No. 99-1871

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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A. As the petition for a writ of certiorari explains (at 3-6), the courts of appeals have repeatedly held that documents prepared outside the government—*e.g.*, by consultants retained by an agency to advise and assist it in performing official functions—may be treated as "intra-agency memorandums or letters" within the meaning of FOIA Exemption 5, 5 U.S.C. 552(b)(5). Respondent contends that the documents submitted by the Klamath Tribes to the Bureau of Indian Affairs (BIA) concerning the water rights the United States holds in trust for the Tribes cannot qualify for protection under Exemption 5 because the Tribes are "non-neutral, interested parties who believe that they will significantly benefit from favorable decisions * * * regarding Klamath Project operations." Br. in Opp. 12. Respondent further argues that the Tribes for whom the United States holds property in trust cannot be accorded the same status as agency consultants for

these purposes because the Tribes have an adversarial relationship with the government. See *id.* at 8, 11-12, 14-15, 16. Those claims lack merit as a legal matter. Furthermore, as we explain in the petition (at 6-11, 14-18, 26-28), the court of appeals' decision, if allowed to stand, will cause substantial disruption of the relationship between the United States and Indian Tribes. It also undermines the performance of the United States' historic trust responsibility with respect to land and water rights that the United States holds in trust for Indians and that are critical to the economy and way of life of reservation communities.

1. Situations may arise in which a private party's independent stake in a matter creates a divergence of interests between himself and the government that negates the possibility of a viable consultancy or similar relationship to which Exemption 5 may extend. There is no basis for concluding, however, that an Indian Tribe's interest in resources held in trust by the United States has that effect. The government in its administration of Indian trust property acts in a fiduciary capacity, and the duty not to disclose confidential information acquired from the beneficiary is a traditional feature of the fiduciary's role. See Pet. 14-16. Far from precluding the formation of a proper consultancy relationship, the Tribes' interest in the subject property makes it essential that the Tribes be consulted and that their expectation of confidentiality be respected.[1]

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[1] Although an agency's relationship with an outside consultant is typically formed on an ad hoc basis at the discretion of the agency, the Bureau of Indian Affairs' relationship with Indian Tribes concerning trust property is enduring and arises by operation of law. Confidential treatment of tribal submissions relating to trust resources recognizes the Tribe's enduring interest in the integrity of that relationship, in addition to the governmental

Respondent contends that the government's position "would essentially broaden the FOIA's exemption 5 to include virtually any communications between interested beneficiaries in federal programs and the federal agencies which oversee such programs." Br. in Opp. 9. That is not so. This Court has long recognized that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). In its role *as trustee* for tribal natural resources, the United States is subject to a duty of loyalty separate and distinct from (though not inconsistent with) the general obligation of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. To say that the government's role as trustee entails a duty of confidentiality does not suggest that communications from all persons claiming a legal right to favorable treatment from the government are exempt from disclosure under the FOIA.

Thus, the decision of the Bureau of Indian Affairs to withhold the seven documents at issue in this case does not reflect "a failure to acknowledge Interior's dual obligations toward the Klamath Basin Tribes and its Klamath Project contractors." Br. in Opp. 17. We agree that the Department of the Interior (DOI) (like the federal government generally) has legal obligations

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interest in receiving candid advice that generally underlies (see Pet. 4-6) the application of Exemption 5 to documents submitted by an outside consultant. For that reason it was especially inappropriate for the court of appeals to afford communications with Indian Tribes concerning their trust property a dignity less than that of communications with ordinary consultants, based on the court's view of a factor—the Tribes' interest in their trust resources—that is the very foundation for the relationship and the very reason why the BIA solicits the Tribes' advice and assistance.

both to the Tribes and to respondent's members. We do not agree, however, with the suggestion that those obligations can be equated. The United States' special duty of loyalty and confidentiality in its role as trustee for tribal property rights has no analogue in the government's relationship to other private parties, and that duty has direct implications for the proper application of the FOIA.

