

**AMERICAN INDIAN LAW:
NATIVE NATIONS AND THE
FEDERAL SYSTEM**

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AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM

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Robert N. Clinton

*Foundation Professor of Law
Sandra Day O'Connor College of Law
Arizona State University*

Carole E. Goldberg

*Vice Chancellor, Academic Personnel
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UCLA School of Law*

Rebecca Tsosie

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121 Chanlon Road, New Providence, NJ 07974
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

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PREFACE

This supplement includes updates on the Tribal Law and Order Act and NAGPRA, posted in Fall 2010, as well as noteworthy cases from the Supreme Court and Circuit Courts.

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TRIBAL SOVEREIGNTY AND ITS EXERCISE

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WATER WHEEL CAMP RECREATIONAL AREA, INC. v. LARANCE

United States Court of Appeals, Ninth Circuit

[642 F.3d 802](#) (2011)

...

OPINION

A tribal court system exercised jurisdiction over a non-Indian closely held corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass. It entered judgment in favor of the tribe. We examine the extent of an Indian tribe's civil authority over non-Indians acting on tribal land within the reservation. We hold that under the circumstances presented here, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, (2001), the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544, (1981). Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. In light of Supreme Court precedent recognizing tribes' inherent civil authority over non-Indian conduct on tribal land and congressional interest in promoting tribal self-government, we conclude that it does. Finally, applying traditional personal jurisdiction principles, we hold that in this instance, the tribal court has personal jurisdiction over a non-Indian agent acting on tribal land.

I

In 1975, the Colorado River Indian Tribes (“CRIT”) and Water Wheel Camp Recreational Area, Inc. (“Water Wheel”) entered into a thirty-two-year business lease of twenty-six acres of CRIT tribal land located within the reservation along the California side of the Colorado River. The land is held in trust by the United States and the local Superintendent of the Bureau of Indian Affairs (“BIA”) approved the lease under the authority delegated by the Secretary of the Department of the Interior, as required by law. *See* 25 U.S.C. § 415(a) (2006). Throughout the term of the lease, Water Wheel operated a recreational resort on the leased tribal land that included a marina, convenience store, bar, trailer and camping spaces, and related facilities.

Robert Johnson, a non-Indian, purchased from non-Indian owners half of Water Wheel's stock in 1981 and the remaining stock in 1985, at which point he became president

of the corporation. He controlled and operated the Water Wheel resort on CRIT land for more than twenty-two years while living at the site. Under the lease agreement, he collected rents from the resort's subtenants and paid that rent to the tribe. The lease called for renegotiation of the minimum base rental value after twenty-five years to more accurately reflect the current market value, but in 2000, when it was time to renegotiate, the CRIT and Johnson (acting on behalf of Water Wheel) failed to reach an agreement. After that, Water Wheel stopped making payments as required by the lease. Beginning in 2001, the corporation stopped paying the required percentage of gross business receipts. It paid only nominal rent in 2003 and 2004, and failed to pay any rent at all beginning in 2005.

When the lease expired on July 6, 2007, Water Wheel and Johnson failed to vacate the property “peaceably and without legal process” as the lease required. Instead, Johnson continued to operate Water Wheel and collect funds from resort patrons, but paid nothing to the tribe. When he refused to vacate, the CRIT filed suit against Water Wheel and Johnson in tribal court for eviction, unpaid rent, damages from the tribe's loss of use of their property, and attorney's fees. Johnson and Water Wheel challenged both the tribe's right to evict them and the jurisdiction of the CRIT tribal courts. They moved to dismiss, arguing in relevant part that the tribal court lacked subject matter jurisdiction under *Montana*, 450 U.S. 544, and lacked personal jurisdiction over Johnson.

The tribal court denied the motions to dismiss and, following a three-day trial on the merits, ruled in favor of the CRIT on all claims. The tribal court found that because Water Wheel had entered into a consensual relationship with the tribe through commercial dealings, the court had subject matter jurisdiction over Water Wheel under *Montana's* first exception.¹ Regarding Johnson himself, the tribal court reasoned that it had subject matter jurisdiction over the breach of lease under *Montana's* first exception and that it had personal jurisdiction over him because Johnson had “sufficient minimum contacts” with the CRIT to support the exercise of jurisdiction. Specifically, the court determined that Johnson's business dealings and his continuing trespass after the lease expired provided sufficient contacts necessary to establish personal jurisdiction. The court further reasoned that it had subject matter jurisdiction over Water Wheel and Johnson through its own laws and ordinances for purposes of eviction and assessing damages.

Finally, the tribal court noted that Water Wheel and Johnson had repeatedly and willfully disobeyed pretrial orders compelling discovery of financial and corporate records. As a sanction, the court found as true the tribe's contention that Water Wheel and Johnson were “alter egos” and, pursuant to tribal rules of civil procedure that mirror the Federal Rules of Civil Procedure, that the facts embraced in the discovery requests were established as the tribe had claimed. Specifically, the tribal court found that Water Wheel was inadequately capitalized; that the corporation and Johnson had made gifts to each other

¹ [2] *Montana*, discussed in greater detail below, held that a tribe may not regulate the activities of non-Indians on non-Indian fee land within the reservation unless one of two exceptions applies. The first exception exists where non-Indians “enter consensual relationships with the tribe or its members,” and the second exception exists where the conduct of a non-Indian “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566.

since 1999 in fraud of creditors; and that Johnson borrowed funds for his own personal use, failed to maintain separate financial records, failed to keep formal corporate board meeting minutes, failed to elect directors, and had commingled corporate money with his own personal assets instead of paying the rent. In light of these factual findings, the tribal court pierced the corporate veil to hold Johnson personally and jointly liable for all damages related to breach of the lease agreement.

The tribal court of appeals affirmed.² In a fifty-eight-page opinion, the appellate court held that the CRIT had subject matter jurisdiction both through its inherent sovereign authority and through the first and second *Montana* exceptions. ...

While the case was pending before the tribal court, Water Wheel and Johnson filed a complaint in the District of Arizona seeking declaratory and injunctive relief against the tribal court's exercise of jurisdiction. After the tribal court of appeals issued its decision, the district court reviewed the jurisdictional questions. The district court declined to reach the question whether the tribe's inherent authority to exclude non-Indians from tribal land provided jurisdiction over Water Wheel. Relying on the facts surrounding the lease between the CRIT and Water Wheel, the district court found a consensual relationship existed and that the tribal court had subject matter jurisdiction over Water Wheel under *Montana's* first exception.³ The court further determined that the tribe had not waived its sovereign powers through the lease and that BIA regulations did not preempt tribal court jurisdiction.

The district court rejected the tribe's argument that its inherent power to exclude provides a basis for jurisdiction over Johnson independent of *Montana*, reasoning that *Montana* applied to determine whether a tribe could exercise its inherent authority to exclude. In a footnote, the court attempted to clarify that its decision addressed only whether the tribe's authority to exclude provided a jurisdictional basis for Johnson, not that *Montana* would prevent the tribe from excluding Johnson from tribal land. The court did not consider the connection between the tribe's authority to exclude and its regulatory jurisdiction, nor did it consider whether the tribe's status as landowner made any difference to the analysis.

Considering tribal court's jurisdiction over Johnson, the district court first determined whether Johnson's relationship with the CRIT was consensual. Johnson argued that he had protested the CRIT's involvement and had not understood that he, personally, would be dealing with the tribe, so the relationship was not voluntary. The district court agreed, noting that the tribal court made no factual findings regarding voluntariness to which the clearly erroneous standard of review could be applied. The district court reasoned that the evidence regarding Johnson's personal understanding could not "fairly be

² [3] The court reversed the award for trespass damages and remanded for recalculation based on the fair rental value of the formerly leased property. That issue is not before us.

³ [4] The court reasoned that it did not need to reach the question regarding the tribe's inherent authority given its decision that *Montana's* first exception provided a basis for jurisdiction. Apparently, the court failed to recognize that in applying *Montana* unnecessarily, it improperly expanded limitations on tribal sovereignty that, with only one narrow exception, have been applied exclusively to non-Indian land.

characterized as his personal consent to the tribe's jurisdiction,” so Johnson could not have entered into a consensual relationship with the tribe.

Finally, the district court rejected the argument that the tribal court had jurisdiction over Johnson through a provision in the lease specifying that Water Wheel, its agents, and its employees would abide by tribal laws and regulations. Nothing in the provision, the court reasoned, suggested that Water Wheel had agreed that its agents would be subject to tribal court jurisdiction. The district court declined to consider the second *Montana* exception, reasoning that the defendants had not made that argument.

Both parties appealed.

II

We have jurisdiction under 28 U.S.C. § 1291. A decision regarding tribal court jurisdiction is reviewed *de novo*, and factual findings are reviewed for clear error. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir.2006). ... We have also recognized that because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to “some deference.” *Id.* at 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978)).

As we consider questions of tribal jurisdiction, we are mindful of “the federal policy of deference to tribal courts” and that “[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *see also United States v. Wheeler*, 435 U.S. 313, 332, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (recognizing that “tribal courts are important mechanisms for protecting significant tribal interests”).

III

In considering the extent of a tribe's civil authority over non-Indians on tribal land, we first acknowledge the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) ...

From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land. *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (recognizing that a tribe's power to exclude includes the incidental power to regulate). We also adhere to the Supreme Court's instruction that a tribe's adjudicative authority may not exceed its regulatory authority. *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction. The question we consider is whether and to what extent *Montana* limits these powers. We turn first to the question of subject matter jurisdiction.

A

Montana is “the pathmarking case concerning tribal civil authority over nonmembers.” *Strate*, 520 U.S. at 445, 117 S.Ct. 1404. In *Montana*, the Supreme Court stated that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana*, 450 U.S. at 564, 101 S.Ct. 1245. The narrow question the Court considered in light of this test concerned the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian* land within the reservation.⁴ *Id.* at 557, 101 S.Ct. 1245 ...

The Court noted two exceptions to this limitation on tribal powers. First, the Court stated that

[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. at 565. Second, the Court stated that, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566, 101 S.Ct. 1245. These exceptions have come to be known as the two *Montana* exceptions.

Since deciding *Montana*, the Supreme Court has applied those exceptions almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent. *See analysis infra*. The exception is *Hicks*, discussed in greater detail below, where the Court noted that while land ownership may sometimes be a “dispositive factor” in determining whether a tribe has jurisdiction over a non-Indian, it was not dispositive when weighed against the state's considerable interest in executing a search warrant for an off-reservation crime. *Hicks*, 533 U.S. at 358–60, 363.

... The CRIT and the United States, through its amicus brief, argue that *Montana* does not apply to this case. Their position is that the CRIT's inherent authority to exclude provides regulatory jurisdiction over Water Wheel and Johnson and that there are no competing state interests at play that might otherwise trigger *Montana's* application. They further suggest that because regulatory jurisdiction exists and neither Congress nor the Supreme Court have said otherwise, the tribal court may also exercise adjudicative jurisdiction. We agree.

⁴ [5] A reservation may contain both Indian and non-Indian land, and Indian land may also exist outside of the reservation. See [18 U.S.C. § 1151](#) (2006).

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

Montana limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (recognizing a tribe's inherent authority to exclude non-Indians from tribal land, without applying *Montana*); ...*cf.* *Atkinson Trading Co.*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (holding that the Navajo Nation's power to exclude did not allow it to tax non-Indians on *non-Indian* fee land (emphasis added)).⁵

Here, through its sovereign authority over tribal land, the CRIT had power to exclude Water Wheel and Johnson, who were trespassers on the tribe's land and had violated the conditions of their entry. Having established that the tribe had the power to exclude, we next consider whether it had the power to regulate. The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations. *Merrion*, 455 U.S. at 144, 102 S.Ct. 894 ...

As a general rule, both the Supreme Court and the Ninth Circuit have recognized that *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. See *Bourland*, 508 U.S. at 688–89, 113 S.Ct. 2309 (describing *Montana* as establishing that when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses “the incidental regulatory jurisdiction formerly enjoyed by the Tribe”) ...

