TRUST IN THE BALANCE: THE INTERPLAY OF FOIA'S EXEMPTION 5, AGENCY-TRIBAL CONSULTATIVE MANDATES, AND THE TRUST RESPONSIBILITY

INTRODUCTION

On March 5, 2001, the Supreme Court decided *Department of Interior v. Klamath Water Users Protective Association*, a case presenting an interesting confluence of administrative and Indian law.[1] The Court unanimously determined that the trust resource information submitted by Indian tribes at the request of the Department of Interior (DOI) must be divulged to the public in response to a Freedom of Information Act[2] (FOIA) request. The Supreme Court considered the case after the Ninth Circuit Court of Appeals arguably deviated from precedent concerning the applicability of FOIA's exemption 5 to the trust resource documents. The Ninth Circuit held that the DOI documents—prepared by Indian tribes who have a direct interest in the subject matter of the documents and in the future agency policies for which the DOI solicited the documents—did not qualify for exemption 5 withholding.[3] A strong dissent in the Ninth Circuit criticized that court's majority for deviating from the proper analytical test to determine the applicability of exemption 5.[4] However, the Supreme Court unanimously upheld the Court of Appeals' decision, thereby resolving any conflict the Ninth Circuit's opinion had introduced into the field of administrative law.

The case, however, put other issues squarely before the Court. Because *Klamath Water Users* involved larger issues of tribes' interests in their natural resources and in agencies' policy-development processes regarding tribal resources, the Court's opinion impacted the unique relationship between federally recognized Indian tribes and the U.S. government. In resolving the exemption 5 dispute, the Court's decision might have helped clarify the role that agency-tribal consultations play in a well-functioning, sovereign-to-sovereign relationship. Instead, with the exception of perfunctory dicta, the Court refused to recognize the need for agencies and tribes to structure their collaborative efforts unfettered by the glare of public scrutiny. In neglecting to extend its holding in this manner, the Court implied that the judiciary will not recognize the executive branch's emphasis on such efforts.

This Note critiques the Court's *Klamath Water Users* opinion and argues that a well-reasoned Supreme Court opinion would have clearly defined the

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1. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060 (2001).

2. 5 U.S.C. § 552 (2000).

3. Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1038 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28 (2000).

4. *Id.* at 1039-47 (Hawkins, J., dissenting).

parameters of FOIA's exemption 5 while highlighting the role that agency-tribal consultative approaches must play if the federal government is to meet effectively its fiduciary obligations to Indian tribes and its overall FOIA objectives. Focusing on the administrative law component of the *Klamath Water Users* case, Part I outlines the general goals behind FOIA and exemption 5. It reviews the judiciary's traditional exemption 5 analysis and delineates the outer boundaries of the narrow exemption as most recently defined by the Supreme Court. Part II shifts the focus to Indian law, summarizing the operation of the trust doctrine in American jurisprudence. This Part concentrates primarily on the fiduciary obligations the executive administrative agencies owe to Indian tribes and on the trust policies of the 1990's that mandate a consultative and confidential relationship between agencies and tribes. Part III offers a background to the *Klamath Water Users* controversy, detailing the parties involved and the lower courts' findings and opinions. Applying both administrative precedent (discussed in Part I) and fiduciary obligations (presented in Part II) to the *Klamath Water Users* situation, Part IV contrasts an optimum model opinion that the Court might have issued with the recently published Supreme Court opinion. Finally, this Note concludes that applying exemption 5 to the *Klamath Water Users* documents would have furthered both the broad goals of FOIA and the federal government's fiduciary obligations to Indian tribes.

I. THE FREEDOM OF INFORMATION ACT AND EXEMPTION 5

A. FOIA's Overall Purpose and Goals

Congress passed FOIA in 1966 to increase the public's access to government records, to enhance "popular control" of the federal bureaucracy, and, ultimately, to promote responsible agency action.[5] FOIA revamped section 3 of the Administrative Procedure Act (APA) of 1946, which was perceived as a vague provision that essentially sanctioned the government's practice of withholding documents rather than disclosing them.[6] Replacing the

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5. Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1047 (1973) [hereinafter *FOIA Memoranda*].

6. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (codified as amended at 5 U.S.C. § 552 (2000)). *See, e.g.*, EPA v. Mink, 410 U.S. 73, 79 (1973). Section 3 of the APA stipulated that agency records would be available "only to 'persons properly and directly concerned' with the matter," and the section's hazy terms led to it being "extensively abused as a justification for withholding information." *FOIA Memoranda*, *supra* note 5, at 1067 n.2. The APA disclosure provisions permitted agencies to withhold material for "good cause shown," in "the public interest," or because the person seeking the disclosure was simply not "properly and directly concerned" with the material that she wished to obtain. Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971).

APA provision, FOIA now directs governmental agencies to disclose identifiable agency records to any person who requests them.[7]

In addition to directing broad agency disclosure in response to public requests for agency records, FOIA provides "a judicial remedy for improper withholding of information by an agency."[8] The provisions for *de novo* trials are atypical in that FOIA authorizes the courts to deviate from the "usual principle of deference to administrative determinations."[9] Accordingly, the agency resisting disclosure has the burden of demonstrating that FOIA authorizes it to withhold the information.[10]

The general purpose of FOIA is simple: It aims at broad disclosure.[11] Five years after Congress enacted FOIA, the D.C. Circuit Court of Appeals summarized the Act's purpose: "The chief purpose of the new Act was to increase public access to governmental records by substituting limited categories of privileged material for [previous] discretionary standards, and providing an effective judicial remedy [for improper withholding by an agency]."[12] Recognizing that certain agency materials are requisite to the public citizen's ability to make an informed and intelligent impact on political processes, Congress intended FOIA to open the inner workings of government to the people.[13] In order to restore governmental institutions' responsiveness to public needs, FOIA operates as a vehicle to provide the public with access to agency activities and information.[14] By largely unveiling governmental agency information to any requestor, Congress also intended FOIA to "instill a sense of responsibility in the agency" so that it would realize that "it can no longer hide its mistakes."[15]

Because of FOIA's broad goal of agency disclosure, the interest of the person requesting the disclosure is not a factor in assessing FOIA's

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7. 5 U.S.C. § 552(b)(5) (2000). *See also FOIA Memoranda*, *supra* note 5, at 1047. The definition of an "agency" under the FOIA is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1) (Supp. V, 2000). While this definition is not completely clear, it has been interpreted rather expansively: "[T]he APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Soucie*, 448 F.2d at 1073. Thus, although the APA primarily regulates agencies' adjudication and rulemaking procedures, the APA-incorporated FOIA disclosure provisions apply to all agencies, regardless of an agency's administrative functions. *Id.*

8. *FOIA Memoranda*, *supra* note 5, at 1047.

9. *Soucie*, 448 F.2d at 1077.

10. *Mink*, 410 U.S. at 93.

11. *Id.* at 80.

12. Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971). The *Soucie* court emphasized that the FOIA was Congress' legislative response to "a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies." *Id.* at 1080.

13. *Id.*

14. *Id.*

15. *FOIA Memoranda*, *supra* note 5, at 1052.

applicability to an agency document.[16] Rather, FOIA makes agency records available to "any" person.[17]

B. Nine Narrow Exemptions

In concert with providing for broad agency disclosure, FOIA also aims at protecting certain agency processes and information from disclosure. While disseminating useful agency information to the public is the most widely touted goal of FOIA, shielding certain materials from public disclosure and protecting the "free flow of information and free discussion within the agency" are equally important aims of the Act.[18]

FOIA includes nine specific exemptions that outline when an agency can elect *not* to disclose information to the public.[19] These exemptions ensure that both aims of FOIA—disclosure of agency records to any requestor and protection of free agency discussion—are met. An agency may withhold information *only* if one of the nine exemptions applies, and any document that does not qualify under one of the nine exemptions *must* be disclosed pursuant to a FOIA request.[20]

