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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we explain that Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5), which shields from compelled disclosure "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," is properly construed to cover documents that are prepared by persons outside the government but that play essentially the same role in the agency's decisionmaking process as documents created by an agency employee. We further explain that documents prepared by Indian Tribes to assist the government in managing Indian trust resources fall into that category, and that a blanket requirement that such materials be disclosed would substantially impair the United States' ability to perform its duties as trustee.

Respondent appears to acknowledge that Exemption 5 may under some circumstances appropriately be applied to documents created outside the government. Respondent contends, however, that Exemption 5 does not cover the documents at issue here, chiefly because the Tribes that submitted them to the Bureau of Indian Affairs (BIA) have a "direct interest" in the manner in which the Department of the Interior (DOI) manages the relevant trust resources. In respondent's view, the Klamath Basin Tribes have no special claim to the protection of the United States, but must instead be treated as indistinguishable from competing claimants to Klamath Basin water.

For the reasons that follow, respondent's arguments lack merit. 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. Application of the FOIA in a manner that protects the trust relationship does not accord Indian Tribes an unfair advantage over competing claimants. Rather, the government's acknowledgment of its special trust obligations to Indian Tribes, and its efforts to satisfy the exacting standards that the trustee's role entails, simply reflect the recognition that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

I. AN INDIAN TRIBE'S "DIRECT INTEREST" IN THE UNITED STATES' MANAGEMENT OF NATURAL RESOURCES HELD IN TRUST BY THE GOVERNMENT DOES NOT PRECLUDE THE APPLICATION OF EXEMPTION 5 TO TRIBAL COMMUNICATIONS

A. Respondent acknowledges (Br. 26-27) that the courts of appeals have frequently upheld the application of Exemption 5 to documents created by outside consultants for use by agency personnel. Respondent contends, however, that those decisions are inapposite here because "[d]irectly interested parties are not the kind of neutral hired experts that some courts of appeals have described as the 'functional equivalent of agency staff' relied upon by agency decisionmakers to provide frank and objective advice." Resp. Br. 18-19.

As our opening brief explains (at 31, 38-39), application of Exemption 5 to documents created outside the government depends in part on whether a basic congruence of interests exists between the agency and the putative consultant. It is likely true that when an agency is selecting a consultant to offer advice on a particular matter, it typically will seek to ensure a congruence of interests by selecting a consultant who has no tangible stake in the agency's decision and, where the agency deems it appropriate, by requiring the consultant to adopt the perspective of the government. It

does not follow, however, that the requisite congruence of interests can never exist in cases where the agency seeks advice and assistance from persons having a direct interest in the agency's performance of its responsibilities. See, *e.g.*, Gov't Br. 29-30 (Justice Department representation of former employees sued in their personal capacities).

In its role as trustee for tribal resources, the government "acts in a fiduciary capacity," *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), and its "conduct * * * should therefore be judged by the most exacting fiduciary standards," *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942); see Gov't Br. 17-18. Within the sphere of the trust relationship, it would seem obvious that the United States' obligation to manage and safeguard tribal property creates a sufficient community of interests to justify reliance on the Tribes as a source of confidential advice and assistance. That is particularly so in light of the fact that preserving the confidentiality of the beneficiary's communications has traditionally been recognized as an integral component of the trustee's duties. See Restatement (Second) of Trusts § 170 cmt. s (1959); Gov't Br. 17, 36-37. Thus, while a person's financial or similar stake in a government decision might sometimes create a sufficient divergence of interests that the agency should not enter into a confidential consultative relationship with that person in the first place (see Gov't Br. 38-39), it is perverse to regard a Tribe's interest in a trust corpus as a basis for refusing to accord confidentiality to its communications with the United States as trustee in the course of a fiduciary relationship that is independently established by law. See Gov't Br. 39-40.[1]

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[1] Respondent contends that the application of Exemption 5 to documents created outside the government has previously been confined to the submissions of "unbiased, neutral outside experts" and has never "involved communications from 'consultants' who had a direct and personal interest in the outcome of the agency decision for which their 'advice' was given." Resp. Br. 28; see *id.* at 27, 28-29. Before the Ninth Circuit's

B. As we explain in our opening brief (at 42-45), the court of appeals' analysis is particularly flawed with respect to the documents pertaining to the Oregon general stream adjudication, where the United States represents the interests of the Klamath Tribes but does not perform any decision-making function. In discussing that adjudication, respondent seeks to convey the impression that the United States performs essentially the same role vis-à-vis respondent and its members that it plays with respect to the Klamath Tribes. See, *e.g.*, Resp. Br. 7-8. That characterization misconceives the nature of the United States' responsibilities.