⁵ [6] To support its conclusion that *Montana* applies to a tribe's inherent authority to exclude persons from tribal land, the district court cited *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir.1985). *Plains Commerce Bank* considered a tribe's authority to regulate the alienation of non-Indian land, not the tribe's power to exclude non-Indians from tribal lands or its sovereign interest in managing tribal land. The district court misinterpreted passages from that opinion discussing *Montana's* treatment of regulations that flow from a tribe's inherent tribal government powers on non-Indian lands to stand for the proposition that a tribe's power to exclude is subject to *Montana*. ... *Plains Commerce Bank* does not support the district court's conclusion that a tribe's right to exclude may be exercised on tribal land only if *Montana* is satisfied. ...

We must therefore conclude that the CRIT's right to exclude non-Indians from tribal land includes the power to regulate them⁶ unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government. *Iowa Mut. Ins. Co.*, 480 U.S. at 18, 107 S.Ct. 971 ...

We see no evidence of congressional intent to limit the CRIT's regulatory jurisdiction in this instance, and the Supreme Court has on only one occasion established an exception to the general rule that *Montana* does not apply to jurisdictional questions arising from the tribe's authority to exclude non-Indians from tribal land. *See Hicks*, 533 U.S. 353, 121 S.Ct. 2304. In *Hicks*, the Court held that where a state has a competing interest in executing a warrant for an off-reservation crime, the tribe's power of exclusion is not enough on its own to assert regulatory jurisdiction over state officers and *Montana* thus applies. *Id.* at 359–60, 121 S.Ct. 2304 (rejecting the tribe's argument that it could exercise its regulatory authority over state officers as a condition of entry for purposes of executing a search warrant).

... *Hicks* expressly limited its holding to “the question of tribal-court jurisdiction over state officers enforcing state law” and left open the question of tribal court jurisdiction over nonmember defendants generally. *Id.* at 358 n. 2, 121 S.Ct. 2304; *id.* at 371, 121 S.Ct. 2304 (noting that the issue being considered concerned “a narrow category of outsiders”). Furthermore, the Court did not overrule its own precedent specifying that *Montana* ordinarily applies only to non-Indian land.

...

To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it explicitly claims to be. *See Hicks*, 533 U.S. at 358 n. 2, 121 S.Ct. 2304. Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist. Because none of those circumstances exist here, we must follow precedent that limits *Montana* to cases arising on non-Indian land. Doing otherwise would impermissibly broaden *Montana's* scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government. *See Mescalero Apache Tribe*, 462 U.S. at 335–36, 103 S.Ct. 2378 (recognizing that as a “necessary implication” of Congress's broad commitment to further tribal self-government, “tribes have the power to manage the use of [their] territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes” (internal citations omitted)). We therefore hold that the CRIT has regulatory jurisdiction over *Water Wheel and Johnson* for claims arising from their activities on tribal land, independent of *Montana*.

⁶ [7] Further bolstering our conclusion that the tribe has regulatory jurisdiction is the fact that this is an action to evict non-Indians who have violated their conditions of entry and trespassed on tribal land, directly implicating the tribe's sovereign interest in managing its own lands. *See Plains Commerce Bank*, 554 U.S. at 334–35, 128 S.Ct. 2709

In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress.

B

Since deciding *Montana*, the Supreme Court has specified limits to the extent of a tribe's adjudicative jurisdiction over non-Indians three times: first in *Strate*, then in *Hicks*, and most recently in *Plains Commerce Bank*. In all three cases, the Court articulated the general rule that a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction, and in all three cases the Court found the tribe lacked regulatory, and therefore adjudicative, authority. The Supreme Court has not yet considered the question of adjudicative authority where regulatory jurisdiction exists. However, it is clear that the general rule announced in *Strate*, and confirmed in *Hicks* and *Plains Commerce Bank*, that adjudicative jurisdiction is confined by the bounds of a tribe's regulatory jurisdiction, applies. Beyond that, because the Supreme Court has repeatedly recognized that only Congress may restrict a tribe's inherent sovereignty, we must consider the question of the CRIT's adjudicative jurisdiction without contradicting the rules that have long governed tribes' civil authority over non-Indians on tribal land.

Because the CRIT has regulatory jurisdiction, there is no danger that recognizing adjudicative jurisdiction would conflict with *Strate*, *Hicks*, or *Plains Commerce Bank*. Water Wheel, Johnson, and the district court erroneously point to *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir.2009), for the proposition that *Montana* applies to questions of a tribe's adjudicative authority. In *Philip Morris* we determined that the Yakama Tribe lacked regulatory, and therefore adjudicative, jurisdiction over non-Indian corporation Philip Morris regarding federal trademark registration. 569 F.3d at 945 (Fletcher, W., J., concurring); *see also id.* at 942.

... *Philip Morris's* comments regarding jurisdiction are best understood as a reiteration of the Supreme Court's rule that a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction.

Furthermore, *Philip Morris* did not involve a question related to the tribe's authority to exclude or its interest in managing its own land. To the contrary, the activity in question occurred off reservation. The tribal court clearly lacked jurisdiction and, arguably, *Montana* did not even apply because there the Court considered a tribe's regulatory jurisdiction over activities on non-Indian fee land within the reservation, not beyond the reservation's borders where the tribe lacked authority to regulate a non-Indian...

Because recognizing adjudicative jurisdiction would not conflict with the rule articulated in *Strate*, *Hicks*, and *Plains Commerce Bank*, we consider whether recognizing adjudicative jurisdiction would conflict with earlier precedent. Prior to *Hicks*, the general rule for adjudicative authority over the conduct of non-Indians on tribal land was that tribes had jurisdiction. See *Iowa Mut. Ins. Co.*, 480 U.S. at 18, 107 S.Ct. 971 (observing that a tribe's inherent civil jurisdiction over non-Indian activities on the reservation should be presumed unless Congress has said otherwise) ...

The Supreme Court recently reaffirmed those long-standing principles when it recognized the general rule that a tribe has plenary jurisdiction over tribal land until or unless that land is converted to non-Indian land. See *Plains Commerce Bank*, 554 U.S. at 328, 128 S.Ct. 2709 (“Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.”)...

Here, the land is tribal land and the tribe has regulatory jurisdiction over Water Wheel and Johnson. While it is an open question as to whether a tribe's adjudicative jurisdiction is equal to its regulatory jurisdiction, the important sovereign interests at stake, the existence of regulatory jurisdiction, and long-standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government. Accordingly, we hold that in addition to regulatory jurisdiction, the CRIT has adjudicative jurisdiction over both Water Wheel and Johnson. ...

C

Montana does not apply to this case. However, because we disagree not only with the district court's application of the case in the first place, but also with its interpretation of the case as it applies to Johnson, we briefly explain why, even if *Montana* applied, the tribe would have subject matter jurisdiction.

...

Regarding claims related to Water Wheel, the district court correctly found that the corporation's long-term business lease with the CRIT for the use of prime tribal riverfront property established a consensual relationship and that the tribe's eviction action bears a close nexus to that relationship. The corporation had full knowledge that the leased land was tribal property and that under the lease's terms, CRIT laws and regulations applied to the land and Water Wheel's operations. The tribe clearly had authority to regulate the corporation's activities under *Montana's* first exception and—considering that the business also involved the use of tribal land and that the business venture itself constituted a significant economic interest for the tribe—under the second exception as well. *Montana*, 450 U.S. at 565, 101 S.Ct. 1245.

The district court then considered whether Johnson's personal twenty-two-year

relationship with the CRIT was subjectively voluntary and consensual under *Montana's* first exception.⁷ The court erred in applying a subjective test to the question of subject matter jurisdiction, which is not required under *Montana* or its federal common law progeny, and is irrelevant to resolving subject matter jurisdiction over a tort claim. The Supreme Court has indicated that tribal jurisdiction depends on what non-Indians “reasonably” should “anticipate” from their dealings with a tribe or tribal members on a reservation. *Plains Commerce Bank*, 554 U.S. at 338, 128 S.Ct. 2709.

Regarding the tribe's regulatory jurisdiction over the breach of contract claim against Johnson personally, Johnson argues the tribe lacks jurisdiction because any relationship he entered into was on behalf of the corporation and not himself. To support his position, Johnson cites *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) (“As an inanimate entity, a corporation must act through agents.”). Outside of the Indian law context, this argument is often couched in terms of the “fiduciary shield rule” doctrine, an equitable doctrine courts sometimes use to insulate corporate employees acting in their official capacities from *personal jurisdiction* in a distant forum. ...

Subject matter jurisdiction, on the other hand, concerns the authority of a court to hear cases of a particular subject matter and usually has nothing to do with the individual actions of the parties. ...

We have recognized that the “jurisprudential contours of what reasons suffice for the court to disregard the corporate form for jurisdictional purposes are somewhat indistinct.” *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir.1989). Nevertheless, we have held that “the corporate form may be ignored” in cases where the corporation is the “alter ego” of the defendant, or where there is an “identity of interests” between the corporation and the individual. *Id.* at 520–21.

In this case, it is a matter of established fact that Johnson was Water Wheel's “alter ego” and, thus, “corporate separateness is illusory.” *Katzir's Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir.2004). Any actions Johnson took on behalf of Water Wheel, he also took on behalf of himself. We therefore consider whether Johnson as an individual entered into a consensual relationship with the tribe, without regard to any protections the corporate form might otherwise offer.

...

Johnson owned and operated Water Wheel on tribal land for more than twenty years

⁷ [9] To assess Johnson's subjective understanding of his relationship with the tribe, the district court improperly relied on the Second Declaration of Robert Johnson, which was not before the tribal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Because the district court's review is akin to appellate review of the tribal court record, this was error. *Cf. id.* at 856, 105 S.Ct. 2447 (“[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.”).

and had extensive dealings with the CRIT before the lease expired. ... Johnson's subjective beliefs regarding his relationship with the tribe do not change the consensual nature of that relationship for purposes of regulatory jurisdiction. Moreover, the tribe's claims for unpaid rent and related damages arose directly from this relationship.

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

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

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

Our analysis of adjudicative jurisdiction, *see supra* Part III.B, applies once regulatory jurisdiction is established under *Montana*, and, accordingly, the tribe would have both regulatory and adjudicative jurisdiction over Water Wheel and Johnson even if *Montana* applied.

IV

To exercise civil authority over a defendant, a tribal court must have both personal jurisdiction and subject matter jurisdiction. ... One of the most “firmly established principles of personal jurisdiction” is that personal jurisdiction exists over defendants physically present in the forum state. *Burnham v. Superior Court*, 495 U.S. 604, 610, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). In-state personal service also serves as a basis for personal jurisdiction. *Id.* at 615–16, 110 S.Ct. 2105.

Johnson lived on tribal land, which on its own serves as a basis for personal jurisdiction. Additionally, he was served with tribal process at the Water Wheel location on tribal land, and that service within the tribal court's territorial jurisdiction is also sufficient to confer personal jurisdiction. We therefore hold that the tribal court has personal jurisdiction over Johnson.

To the extent Johnson argues that the fiduciary shield rule prevents the tribal court

from exercising personal jurisdiction over him, his argument fails. Assuming the fiduciary shield rule applies to defendants present in the forum state, it would not protect Johnson, an “alter ego” to Water Wheel. *See Katzir's Floor & Home Design, Inc.*, 394 F.3d at 1149. ...

Absent the fiduciary shield, a court may exercise personal jurisdiction over a defendant where that defendant has sufficient minimum contacts with the forum state such that the suit does not offend “traditional notions of fair play and substantial justice.” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In his role as president and owner of the corporation, Johnson failed to pay rent and receipts owed to the tribe pursuant to the lease and failed to surrender the property peacefully. He also failed to adhere to corporate formalities in that he had, among other things, commingled personal and business funds, failed to maintain separate financial records, and borrowed and used Water Wheel funds for his personal use and the use of third persons, instead of paying the CRIT.

