.

20. On January 8, 1996, the Special Trustee delivered to Plaintiff a report prepared by Andersen and entitled "Agreed-Upon Procedures and Findings Report for the Jicarilla Apache Tribe, July 1, 1972 Through September 30, 1992" ("the Andersen Report"). On or about February 14, 1996, the Special Trustee delivered to Plaintiff a Compact Disc (CD) containing electronic scans of documents that purportedly are transactional records pertaining to Plaintiff' s trust funds.

21. On January 8, 1996, the Bureau delivered to Plaintiff a "Summary and Detail of Trust Funds Report, Fiscal Years 1993-03/31/95; Asset and Transaction Statement, 04/01/95; 09/30/95" ("the Bureau Report"), containing the Bureau's accounting, reconciliation and reconstruction procedures for the period October 1, 1992 through September 30, 1995 to arrive at the September 30, 1995 balances reported. The tribal trust fund account reconciliation work performed by the Bureau utilized as starting balances those amounts which Andersen generated as ending balances on September 30, 1992.

22. In the Andersen Report, Andersen made the following statements to Plaintiff, with regard to its findings:

> a. The primary objective of the Reconciliation Project was to reconstruct historical transactions, to the extent practicable, for all years for which records are available for all tribal trust funds managed by the Bureau. Andersen did not state that a primary objective was to reconcile the *balances of tribal trust funds.*
>
> b. Because the procedures utilized by Andersen in the Reconciliation Project did not constitute an audit made in accordance with generally accepted auditing standards, Andersen did not express an opinion on the accuracy of any of its findings.

23. On January 12, 1996, Defendant informed Plaintiff that despite its duty described above in paragraph 15, the United States had not obtained an independent certification from the accounting firm of Coopers & Lybrand, LLP, in the form of an attest, service, exami-

nation, compilation or agreed-upon procedures report certifying that the procedures performed and findings made by Andersen in the Andersen Report were adequate, reliable and complete.

24. On June 11, 1996, the Special Trustee testified before the Senate Committee on Indian Affairs that the Reconciliation Project was concluded in December, 1995.

25. On August 19, 1996, the United States entered into a contract with Andersen for the latter to provide support services including, among others, access and presentation of Andersen's work papers to tribal representatives.

26. Section 304(2)(A) and (B) of the Trust Fund Reform Act, 25 U.S.C. § 4044 states that the Secretary has a duty to report to Congress, identifying for each tribal trust fund a balance reconciled as of September 30, 1995. It further states that the Secretary's report shall include an attestation by each tribe that the Secretary has provided the account holder with as full and complete an accounting as possible and that the tribe accepts the balance as reconciled by the Secretary, or that the tribe dispute the balance as reconciled, and provides an explanation why the tribe disputes the Secretary's balance.

27. In order to fulfill the Secretary's duty described above in paragraph 26, on January 8, 1996, the Special Trustee requested that Plaintiff state in an "Acknowledgement" form provided by the Special Trustee, whether the Plaintiff accepts the findings of the Andersen Report as a full and complete accounting, and whether Plaintiff accepts the balances of its trust funds, reflected in the Andersen Report findings, as reconciled by the Secretary. Plaintiff disagrees with those posited balances.

28. Plaintiff alleges that the Bureau/Andersen Report findings do not reflect reliable, accurate and complete amounts of the losses incurred in Plaintiff's trust funds from their dates of inception through 1995, which losses are the result of the United States' mismanagement of the trust funds and other trust assets. Among the Bureau Andersen Report deficiencies are the following:

a. The reconciliation and reconstruction procedures designed by the Bureau and Andersen contain a significant design flaw, namely, the assumption utilized by the Bureau and Andersen that an accurate accounting of the Plaintiff's trust funds will result from the summation of those entries recorded by the Bureau in its accounting, system which are supported by accomplished source documents. The design does not adequately address the possibility that transactions not recorded by the Bureau in its accounting system may occur and be material in amount to Plaintiff, or that the allocations and calculations performed by the Bureau's staff were inaccurate, unauthorized, or improperly recorded. This design flaw is significant and apparent cause the internal control structure and accounting and financial management systems utilized by the Bureau to account for tribal trust funds historically contain significant deficiencies.

b. Most significantly, the reconstruction and reconciliation procedures performed by Andersen fail to adequately address the accounting inaccuracies that might result from the United States' failure to credit Plaintiff's Trust Account the complete royalty amounts due from the hundreds of producing oil

and gas leases on Plaintiff's trust lands administered, controlled and managed by Defendant.