2. Respondent contends that the Tribes are inappropriate consultants because they "are past, present, and potential future adversaries of [the Department of the] Interior with respect to the decisions being made in the KPOP and the adjudication." Br. in Opp. 12; see *id.* at 8, 11-12, 14-15, 16. That characterization rests on tribal officials' occasional references to the possibility of lawsuits against the DOI regarding its allocation of Klamath Project water. See *id.* at 15. In any consultative relationship, however, there exists a *possibility* of future litigation between the parties. That certainly is the case with respect to consultations between the Archivist and former Presidents concerning the confidentiality of Presidential records, which were at issue in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997).[2] Yet the District of Columbia Circuit sustained the application of Exemption 5 to those communications, observing that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Public Citizen*, 111 F.3d at 171. Neither the possibility

[2] See *Nixon* v. *United States*, 978 F.2d 1269, 1270-1275 (D.C. Cir. 1992) (recounting history of litigation between the United States and former President Nixon regarding public use of the former President's records).

of litigation between the Tribes and the United States, nor tribal officials' occasional allusions to that possibility, negate the consultative relationship that otherwise exists between the Tribes and the government in its role as trustee. See *ibid.* (observing that "there is often a *possibility* of litigation between entities within the executive branch, yet no one has suggested that courts should on this account refuse to apply Exemption 5 to their inter-agency communications") (citation omitted).[3]

The court in *Public Citizen* noted the possibility that an adversary relationship between parties previously engaged in consultation "might come to eclipse the consultative relationship." 111 F.3d at 171. But nothing of that sort has happened here. The fact that the Tribes have disagreed with some aspects of DOI policy does not undermine the essential consultative relationship. Those who are called upon to consult with an agency about the agency's official responsibilities may express divergent views (just as agency employees themselves may do), and the "give-and-take of the consultative process," *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), ensures that an agency policymaker can benefit from a range of perspectives before reaching a decision. Respondent does not contend that the Tribes have actually initiated litigation against any federal agency concerning the allocation of water within the Klamath

[3] That is particularly so in light of the fact (see Pet. 11; Pet. App. 41a-49a) that six of the seven documents at issue here were submitted to or created by the BIA, the agency most specifically "charged with fulfilling the trust obligations of the United States" to the Indians. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); see also *Nevada* v. *United States*, 463 U.S. 110, 127, 135-138 n.15 (1983). The record materials on which respondent relies (see Br. in Opp. 15) refer to the possibility of litigation against the Bureau of Reclamation.

Basin, much less provide any basis for concluding that the relationship between the government as trustee and the tribal beneficiaries has become *predominantly* adversarial.

There is, in particular, no basis for regarding the Tribes and the government as "adversaries" with respect to the seven documents at issue here. The district court found that "[a]ll the documents played a role in the agency's deliberations" and that "[m]ost of the documents were provided to the agency by the Tribes at the agency's request." Pet. App. 59a. As the dissenting judge in the court of appeals recognized, "these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a (Hawkins, J., dissenting).[4]

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[4] As the petition explains (at 7), DOI's Departmental Manual states that agency policy is "to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." C.A. E.R. 254. That policy statement makes clear that the tribal submissions in this case were not foisted on an unreceptive agency; rather, they were solicited by the DOI in order to assist the agency in its performance of trust responsibilities.

As respondent points out (Br. in Opp. 8), Executive Branch policy statements issued in November 1993 and April 1994 state that consultations between federal and tribal officials "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." C.A. E.R. 250; see *id.* at 252. The obvious import of those statements, and the way in which they are interpreted and applied by the DOI, is that federal and tribal officials (the "interested parties" to the consultations) are to deal *with each other* in an "open and candid" manner—not that the consultations are to be "open" to the public or that the substance of the communications between the federal government and the Tribes is to be routinely released to the

3. Respondent virtually ignores the fact that four of the seven documents at issue in this case pertain to the federal government's representation of tribal interests in adjudicative proceedings conducted by the State of Oregon. See Pet. 9-10, 22-24. As the petition explains (at 22-24), the federal government in those proceedings does not act as a decisionmaker, but instead asserts claims on behalf of the Tribes (and on its own behalf) for ultimate resolution by state officials. In representing the Tribes in the Oregon proceedings, the United States is fulfilling a responsibility that has historically been an integral part of the government's role as trustee. See Pet. 23.