Johnson had notice through the lease that, as an agent of Water Wheel, he was subject to CRIT laws, regulations, and ordinances. He lived and operated a business on the tribe's land within its reservation for more than twenty years. Certainly it was reasonable to anticipate that he could be haled into tribal court. The tribal court properly found personal jurisdiction over Johnson for the claims related to unpaid rent due under the lease and for attorney's fees.

As for damages related to his unlawful trespass, for more than nineteen months after the lease expired Johnson continued unauthorized operation of a business on tribal land, collected rents, and paid absolutely nothing to the tribe. The tribal court had personal jurisdiction over Johnson for purposes of the trespass claim and damages arising from that violation. *See Calder*, 465 U.S. at 790, 104 S.Ct. 1482.

Johnson clearly had sufficient minimum contacts with the CRIT and its tribal land to satisfy considerations of fairness and justice. *Int'l Shoe Co.*, 326 U.S. at 316, 66 S.Ct. 154; *see also Davis*, 885 F.2d 515, 520 (9th Cir.1989). That he acted unlawfully and wrongfully on behalf of a corporation is no defense. *Calder*, 465 U.S. at 790, 104 S.Ct. 1482.

V

The judgment of the district court is **AFFIRMED** as to Water Wheel Camp Recreational Area, Inc., and **REVERSED** with respect to Robert Johnson. The district court's order directing the tribal court to vacate its judgment against Robert Johnson and to cease any litigation concerning Robert Johnson personally is **VACATED**. The case is **REMANDED** for entry of judgment upholding the tribal court's jurisdiction. Costs are awarded to the tribal parties.

CASE NOTE

The Tenth Circuit Court of Appeals also addressed the issue of tribal court jurisdiction over a non-member in *Crowe & Dunlevy, P.C. v. Stidham*, [640 F.3d 1140](#) (10th

Cir. 2011). The court affirmed the district court's ruling and found that a nonmember attorney had not entered a "consensual relationship" with the Muscogee (Creek) Nation by enrolling in its bar association and practicing before its courts, where there was no "nexus" between that relationship and the exertion of tribal authority, which concerned an order to return attorney's fees already paid pursuant to a contract with another federally-recognized Indian tribe. The court noted that the Tribe in question (the Thlopthlocco Tribe) did not want Crowe to return the funds, and found that "[f]or ancillary jurisdiction over Crowe as a nonmember of the tribe to be appropriate under the consensual relationship exception to Montana, the dispute before the tribal court must arise directly out of that consensual relationship." In this case, Crowe's consensual relationship with the Thlopthlocco tribal government had "nothing to do with Crowe attorneys' consensual relationship with the Creek Nation based on their Bar membership."

Page 421: Add to Note 2 regarding tribal sentencing authority.

MIRANDA v. BRAATZ

United States Court of Appeals, Ninth Circuit
[2011 U.S. App. LEXIS 17024](#) (Aug. 17, 2011)

SAMMARTINO, DISTRICT JUDGE:⁸

In these consolidated appeals, Respondents Vincent Anchando and Tracy Nielsen appeal the district court's order granting Petitioner Beatrice Miranda's amended petition for writ of habeas corpus. The Pascua Yaqui Tribal Court convicted Petitioner of eight criminal violations arising from a single criminal transaction. The tribal court sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days' imprisonment. On habeas review, the district court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2009),⁹ prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction. Respectfully, we disagree with the district court and hold that § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is an enrolled member of the Pascua Yaqui Tribe (the Tribe). On the evening of January 25, 2008, while drunkenly wandering the Pascua Yaqui Indian Reservation, Petitioner stumbled upon M.V.,¹⁰ a minor teenager. Apparently believing that M.V. was laughing at her, Petitioner drew a knife and initiated a profanity-laden chase scene across the reservation.

⁸ [*]The Honorable Janis L. Sammartino, District Judge for the U.S. District Court for Southern California, San Diego, sitting by designation.

⁹ [1] Unless otherwise noted, all subsequent references to [§ 1302](#) are to the version that was in effect when Petitioner was sentenced. See *infra* note 3.

¹⁰ [2] Because the victim is a minor, we refer to her using only her initials.

M.V. ran home and alerted her sister, Bridget, that a woman was chasing her with a knife. Bridget went outside to investigate, where she observed an agitated Petitioner, yelling and brandishing the knife. Petitioner ignored Bridget's pleas to leave; instead, she raised the knife and threatened to throw it at the girls. In a last-ditch effort to protect herself and her sister, M.V. took aim with a basketball and launched it at Petitioner, hitting Petitioner squarely in the face.

Petitioner retreated across the street but continued to shout obscenities and threats. She finally left after Bridget called the police, who quickly apprehended Petitioner near the girls' home.

The Tribe filed a criminal complaint charging Petitioner with eight violations of the Pascua Yaqui Tribal Criminal Code: two counts of endangerment, two counts of threatening and intimidating, two counts of aggravated assault, and two counts of disorderly conduct. Petitioner appeared pro se at trial, and the Pascua Yaqui Tribal Court found her guilty on all eight counts. The tribal court sentenced her to a determinate term of 910 days' imprisonment as follows: (1) two consecutive 365-day terms on the aggravated assault counts; (2) two consecutive ninety-day terms on the threatening and intimidating counts; (3) two concurrent sixty-day terms on the endangerment counts; and (4) two concurrent thirty-day terms on the disorderly conduct counts. The sentence was reduced by 114 days for time served.

Petitioner appealed her conviction and sentence to the Pascua Yaqui Tribe Court of Appeals, arguing, *inter alia*, that her 910-day sentence violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(7). The tribal appellate court rejected Petitioner's arguments and affirmed her conviction on all counts.

Petitioner subsequently filed an amended petition for writ of habeas corpus pursuant to 25 U.S.C. § 1303 and 28 U.S.C. § 2241, again arguing that her sentence violated § 1302(7). The parties cross-moved for summary judgment, and the magistrate judge issued a report and recommendation (R & R) advising the district court to grant Petitioner's motion for summary judgment, deny Respondents' cross-motion, and grant Petitioner's amended petition. The magistrate judge explicitly adopted the reasoning of *Spears v. Red Lake Band of Chippewa Indians*, 363 F.Supp.2d 1176 (D.Minn.2005), and concluded that, in enacting § 1302(7), "Congress did not intend to allow tribal courts to impose multiple consecutive sentences for criminal violations arising from a single transaction." Therefore, like the *Spears* court, the magistrate judge found that the phrase "any one offense" in § 1302(7) meant "a single criminal transaction." . . .

On January 12, 2010, the district court adopted the magistrate judge's R & R, granted Petitioner's amended petition, and ordered the tribal court to reduce Petitioner's sentence to one year and release her from custody. . . . The district court agreed with the magistrate judge that "the 'any one offense' language of ... § 1302(7)[was] properly interpreted to include all tribal code violations committed during a single transaction."

ANALYSIS

[In section 1 of the opinion, the court held that the Respondents had not waived their right to appeal by their failure to object to the magistrate judge's report in a timely manner.]

2. Section 1302(7) unambiguously permits imposition of up to a one-year term of imprisonment for each criminal violation.

Respondents argue that the district court erred in interpreting § 1302(7) to prohibit tribal courts from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single transaction. More specifically, Respondents contend that the statutory language “any one offense” has a plain meaning, and that the district court erred in relying on the statute's legislative history to manufacture ambiguity in this otherwise clear language. We agree.

We review de novo a district court's decision to grant a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. *United States v. Lemoine*, 546 F.3d 1042, 1046 (9th Cir.2008) The construction or interpretation of a statute is a question of law also reviewed de novo. *United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir.2003).

“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’ ” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, (2004) (alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Thus, statutory interpretation “begins with the statutory text.” *Id.* “If the statutory language is unambiguous and the statutory scheme is ‘coherent and consistent,’ ” judicial inquiry must cease. *In re Ferrell*, 539 F.3d 1186, 1190 n. 10 (9th Cir.2008) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). Resorting to legislative history as an interpretive device is inappropriate if the statute is clear. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); accord *United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134, 1143 (9th Cir.2008).

“[U]nless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). And under the doctrine of *in pari materia*, words in different sections of the same statute should be construed similarly. *Erlenbaugh v. United States*, 409 U.S. 239, 243–44, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972).

Section 1302(7) provides, in relevant part, that an Indian tribe exercising powers of self-government shall “in no event impose for a conviction of *any one offense* any penalty or punishment greater than imprisonment for a term of one year.” 25 U.S.C. § 1302(7) (emphasis added). The pre–2010 version of the ICRA did not define “offense” as used in §

1302(7).¹¹ *But see* 25 U.S.C. § 1302(e) (2011) (defining “offense”). Accordingly, we must determine whether the term had an ordinary, contemporary, common meaning in 1968, when Congress enacted the ICRA.

Contrary to Petitioner's contention, “offense” had an established meaning in 1968: “A crime or misdemeanor; a breach of the criminal laws.” BLACK'S LAW DICTIONARY 1232 (4th ed.1968); *accord* WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 586 (1965) (defining “offense” as “an infraction of law; crime”); ... Contemporary case law illustrates that courts used the term to refer to a violation of a criminal law, in a manner consistent with its established meaning. *See, e.g., United States v. Ewell*, 383 U.S. 116, 127 (1966) (Fortas, J., dissenting) *Barnett v. Gladden*, 375 F.2d 235, 238 (9th Cir.1967) (“[T]he test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statute.” (quoting *Conerly v. United States*, 350 F.2d 679, 681 (9th Cir.1965)); *Forsberg v. United States*, 351 F.2d 242, 245 (9th Cir.1965) (“While two statutory offenses are charged in this case, they describe but one assault.”). ...

The ordinary meaning of “offense” in 1968 is also consistent with the meaning of that term in the ICRA's double jeopardy provision. *See* 25 U.S.C. § 1302(3). In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the Court held that, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Twenty-six years later, the Court reaffirmed *Blockburger* in *Gore v. United States*, 357 U.S. 386, 387 (1958), holding that the defendant was properly convicted of “three distinct offenses in connection with the vending of illicit drugs ... despite the fact that these violations of what Congress had proscribed were compendiously committed in single transactions of vending.” Thus, by the time Congress enacted the ICRA in 1968, “offense” as used in the statute's double jeopardy provision had an established meaning-it meant a criminal violation with separate elements of proof, not a single criminal transaction. There is no reason to conclude that Congress meant something different when it used the term in § 1302(7). *See Erlenbaugh*, 409 U.S. at 243–44.

The contemporary usage of “offense” to uniformly refer to a violation of a criminal law and its similar meaning in the statute's double jeopardy provision confirm that the phrase “any one offense” in § 1302(7) is not ambiguous. Section 1302(7)'s one-year sentencing cap for “any one offense” means that a tribal court may impose up to a one-year sentence for each violation of a criminal law. As it is undisputed that Petitioner committed multiple criminal violations, the district court erred in concluding that her 910–day sentence violated § 1302(7).

¹¹ [3] In 2010, Congress rewrote [§ 1302](#). *See* Tribal Law and Order Act of 2010, [Pub. L. No. 111–211, § 234\(a\), 124 Stat. 2258](#), 2279–81. Unlike the former version, the amended statute permits up to a three-year term for “any 1 offense” in certain circumstances. [25 U.S.C. §§ 1302\(a\)\(7\)\(C\), \(b\)](#) (2011). It also explicitly defines “offense” to mean “a violation of a criminal law,” [id. § 1302\(e\)](#), and permits consecutive sentences up to a cumulative total of nine years, [id. § 1302\(a\)\(7\)\(D\)](#). However, if a tribal court metes out this enhanced punishment in a single “criminal proceeding,” the defendant must receive something akin to the full panoply of procedural rights that would be due a criminal defendant prior to conviction. [Id. § 1302\(c\)](#).

Petitioner provides no principled reason to conclude that “offense” was susceptible of multiple meanings in 1968. First, although Petitioner faults Respondents for “myopically focus[ing]” on the term “offense,” Petitioner fails to explain how the prefatory words “any one” affect the interpretation inquiry. “Any one” does not modify “offense” in any salient respect other than to indicate that § 1302(7)'s sentencing cap applies to a single indiscriminate “offense,” however “offense” is interpreted. *Cf.* 25 U.S.C. § 1302(e) (2011) (defining “offense” in statute containing phrase “any 1 offense”).