1. In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting, fishing, and gathering rights reserved to the Klamath Tribes by an 1864 treaty carry with them an implied reservation of water rights, "with a priority date of

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decision in this case, however, the courts of appeals had not suggested that the availability of Exemption 5 was contingent on the willingness of a document's creator to subordinate his own interests and perspective to those of the agency to which the document was submitted. To the contrary, the District of Columbia Circuit has upheld the application of Exemption 5 to situations in which persons outside the agency were consulted precisely because they were believed to have perspectives distinct from those of the relevant FOIA agency. In *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the court upheld the application of Exemption 5 to records submitted to the Archivist by former President Bush, and it specifically rejected (see *id.* at 171) the claim that "[t]he existence of independent presidential interests" precluded the formation of an appropriate consultative relationship. In *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the court held that Exemption 5 was properly applied to responses made by various Senators to a questionnaire sent by the Attorney General regarding the process by which nominees for federal district court judgeships were recommended to the President. See *id.* at 784, 789-791. The Senate has a defined constitutional role in the process by which federal judges are selected, see U.S. Const. Art. II, § 2, Cl. 2, and it is scarcely to be expected that an individual Senator in completing such a questionnaire would consider himself obliged to adopt the perspective of the Executive Branch.

immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415; Gov't Br. 8. Those water rights, it should be emphasized, were not gratuitously conferred upon the Tribes by the United States. See *Adair*, 723 F.2d at 1414 ("The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights."). The Tribes have possessed the water rights from "time immemorial," *ibid.*, and they reserved equitable title to those rights as part of the 1864 treaty, in which the Tribes "relinquished [their] aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres in south-central Oregon," *id.* at 1398. The resulting arrangement, whereby the United States holds legal title to the water rights and is subject to a consequent duty to act as trustee for the Tribes, is thus a direct result of a bargained-for exchange that has no meaningful analogue in the government's course of dealing with respondent and/or its members.[2]

As one aspect of its duty to act as trustee for tribal natural resources, the federal government has undertaken to represent the Tribes in state proceedings established to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. In that adjudicative proceeding, "any judgment against the United States, as trustee

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[2] Respondent's assertion (Br. 3) that "each Tribe seeks to reallocate Klamath Project water from current irrigation uses to its preferred uses" is at least potentially misleading, insofar as it suggests that the irrigators' claim to water has a preferred or established *legal* status that the Tribes' claims lack. As we explain in the text, the Klamath Tribes have *judicially recognized* water rights for hunting, fishing, and gathering with a priority date ("time immemorial," *Adair*, 723 F.2d at 1414) earlier than any that respondents' members might hope to establish. See also *id.* at 1415 (affirming the district court's holding that "[t]he priority date of Indian rights to water for irrigation and domestic purposes is 1864"). And while the Tribes' water rights have yet to be quantified in any judicial proceeding, the same is true of the rights claimed by respondent's members.

for the Indians, would ordinarily be binding on the Indians." *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983). And while the Tribes retain the right to intervene separately in the state proceeding if they believe that the United States is not adequately representing their interests, see *ibid.*, the ordinary assumption is that the United States —consistent with the general rule that "[t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust," Restatement (Second) of Trusts § 177 (1959)—will diligently litigate on the Tribes' behalf in this and similar state water-rights proceedings. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 812 (1976) (noting that "[t]he Government has not abdicated any responsibility fully to defend Indian rights in state court"). A construction of the FOIA that would compromise the United States' ability to act as an effective representative of tribal interests would prevent the system from functioning as Congress intended, notwithstanding the Tribes' theoretical ability to pursue the alternative course of representing themselves.