c. Defendant has a well documented history of failure to enforce Plaintiff's oil and gas lease terms and other rights arising under treaties, executive orders, statutes, and federal law, resulting in under collection by Defendant and a loss, therefore, to Plaintiff's trust funds of amounts that should have been collected by Defendant and deposited to the credit of Plaintiff's trust funds.

d. Upon information and belief, Defendant similarly has failed to fulfill its fiduciary duties arising under treaties, executive orders, statutes, regulations, and contractual documents to collect the full amounts available or due with respect to other trust resources of the Plaintiff.

e. Based upon the extensive inadequacies in the Bureau's internal control structure, as reported by the independent public accountants of Griffin and Associates, P.C. on May 17, 1996, which existed during the period when the Bureau was performing the reconstruction and reconciliation procedures for 1992 to 1995 for Plaintiff's trust funds, it is not prudent for Plaintiff to rely on any work product produced by Bureau personnel, including the Bureau Report findings.

f. The procedures performed in the Reconciliation Project were exclusively designed and agreed-upon by Andersen and the Bureau. The procedures were not consistent with generally accepted auditing standards. Based upon the inadequate historical performance of the Bureau in managing and account-

ing for tribal trust funds and the extent of its involvement in the Andersen procedures, Plaintiff concludes that it is not prudent for Plaintiff to accept the procedures designed by Andersen and the Bureau as being sufficient to produce an accounting that would be complete and accurate.

g. The certification contract with Coopers & Lybrand might have compensated for the weakness described in the previous sub-paragraph, but the certification process was procedures performed were adequate to produce a complete and full accounting to Plaintiff. In fact, upon information and belief, Plaintiff asserts that the Coopers & Lybrand contract was terminated precisely *because it was about to attest to the wholesale inadequacies of the Bureau/Andersen Reconciliation Project and the fact that the "account balances" asserted therein for Plaintiff and other tribes could not be relied upon and were not in compliance with the Congressional mandate in the Trust Reform Act of 1994.*

h. The Andersen Report contains scope limitations, including a limited time period, beginning only from 1972, and Andersen's assertion of its inability to perform basic reconciliation procedures because of missing transactional records.

29. Plaintiff alleges that in order to know complete and accurate balances to its trust funds an audit is required, and in order to perform the audit, review is necessary of all records in the possession, custody or control of the Defendant, including any of it agencies and agents, Andersen, and other available sources pertaining to the management of Plaintiff's trust funds and

trust property including, but not limited to the calculations of royalty amounts for the volume, quality and value of oil and gas and timber severed and removed from Plaintiff's reservation.

THE SPECIAL TRUSTEE AND THE SECRETARY INTEND TO BRING THE UNITED STATES' MISMANAGEMENT OF THE TRIBAL TRUST FUNDS TO CLOSURE BASED UPON ANDERSEN'S FINDINGS IN THE RECONCILIATION PROJECT

30. On December 11, 1996, the Secretary informed the Chairmen of the House Resources Committee and the Senate Committee on Indian Affairs that the Reconciliation Project accounting activities were completed.

31. On December 11, 1996, the Secretary submitted to the Chairmen of the House Committee on Resources and the Senate Committee on Indian Affairs a report entitled "Department of the Interior's Proposed Legislative Options in Response to the Tribal Trust Fund Reconciliation Project Results." The proposed options are based upon the Andersen Report findings for Plaintiff and all other tribes.

31. In the report described in the previous paragraph, the Secretary stated that he intended to present final tribal trust fund settlement options to Congress by April, 1997.

FIRST CLAIM FOR RELIEF

32. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 31, above.

33. Defendant's actions as alleged hereinabove establish that, throughout all time periods relevant hereto,

Defendant exercised (and continues to exercise) broad authority and control over Plaintiff's trust funds and other trust property pursuant to treaties, executive orders, statutes, regulatory structure and other federal law from which emanates the fiduciary role the Defendant has demanded for itself vis à vis Plaintiff and Plaintiff's trust property.

34. As alleged hereinabove, the Defendant's activities vis à vis Plaintiff and Plaintiff's trust property at issue herein are subject to comprehensive statutory and regulatory structures of Defendant as executed by various branches and departments of the Executive Branch of the United States.

35. Defendant's activities aforesaid are those of a fiduciary relative to Plaintiff and Plaintiff's trust property. Defendant routinely failed (and continues to fail) to fulfill these fiduciary obligations causing economic loss to Plaintiff, Plaintiff's trust funds, and other trust property of Plaintiff.