Second, contrary to Petitioner's contention, *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), does not illustrate that “close to the time of the ICRA's enactment, the Supreme Court found it natural to presume that a single ‘transaction’ constitutes a single ‘offense’ when construing a federal statute.” The *Bell* Court held that “if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.” 349 U.S. at 84. In the quoted passage, the Court used “offense” for its ordinary meaning—a violation of a criminal law. In fact, the very idea that a transaction *could* constitute “multiple offenses” supports the conclusion that “offense” means a discrete criminal violation. Moreover, Petitioner overlooks that, before the ICRA's enactment, the Court clarified that *Bell's* rule of lenity does not apply to “separate offenses created by Congress at ... different times,” even if multiple offenses are committed in a single transaction. *Gore*, 357 U.S. at 391.

Third, the lower court cases Petitioner cites do not demonstrate that “offense” was ambiguous in 1968. In fact, each case recognized that the term had an ordinary, contemporary, common meaning—“a breach of law established for the protection of the public,” *Dugan & McNamara, Inc. v. United States*, 130 Ct.Cl. 603, 127 F.Supp. 801, 804 (Ct.Cl.1955), or “[t]he doing of that which the penal law forbids to be done,” *W.J. Dillner Transfer Co. v. Int'l Bhd. of Teamsters*, 94 F.Supp. 491, 492 n. 2 (D.Pa.1950) (internal quotation marks omitted).

Finally, although Petitioner criticizes Respondents for citing “decisions in which courts have used the term ‘offense’ in a manner broadly consistent with [Respondents'] preferred interpretation,” she does not identify any authority requiring this court to look to cases addressing “the question of how the term ‘offense’ should be construed when used in a statute” when interpreting § 1302(7). Rather, the statutory interpretation inquiry's focus, in the first instance, is whether “offense” had an “ordinary, contemporary, common meaning” in 1968. *Perrin*, 444 U.S. at 42.

CONCLUSION

Because § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation, and because it is undisputed that Petitioner committed multiple criminal violations, we reverse the district court's decision to grant Petitioner's amended habeas corpus petition.

REVERSED.

Chapter 4

FEDERAL & STATE AUTHORITY IN INDIAN COUNTRY

Pages 517-46: Update on Tribal Law and Order Act.

Since we submitted the Sixth Edition for publication, Congress passed the Tribal Law and Order Act (TLOA) under the heading of Indian Arts and Crafts Amendments. President Obama signed the TLOA on July 29, 2010, in an emotion-filled ceremony that included testimony by a member of the Rosebud Sioux Tribe who had been the victim of a violent sexual assault that was never prosecuted in federal court. The full text of the TLOA can be found at Pub. L. 111-211 (124 Stat. 2258), [25 U.S.C. § 2801](#).

The TLOA amends many different provisions of the federal code, with all of the new sections and language designed to enhance community safety in Indian country. This new legislation is not intended to be a comprehensive response to the criminal justice challenges affecting Indian country, however. Significantly, section 235 of the TLOA amends the Indian Law Enforcement Reform Act, [25 U.S.C. § 2801](#) et seq., to establish the Indian Law and Order Commission. The charge of this new Commission, whose members will be appointed by the President and leaders of Congress, is to “conduct a comprehensive study of law enforcement and criminal justice in tribal communities,” including criminal jurisdiction in Indian country, systems of incarceration serving Indian country, juvenile justice and prevention of juvenile offenses, and the impact of the Indian Civil Rights Act.

Here are the most important changes effected by the TLOA.

- Sec. 211 amends the Indian Law Enforcement Reform Act, *supra*, to impose new responsibilities on the BIA’s Office of Justice Services, including greater consultation with tribes regarding criminal justice policies, training for tribal access to national crime databases, collecting and reporting tribe-by-tribe crime data, and reporting to Congress on staffing, funding formulas, and unmet needs for criminal justice programs serving Indian country. It also charges the Secretary of the Interior with developing a long-term plan for tribal detention, including alternatives to incarceration.
- Sec. 212 amends § 2809 of the Indian Law Enforcement Reform Act to impose reporting requirements on federal investigators and prosecutors who decline to pursue Indian country cases. These investigators and prosecutors are also required to coordinate with tribal officials regarding the status of cases and use of evidence in possible tribal proceedings. Normally federal investigators and prosecutors are under no obligation to explain such decisions, so this is a major change.
- Sec. 213 amends [28 U.S.C. § 543](#) to allow tribal prosecutors to serve as special federal prosecutors for Indian country offenses, and encourages United States

Attorneys to appoint such individuals (after appropriate tribal consultation) where crime rates warrant and to hold prosecutions within Indian country. It also amends the [Indian Law Enforcement Act, supra](#), to require each United States Attorney whose district includes Indian country to appoint a Tribal Liaison. The Tribal Liaisons are directed to coordinate prosecutions of Indian country crime, develop relationships with residents of Indian country, and serve as a link between Indian country residents and the Federal justice process. This section also contains a “sense of Congress” statement that the Attorney General “take all appropriate actions to encourage the aggressive prosecution of all Federal crimes committed in Indian country.”

- Sec. 214 amends the Indian Tribal Justice Technical and Legal Assistance Act of 2000, [25 U.S.C. § 3653](#), to give a more permanent status within the Department of Justice to the Office of Tribal Justice.
- Sec. 221 amends Public Law 280 ([18 U.S.C. § 1161](#) and [25 U.S.C. § 1321](#)) to provide that in the “mandatory” states (AK, CA, MN, NE, OR, WI), tribes can ask the United States to reassume jurisdiction under [18 U.S.C. §§ 1152](#) and 1153. The Attorney General is allowed to accept or deny the request. Where such a request is granted, state jurisdiction remains, so there is three-way criminal jurisdiction—tribal, state, and federal. Although this provision does not achieve retrocession of state criminal jurisdiction under Public Law 280, it does open the possibility of greater tribal deputization under special BIA commissions to conduct federal law enforcement activities. It also may make it easier for tribes to argue in favor of retrocession in the future, at least if the federal government is already assuming significant law enforcement and criminal justice responsibility. Finally, it may provide a partial remedy where tribes have difficulty securing adequate law enforcement and prosecutorial services from state and local governments. This section makes it clear that state duties to provide such services to Indian country under Public Law 280 are not diminished.
- Sec. 222 authorizes the Attorney General to provide “technical and other assistance” to tribes and states to enter into cooperative agreements for cross-deputization, mutual assistance, etc. The Senate version of the bill had also authorized financial incentives for such agreements, but, unfortunately, this provision was deleted in the final bill. Experience with states such as Wisconsin shows that financial incentives can make a big difference in producing tribal-state cooperation.
- Sec. 231 amends in Indian Law Enforcement Reform Act, [25 U.S.C. § 2802\(e\)](#), to provide enhanced training and training standards for tribal law enforcement officials, and raises the age limit in order to attract more military veterans to tribal forces. It also promotes the establishment of agreements between the BIA and tribes for designation of tribal law enforcement officials as “federal law enforcement officers,” and clarifies that any tribal official with a federal commission has the status of a “federal law enforcement officer.” This provision should assist tribes, such as those in California, that have been having difficulty getting the BIA to make

such agreements and in getting states to recognize their federally commissioned police as federal officers.

- Sec. 232 amends a variety of provisions in the federal code relating to drug enforcement by including tribes along with states for purposes of education programs, law enforcement authority, cooperative agreements, etc.
- Sec. 233 amends [28 U.S.C. § 534](#) to expand tribal access to national crime information databases. This access is essential to protect tribal communities as well as the safety of tribal officers, as tribal officers need to know the criminal records of individuals they encounter. Unfortunately, some states have refused to cooperate with tribal law enforcement agencies in granting access to such information.
- Sec. 234 amends the Indian Civil Rights Act, [25 U.S.C. § 1302](#), to allow tribes to impose longer sentences under certain limited conditions. Sentences of up to three years imprisonment and \$15,000 per offense are allowable, subject to a cap of 9 years imprisonment for combined offenses, where:
 - the defendant has already been convicted of the same offense or the offense is one where the penalty is greater than one year under United States or any state law;
 - the tribe guarantees defendants the right to effective assistance of counsel as specified under federal law;
 - the tribe provides defense counsel at government expense to indigent defendants, and that defense counsel is licensed to practice law in any jurisdiction that applies appropriate professional licensing standards and “effectively ensures the competence and professional responsibility of its licensed attorneys;”
 - the tribal judge who imposes the sentence has “sufficient legal training” and is licensed to practice in any jurisdiction in the United States;
 - the tribe publicizes its criminal laws and rules, including rules on the recusal of judges;
 - the tribe maintains an audio or written recording of the proceedings.

A separate provision establishes a pilot project that would allow tribal courts to sentence their longer-term defendants to federal Bureau of Prison facilities, rather than BIA or tribal jails. After four years, the Attorney General is required to report to Congress on how this expanded sentencing authority is working and whether it should be continued. Tribes are obviously not required to opt for this enhanced authority, and may prefer (for reasons of cost and/or policy) to continue functioning under the one year/\$5,000 limit per offense. It is unclear how this provision will affect current disputes regarding stacking of one-year sentences, and how many tribal bar associations will satisfy the requirements for enhanced sentencing authority.

- Secs. 241, 242, and 243 amend the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, the Indian Tribal Justice Act of 2000, and the Omnibus

Crime Control and Safe Streets Act of 1968 to extend authorization for funding for various justice services and technical assistance programs relating to Indian country criminal justice. These services and programs include training for BIA and tribal law enforcement and judicial personnel in substance abuse prevention, investigation, and prosecution, as well as training for public defenders serving Indian country. Funding for Community Oriented Policing (COPS) grants is prioritized for parts of Indian country with highest crime rates and law enforcement staffing needs.

- Sec. 244 amends the Violent Crime Control and Law Enforcement Act of 1994 ([42 U.S.C. § 13709](#)) to create a Tribal Jails Program. The program is designed to support construction of tribal jails, tribal contracts with state and local detention facilities, and alternatives to incarceration. Grants for comprehensive public safety facilities and consortia of tribes are specifically mentioned.
- Sec. 245 amends the Indian Tribal Justice Technical and Legal Assistance Act of 2000 ([25 U.S.C. § 3681](#) et seq.) to encourage (to the “maximum extent practicable”) the appointment of Indian country residents as federal probation officers and the provision of rehabilitation services to Indian country defendants.
- Sec. 246 amends the Juvenile Justice and Delinquency Prevention Act of 1974 ([42 U.S.C. § 5783](#)) to authorize grants to tribes for programs to prevent tribal juvenile delinquency.
- Sec. 247 creates a special program for public safety in rural Alaska, enabling state-appointed Village Public Safety Officers to receive grants and training normally reserved for tribal and federal officials serving Indian country.
- Sec. 251 and 252 set up requirements and programs to enhance Indian country crime data collection by the BIA, DOJ’s Bureau of Justice Statistics, and the tribes themselves.
- Sec. 261 amends [18 U.S.C. § 4042](#) to require that tribal officials be notified when certain federal prisoners and sex offenders are released or sentenced to probation.
- Sec. 262 amends the Indian Law Enforcement Reform Act ([25 U.S.C. § 2802\(c\)\(9\)](#)) to authorize training of Indian country law enforcement officials on proper interviewing and collection of evidence in cases of sexual assault and domestic violence.
- [Sec. 263 amends the Indian Law Enforcement Reform Act, supra](#), to promote response by the Indian Health Service to requests or subpoenas from tribal or state courts to provide evidence. Nonresponsiveness by the Indian Health Service has been a particular problem in sexual assault cases.