Insofar as consultation between the Tribes and the government lessens or eliminates the need for the Tribes to pursue separate claims on their own behalf, it substantially furthers the government's performance of its trust responsibilities. Such consultation also assists state adjudicators by reducing the number of competing claims and the consequent need for a state tribunal to resolve disputes between the Tribes and the federal government regarding the scope of tribal trust resources. In the Oregon adjudication, the Klamath Tribes have intervened separately but have, with one minor exception, adopted and incorporated by reference the claims asserted on the Tribes' behalf by the United States.[3]

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[3] The United States has filed 58 claims on the Tribes' behalf, 46 of which have three distinct parts. The Tribes and the United States have

2. The relationship between the United States and respondent's members in the context of the Oregon adjudication is fundamentally different. Respondent states (Br. 7-8) that "[i]rrigation water users have filed claims for determination of rights for irrigation in the Klamath Project, and the United States has filed parallel water right claims to assert and protect irrigation water rights in the Klamath Project." In asserting claims for the Project, however, the United States has not purported to exercise a fiduciary or similar representative function vis-à-vis respondent or its members. Nor does a comparison of the federal filings in the Oregon adjudication with those submitted by respondent suggest an essential congruence of interests between the two parties. To the contrary, respondent and the government disagree concerning such fundamental questions as the ownership of the relevant water rights. It is true that the interests of the United States and respondent's members may overlap at a very general level, since if greater volumes of water are allocated to the Project as a whole, it is more likely that irrigators will receive the amount of water allocated to them under their individual contracts with the Bureau of Reclamation. But the differences between the parties' legal and factual theories are substantial; and, in any event, the federal government has not purported to litigate *on behalf of* respondent or its members in the Oregon adjudication. Compare *Nevada* v. *United States*, 463 U.S. 110, 140, 142-143 (1983).[4]

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disagreed with respect to one part of one of those 46 claims. Thus, out of a total of 150 different claim values (46 claims with three parts each, plus 12 claims with a single value), the Tribes and the United States have agreed on 149.

[4] The position of the United States is that the rights to Klamath Project water are owned by the federal government, and that respondent's members may assert an entitlement to Project water only pursuant to contracts with the Bureau of Reclamation. See *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977). Respondent has contested the govern-

As this Court observed in *Nevada* v. *United States*, "it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands." 463 U.S. at 128. With respect to the pending Oregon general stream adjudication, the United States government's obligation to represent the Klamath Tribes necessarily coexists with the duty to protect other federal interests, including in particular its interests with respect to the Klamath Project. It does not follow, however, that the federal government is subject to a *fiduciary* obligation to every private party (such as respondent or its members) that may as a practical matter be affected by the manner in which the government performs its assigned functions.

C. Respondent observes (Br. 19) that the Administrative Procedure Act (APA) "specifically prohibits ex parte contacts with agency decisionmakers in the context of formal rulemaking and formal adjudication." Respondent contends (Br. 19-23) that ex parte contacts should likewise be prohibited in all contexts (including the filing of claims in the Oregon adjudication and even preliminary steps in the development by the Bureau of Reclamation (BOR) of the Klamath Project Operations Plan (KPOP)) in which federal officials are required to mediate between potentially con-

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ment's claims in the Oregon adjudication and has argued, *inter alia*, that with respect to specified claims "the rights to the use of water * * * lawfully must be issued in the names of [respondent's members] * * *, not to the United States or any agency of the United States." Claim #293, Statement of Contests of Claim and/or Preliminary Evaluation of Claim: Claims of Others 2 (May 2, 2000). That dispute will be resolved in the course of the state adjudication. But the very existence of that disagreement belies respondent's suggestion (Br. 33) that the United States has "file[d] claims for * * * the Klamath Project irrigators in the [Oregon] adjudication."

flicting private interests. That argument is wrong for at least two reasons.