Each of the nine exemptions must be construed narrowly so that the Act's disclosure purposes are not thwarted.[21] General ambiguities in the text must also favor disclosure, as FOIA's purpose is "to 'eliminate' vague statutory phrases that agencies had previously used as 'loopholes' for withholding

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16. *Soucie*, 448 F.2d at 1077. *But see* DOJ v. Julian, 486 U.S. 1 (1988). The Court in *DOJ v. Julian* suggested that while "no one need show a particular need for information in order to qualify for disclosure under the FOIA [that] does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class." *Id.* at 14. The Court indicated, then, that the requestor's interests might be a factor as a function of an agency's attempts to resist a FOIA disclosure. Justice Scalia criticized the *Julian* majority for this FOIA analysis reasoning, asserting, "[i]t has long been established that in applying Exemption 5 the individuating characteristics of the particular requester are not to be considered." *Id.* at 19 (Scalia, J., dissenting). Justice Scalia, framing the issue in the context of an attempted exemption 5 withholding, stopped short of unequivocally stating that the requestor's interests are never considered in a FOIA request. *Id.*

17. *FOIA Memoranda*, *supra* note 5, at 1047. Dissenting in *DOJ v. Julian*, however, Justice Scalia sought to refine the difference between an "individual" and "the public:" "It is too well established to warrant extensive discussion . . . that the FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather 'to inform the *public* about agency action.'" *Julian*, 486 U.S. at 17 (Scalia, J., dissenting) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143, n.10 (1975)). Regardless of this somewhat fastidious distinction, the FOIA is generally held to provide agency records to *anyone*.

18. *FOIA Memoranda*, *supra* note 5, at 1052-53.

19. *Id.* at 1048.

20. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

21. County of Madison v. DOJ, 641 F.2d 1036, 1040 (1st Cir. 1981).

information and 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'"[22]

FOIA's exemptions must not be construed so narrowly, however, that they leave *all* agency records open to public disclosure at the simple submission of a FOIA request. While FOIA is "broadly conceived," its provisions seek to further responsible policy development by providing a practical formula that protects "all interests."[23] The standards of the exemptions are "explicitly made exclusive . . . and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed."[24] Because FOIA's exemptions must be "workable," disclosure of agency documents may not frustrate efficient government operation.[25] As the D.C. Circuit Court of Appeals explained in *Ryan v. Department of Justice*, "efficient government operation requires open discussions among all government policy-makers and advisors."[26]

C. General Purposes Behind FOIA's Exemption 5

1. Efficient Administrative Processes and Free Exchange of Agency Opinions

Exemption 5 stipulates that an agency is not compelled under FOIA to disclose "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."[27] The exemption is, perhaps, the exception to FOIA that aims the most precisely at protecting efficient and effective government operation. The D.C. Circuit, in *Soucie v. David*, cogently articulated the purpose behind exemption 5: "That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policymaking; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports."[28]

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22. *Id.*

23. EPA v. Mink, 410 U.S. 73, 80 (1973).

24. *Id.* at 79.

25. The court in *Soucie* explained that, "[t]hrough the general disclosure requirement and specific exemptions, the Act thus strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, i.e., the public interest in freedom of information and countervailing public and private interests in secrecy." Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). The "interests in secrecy" that the exemptions seek to protect are not inapposite to the FOIA; they include, rather, the public and private sectors' interests in effective and efficient government.

26. Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980).

27. 5 U.S.C. § 552(b)(5) (2000).

28. *Soucie*, 448 F.2d at 1077.

The "inter-agency or intra-agency memorandums" provision of exemption 5 is a short and deceptively simple exception to FOIA disclosure principles. Although it is "one of the most important and frequently invoked exemptions," exemption 5 is not the most intuitively understandable of the exceptions.[29] As the remaining text in this Part explains, courts have spent a fair amount of time expounding upon which agency documents Congress actually intended exemption 5 to protect and which agency documents Congress determined should be disclosed.