- Sec. 265 requires the Indian Health Service, in coordination with BIA and DOJ, and in consultation with tribes and victim organizations, to develop “standardized sexual assault policies and protocol” for the IHS facilities.
- Sec. 266 requires the Comptroller of the United States to conduct a study to determine whether the Indian Health Service has the capacity “to collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution,” and to make recommendations regarding improvement in those capabilities.

Page 618: Add to material regarding conflicts of interest and the nature of the government’s role as trustee.

UNITED STATES v. JICARILLA APACHE NATION

United States Supreme Court

[131 S. Ct. 2313](#) (2011)

...

JUSTICE ALITO delivered the opinion of the Court.

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

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

I

The Jicarilla Apache Nation (Tribe) occupies a 900,000-acre reservation in northern New Mexico that was established by Executive Order in 1887. The land contains timber, gravel, and oil and gas reserves, which are developed pursuant to statutes administered by the Department of the Interior. Proceeds derived from these natural resources are held by the United States in trust for the Tribe pursuant to the American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, and other statutes.

In 2002, the Tribe commenced a breach-of-trust action against the United States in the Court of Federal Claims (CFC). The Tribe sued under the Tucker Act, 28 U.S.C. § 1491 (2006 ed. and Supp. III), and the Indian Tucker Act, § 1505, which vest the CFC with jurisdiction over claims against the Government that are founded on the Constitution, laws, treaties, or contracts of the United States. The complaint seeks monetary damages for the Government's alleged mismanagement of funds held in trust for the Tribe. The Tribe argues that the Government violated various laws, including 25 U.S.C. §§ 161a and 162a, that govern the management of funds held in trust for Indian tribes. See 88 Fed.Cl. 1, 3 (2009).

From December 2002 to June 2008, the Government and the Tribe participated in alternative dispute resolution in order to resolve the claim. During that time, the Government turned over thousands of documents but withheld 226 potentially relevant documents as protected by the attorney-client privilege, the attorney work-product doctrine, or the deliberative-process privilege.

In 2008, at the request of the Tribe, the case was restored to the active litigation docket. The CFC divided the case into phases for trial and set a discovery schedule. The first phase, relevant here, concerns the Government's management of the Tribe's trust accounts from 1972 to 1992. The Tribe alleges that during this period the Government failed to invest its trust funds properly. Among other things, the Tribe claims the Government failed to maximize returns on its trust funds, invested too heavily in short-term maturities, and failed to pool its trust funds with other tribal trusts. During discovery, the Tribe moved to compel the Government to produce the 226 withheld documents. In response, the Government agreed to withdraw its claims of deliberative-process privilege and, accordingly, to produce 71 of the documents. But the Government continued to assert the attorney-client privilege and attorney work-product doctrine with respect to the remaining 155 documents. The CFC reviewed those documents *in camera* and classified them into five categories: (1) requests for legal advice relating to trust administration sent by personnel at the Department of the Interior to the Office of the Solicitor, which directs legal affairs for the Department, (2) legal advice sent from the Solicitor's Office to personnel at the Interior and Treasury Departments, (3) documents generated under contracts between Interior and an accounting firm, (4) Interior documents concerning litigation with other tribes, and (5) miscellaneous documents not falling into the other categories.

The CFC granted the Tribe's motion to compel in part. The CFC held that communications relating to the management of trust funds fall within a "fiduciary exception" to the attorney-client privilege. Under that exception, which courts have applied in the context of common-law trusts, a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust. The CFC concluded that the trust relationship between the United States and the Indian tribes is sufficiently analogous to a common-law trust relationship that the exception should apply. Accordingly, the CFC held, the United States may not shield from the Tribe communications with attorneys relating to trust matters.

...

The Government sought to prevent disclosure of the documents by petitioning the Court of Appeals for the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. The Court of Appeals denied the petition because, in its view, the CFC correctly applied the fiduciary exception. The court held 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.” *In re United States*, 590 F.3d 1305, 1313 (C.A.Fed.2009). In qualifying its holding, the court recognized that sometimes the Government may have other statutory obligations that clash with its fiduciary duties to the Indian tribes. But because the Government had not alleged that the legal advice in this case related to such conflicting interests, the court reserved judgment on how the fiduciary exception might apply in that situation. The court rejected the Government's argument that, because its duties to the Indian tribes were governed by statute rather than the common law, it had no general duty of disclosure that would override the attorney-client privilege. The court also disagreed with the Government's contention that a case-by-case approach made the attorney-client privilege too unpredictable and would impair the Government's ability to obtain confidential legal advice.

We granted certiorari, 562 U.S. ____, 131 S.Ct. 856, 178 L.Ed.2d 622 (2011), and now reverse and remand for further proceedings.

...

II

The Federal Rules of Evidence provide that evidentiary privileges “shall be governed by the principles of the common law ... in the light of reason and experience.” Fed. Rule Evid. 501. The attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev.1961)). Its aim is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” 449 U.S., at 389, 101 S.Ct. 677; *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488 (1888).

The objectives of the attorney-client privilege apply to governmental clients. ... Unless applicable law provides other-wise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys. *Id.*, at 574 (“[G]overnmental agencies and employees enjoy the same privilege as nongovernmental counterparts”). The Tribe argues, however,

that the common law also recognizes a fiduciary exception to the attorney-client privilege and that, by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed. As preliminary matters, we consider the bounds of the fiduciary exception and the nature of the trust relationship between the United States and the Indian tribes.

A

English courts first developed the fiduciary exception as a principle of trust law in the 19th century. The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. *Wynne v. Humberston*, 27 Beav. 421, 423–424, 54 Eng. Rep. 165, 166 (1858); *Talbot v. Marshfield* 2 Dr. & Sm. 549, 550–551, 62 Eng. Rep. 728, 729 (1865). The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees. *Ibid.*; *Wynne, supra*, at 423–424, 54 Eng. Rep., at 166.

The fiduciary exception quickly became an established feature of English common law, see, e.g., *In re Mason*, 22 Ch. D. 609 (1883), but it did not appear in this country until the following century. ...

The leading American case on the fiduciary exception is *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del.Ch.1976). In that case, the beneficiaries of a trust estate sought to compel the trustees to reimburse the estate for alleged breaches of trust. The beneficiaries moved to compel the trustees to produce a legal memorandum related to the administration of the trust that the trustees withheld on the basis of attorney-client privilege. The Delaware Chancery Court, observing that “American case law is practically nonexistent on the duty of a trustee in this context,” looked to the English cases. *Id.*, at 712. Applying the common-law fiduciary exception, the court held that the memorandum was discoverable. It identified two reasons for applying the exception.

First, the court explained, the trustees had obtained the legal advice as “mere representative[s]” of the beneficiaries because the trustees had a fiduciary obligation to act in the beneficiaries' interest when administering the trust. *Ibid.* For that reason, the beneficiaries were the “real clients” of the attorney who had advised the trustee on trust-related matters, and therefore the attorney-client privilege properly belonged to the beneficiaries rather than the trustees. *Id.*, at 711–712. The court based its “real client” determination on several factors: (1) when the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust assets. ...The court distinguished between “legal advice procured at the trustee's *own* expense and for his *own* protection,” which would remain privileged, “and the situation

where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake.” *Ibid.* In the latter case, the fiduciary exception applied, and the trustees could not withhold those attorney-client communications from the beneficiaries.

Second, the court concluded that the trustees' fiduciary duty to furnish trust-related information to the beneficiaries outweighed their interest in the attorney-client privilege. “The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship,” the court explained, “is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust.” *Id.*, at 714. Because more information helped the beneficiaries to police the trustees' management of the trust, disclosure was, in the court's judgment, “a weightier public policy than the preservation of confidential attorney-client communications.” *Ibid.*

The Federal Courts of Appeals apply the fiduciary exception based on the same two criteria. See, e.g., *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (C.A.2 1997). ... Not until the decision below had a federal appellate court held the exception to apply to the United States as trustee for the Indian tribes.

B

In order to apply the fiduciary exception in this case, the Court of Appeals analogized the Government to a private trustee. 590 F.3d, at 1313. We have applied that analogy in limited contexts, see, e.g., *United States v. Mitchell*, 463 U.S. 206, 226, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), but that does not mean the Government resembles a private trustee in every respect. On the contrary, this Court has previously noted that the relationship between the United States and the Indian tribes is distinctive, “different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise.” *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254, 56 S.Ct. 212, 80 L.Ed. 202 (1935) (emphasis added). “The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship.” *Cherokee Nation of Okla. v. United States*, 21 Cl.Ct. 565, 573 (1990) (emphasis added).

The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a “trust,” see, e.g., 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law. See *United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (*Navajo I*) (“[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions”). As we have recognized in prior cases, Congress may style its relations with the Indians a “trust” without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is “limited” or “bare” compared to a trust relationship between private parties at common law. *United States v. Mitchell*, 445 U.S.

535, 542, (1980) (*Mitchell I*); *Mitchell II*, *supra*, at 224, 103 S.Ct. 2961.¹²

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

Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169, n. 18, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (“The United States retains plenary authority to divest the tribes of any attributes of sovereignty”); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (“Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government”); *Winton v. Amos*, 255 U.S. 373, 391(1921) (“Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government”); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (“The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts”); see also *United States v. Candelaria*, 271 U.S. 432, 439 (1926); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911).

Because the Indian trust relationship represents an exercise of that authority, we have explained that the Government “has a real and direct interest” in the guardianship it exercises over the Indian tribes; “the interest is one which is vested in it as a sovereign.” *United States v. Minnesota*, 270 U.S. 181, 194, 46 S.Ct. 298, 70 L.Ed. 539 (1926). This is especially so because the Government has often structured the trust relationship to pursue its own policy goals. Thus, while trust administration “relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its

¹² [4] “There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term ‘trust’ is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them.” Restatement (Second) of Trusts § 4, Introductory Note, p. 15 (1957) (hereinafter Restatement 2d); see also *Begay v. United States*, 16 Cl.Ct. 107, 127, n. 17 (1987) (“[T]he provisions relating to private trustees and fiduciaries, while useful as analogies, cannot be regarded as finally dispositive in a government-Indian trustee-fiduciary relationship”).

plan of distribution is distinctly an interest of the United States.” *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 56 L.Ed. 820 (1912); see also *Candelaria, supra*, at 443–444, 46 S.Ct. 561.

In *Heckman*, the Government brought suit to cancel certain conveyances of allotted lands by members of an Indian tribe because the conveyances violated restrictions on alienation imposed by Congress. This Court explained that the Government brought suit as the representative of the very Indian grantors whose conveyances it sought to cancel, and those Indians were thereby bound by the judgment. 224 U.S., at 445–446, 32 S.Ct. 424. But while it was formally acting as a trustee, the Government was in fact asserting its own sovereign interest in the disposition of Indian lands, and the Indians were precluded from intervening in the litigation to advance a position contrary to that of the Government. *Id.*, at 445, 32 S.Ct. 424. Such a result was possible because the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law.

We do not question “the undisputed existence of a general trust relationship between the United States and the Indian people.” *Mitchell II*, 463 U.S., at 225, 103 S.Ct. 2961. The Government, following “a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,” *Seminole Nation v. United States*, 316 U.S. 286, 296–297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942), obligations “to the fulfillment of which the national honor has been committed,” *Heckman, supra*, at 437, 32 S.Ct. 424. Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. See *Mitchell I*, 445 U.S., at 544, 100 S.Ct. 1349 (Congress intended the United States to hold land “‘in trust’” under the General Allotment Act “‘simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation’”); *Navajo I*, 537 U.S., at 507–508, 123 S.Ct. 1079 (Indian Mineral Leasing Act imposes no “detailed fiduciary responsibilities” nor is the Government “expressly invested with responsibility to secure ‘the needs and best interests of the Indian owner’”).