36. Defendant's activities as alleged hereinabove are, in addition, those of a fiduciary, i.e., a trustee that controls and manages the Plaintiff's trust funds and trust resources pursuant to treaty, executive order, statute, regulation, and federal law. Defendant is possessed of, has exercised and continues to exercise, Congressionally mandated control, supervision, and management responsibilities as a fiduciary vis à vis Plaintiff and Plaintiff's trust funds and trust resources including all appurtenant duties thereto.

37. The Defendant's breaches of the fiduciary obligations detailed hereinabove has resulted in (and continue to result in) losses to, as well as mismanagement of, Plaintiff's trust funds and other trust property.

38. Due to Defendant's failure to fulfill its fiduciary duties to Plaintiff arising under treaty, executive orders, statutes, regulations, and federal law, all as alleged hereinabove, in the proper management of Plaintiff's trust assets and trust funds, on the basis of information made available to Plaintiff, Plaintiff has suffered damage caused by Defendant's breach of fiduciary obligations in the amount of Three Hundred Million ($300,000,000.00) Dollars.

SECOND CLAIM FOR RELIEF

39. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 38, above.

40. Because the Defendant has failed to provide an accounting consistent with the requirements of generally accepted accounting principles and auditing standards, the Plaintiff is entitled to an order of this Court compelling such an accounting to aid the Court in a final determination of damages that Plaintiff is entitled to.

41. Ancillary to this demand for an accounting, Plaintiff is entitled to an order from this Court directing Defendant to assure the preservation of all records relating to Plaintiff's trust funds as well as all records pertaining to the underlying royalty income stream into the trust funds, namely, those relating to volume, quality and value of oil and gas, and timber severed and removed from Plaintiff's reservation.

42. Under applicable federal law trust principles between the United States as trustee and an Indian tribal beneficiary, explicitly and implicitly under the federal statutes that require the Bureau to perform an audit, reconciliation and certification, Plaintiff is entitled to all information about its trust funds and income producing

trust assets and the Bureau's execution of its trust funds for which Plaintiff has any reasonable use. This includes all relevant information about the terms of the trust, its present status, past acts of management or other incidents of the administration of the trust, including investments, which information is in the custody, possession or control of the United States or its agents. So long as these requests are made at a reasonable time and place, the trustee is obliged to give the tribal beneficiary the information which it has requested. Plaintiff requests that this Court enter an appropriate Order providing Plaintiff with this information.

THIRD CLAIM FOR RELIEF

43. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 42, above.

44. Congress directed the Bureau, Special Trustee, and Secretary to do a reconciliation, audit, and certification for the primary purpose of providing Plaintiff the most complete and accurate balances possible of its trust funds. Defendant failed to do so. Further, Defendant's actions as alleged constitute a breach of the Defendant's duty of loyalty and good faith owed to Plaintiff within the context of the trust relationship alleged hereinabove. Plaintiff is entitled to a fundamental duty of undivided loyalty from the United States to fulfill these Congressional mandates.

45. Plaintiff is entitled to declaratory and injunctive relief against the Defendant, declaring that Defendant owes Plaintiff a fiduciary duty of loyalty to forbid its agent Andersen from imposing any restrictions or fee requirements on Plaintiff's right to review and photocopy any records in Andersen's possession, custody or

control pertaining to Plaintiff's trust funds, including all Andersen work papers.

WHEREFORE, Plaintiff respectfully requests the Court award the following relief:

1. To take jurisdiction of this action;

2. To award Plaintiff Three Hundred Million ($300,000,000.00) Dollars in damages against Defendant;

3. To order Defendant to perform a complete accounting for all trust funds and trust assets of Plaint if fin Defendant's care, custody, or control from August 14, 1946 to the present;

4. To immediately order Defendant to preserve *all* records of any kind whatsoever pertaining to Plaintiff's trust funds as well as other trust assets during the pendency of this action, until further order of this Court;

5. To grant Plaintiff prejudgment interest, costs and attorneys fees in this litigation as may be provided by law.

6. To grant such other and further relief as the Court deems proper and appropriate.

Dated: Aug. 26, 2002

Respectfully submitted,

/s/ ALAN R. TARADASH
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APPENDIX F

May 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratified numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior. 43 U.S.C. § 1457(10). The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect—albeit and important one—of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights in the intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are here concerned relates to property rights reserved

to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all people of the Nation. This functional thesis upon which our form of government is premised —the Separation of Powers—pre-supposes that the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian property rights recognized in treaty commitments ratified, by a coordinate branch. The fact that an identifiable class realizes tangible benefits from litigation brought by the Federal Government does not distinguish Indian cases from many civil rights, labor, and other cases. Just as we go to court to enforce the laws designed to protect minorities from discrimination or disenfranchisement by the majority, we must litigate when necessary to protect rights secured to Indians without reference to whether any present majority of the citizenry would profit from, or otherwise embrace, that action.