1. Congress specifically limited the APA ban on ex parte contacts to agency proceedings in which a formal hearing is required. See 5 U.S.C. 557(a) and (d)(1); H.R. Rep. No. 880, 94th Cong., 2d Sess. Pt. 1, at 19 (1976). We may assume, arguendo, that even outside the context of formal hearings, an agency's arbitrary decision to consult confidentially with some interested persons but not others might raise due process or other fairness concerns. But where, as here, an agency's willingness to accept confidential submissions from a particular entity is premised on the existence of an established fiduciary relationship, the distinction in treatment cannot plausibly be regarded as arbitrary. Nor, in light of the carefully limited scope of Section 557(d)(1), can the APA reasonably be construed to impose a more general prohibition on confidential communications between agency officials and interested persons outside the government who possess specialized knowledge or expertise. See *New Mexico* v. *EPA*, 114 F.3d 290, 295 (D.C. Cir. 1997); *Sierra Club* v. *Costle*, 657 F.2d 298, 400-404 (D.C. Cir. 1981).[5]

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[5] Contrary to respondent's suggestion (Br. 20, 22), the development of the KPOP by the BOR is not properly characterized as an adjudicative process. The Bureau recognizes, and is currently participating in, the State of Oregon's Klamath Basin Adjudication. At some point, the State will quantify the rights of all claimants to water in the Klamath Basin in Oregon, and the Bureau will revise its operations as necessary to accommodate those determinations. While that adjudication is pending, however, the Bureau must distribute water in a manner consistent with its contractual, statutory, and trust responsibilities. And until the relative entitlements of the various claimants have been finally determined in the state proceeding, BOR must necessarily decide how its various duties are appropriately reconciled. See *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (BOR, in managing the Klamath Project, must ensure that relevant statutory requirements are followed and that Indian treaty rights are upheld; irrigators' contractual rights to Project water are subordinate to applicable statutory and treaty

2. The APA defines the term "ex parte communication" to mean "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. 551(14). If either the APA or the Due Process Clause actually prohibited ex parte communications under the circumstances presented here, the problem would scarcely be solved simply by treating written tribal submissions as subject to disclosure upon request under the FOIA. Rather, extension of the APA ban to the preparation of claims for the Oregon adjudication and/or the development of the KPOP would logically mean that neither the Tribes nor respondent could communicate with the agency orally or in writing regarding those subjects without giving prior notice to all potentially interested parties.[6]

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directives), cert. denied, 121 S. Ct. 44 (2000). The Bureau's acceptance of that responsibility does not amount to an "adjudication" by BOR of competing claims.

If and when the KPOP process culminates in "final agency action" adopting a long-term operations plan, respondent will be free to challenge that decision on procedural and/or substantive grounds. Insofar as respondent's FOIA suit rests on the purported unfairness of the procedures devised by the agency for the long-term operation of the Klamath Project, the suit is in an important sense an attempt to evade the "final agency action" requirement. It is well-established, moreover, that "the needs of a *particular* plaintiff are not relevant to [Exemption 5's] applicability." *Martin* v. *Office of Special Counsel, MSPB*, 819 F.2d 1181, 1184 (D.C. Cir. 1987); see, *e.g.*, *EPA* v. *Mink*, 410 U.S. 73, 86 (1973) ("Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information."). Respondent's FOIA claim thus depends on whether confidential consultation between DOI and the Tribes is inappropriate in some absolute sense—not on whether such consultation imposes particular hardships on respondent or its members.

[6] Respondent's own declarant explained that DOI representatives have routinely conducted separate meetings with irrigation interests and with Tribes during the course of the agency's efforts to develop the KPOP. See J.A. 69-70. The record also makes clear that respondent (and irrigation interests generally) have engaged in extensive written communi-

II. RESPONDENT OFFERS NO PERSUASIVE GROUND FOR REJECTING THE DISTRICT COURT'S CONCLUSION THAT THE DOCUMENTS AT ISSUE HERE WOULD BE PRIVILEGED FROM DISCLOSURE IN CIVIL DISCOVERY