Particularly in the context of the Oregon proceedings, it is farfetched to contend that the Tribes' "direct and personal interest" (Br. in Opp. 11) in the allocation of Klamath Basin water renders the Tribes an inappropriate consultant. Nor is there any basis for viewing the relationship between the Tribes and the federal government as adversarial. To the contrary, there is in this context an inherent community of interests between the Tribes and the United States, and the Tribes are a natural source of expertise for the federal officials charged with protecting the Tribes' interests. Tellingly, respondent (like the court of appeals) makes no effort to explain how its theory of the case applies to

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public. Indeed, the Departmental Manual clarifies that information received by the DOI through consultation with tribal representatives "shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s)." *Id.* at 255; see Pet. 8.

the documents submitted to the agency in connection with the state adjudication.[5]

B. Respondent argues (Br. in Opp. 18-23) that the government's position depends upon the existence of a "trustee-beneficiary privilege" in the civil discovery context. That argument misapprehends the government's theory. FOIA Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Thus, if particular documents qualify as "intra-agency memorandums," those documents are covered by Exemption 5 if, but only if, they are "not available by law * * * in litigation"—*i.e.*, are privileged from disclosure in discovery. See Pet. 3; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

The magistrate judge found that all seven documents at issue in this case are covered by the deliberative-process privilege, Pet. App. 56a-61a, and that two of the documents (involving the Oregon adjudication) are

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[5] As the petition explains (at 27 n.6), respondent's reliance (see Br. in Opp. 12-15) on *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1st Cir. 1981), is misplaced. The documents at issue in that case were submitted to the Department of Justice within the context of ongoing litigation between an Indian Tribe and the federal government. *Id.* at 1038. Here, by contrast, there is no litigation between the United States and the Tribes. See pp. 4-7, *supra*. The contrast between the two cases is particularly clear with respect to the documents relating to the Oregon adjudication, where the Tribes and the United States are in effect co-parties with an obvious community of interests. See also Pet. 23-24 (explaining that exchanges of information between parties with a common interest in litigation have traditionally been treated as privileged).

covered by the attorney-work-product privilege as well, see *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a. The government has never asserted a "trustee-beneficiary privilege" as a basis for finding that the documents satisfy the *second* requirement of Exemption 5—*i.e.*, that they are "not available by law * * * in litigation." Rather, under the "functional test" consistently employed by the courts of appeals, the determination whether particular records are "intra-agency memorandums or letters" (and therefore satisfy the *first* requirement of Exemption 5) depends on whether the private party who submits them is appropriately treated as a confidential consultant.[6] The trustee's well-established duty not to disclose information acquired in administering a trust where disclo-

[6] The petition states (at 24) that "[u]nder the [court of appeals'] ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege." Contrary to respondent's contention (Br. in Opp. 18), that statement does not "suggest[] the existence of a recognized trustee-beneficiary privilege in the discovery context." Rather, our point is that the court of appeals' unduly narrow construction of the term "intra-agency" has the practical effect of requiring the agency to release documents that in civil litigation would be covered by the deliberative-process and/or attorney-work-product privilege. That result would disrupt the government's performance of its trust responsibilities, and it would facilitate efforts to employ the FOIA "to supplement civil discovery," in derogation of congressional intent. *Weber Aircraft*, 465 U.S. at 801; see also *id.* at 801-802 ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."). The court of appeals' decision also disadvantages the government and the Tribes vis-à-vis other parties to the Oregon adjudication (including respondent), who may continue to assert all available privileges. See Pet. 24.

sure would disserve the beneficiary's interests bears directly on that question. See Pet. 20-21.

C. Respondent errs in contending (Br. in Opp. 7) that the court of appeals' decision is "based upon the unique and limited factual circumstances of this case." Under the court of appeals' "direct interest" test, documents submitted by Tribes or individual Indians to assist federal officials in their performance of trust responsibilities can *never* be withheld under Exemption 5, since the trustee's administration of a trust corpus is always (by definition) a matter in which the beneficiary has a direct interest. As the petition explains (at 27), well over half of the lands held by the United States in trust for Tribes and individual Indians lie within the Ninth Circuit. The amicus briefs filed in this Court on behalf of numerous Tribes make clear that the question presented here recurs frequently, and that the court of appeals' decision can be expected substantially to disrupt the interactions between federal and tribal officials that facilitate the United States' performance of its trust responsibilities. See, *e.g.*, Brief Amici Curiae of the Ute Indian Tribe 17-20; Brief Amici Curiae of the National Congress of American Indians 5-7; Brief Amici Curiae of the Eastern Shoshone Tribe of the Wind River Reservation 4-6.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Solicitor General

AUGUST 2000