In addition to being both important to agencies and somewhat cryptic in application, exemption 5 is "potentially the most far-reaching" of the nine exemptions to FOIA.[30] It ostensibly appears to shield the agency from almost *any* disclosure. The *Soucie* court cautioned against such an interpretation: "[C]ourts must beware of 'the inevitable temptation of a governmental litigant to give [exemption 5] an expansive interpretation in relation to the particular records in issue.'"[31] Because this reading would effectively nullify the entire FOIA, courts interpret the exemption to protect only narrowly defined categories of agency documents.

The exemption's scope is specifically delimited by two policy considerations: "(1) [P]reventing premature disclosure of agency records that might impede the proper functioning of the administrative process and (2) eliminating the inhibition of a free and frank exchange of opinions and recommendations among government personnel which could result from routine disclosure of their internal communications."[32] Thus refined, exemption 5 does not permit an agency to declare any record an internal memorandum and cover it with a blanket of secrecy.[33] Instead, only those internal working documents that recommend, formulate, or express policies or opinions may shelter under the exemption.[34] The balance between disclosure and secrecy must not impede efficient government operation.[35]

Succinctly stated, the primary goal behind exemption 5 is to encourage "the free and uninhibited exchange and communication of opinions, ideas, and

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29. DOJ v. Julian, 486 U.S. 1, 22 (1988) (Scalia, J., dissenting).

30. *FOIA Memoranda*, *supra* note 5, at 1048.

31. *Soucie*, 448 F.2d at 1078 (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)).

32. *FOIA Memoranda*, *supra* note 5, at 1048-49.

33. Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1033 (5th Cir. 1972).

34. *Id.* (citing Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970)).

35. Efficient government operation, in the context of an agency asserting exemption 5 protection, means open discussions, honest communications, and frank decision- and policy-making within the agency. Ryan v. DOJ, 617 F.2d 781, 789 (D.C. Cir. 1980) (citing H.R. REP. No. 89-1497, at 10 (1966)). The Supreme Court's 1973 decision in *EPA v. Mink* outlined the finite limit of exemption 5 as shielding from disclosure those memoranda that are consultative, the disclosure of which would be injurious to government functions. EPA v. Mink, 410 U.S. 73, 87 (1973). These elaborations each reflect the general purposes for which exemption 5 was enacted.

points of view" within an agency.[36] The exemption accomplishes this goal by protecting from disclosure "the mental processes of executive and administrative officers."[37] Courts commonly refer to this language (mental processes, free exchange of agency opinions, consultative material, frank decision-making) as "deliberative processes."[38] If a document reveals an agency's "deliberative processes," the agency may choose to withhold the document pursuant to exemption 5 in response to a FOIA disclosure request.

2. Shielding the Deliberative, Decision-Making Process

Exempting documents an agency uses in its deliberations and decision-making is "a process as essential to the wise functioning of a big government as it is to any organized human effort."[39] In its 1973 decision in *Environmental Protection Agency v. Mink*, the Supreme Court explained that the "efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'"[40]

While exemption 5 works to improve governmental efficiency, it thematically protects only those materials that reveal an agency's deliberative processes. The Supreme Court recently confirmed as much in *Klamath Water Users*, recognizing that the exemption incorporates the "'deliberative process' privilege."[41] Because it detracts from FOIA's overall policy of broad disclosure, exemption 5 is advantageous for the government; it reflects the government's privilege during litigation to withhold internal documents that expose opinions, decision-making, and policy formation.[42]

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36. *Wu*, 460 F.2d at 1034 (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)).

37. *Id.* (quoting Int'l Paper Co. v. FPC, 438 F.2d 1349, 1358-59 (2nd Cir. 1971)).

38. *See generally Mink*, 410 U.S. at 89; *Wu*, 460 F.2d at 1034; *Ryan*, 617 F.2d at 789.

39. *Wu*, 460 F.2d at 1034 (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)).