Both the magistrate judge and the district court concluded that all seven documents at issue in this case are protected by the deliberative-process privilege, and that two are protected by the attorney-work-product privilege. See Pet. App. 31a-32a, 56a-65a; Gov't Br. 12. The court of appeals did not disagree with or even address that holding, but it nevertheless ordered that the documents be released, on the ground that the documents did not fall within the threshold description of "inter-agency or intra-agency memorandums or letters." See Pet. App. 6a-10a; Gov't Br. 12-13. Apparently seeking to defend the court of appeals' judgment on an alternative rationale, respondent argues at length (see Br. 24-48) that the documents cannot be withheld under Exemption 5 because they would not be privileged from discovery in civil litigation. That contention provides no basis for affirming the court of appeals' judgment.

A. Respondent contends (Br. 24-35) that the deliberative-process privilege is inapplicable to the documents at issue here because the privilege is restricted to "intra-governmental communications" (Resp. Br. 26). Respondent correctly asserts that the deliberative-process privilege is characteristically described as covering "intragovernmental or "intra-agency" communications that are deliberative in character and predate the agency's final decision. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (referring to "the generally recognized privilege for confidential intra-agency advisory opinions, disclosure of which

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cations with DOI officials regarding the development of the KPOP. See J.A. 106-110.

would be injurious to the consultative functions of government.") (citing *Kaiser Aluminum & Chem. Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.)) (ellipses and internal quotation marks omitted); *EPA* v. *Mink*, 410 U.S. 73, 87 (1973) ("the privilege * * * has been held to attach to intragovernmental memoranda"); *Kaiser Aluminum*, 157 F. Supp. at 947 (referring to "the executive privilege for intra-departmental advice").

Respondent does not even contend, however, that for purposes of the deliberative-process privilege, the "intragovernmental" character of disputed documents should be ascertained by means of a test different from that used to determine whether the records constitute "intra-agency memorandums or letters" within the meaning of Exemption 5's threshold requirement. Rather, in asserting that the documents at issue here lack the "intragovernmental" character that the deliberative-process privilege requires, respondent relies on the *same* fact—the Tribes' interest in the outcome of the agency's decisionmaking process—on which the court of appeals based its conclusion that the tribal submissions are not "intra-agency" records within the meaning of Exemption 5. Respondent's argument regarding the scope of the privilege is not so much an alternative rationale for affirming the court of appeals' judgment as an alternative label for the same basic contention—*i.e.*, that the Tribes' tangible stake in the allocation of Klamath Basin water makes them an inappropriate confidential consultant to the DOI. There is no reason whatever to suppose that respondent could prevail on that "alternative" theory if this Court disagrees with the court of appeals' construction and application of Exemption 5's threshold language.

B. Respondent contends that the Tribes are inappropriate consultants for purposes of the deliberative-process privilege because they "are past, present, and potential future adversaries of both [the Department of the] Interior and the Project irrigators with respect to the decisions being

made in the KPOP and the adjudication." Resp. Br. 29; see *id.* at 32-33. At least with respect to the purported adversary relationship between the Tribes and DOI, that characterization rests on tribal officials' occasional references to the possibility of lawsuits against the DOI regarding the operation of the Klamath Project. See *id.* at 32. 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 Archives and former Presidents concerning the confidentiality of Presidential records, which were at issue in *Public Citizen*. 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). 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, Inc.* v. *Department of Justice*, 111 F.3d 168, 171 (D.C. Cir. 1997). Neither the existence of that possibility, nor tribal officials' occasional allusions to it, negate the enduring fiduciary and consultative relationship that exists between the United States in its role as trustee and the Tribes. 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).[7]

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[7] That is particularly so in light of the fact (see Pet. App. 41a-49a; Gov't Br. 11) 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

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 often 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 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

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Indians. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); see also *Nevada* v. *United States*, 463 U.S. at 127, 135-138 n.15. The record materials on which respondent relies (see Br. 32) refer to the possibility of litigation against the BOR.

expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a (Hawkins, J., dissenting).[8]