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus,

in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

The litigating position adopted by the Attorney General on behalf of the United States may affect your administrative and policy-making functions. Accordingly, with respect to all litigation in which the Attorney General represents the United States in protecting Indian property would expect to receive—and would most carefully consider—the advice of your Department, possessing as it does the primary policy responsibility in Indian matters.

Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or over-lapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the especial relationship and special responsibilities of the government toward Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may —indeed must—be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute the law as it now stands.

I look forward to close cooperation between our two Departments in these matters.

Yours sincerely,

Griffin B. Bell
Attorney General

APPENDIX G

The following charts display pending lawsuits by Indian tribes against the United States relating to tribal trust management both in the Court of Federal Claims and in federal district courts (94 pending as of September 9, 2010):

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
1	*Ak-Chin Indian Community v. United States* No. 06-cv-00932-ECH
2	*Belgarde v. United States* No. 07-cv-00265-CFL
3	*Blackfeet Tribe of the Blackfeet Indian Reservation v. United States* No. 02-cv-00127-LSM
4	*Cheyenne River Sioux Tribe v. United States* No. 06-cv-00915-NBF
5	*Chippewa Cree Tribe of the Rocky Boy's Reservation; Little Shell Tribe of Chippewa Indians; Turtle Mountain Band of Chippewa Indians; White Earth Band of Chippewa Indians v. United States* (Pembina Judgment Fund) No. 92-cv-00675-ECH
6	*Coeur d'Alene Tribe v. United States* No. 06-cv-00940-EJD

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
7	*Colorado River Indian Tribes v. United States* No. 06-cv-00901-LAS
8	*Confederated Tribes of the Goshute Reservation v. United States* No. 06-cv-00912-EGB
9	*Crow Creek Sioux Tribe v. United States* No. 05-cv-1383L-MCW
10	*Delaware Tribe of Indians and the Delaware Trust Board v. United States* No. 02-cv-00026-FMA
11	*Eastern Shawnee Tribe of Oklahoma v. United States* No. 06cv00917-CFL
12	*[Eastern] Shoshone Indian Tribe of the Wind River Reservation v. United States, [Northern] Arapahoe Indian Tribe of the Wind River Reservation v. United States* No. 79-cv-00458-ECH (consolidated with No. 06-cv-00903-ECH)
13	*Gros Ventre Tribe and Assiniboine Tribe v. United States* No. 06-cv-00931-NBF

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
14	*Haudenosaunee and Onodaga Nation v. United States* No. 06-cv-00909-TCW
15	*Hoopa Valley Tribe v. United States* No. 06-cv-00908-LMB
16	*Hopi Tribe v. United States* No. 06-cv-00941-CFL
17	*Iowa Tribe of Kansas and Nebraska v. United States* No. 06-cv-00920-EJD
18	*Jicarilla Apache Nation v. United States* No. 02-cv-00025-FMA
19	*Kaw Nation of Oklahoma v. United States* No. 06-cv-00934-FMA
20	*Lower Brule Sioux Tribe v. United States* No. 06-cv-00922-LB
21	*Makah Tribe of the Makah Reservation v. United States* No. 06-cv-00889-LJB
22	*Miami Tribe of Oklahoma v. United States* No. 08-cv-00104-LMB

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
23	*Muscogee (Creek) Nation of Oklahoma v. United States* No. 06-cv-00918-JFM
24	*Navajo Nation v. United States* No. 06-cv-00945-FMA
25	*Nez Perce Tribe v. United States* No. 06-cv-00910-CFL
26	*Northwestern Band of Shoshone Indians v. United States* No. 06-cv-00914-LB
27	*Oglala Sioux Tribe v. United States* No. 05-cv-1378L-RHH
28	*Omaha Tribe of Nebraska v. United States* No. 06-cv-00911-NBF
29	*Osage Nation of Oklahoma v. United States* No. 99-cv-00550-ECH (consolidated with 00-169)
30	*Otoe-Missouria Tribe of Indians of Oklahoma v. United States* No. 06-cv-00937-LAS