In other cases, we have found that particular “statutes and regulations ... clearly establish fiduciary obligations of the Government” in some areas. *Mitchell II, supra*, at 226, 103 S.Ct. 2961; see also *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). Once federal law imposes such duties, the common law “could play a role.” *United States v. Navajo Nation*, 556 U.S. 287, —, 129 S.Ct. 1547, 1558, 173 L.Ed.2d 429 (2009) (*Navajo II*). We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed. See *White Mountain Apache Tribe, supra*, at 475–476, 123 S.Ct. 1126. But the applicable statutes and regulations “establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” *Mitchell II, supra*, at 224, 103 S.Ct. 2961. When “the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government’s ‘control’ over [Indian assets] nor common-law trust principles matter.” *Navajo II, supra*, at —, 129 S.Ct., at

1558.¹³ The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.¹⁴

Over the years, we have described the federal relationship with the Indian tribes using various formulations. The Indian tribes have been called “domestic dependent nations,” *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831), under the “tutelage” of the United States, *Heckman, supra*, at 444, 32 S.Ct. 424, and subject to “the exercise of the Government's guardianship over ... their affairs,” *United States v. Sandoval*, 231 U.S. 28, 48, 34 S.Ct. 1, 58 L.Ed. 107 (1913). These concepts do not necessarily correspond to a common-law trust relationship. See, e.g., Restatement 2d, § 7 (“A guardianship is not a trust”). That is because Congress has chosen to structure the Indian trust relationship in different ways. We will apply common-law trust principles where Congress has indicated it is appropriate to do so. For that reason, the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.

III

In this case, the Tribe's claim arises from 25 U.S.C. §§ 161–162a and the American Indian Trust Fund Management Reform Act of 1994, § 4001 *et seq.* These provisions define “the trust responsibilities of the United States” with respect to tribal funds. § 162a(d). The Court of Appeals concluded that the trust relationship between the United States and the Indian tribes, outlined in these and other statutes, is “sufficiently similar to a private trust to justify applying the fiduciary exception.” 590 F.3d, at 1313. We disagree.

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

A

The Court of Appeals applied the fiduciary exception based on its determination that the Tribe rather than the Government was the “real client” with respect to the Government attorneys' advice. *Ibid.* In cases applying the fiduciary exception, courts identify the “real client” based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. *Riggs*, 355 A.2d, at 711–712. Applying these factors, we conclude that the United States does not

¹³ [5] Thus, the dissent's reliance on the Government's “managerial control,” *post*, at 2335 (opinion of SOTOMAYOR, J.), is misplaced.

¹⁴ [6] Cf. Restatement 2d, § 25, Comment *a* (“[A]lthough the settlor has called the transaction a trust[,] no trust is created unless he manifests an intention to impose duties which are enforceable in the courts”).

obtain legal advice as a “mere representative” of the Tribe; nor is the Tribe the “real client” for whom that advice is intended. See *ibid.*

Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. ...

The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Undoubtedly, Congress intends the Indian tribes to benefit from the Government's management of tribal trusts. That intention represents “a humane and self imposed policy” based on felt “moral obligations.” *Seminole Nation*, 316 U.S., at 296–297, 62 S.Ct. 1049. This statutory purpose does not imply a full common-law trust, however. ... We have said that “the United States continue[s] as trustee to have an active interest” in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States. *McKay v. Kalyton*, 204 U.S. 458, 469 (1907).

In some prior cases, we have found that the Government had established the trust relationship in order to impose its own policy on Indian lands. See *Mitchell I*, 445 U.S., at 544, 100 S.Ct. 1349 (Congress “intended that the United States ‘hold the land ... in trust’ ... because it wished to prevent alienation of the land”). In other cases, the Government has invoked its trust relationship to prevent state interference with its policy toward the Indian tribes. See *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *Candelaria*, 271 U.S., at 442–444, 46 S.Ct. 561; *United States v. Kagama*, 118 U.S. 375, 382–384 (1886). And the exercise of federal authority thereby established has often been “left under the acts of Congress to the discretion of the Executive Department.” *Heckman, supra*, at 446, 32 S.Ct. 424. In this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes. See *United States v. Rickert*, 188 U.S. 432, 443 (1903) (trust relationship “ ‘authorizes the adoption on the part of the United States of such policy as their own public interests may dictate’ ” (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886))).¹⁵

¹⁵ [8] Congress has structured the trust relationship to reflect its considered judgment about how the Indians ought to be governed. For example, the Indian General Allotment Act of 1887, 24 Stat. 388, was “a comprehensive congressional attempt to change the role of Indians in American society.” F. Cohen, *Handbook of Federal Indian Law* § 1.04, p. 77 (2005) (hereinafter Cohen). Congress aimed to promote the assimilation of Indians by dividing Indian lands into individually owned allotments. The federal policy aimed “to substitute a new individual way of life for the older Indian communal way.” *Id.*, at 79. The Indian Reorganization Act of 1934, 48 Stat. 984, marked a shift away “from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.” Cohen § 1.05, at 84. The Act prohibited further allotment and restored tribal ownership. *Id.*, at 86. The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, and the Tribal Self-Governance Act of 1994, 108 Stat. 4270, enabled tribes to run health, education, economic development, and social programs for themselves. Cohen § 1.07, at 103. This strengthened self-government supported Congress' decision to authorize tribes to withdraw trust funds from Federal Government control and place the funds under tribal control. American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, 4242–4244; see 25 U.S.C. §§ 4021–4029 (2006 ed. and Supp. III). The control over the Indian tribes that has been exercised by the United States pursuant to the trust relationship—forcing the division of tribal lands, restraining alienation—does not correspond to the fiduciary duties of a common-law trustee. Rather, the trust relationship has been altered and administered as an instrument of federal policy.

We cannot agree with the Tribe and its *amici* that “[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role,” Brief for Respondent 9, or that “the United States’ interests in trust administration were identical to the interests of the tribal trust fund beneficiaries,” Brief for National Congress of American Indians et al. as *Amici Curiae* 5. The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. ... For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a “personal” rather than a fiduciary capacity. See *Riggs*, 355 A.2d, at 711.

Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication. When “multiple interests” are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down. *Id.*, at 714. That principle applies with particular force to the Government. Because of the multiple interests it must represent, “the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary’s consent.” *Nevada v. United States*, 463 U.S. 110, 128 (1983).

As the Court of Appeals acknowledged, the Government may be obliged “to balance competing interests” when it administers a tribal trust. 590 F.3d, at 1315. The Government may need to comply with other statutory duties, such as the environmental and conservation obligations that the Court of Appeals discussed. See *id.*, at 1314–1315. The Government may also face conflicting obligations to different tribes or individual Indians. ... The Government may seek the advice of counsel for guidance in balancing these competing interests. Indeed, the point of consulting counsel may be to determine whether conflicting interests are at stake.

The Court of Appeals sought to accommodate the Government’s multiple obligations by suggesting that the Government may invoke the attorney-client privilege if it identifies “a specific competing interest” that was considered in the particular communications it seeks to withhold. 590 F.3d, at 1313. But the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable.

We have said that for the attorney-client privilege to be effective, it must be predictable. See *Jaffee v. Redmond*, 518 U.S. 1, 18, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996); *Upjohn*, 449 U.S., at 393, 101 S.Ct. 677. If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. The Government will not always be able to predict what considerations qualify as a “specific competing interest,” especially in advance of receiving counsel’s advice. Forcing the Government to monitor all the considerations contained in each communication with counsel would render its attorney-

client privilege “little better than no privilege at all.” *Ibid.*

B

The Court of Appeals also decided the fiduciary exception properly applied to the Government because “the fiduciary has a duty to disclose all information related to trust management to the beneficiary.” 590 F.3d, at 1312. In general, the common-law trustee of an irrevocable trust must produce trust-related information to the beneficiary on a reasonable basis, though this duty is sometimes limited and may be modified by the settlor. Restatement (Third) of Trusts § 82 (2005) (hereinafter Restatement 3d); Bogert §§ 962, 965.¹⁶ The fiduciary exception applies where this duty of disclosure overrides the attorney-client privilege. *United States v. Mett*, 178 F.3d 1058, 1063 (C.A.9 1999) (“[T]he fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle”).

The United States, however, does not have the same common-law disclosure obligations as a private trustee. As we have previously said, common-law principles are relevant only when applied to a “specific, applicable, trust-creating statute or regulation.” *Navajo II*, 556 U.S., at —, 129 S.Ct., at 1550. The relevant statute in this case is 25 U.S.C. § 162a(d), which delineates “trust responsibilities of the United States” that the Secretary of the Interior must discharge. The enumerated responsibilities include a provision identifying the Secretary’s obligation to provide specific information to tribal account holders: The Secretary must “suppl[y] account holders with periodic statements of their account performance” and must make “available on a daily basis” the “balances of their account.” § 162a(d)(5). The Secretary has complied with these requirements by adopting regulations that instruct the Office of Trust Fund Management to provide each tribe with a quarterly statement of performance, 25 CFR § 115.801 (2010), that identifies “the source, type, and status of the trust funds deposited and held in a trust account; the beginning balance; the gains and losses; receipts and disbursements; and the ending account balance of the quarterly statement period,” § 115.803. Tribes may request more frequent statements or further “information about account transactions and balances.” § 115.802.

¹⁶ [9] We assume for the sake of argument that an Indian trust is properly analogized to an irrevocable trust rather than to a revocable trust. A revocable trust imposes no duty of the trustee to disclose information to the beneficiary. “[W]hile a trust is revocable, only the person who may revoke it is entitled to receive information about it from the trustee.” Bogert § 962, at 25, § 964; Restatement 3d, § 74, Comment *e*, at 31 (“[T]he trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute”). In many respects, Indian trusts resemble revocable trusts at common law because Congress has acted as the settlor in establishing the trust and retains the right to alter the terms of the trust by statute, even in derogation of tribal property interests. See *Winton v. Amos*, 255 U.S. 373, 391, 56 Ct.Cl. 472, 41 S.Ct. 342, 65 L.Ed. 684 (1921) (“It is thoroughly established that Congress has plenary authority over the Indians ... and full power to legislate concerning their tribal property”); Cohen § 5.02 [4], at 401–403. The Government has not advanced the argument that the relationship here is similar to a revocable trust, and the point need not be addressed to resolve this case.

The common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government's disclosure obligation to the Tribe. The Tribe emphasizes, Brief for Respondent 34, that the statute identifies the list of trust responsibilities as nonexhaustive. See § 162a(d) (trust responsibilities “are not limited to” those enumerated). ...Whatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. When Congress provides specific statutory obligations, we will not read a “catchall” provision to impose general obligations that would include those specifically enumerated. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141–142 (1985).

... Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations.¹⁷

By law and regulation, moreover, the documents at issue in this case are classed “the property of the United States” while other records are “the property of the tribe.” 25 CFR § 115.1000 (2010); see also §§ 15.502, 162.111, 166.1000. Just as the source of the funds used to pay for legal advice is highly relevant in identifying the “real client” for purposes of the fiduciary exception, we consider ownership of the resulting records to be a significant factor in deciding who “ought to have access to the document.” See *Riggs*, 355 A.2d, at 712. In this case, that privilege belongs to the United States.¹⁸

* * *

Courts and commentators have long recognized that “[n]ot every aspect of private trust law can properly govern the unique relationship of tribes and the federal government.” Cohen § 5.02[2], at 434–435. The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the Government's administration of Indian trusts. The Court of Appeals denied the Government's petition for a writ of mandamus based on its erroneous view to the contrary. We leave it for that court to determine whether the standards for granting the writ are met in light of our opinion.¹⁹ We

¹⁷ [10] Our reading of 25 U.S.C. § 162a(d) receives additional support from another statute in which Congress expressed its understanding that the Government retains evidentiary privileges allowing it to withhold information related to trust property from Indian tribes. The Indian Claims Limitation Act of 1982, 96 Stat. 1976, addressed Indian claims that the claimants desired to have litigated by the United States. If the Secretary of the Interior decided to reject a claim for litigation, he was required to furnish a report to the affected Indian claimants and, upon their request, to provide “any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim.” *Id.*, at 1978. That Congress authorized the withholding of information on grounds of privilege makes us doubt that Congress understood the Government's trust obligations to override so basic a privilege as that between attorney and client.