C. Respondent explains (Br. 35-43) that no recognized "trustee-beneficiary privilege" exists in the civil discovery context. But the government's position in this case has never depended on the existence of such a privilege. 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 protected by Exemption 5 if, but only if, they are "not available by law * * * in litigation"—*i.e.*, are privileged from disclosure in discovery. See Gov't Br. 2, 20-21; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983); *Sears, Roebuck*, 421 U.S. at 149.[9]

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[8] Respondent's reliance (Br. 31-33) on *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1st Cir. 1981), is therefore misplaced. In *County of Madison*, the First Circuit held that several documents submitted by an Indian Tribe to the Department of Justice were not "intra-agency" records within the meaning of Exemption 5. The documents at issue in that case, however, were submitted in connection with settlement negotiations concerning the Tribe's lawsuit against the United States. *Id.* at 1038. The records at issue here, by contrast, were submitted not in a setting marked by conflict between the Tribes and the United States, but "as part of a cooperative, consultative relationship mandated by Departmental policy and federal law." Pet. App. 27a (Hawkins, J., dissenting).

[9] Respondent is therefore wrong in suggesting (Br. 43) that under our theory "nearly all communications between Indian Tribes and the United States" would be protected from disclosure by Exemption 5. Many communications unrelated to the government's management of trust resources might fail to satisfy even the threshold requirement that the records in question must constitute "inter-agency or intra-agency memorandums or letters." And even where that threshold requirement is met, the government would be required to demonstrate the applicability of a recognized privilege. Invocation of the deliberative-process privilege, for

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 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. The trustee's well-established duty not to disclose information acquired in administering a trust where disclosure would disserve the beneficiary's interests bears directly on that question. See Gov't Br. 34-37.

It is doubtless true, as respondent suggests (Br. 35-37), that under our theory the government acting in its fiduciary capacity will in some circumstances be permitted to withhold documents that a private trustee would be obliged to disclose. That disparity, however, is the inevitable consequence of the deliberative-process privilege itself—a privilege unique to governmental entities that is designed to safeguard the distinct public interest in the effective performance of official functions. As the seminal decision in *Kaiser Aluminum* explains,

> [i]n the case of governments, the administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the

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example, would require a showing that the pertinent records are "predecisional" and "deliberative" in character. See pp. 11-12, *supra*.

> production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community. Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. *Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen.*

157 F. Supp. at 945-946 (emphasis added; brackets, footnote, and internal quotation marks omitted).[10]

D. In our opening brief we explain (at 34-37) that if tribal submissions to the DOI regarding the management of trust resources are held to fall outside the scope of Exemption 5, the federal government's ability to perform its fiduciary duties will be severely compromised. Respondent's primary answer to that argument is that the wide range of legal

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[10] Moreover, the disparity of which respondent complains could arise only in the context of civil discovery in ongoing litigation. In that setting it is possible that records possessed by a federal agency acting in its fiduciary capacity could be withheld pursuant to the deliberative-process privilege, even though a private trustee would be required to produce analogous records in response to an appropriate discovery request. Outside the context of ongoing litigation, however, a private trustee is not subject to any general duty (comparable to the obligation the FOIA places upon federal agencies) to disclose non-privileged materials upon request. The instant FOIA suit is thus a particularly inapt context for respondent's suggestion that DOI's withholding of certain tribal submissions unfairly advantages the Tribes vis-à-vis other beneficiaries. In any event, this Court has recognized that Congress in enacting Exemption 5 specifically intended to incorporate the deliberative-process privilege. See *Sears, Roebuck*, 421 U.S. at 150-151; *Mink*, 410 U.S. at 86; Gov't Br. 19-20. Congress must therefore be assumed to have understood that Exemption 5 would sometimes protect records that would not fall within any of the discovery privileges that apply to wholly private litigation.

obligations to which the United States is subject makes it inevitable that the government in performing its fiduciary role will sometimes deviate from the standards that bind a private trustee.[11] As the Court explained in *Nevada* v. *United States*,

> 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. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