40. *Mink*, 410 U.S. at 87 (quoting S. REP. No. 89-813, at 9 (1965)). Elaborating on the government efficiency policies behind the FOIA's exemption 5, the D.C. Circuit emphasized that exposing an agency's deliberative processes to the public would impede frank policy discussion and ultimately lead to policy decisions of poorer quality. *Ryan*, 617 F.2d at 790. That court characterized exemption 5's objective as "ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity." *Id.*

41. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1065-66 (2001). The exemption is interpreted, perhaps optimistically, as a proper balance between withholding and disclosure. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967)) ("Exemption 5, properly construed, calls for 'disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'").

42. *Wu*, 460 F.2d at 1034 (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969)). That Congress intended exemption 5 to extend this privilege to governmental agencies seeking to comply with the FOIA is evident from the exemption's history. The original version of the "inter-agency or intra-agency

D. Unraveling the Specifics of Exemption 5's Protections

In practice, courts require agencies to disclose factual information.[43] The Court in *Mink* articulated the "common-sense approach," providing for FOIA's disclosure "of purely factual material appearing in [the] documents in a form that is severable without compromising the private remainder of the documents."[44] The corollary to this standard is that exemption 5 protects from FOIA disclosure both factual and nonfactual material inextricably linked to deliberative processes, opinions, and policy-making.[45] To the extent that FOIA seeks to enhance the public's ability to contribute to, and meaningfully monitor, governmental processes (without impeding their efficient functioning), disclosing facts upon which policies are developed, rather than opinions of those facts, is arguably more desirable to the interested citizen.[46]

Although factual material may not shelter under exemption 5, the exemption protects other specific types of information. Courts have characterized exemption 5 as protecting broad categories of privileged information, including generally privileged documents,[47] "executive privilege"

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memorandums" exemption applied only to "adjudicatory and rulemaking matters." EPA v. Mink, 410 U.S. 73, 90 n.17 (1973). Congress broadened the final version, though, to protect general policy matters from FOIA-compelled agency disclosure. *Id.* Additionally, the Supreme Court's 1973 decision in *Mink* indicated that Congress approved of exemption 5 protecting documents that exposed an agency's deliberative processes. In *Mink*, the Court interpreted both exemption 1 (*Id.* at 79-85) and exemption 5 (*Id.* at 85-94) of the FOIA in holding that certain documents regarding underground nuclear testing were properly withheld by the government. Exemption 5 was characterized as protecting the government's consultative practices. After *Mink*, the Congress responded by altering exemption 1, but it left exemption 5 unchanged. *Julian*, 486 U.S. at 20 (Scalia, J., dissenting). Both Congress and the courts thus agree that exemption 5 shields agencies' deliberative processes from FOIA disclosure, but determining what types of documents and information satisfy this standard is another legal hurdle.

43. Exemption 5 permits an agency to withhold documents that "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) (2000). The public, then, is entitled to obtain any documents that a private party could discover in litigation with a governmental agency. *Mink*, 410 U.S. at 86. *See, e.g., Wu*, 460 F.2d at 1032 (material discoverable under FED. R. CIV. P. 26(b) may not be withheld under exemption 5 of the FOIA). Although discovery rules can be applied to a FOIA exemption 5 defense only analogously, the criteria to determine whether or not material is discoverable (and hence subject to nondisclosure under exemption 5) are: "(1) whether a case involving the agency can be imagined in which the material sought would be relevant and (2) whether any privilege would protect the material from discovery." *FOIA Memoranda, supra* note 5, at 1049-50. *See also Mink*, 410 U.S. at 86.

44. *Mink*, 410 U.S. at 91.

45. Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980).

46. *FOIA Memoranda, supra* note 5, at 1055. Materials containing opinions and political decision-making do qualify under exemption 5, as their disclosure would more directly inhibit an agency's deliberative processes. *Id.*

47. *Mink*, 410 U.S. at 87 (exemption 5 protects privileged intra-governmental memoranda).

materials,[48] and "government privilege" materials.[49] For the purposes of an exemption 5 defense, courts formerly considered whether an agency document's disclosure would be "injurious to the consultative functions of government."[50] In *Klamath Water Users*, the Supreme Court unified general exemption 5 themes by reducing the legal analysis to two succinct inquiries, and by cementing in a new corollary for tribal consultants.[51]