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

¹⁹ [12] If the Court of Appeals declines to issue the writ, we assume that the CFC on remand will follow our holding here regarding the applicability of the fiduciary exception in the present context.

therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

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

I agree with the Court that the Government is not an ordinary trustee. See *ante*, at 2327–2328. Unlike a private trustee, the Government has its own “distinct interest” in the faithful carrying out of the laws governing the conduct of tribal affairs. *Heckman v. United States*, 224 U.S. 413, 437 (1912). This unique “national interest,” *ibid.*, obligates Government attorneys, in rendering advice, to make their own “independent evaluation of the law and facts” in an effort “to arrive at a single position of the United States,” App. to Pet. for Cert. 124a (Letter from Attorney General Griffin B. Bell to Secretary of the Interior Cecil D. Andrus (May 31, 1979)). “For that reason,” as the Court explains, “the Government seeks legal advice in a ‘personal’ rather than a fiduciary capacity.” *Ante*, at 2327–2328. The attorney-client privilege thus protects the Government’s communications with its attorneys from disclosure.

Going beyond attorney-client communications, the Court holds that the Government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.” *Ante*, at 2325. The Court therefore concludes that the trust relationship described by 25 U.S.C. § 162a does not include the usual “common-law disclosure obligations.” *Ante*, at 2329. Because it is unnecessary to decide what information *other than* attorney-client communications the Government may withhold from the beneficiaries of tribal trusts, I concur only in the Court’s judgment.

JUSTICE SOTOMAYOR, dissenting.

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

The Court’s decision to the contrary rests on false factual and legal premises and deprives the Nation and other Indian tribes of highly relevant evidence in scores of pending cases seeking relief for the Government’s alleged mismanagement of their trust funds. But

perhaps more troubling is the majority's disregard of our settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes. Indeed, aspects of the majority's opinion suggest that common-law principles have little or no relevance in the Indian trust context, a position this Court rejected long ago. Although today's holding pertains only to a narrow evidentiary issue, I fear the upshot of the majority's opinion may well be a further dilution of the Government's fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes.

I

A

Federal Rule of Evidence 501 provides in relevant part that “the privilege of a ... government ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Rule 501 “was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them.” *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 804, n. 25 (1984).

As the majority notes, the purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But the majority neglects to explain that the privilege is a limited exception to the usual rules of evidence requiring full disclosure of relevant information. ...Because it “has the effect of withholding relevant information from the factfinder,” courts construe the privilege narrowly. *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). It applies “only where necessary to achieve its purpose,” *ibid.*; “[w]here this purpose ends, so too does the protection of the privilege,” *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (C.A.3 2007).

...

The majority correctly identifies the two rationales courts have articulated for applying the fiduciary exception, *ante*, at 2322, but its description of those rationales omits a number of important points. With regard to the first rationale, courts have characterized the trust beneficiary as the “real client” of legal advice relating to trust administration because such advice, provided to a trustee to assist in his management of the trust, is ultimately for the benefit of the trust beneficiary, rather than for the trustee in his personal capacity. ...If the advice was rendered for the benefit of the beneficiary and not for the trustee in any personal capacity, the “real client” of the advice is the beneficiary.

As to the second rationale for the fiduciary exception—rooted in the trustee's fiduciary duty to disclose all information related to trust management—the majority glosses over the fact that this duty of disclosure is designed “to enable the beneficiary to

prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.” Third Restatement § 82, Comment [a\(2\), at 184](#). ...The majority fails to appreciate the important oversight and accountability interests that underlie this rationale for the fiduciary exception, or explain why they operate with any less force in the Indian trust context.

B

The question in this case is whether the fiduciary exception applies in the Indian trust context such that the Government may not rely on the attorney-client privilege to withhold from the Nation communications between the Government and its attorneys relating to the administration of the Nation's trust fund accounts. Answering that question requires a proper understanding of the nature of the Government's trust relationship with Indian tribes, particularly with regard to its management of Indian trust funds.

Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831) (Marshall, C. J.). Our decisions over the past century have repeatedly reaffirmed this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); see *United States v. Mitchell*, 463 U.S. 206, 225–226 (1983) (*Mitchell II*) (collecting cases and noting “the undisputed existence of a general trust relationship between the United States and the Indian people”). Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.” F. Cohen, *Handbook of Federal Indian Law* § 5.04[4][a], pp. 420–421 (2005 ed.) (hereinafter Cohen).²⁰

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

The system of trusteeship and federal management of Indian funds originated with congressional enactments in the 19th century directing the Government to hold and manage Indian tribal funds in trust. See, e.g., Act of June 9, 1837, 5 Stat. 135; see also *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*,

²⁰ [2] See, e.g., 25 U.S.C. § 458cc(a) (directing Secretary of the Interior to enter into funding agreements with Indian tribes “in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people”); § 3701 (finding that the Government “has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”); 20 U.S.C. § 7401 (“It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children”).

H.R. Rep. No. 102–449, p. 6 (1992) (hereinafter *Misplaced Trust*). Through these and later congressional enactments, the United States has come to manage almost \$3 billion in tribal funds and collects close to \$380 million per year on behalf of tribes. Cohen § 5.03[3][b], at 407.²¹

Today, numerous statutes outline the Federal Government's obligations as trustee in managing Indian trust funds. In particular, the Secretary of the Treasury, at the request of the Secretary of the Interior, must invest “[a]ll funds held in trust by the United States ... to the credit of Indian tribes” in certain securities “suitable to the needs of the fund involved.” 25 U.S.C. § 161a(a). The Secretary of the Interior may deposit in the Treasury and pay mandatory interest on Indian trust funds when “the best interests of the Indians will be promoted by such deposits, in lieu of investments.” § 161. Similarly, the Secretary of the Interior may invest tribal trust funds in certain public debt instruments “if he deems it advisable and for the best interest of the Indians.” § 162a(a). And Congress has set forth a nonexhaustive list of the Secretary of the Interior's “trust responsibilities” with respect to Indian trust funds, which include a series of accounting, auditing, management, and disclosure obligations. § 162a(d). These and other statutory provisions²² give the United States “full responsibility to manage Indian [trust fund accounts] for the benefit of the Indians.” *Mitchell II*, 463 U.S., at 224, 103 S.Ct. 2961.

“[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over [trust assets] belonging to Indians.” *Id.*, at 225, 103 S.Ct. 2961. Under the statutory regime described above, the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries. As a result, “[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [Tribe]), and a trust corpus (Indian ... funds).” *Ibid.* Unlike in other contexts where the statutory scheme creates only a “bare trust” entailing only limited responsibilities, *United States v. Navajo Nation*, 537 U.S. 488, 505 (2003) (*Navajo I*) (internal quotation marks omitted), the statutory regime governing the United States' obligations with regard to Indian trust funds “bears the hallmarks of a conventional fiduciary relationship,” *United States v. Navajo Nation*, 556 U.S. 287, —, 129 S.Ct. 1547, 1558, 173 L.Ed.2d 429 (2009) (*Navajo II*) (internal quotation marks omitted); see *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (“[T]he law is ‘well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity’ ”) (quoting *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707

²¹ [3] Trust fund accounts are “comprised mainly of money received through the sale or lease of trust lands and include timber stumpage, oil and gas royalties, and agriculture fees,” as well as “judgment funds awarded to tribes.” H.R. Rep. No. 103–778, p. 9 (1994). The Nation's claims involve proceeds derived from the Government's management of the Nation's timber, gravel, and other resources and leases of reservation lands. The Government has held these funds in trust for the Nation since the late 1880's. See App. to Pet. for Cert. 98a–100a, 105a.

²² [4] See, e.g., 25 U.S.C. § 4011(a) (requiring 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”); § 4041(1) (creating the Office of Special Trustee for American Indians “to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes”).

(1987)).

...

II

In light of Federal Rule of Evidence 501 and the Government's role as a conventional fiduciary in managing Indian trust fund accounts, I would hold as a matter of federal common law that the fiduciary exception is applicable in the Indian trust context, and thus the Government may not rely on the attorney-client privilege to withhold communications related to trust management. As explained below, the twin rationales for the fiduciary exception fully support its application in this context. The majority's conclusion to the contrary rests on flawed factual and legal premises.

A

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

The majority correctly notes that, as a general matter, the Government has sovereign interests in managing Indian trusts that distinguish it from a private trustee. See, e.g., *United States v. Minnesota*, 270 U.S. 181, 194, 46 S.Ct. 298, 70 L.Ed. 539 (1926).

...

In the specific context of Indian trust fund management, however, federal Indian policy entirely aligns the interests of the Government as trustee and the Indian tribe as beneficiary. As explained above, Congress has enacted an extensive network of statutes regulating the Government's management of Indian trust fund accounts. That statutory framework establishes a “conventional fiduciary relationship” in the context of Indian trust fund administration. *Navajo Nation II*, 556 U.S., at —, 129 S.Ct., at 1558 (internal quotation marks omitted); see *supra*, at 2321–2322.

As a conventional fiduciary, the Government's management of Indian trust funds must “be judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S., at 296–297, 62 S.Ct. 1049. Among the most fundamental fiduciary obligations of a trustee is “to administer the trust solely in the interest of the beneficiaries.” 2A A. Scott & W. Fratcher, *Law of Trusts* § 170, p. 311 (4th ed. 1987)...

Because federal Indian policy requires the Government to act strictly as a

conventional fiduciary in managing the Nation's trust funds, the Government acts in a “representative” rather than “persona[1]” capacity when managing the Nation's trust funds. *Riggs*, 355 A.2d, at 713. By law, the Government cannot pursue any “independent” interest, *ante*, at 2327–2328, distinct from its responsibilities as a fiduciary. ... In other words, any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration. It naturally follows, then, that when the Government seeks legal advice from government attorneys relating to the management of the Nation's trust funds, the “real client” of the advice for purposes of the fiduciary exception is the Nation, not the Government.

This conclusion holds true even though government attorneys are “paid out of congressional appropriations at no cost to the [Nation].” *Ante*, at 2326. As noted above, although the source of funding for legal advice may be relevant, the ultimate inquiry is for whose benefit the legal advice was rendered. See *supra*, at 2319–2320. And, for all the emphasis the majority places on the funding source here, see *ante*, at 2322, 2326, the majority never suggests that the fiduciary exception would apply if Congress amended federal law to permit Indian tribes to pay government attorneys out of their own trust funds.²³

The majority also suggests that, even if the interests of the United States and Indian tribes may be equivalent in some contexts, that “equivalence” “breaks down” when there are “multiple interests” involved in a trust relationship. *Ante*, at 2327–2328. ...

Preliminarily, while the Government in certain circumstances may have sovereign obligations that conflict with its duties as a fiduciary for Indian tribes, see, e.g., *Nevada v. United States*, 463 U.S. 110 (1983),²⁴ the existence of competing interests is not unique to the Government as trustee. Indeed, the issue of competing interests arises frequently in the private trust context. ... In such circumstances, “a trustee—and ultimately a court—may need to provide some response that offers a compromise between the confidentiality or

²³ [6] The majority also states that ownership of the requested documents is “a significant factor” in deciding whether the fiduciary exception applies, *ante*, at 2330, but the only case it cites as support deals with the source of payment for the legal advice, not the ownership of the documents. See *ibid.* (citing *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712 (Del.Ch.1976)).

²⁴ [7] In *Nevada*, the Government represented certain tribes in litigation involving water rights even though it was also required by statute to represent the water rights of a reclamation project. See 463 U.S., at 128, 103 S.Ct. 2906 (noting 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”). Because of this dual litigating responsibility, we noted 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.” *Ibid.* We thus observed in the context of that case that “the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.” *Ibid.* We expressly distinguished the context “where only a relationship between the Government and the tribe is involved.” *Id.*, at 142, 103 S.Ct. 2906. In that context, we acknowledged that “the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States.” *Ibid.*

privacy concerns of some and the interest-protection needs of others.” *Id.*, § 82, Comment *f*, at 188. ...

The majority's categorical rejection of the fiduciary exception in the Indian trust context sweeps far broader than necessary. ...