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
31	*Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California, v. United States* No. 06-cv-00897-MCW
32	*Prairie Band of Potawatomi Indians v. United States* No. 06-cv-00921-LJB
33	*Pueblo of Laguna v. United States* No. 02-cv-00024-FMA
34	*Quechan Tribe of the Fort Yuma Indian Reservation v. United States* No. 06-cv-00888-SGB
35	*Red Cliff Band of Lake Superior Chippewa Indians v. United States* No. 06-cv-00923-JPW
36	*Rosebud Sioux Tribe v. United States* No. 06-cv-00924-JFM
37	*Round Valley Indian Tribes v. United States* No. 06-cv-00900-SGB
38	*Salt River-Pima-Maricopa Tribes v. United States* No. 06-cv-00943-LMB

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
39	*Seminole Nation of Oklahoma v. United States* No. 06-cv-00935-MMS
40	*Soboba Band of Luiseno Indians v. United States* No. 06-cv-00894-NBF
41	*Sokaogon Chippewa Community (aka Mole Lake Band of Lake Superior Chippewa Indians) v. United States* No. 06-cv-00930-LJB
42	*Stillaguamish Tribe of Indians v. United States* No. 06-cv-00916-NBF
43	*Swinomish Indian Tribal Community v. United States* No. 06-cv-00899-FMA
44	*Tohono O'odham Nation v. United States* No. 06cv00944-EGB (on cert to SCT)
45	*Tonkawa Tribe of Indians of Oklahoma v. United States* No. 06-cv-00938-BAF
46	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 06-cv-00936-TCW

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
47	*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States* No. 06-cv-00866-MCW
48	*Winnebago Tribe of Nebraska v. United States* No. 06-cv-00913-MMS
49	*Wolfchild v. United States* No. 03-cv-02684-CFL
50	*Wyandot Nation of Kansas v. United States* No. 06-cv-00919-LMB
51	*Yomba Shoshone Tribe v. United States* No. 06-cv-00896-EJD

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
1	*Ak-Chin Indian Community v. Salazar* No. 06-cv-02245-TFH
2	*Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Salazar* No. 02-cv-00035-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
3	*Cheyenne River Sioux Tribe v. Salazar* No. 06-cv-01897-TFH
4	*Chippewa Cree Tribe of the Rocky Boy's Reservation v. Salazar* No. 02-cv-00276-TFH
5	*Coeur d'Alene Tribe v. Salazar* No. 06-cv-02242-TFH
6	*Colorado River Indian Tribes v. Salazar* No. 06-cv-02212-TFH
7	*Confederated Tribes of the Colville Reservation v. Salazar* No. 05-cv-02471-TFH
8	*Confederated Tribes of the Goshute Reservation v. Salazar* No. 06-cv-01902-TFH
9	*Crow Creek Sioux Tribe v. Salazar* No. 04-cv-00900-TFH
10	*Eastern Shawnee Tribe of Oklahoma v. Salazar* No. 06-cv-02162-TFH
11	*Gila River Indian Community v. Salazar* No. 06-cv-02249-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
12	*Haudenosaunee and Onondaga Nation v. Salazar* No. 06-cv-02254-TFH
13	*Iowa Tribe of Kansas and Nebraska v. Salazar* No. 06-cv-01899-TFH
14	*Lower Brule Sioux Tribe v. Salazar* No. 05-cv-02495-TFH
15	*Muscogee (Creek) Nation of Oklahoma v. Salazar* No. 06-cv-02161-TFH
16	*Nez Perce Tribe; Mescalero Apache Tribe; Tule River Indian Tribe; Hualapai Tribe;* *Yakama Nation; Klamath Tribes; Yurok Tribes; Cheyenne-Arapaho Tribe; Pawnee Nation; Sac and Fox Nation; Santee Sioux Tribe; Tlingit-Haida Tribes; Bad River Band of Lake Superior Chippewa Indians; Bois Forte Band of Chippewa; Cachil Dehe Band of Wintun Indians of Colusa Rancheria; Confederated Salish & Kootenai Tribes; Confederated Tribes of Siletz Indians; Grand Traverse Band of Ottawa and Chippewa Indians; Kenaitze Indian Tribe; Lac Courte Oreilles Band of Ojibwe; Leech Lake Band of Ojibwe; Minnesota Chippewa Tribe; Nooksack Indian Tribe; Prairie*