1. Its Source Must Be a Government Agency

a. The Agency's Need for Expert Information Produced by Temporary Consultants

A document does not have to be both prepared by and in the control of the agency to qualify for exemption 5 withholding. Courts generally agree that Congress did not intend the "inter-agency" and "intra-agency" terms to be rigidly interpreted; rather, the terms were to include "any agency document that is part of the deliberative process."[52] The oft-cited passage on this topic comes from the D.C. Circuit Court of Appeals' 1971 decision in *Soucie v. David*: "The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity."[53]

The government's need for outside consultants' information and expertise justifies such memoranda sheltering under exemption 5. As the D.C. Circuit explained in its 1987 opinion in *CNA Financial Corp. v. Donovan*, "federal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities."[54] Outside consultants bring expertise to decision-

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48. County of Madison v. DOJ, 641 F.2d 1036, 1039-40 (1st Cir. 1981) (exemption 5 protects confidential advisory opinions sometimes referred to as executive privilege).

49. *FOIA Memoranda*, *supra* note 5, at 1050. *See, e.g.*, DOJ v. Julian, 486 U.S. 1, 11 (1988).

50. *County of Madison*, 641 F.2d at 1040 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)).

51. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1065-69 (2001).

52. *Ryan*, 617 F.2d at 790. *See also* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987); Formaldehyde Inst. v. Dep't of Health and Human Servs., 889 F.2d 1118, 1123 (D.C. Cir. 1989).

53. Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). The *Soucie* court attached no exemption 5 significance to the fact that a document was prepared by an outside consultant or an agency employee. *Id.* at 1076. Over the years, the D.C. Circuit and other courts have followed the *Soucie* reasoning. *See, e.g.*, Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972); *Donovan*, 830 F.2d at 1161 ("It likewise is clear that the agency's privilege to withhold the reports is unaffected by the fact that they were prepared by a consultant from outside the agency."); *Formaldehyde Inst.*, 889 F.2d at 1122; Public Citizen, Inc. v. DOJ, 111 F.3d 168, 170 (D.C. Cir. 1997); Brockway v. Dep't of Air Force, 518 F.2d 1184, 1191 (8th Cir. 1975).

54. *Donovan*, 830 F.2d at 1162. The court in *Ryan* echoed this recognition, explaining that agencies must regularly rely on temporary consultants' advice for integral parts of its deliberative

making that may contribute to, or be an indispensable component of,[55] efficient government operation. Thus, documents prepared by outside consultants further the overall goals of exemption 5 and must be accorded the same privilege from disclosure.

b. Pre-*Klamath Water Users* Qualifications for Temporary Consultants

A few restrictions might have limited an agency from withholding outside consultants' documents pursuant to exemption 5 before *Klamath Water Users*. The Court of Appeals for the Ninth Circuit indicated that the outsider must have had "a formal relationship with the agency" when the consultant submitted the documents.[56] That court, however, neither explained why it required such a relationship, nor defined what constitutes a "formal relationship."[57] Another possible restriction, to which the D.C. Circuit Court of Appeals referred in *Donovan*, was that the outsider's document should have been a "fair substitute for agency experience."[58] Finally, the D.C. Circuit Court of Appeals indicated in *Public Citizen, Inc. v. Department of Justice* that an adversarial relationship between the outside expert and the agency could negate the consultative relationship that exemption 5 aims to protect.[59] The *Public Citizen* court determined, though, that concrete movement toward adversity was necessary to defeat the exemption.[60] Moreover, the court concluded that an outside consultant's distinct and independent interest in the documents at issue did not defeat an agency's exemption 5 withholding.[61]

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functions—to expose these recommendations to the public would impair agency decision-making. Ryan v. DOJ, 617 F.2d 781, 789 (D.C. Cir. 1980). *See also Formaldehyde Inst.*, 889 F.2d at 1122 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987)).

55. Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1034 (5th Cir. 1972). The outside consultants in Wu were "the only ones qualified" to prepare the documents for which the agency retained them; the court characterized the agency's interest in the consultants' services as particularly strong and found that the documents they produced could shelter under exemption 5. *Id.*

56. Van Bourg v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985).

57. *Id.*

58. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1156 (D.C. Cir. 1987). This subtle requirement, however, seems to contradict the *Donovan* court's support for outsider documents qualifying under exemption 5: How could outsider expertise fairly substitute for agency experience if the agency needed consultation precisely because the agency was not itself expert? *Id.* at 1162. This potential limit has not yet operated to exclude any temporary consultant's document from exemption 5 withholding.

59. Public Citizen, Inc. v. DOJ, 111 F.3d 168, 171 (D.C. Cir. 1997).

60. *See id.*

61. *Id.* Regarding a temporary consultant's direct interest in the sought-after documents, the *Public Citizen* court reiterated that deciding whether or not the document was deliberative was the relevant inquiry. *Id.* The only other court that has directly addressed the distinct, independent interest of a temporary consultant within the context of an exemption 5 defense is the Ninth Circuit Court of Appeals in *Klamath Water Users Protective Ass'n v. DOI.* Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28 (2000). That court, however, looked at the potential for adversity between the party that submitted the FOIA request and the interested temporary consultant—not to the

While not exactly a limitation, courts agree that in applying exemption 5 to temporary consultants' documents, the fact that an agency requested the submission of the documents bolsters its privilege to withhold them. The D.C. Circuit Court of Appeals first supported this exemption 5 analytical factor five years after Congress enacted FOIA and has consistently adhered to the principle since then.[62] Three other Circuits attach a similar heightened privilege to those outside consultants' documents that were solicited by an agency.[63]

Justice Scalia's dissent in *United States Department of Justice v. Julian*, though somewhat lengthy, is analytically illustrative.[64] Addressing an issue that the majority did not need to reach in its analysis, Justice Scalia clarified the nexus between temporary consultative expertise, deliberative documents, and efficient government within the context of an exemption 5 defense:

> [T]he most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency—as opposed to an 'inter-agency memorandum,' which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it. . . . It seems to me that [the Courts of Appeals'] decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency

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relationship between the interested temporary consultant and the agency. *Id.* at 1038. Relying on *Public Citizen* to support its finding that the outside consultant's direct interest and potential for adversity precluded exemption 5, the *Klamath* court disingenuously applied the D.C. Circuit Court of Appeals' precedent. *Id.*

62. Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) ("[The document] should therefore be treated as an intra-agency memorandum of the agency *which solicited it.*") (emphasis added); Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980) ("We cannot overlook the fact that the documents here were generated by an initiative from the Department of Justice . . . ."); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) ("[W]here, as here, a consultant is retained to evaluate information and submit recommendations as to decisions thereon, the advice or opinion transmitted to the agency is subject to privileged withholding.").

63. *See* Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972); County of Madison v. DOJ, 641 F.2d 1036, 1040-42 (1st Cir. 1981) (holding that the consultants' approaching the agency, rather than the government requesting the consultative information, was important to finding that exemption 5 did not protect the documents). The *Van Bourg* court's emphasis on temporary consultants having a "formal relationship" with the agency can arguably be construed as favoring the agency soliciting information and retaining the consultant to provide it. Van Bourg v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985).

64. DOJ v. Julian, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting).

> memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.[65]

c. Post-*Klamath Water Users* Restrictions on Temporary Consultants

The *Klamath Water Users* opinion emphasizes the "apparent plainness" of exemption 5's text.[66] Step one of that Court's two-part exemption 5 analysis requires that the document's "source must be a Government agency."[67] Underscoring the inter-agency or intra-agency qualifications as "no less important" than the deliberative processes element, the decision substantially restricts the role of the temporary consultant.[68]

The opinion points out that "*some* Courts of Appeals have held that in *some* circumstances a document prepared outside the Government *may nevertheless* qualify as an 'intra-agency' memorandum under Exemption 5."[69] The Court, however, attempts to distinguish those cases by characterizing the consultants as "enough like the agency's own personnel to justify calling their communications 'intra-agency.'"[70] The opinion suggests that although the former Presidents in *Public Citizen*[71] and the Senators in *Ryan*[72] "arguably extend beyond" the disinterested temporary consultants that the Court describes as necessary to exemption 5, such analytical aberrations are acceptable because those consultants were not "seeking a Government benefit at the expense of other applicants."[73]