The majority's categorical approach fails to appreciate that privilege determinations are by their very nature made on a case-by-case—indeed, document-by-document—basis. ...

Rather than fashioning a blanket rule against application of the fiduciary exception in the Indian trust context, I would, consistent with Rule 501 and principles of judicial restraint, decide the question solely on the facts before us. See *Upjohn*, 449 U.S., at 386, 101 S.Ct. 677 (noting that “we sit to decide concrete cases and not abstract propositions of law” and “declin[ing] to lay down a broad rule or series of rules to govern all conceivable future questions in this area”). On those facts, the fiduciary exception applies to the communications in this case.

B

Like the “real client” rationale, the second rationale for the fiduciary exception, rooted in a trustee's fiduciary duty to disclose all matters relevant to trust administration to the beneficiary, fully supports disclosure of the communications in this case. ... Because the statutory scheme requires the Government to act as a conventional fiduciary in managing the Nation's trust funds, the Government's fiduciary duty to keep the Nation informed of matters relating to trust administration includes the concomitant duty to disclose attorney-client communications relating to trust fund management. See Third Restatement § 82, Comment *f*, at 187–188; Restatement of the Law (Third) Governing Lawyers § 84, pp. 627–628 (1998).

Notably, the majority does not suggest that the Nation needs less information than a private beneficiary to exercise effective oversight over the Government as trustee. Instead, the majority contends that the Nation is entitled to less disclosure because the Government's disclosure obligations are more limited than a private trustee. In particular, the majority states that the Government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute,” and thus the Nation “must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.” *Ante*, at 2325. The majority cites a single statutory provision and its implementing regulations as “defin[ing] the Government's disclosure obligation to the [Nation].” *Ante*, at 2329–2330; see *ante*, at 2329–2330 (citing 25 U.S.C. § 162a(d)(5) and 25 CFR §§ 115.801–115.803 (2010)). Because those “narrowly defined disclosure obligations” do not provide Indian tribes with a specific statutory right to disclosure of attorney-client communications relating to trust administration, *ante*, at 2330, the majority concludes that the Government has no duty to disclose those communications to the Nation.

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

For example, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), we construed a statute that vested the Government with discretionary authority to “use” trust property for certain purposes as imposing a concomitant duty to preserve improvements that had previously been made to the land. *Id.*, at 475, 123 S.Ct. 1126 (quoting 74 Stat. 8). Even though the statute did not “expressly subject the Government to duties of management and conservation,” we construed the Government's obligations under the statute by reference to “elementary trust law,” which “confirm[ed] the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” 537 U.S., at 475, 123 S.Ct. 1126. Similarly, in *Seminole Nation*, we relied on general trust principles to conclude that the Government had a fiduciary duty to prevent misappropriation of tribal trust funds by corrupt members of a tribe, even though no specific statutory or treaty provision expressly imposed such a duty. See 316 U.S., at 296, 62 S.Ct. 1049.²⁵

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

Contrary to the majority's view, the Government's disclosure obligations are not limited solely to the “narrowly defined disclosure obligations” set forth in § 162a(d)(5) and its implementing regulations, *ante*, at 2329–2330; rather, given that the statutory regime requires the Government to act as a conventional fiduciary in managing Indian trust funds, the Government's disclosure obligations include those of a fiduciary under common-law trust principles. ...

This conclusion, moreover, is supported by the plain text of the very statute cited by

²⁵ [8] To be sure, in decisions involving the jurisdiction of the Court of Federal Claims under the Tucker Act, we have explained that the jurisdictional analysis “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *Navajo I*, 537 U.S., at 506, 123 S.Ct. 1079. But even assuming *arguendo* that those jurisdictional decisions have relevance here, they do not stand for the proposition that the Government's fiduciary duties are defined exclusively by express statutory provisions. Indeed, those decisions relied specifically on general trust principles to determine whether the relevant statutory scheme permitted a damages remedy, a prerequisite for jurisdiction under the Tucker Act. See, e.g., *Mitchell II*, 463 U.S., at 226, 103 S.Ct. 2961 (noting that common-law trust sources establish that “a trustee is accountable in damages for breaches of trust” and that, “[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties”); see also *Navajo II*, 556 U.S., at —, 129 S.Ct., at 1558 (affirming that general “trust principles ... could play a role in inferring that the trust obligation is enforceable by damages” (internal quotation marks and brackets omitted)).

the majority. Section 162a(d), which was enacted as part of the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 108 Stat. 4239, sets forth eight “trust responsibilities of the United States.” But that provision also specifically states that the Secretary of the Interior’s “proper discharge of the trust responsibilities of the United States shall include (*but are not limited to*) ” those specified duties. 25 U.S.C. § 162a(d) (emphasis added). By expressly including the italicized language, Congress recognized that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds.²⁶ Indeed, Title I of the 1994 Act is entitled “*Recognition of Trust Responsibility*,” 108 Stat. 4240 (emphasis added), and courts have similarly observed that the Act “recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians.” *Cobell*, 240 F.3d, at 1098; see also H.R. Rep. No. 103–778, p. 9 (1994) (“The responsibility for management of Indian Trust Funds by the [Government] has been determined through a series of court decisions, treaties, and statutes”). That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act.²⁷

The majority requires the Nation to “point to a right conferred by statute” to the attorney-client communications at issue, *ante*, at 2325, and finding none, denies the Nation access to those communications. The upshot of that decision, I fear, may very well be to reinvigorate the position of the dissenting Justices in *White Mountain Apache* and *Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government’s fiduciary obligations to Indian tribes. See *White Mountain Apache*, 537 U.S., at 486–487, 123 S.Ct. 1126 (THOMAS, J., dissenting); *Mitchell II*, 463 U.S., at 234–235, 103 S.Ct. 2961 (POWELL, J., dissenting). That approach was wrong when *Mitchell II* was decided nearly 30 years ago, and it is wrong today. Under our governing precedents, common-law trust

²⁶ [9] The majority invokes the canon against superfluity and argues that the “catchall” phrase (by which it means the “shall include (but are not limited to)” language) cannot be read to “include a general common-law duty to disclose all information related to the administration of Indian trusts” because doing so would “impose general obligations that would include those specifically enumerated.” *Ante*, at 2330. But the flaw in the majority’s argument is that it misperceives the function of the relevant language. Rather than serving as a “catchall” provision that affirmatively “incorporate[s]” common-law trust duties into § 162a(d), *ante*, at 2329–2330, that language simply makes clear that § 162a(d) does not set forth an exhaustive list of the Government’s trust responsibilities in managing Indian trust funds; nothing in that language itself imports any substantive obligations into the statute.

²⁷ [10] The majority also contends that its reading of § 162a(d) is supported by a provision in the Indian Claims Limitation Act of 1982 (ICLA), 96 Stat. 1976, which provided that if the Secretary of the Interior rejected a claim for litigation by an Indian claimant, he was required to provide upon request “any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim.” § 5(b), *id.*, at 1978. According to the majority, this provision reflected Congress’ understanding that “the Government retains evidentiary privileges allowing it to withhold information related to trust property from Indian tribes.” *Ante*, at 2330, n. 11. But this provision cannot bear the weight the majority places on it. Even putting aside the undisputed fact that the ICLA is inapplicable to the claims in this case, the majority’s reliance on the ICLA provision fails to recognize that documents subject to the fiduciary exception are, under the “real client” rationale, *per se* nonprivileged. See, e.g., *Mett*, 178 F.3d, at 1063. Accordingly, if anything, the ICLA’s requirement that the Government disclose “nonprivileged” materials to Indian claimants supports the conclusion that Congress intended communications related to trust fund management to be disclosed to Indian tribes.

principles play an important role in defining the Government's fiduciary duties where, as here, the statutory scheme establishes a conventional fiduciary relationship. Applying those principles in this context, I would hold that the fiduciary exception is fully applicable to the communications in this case.

...

III

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

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

But perhaps even more troubling than the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting

the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes. Because there is no warrant in precedent or reason for reaching that result, I respectfully dissent.

Page 618: Update on *Cobell* Settlement Agreement.

On June 20, 2011, the District Court held a Fairness Hearing during which the court heard arguments from the attorneys on behalf of the parties regarding the terms of the proposed settlement. *Cobell v. Salazar*, Transcripts of Fairness Hearings, Case No. 1:96-CV-01285 (filed July 5, 2011). On July 27, 2011, Judge Thomas F. Hogan issued an Order granting final approval for the Settlement and directing the Clerk to enter Final Judgment in accordance with the Order. *Cobell v. Salazar*, Order Granting Final Approval to Settlement, No.1: 96CV01285 (TFH) (D.D.C. July 27, 2011). Among other things, the court expressly found that “the requirements for settlement under Rule 23(e) are satisfied, and that the terms of the settlement are ‘fair, reasonable and adequate’ from the perspective of absent class members.” The court also concluded that adequate due process had been afforded to class members, and that they had been adequately represented in the proceedings. Individuals who are entitled to participate in the settlement as a class member have been encouraged (via a nationwide advertising campaign) to submit claim forms to opt in the settlement by mid September 2011.

Chapter 6

TRIBAL RIGHTS TO LAND & CULTURAL RESOURCES

Page 1165: Update on NAGPRA and Disposition of Culturally Unidentifiable Human Remains. Insert to notes on repatriation and NAGPRA.

On Mar. 15, 2010, the final rule on “Disposition of Culturally Unidentifiable Human Remains” was published as [43 C.F.R. 10.11](#). The text of this new regulation appears below. This section implements section 8(c)(5) of NAGPRA and “applies to human remains previously determined to be Native American under section 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.” The rule requires agencies, educational institutions, or museums to transfer these human remains to appropriate Native American parties when those institutions do not have a “right of possession” to the deceased persons, and prescribes a process for this to occur. The transfer of these remains is mandatory upon the conclusion of the requisite process. The transfer of “associated funerary objects” is recommended where “State or Federal law does not preclude” this, but remains discretionary under the rule.

According to the rule, the process begins with a mandatory consultation process between the institutions and specified Native American officials and religious leaders. That consultation ideally would result in a mutually agreeable disposition. Section 10.11(c) requires the entity to offer to transfer control of human remains to Indian tribes and Native Hawaiian organizations, according to a specified order of priority that largely relates to the geographic connections of the remains to historical patterns of tribal land ownership and aboriginal occupancy. If none of the parties agree to accept control, the institution may transfer control to “an Indian group that is not federally-recognized” or may “reinter the remains according to State or other law” provided that this is recommended by the Secretary of the Interior and there is no objection from the Indian tribes or Native Hawaiian organizations who were entitled to receive the remains.

The rule is of great significance given the fact that there are approximately 118,000 sets of Native American human remains and thousands of associated funerary objects still in the custody of agencies, museums, and educational institutions. Not surprisingly, many archeologists have objected to the rule, which would apply to ancient human remains, such as those at issue in the Bonnicksen case, asserting that valuable data will be lost and that these remains cannot be culturally affiliated to any contemporary tribe. Native Nations and their advocates, however, assert that this is a human rights issue and that all deceased Native American persons are entitled to a decent burial and should not be treated as “research specimens.”

§ 10.11 Disposition of culturally unidentifiable human remains.

(a) General. This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under §10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

(b) Consultation.

(1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:

(i) A list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) A list of any Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.

(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:

(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;

(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;

(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and

(v) A schedule and process for consultation.

(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.

(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by §10.9(e) and §10.10(b).

(c) Disposition of culturally unidentifiable human remains and associated funerary objects.

(1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at §10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or

(B) Reinter culturally unidentifiable human remains according to State or other law.

(3) The Secretary may make a recommendation under paragraph (c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.

(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

(5) The exceptions listed at §10.10(c) apply to the requirements in paragraph (c)(1) of this section.

(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act ([16 U.S.C. 470bb](#) (4)) must also comply with the provisions of that statute and its implementing regulations.

(d) Notification.

(1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a notice of inventory completion in the Federal Register as described in §10.9.

(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:

(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and

(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

(e) Disputes. Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under §10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

[75 FR 12403](#), Mar.15, 2010.