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
	Island Indian Community; Pueblo of Zia; Rincon Luiseno Band of Indians; Samish Indian Nation; San Luis Rey Indian Water Authority; Spirit Lake Dakotah Nation; Spokane Tribe of Indians; Summit Lake Paiute Tribe; Tulalip Tribes; Ute Mountain Ute Tribe (Plaintiff-intervenors: *Caddo Tribe of Oklahoma; Kickapoo Tribe of Kansas; Sault Ste. Marie Tribe of Chippewa Indians; Shoalwater Bay Indian Tribe; Skokomish Tribal Nation; Kaibab Band of Paiute Indians of Arizona; Lac du Flambeau Band of Lake Superior Chippewa; Qawalangin Tribe; Aleut Community of St. Paul Island (Aleutian Pribilof Island Restitution Trust); Native Village of Atka) v. Salazar* No. 06-cv-02239-TFH
17	*Northern Cheyenne Tribe of Indians v. Salazar* No. 06-cv-02250-TFH
18	*Northwestern Band of Shoshone Indians v. Salazar* No. 06-cv-02163-TFH
19	*Oglala Sioux Tribe v. Salazar* No. 04-cv-01126-TFH
20	*Omaha Tribe of Nebraska v. Salazar* No. 04-cv-00901-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
21	*Osage Tribe of Indian of Oklahoma v. United States* No. 04-cv-00283-TFH
22	*Passamaquoddy Tribe of Maine v. Salazar* No. 06-cv-02240-TFH
23	*Pechanga Band of Luiseno Mission Indians v. Salazar* No. 06-cv-02206-TFH
24	*Prairie Band of Potawatomi Nation v. Salazar* No. 05-cv-02496-TFH
25	*Red Cliff Band of Lake Superior Indians v. Salazar* No. 06-cv-02164-TFH
26	*Rosebud Sioux Tribe v. Salazar* No. 05-cv-02492-TFH
27	*Salt River Pima-Maricopa Indian Community v. Salazar* No. 06-cv-02241-TFH
28	*Shoshone-Bannock Tribes of the Fort Hall Reservation v. Salazar* No. 02-cv-00254-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
29	*Sokaogon Chippewa Community v. Salazar* No. 06-cv-02247-TFH
31	*Standing Rock Sioux Tribe v. Salazar* No. 02-cv-00040-TFH
31	*Stillaguamish Tribe of Indians v. Salazar* No. 06-cv-01898-TFH
32	*Te-Moak Tribe of Western Shoshone Indians v. Salazar* No. 05-cv-02500-TFH
33	*Tohono O'Odham Nation v. Salazar* No. 06-cv-02236-TFH
34	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 1:08cv01087-TFH
35	*Winnebago Tribe of Nebraska v. Salazar* No. 05-cv-02493-TFH
36	*Wyandot Nation of Kansas v. Salazar* No. 05-cv-02491-TFH
37	*Yankton Sioux Tribe v. Salazar* No. 03-cv-01603-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Courts in Oklahoma
1	*Alabama-Quassarte Tribal Town v. United States* No. 06-cv-00558-RAW (E.D. Okla.)
2	*Chickasaw Nation and Choctaw Nation v. Department of the Interior* No. 05-cv-01524 (W.D. Okla.)
3	*Kaw Nation v. Salazar* No. 06-cv-01437-W (W.D. Okla.)
4	*Otoe-Missouria Tribe of Oklahoma v. Salazar* No. 06-cv-01436-C (W.D. Okla.)
5	*Ponca Tribe of Indians of Oklahoma v. United States* No. 06-cv-01439-C (W.D. Okla.)
6	*Seminole Nation of Oklahoma v. Salazar* No. 06-cv-00556-SPS (E.D. Okla.)
7	*Tonkawa Tribe of Indians v. Salazar* No. 06-cv-01435-F (W.D. Okla.)

APPENDIX H

1. 25 U.S.C. 162a provides, in pertinent part:

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

* * * * *

(d) Trust responsibilities of Secretary of the Interior

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

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

2. 25 U.S.C. 4011 provides:

Responsibility of Secretary to account for the daily and annual balances of Indian trust funds

(a) Requirement to account

The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

(b) Periodic statement of performance

Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) Annual audit

The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title, and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit.

3. 25 C.F.R. 115.1000(a) provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program pursuant to 25 U.S.C. 450f *et seq.*; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.