463 U.S. at 128; see Resp. Br. 38.

This Court's decision in *Nevada* v. *United States* logically implies that *if* Congress had specifically required federal agencies to disclose to the public all tribal submissions bearing on the management of trust resources, the DOI would not breach its fiduciary duty to the Tribes by releasing such materials in accordance with that statutory directive. The question in the instant case, however, is not whether Congress *could* redefine the agency's trust obligations in that

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[11] Respondent also suggests (Br. 28) that the Tribes' tangible interest in the appropriate management of trust resources will provide an adequate incentive for communications with the government, even if the responsible federal officials are unable to maintain the confidentiality of those submissions. The relevant question, however, is not whether Tribes if confronted with a disclosure requirement would discontinue communications with the government altogether. Rather, the crucial point is that the Tribes would predictably cease to communicate with the government *in the manner that a beneficiary customarily communicates with its trustee*. See Gov't Br. 35-36. A legal regime that induced Tribes to deal with the United States at arm's length would substantially disrupt the trust relationship, even if interaction between the trustee and beneficiary did not cease entirely.

manner, but whether it has done so. The FOIA should not be read to require so drastic a departure from traditional fiduciary standards absent compelling evidence that Congress intended that result.[12]

That interpretive approach is consistent with this Court's longstanding "reluctance to construe the FOIA as silently departing from prior longstanding practice." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 154

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[12] Respondent suggests (Br. 41-42) that a congressional intent to subject tribal submissions to disclosure can be inferred from its failure to enact statutory amendments proposed in 1976 and 1978. The bill proposed in 1976, however, would have created a blanket FOIA exemption for all "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof," without regard to the origin of the records and without regard to whether particular documents would fall within any established privilege in civil litigation. See *Indian Amendment to Freedom of Information Act: Hearing Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 4 (1976) (*1976 Hearing*). The 1978 amendment would have gone even further, prohibiting release of all such information (rather than simply exempting it from compelled disclosure under the FOIA). See Resp. Br. 42. Congress's failure to enact those provisions is in no way inconsistent with our contention that tribal submissions bearing on the government's management of trust property are "intra-agency memorandums or letters" within the meaning of Exemption 5 that may be withheld from disclosure under the FOIA *if* they fall within a recognized discovery privilege. Cf. note 9, *supra*. Contrary to respondent's suggestion (Br. 42), DOI did not take the position in the 1976 congressional hearings that tribal submissions of the sort at issue here were unprotected by an existing FOIA exemption. To the contrary, the agency specifically noted the possibility that some documents bearing on the management of trust resources might be covered by Exemption 5, while warning that reliance on that exemption was "an unclear and inconclusive prospect, and it invites continuous appeals and litigation." *1976 Hearing* 9. During the years since 1976, a considerable body of law has developed regarding the application of Exemption 5 to documents that were created outside an agency but that played much the same role in the agency's decisionmaking process as documents prepared by an agency employee. See Gov't Br. 21.

(1980); see Gov't Br. 28-29.[13] Our position is also consistent with the numerous court of appeals decisions recognizing that documents submitted by persons outside the government may be withheld under Exemption 5 when release would impair the agency's decisionmaking process (and thus its ultimate performance of official responsibilities). See Gov't Br. 21. Although competing statutory obligations might *sometimes* require federal officials acting in a fiduciary capacity to deviate from the norms that govern private trustees, ambiguous language in a law of general applicability should not be read to compel the wholesale breach of one of a trustee's most fundamental duties.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

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[13] The Court in *Nevada* v. *United States* observed that "the analogy of a faithless private fiduciary cannot be controlling *for purposes of evaluating the authority of the United States to represent different interests*." 463 U.S. at 142 (emphasis added). As the italicized language suggests, *Nevada* v. *United States* did not involve a situation in which the federal government was shown to have rendered substantively inadequate representation of tribal interests. Rather, the import of the quoted language is simply that in light of the broad range of the federal government's duties, the United States cannot feasibly be expected to comply with the *prophylactic* rule against representation of potentially competing interests that would bind a private fiduciary. Here, by contrast, respondent seeks to use the FOIA to intrude directly into the trust relationship between the Tribes and the United States, and to compel violations of the duty of confidentiality that lies at the core of that relationship.