Regardless of past anomalies, *Klamath Water Users* clearly requires present and future consultants to be "independent contractors."[74] According to the Court, a consultant's own interest in the subject matter makes it impossible for the consultant's document to play "essentially the same part . . . [as] agency personnel might have done."[75] The opinion requires that, for

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65. *Id.*
66. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1066 (2001).
67. *Id.* at 1065.
68. *Id.* at 1066.
69. *Id.* (emphasis added).
70. *Id.* at 1068.
71. Public Citizen, Inc. v. DOJ, 111 F.3d 168 (D.C. Cir. 1997).
72. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980).
73. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1068 n.4 (2001).
74. *Id.* at 1067.
75. *Id.*

exemption 5 to apply, a temporary consultant must not "represent an interest of its own, or the interest of any other client, when it advises the agency that hires it."[76]

2. It Must Fall Within the Ambit of a Privilege Against Discovery

The *Klamath Water Users* second inquiry regarding the applicability of exemption 5 requires that a document "must fall within the ambit of a privilege against discovery."[77] This analysis returns to the familiar "deliberative processes" definition that is fundamental to the general purpose behind the exemption. A document that exposes an agency's deliberative processes is injurious to the consultative functions of government and may be properly withheld according to FOIA.[78] The deliberative processes may include or be found in, inter alia, policy recommendations, decision-making advice, and suggestions from temporary consultants.[79] If the documents in question are those wherein "opinions are expressed and policies formulated and recommended," then exemption 5 applies.[80]

Implicit in the "deliberative process" requirement is the notion that it is the purpose of the document that either qualifies the document for, or disqualifies it from, FOIA's exemption 5. According to the Supreme Court, exemption from disclosure turns on "an understanding of the function of the documents in issue in the context of the administrative process."[81] As the D.C. Circuit explained, "the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure."[82] Thus, because the ultimate exemption 5 inquiry asks whether a document's disclosure would harm the government's consultative, deliberative functions, the court must analyze the context in which the agency used the document.[83] In 1989, the D.C. Circuit Court of Appeals offered the most explicit articulation of the requisite "role" characteristics in *Formaldehyde Inst. v. Department of Health*

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76. *Id.*

77. *Id.* at 1065.

78. *Mink*, 410 U.S. at 87-88; Ryan v. DOJ, 617 F.2d 781, 789 (D.C. Cir. 1980); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

79. *Soucie*, 448 F.2d at 1078.

80. Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1034 (5th Cir. 1972) (quoting Int'l Paper Co. v. FPC, 438 F.2d 1349, 1358-59 (2nd Cir. 1971)).

81. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975).

82. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987). *See also, e.g.*, Formaldehyde Inst. v. Dep't of Health and Human Servs., 889 F.2d 1118, 1122 (D.C. Cir. 1989) (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987)).

83. *Formaldehyde Inst.*, 889 F.2d at 1123-24.

and Human Services.[84] That court held that a document must be both predecisional and deliberative for an agency to withhold it under exemption 5.[85]

A predecisional document is a recommendation, proposal, draft, suggestion, or other type of subjective material that reflects the creator's personal opinions instead of the agency's policy.[86] Moreover, a predecisional document is prepared specifically to assist an agency decision-maker in making her decision.[87] Courts have not offered any straightforward, simple tests for assessing whether a document is deliberative. Precedent seems to indicate that the determination depends in part on the potential impact of disclosure. "[I]f 'the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions,'" then the document may be properly classified as deliberative.[88] Thus, in order to provide for the most effective and efficient agency decision-making, characterized by a free exchange of ideas, advice, opinions, and consultations in an agency, exemption 5 lets the agency decide whether or not to disclose publicly predecisional, deliberative documents.[89]

3. Putting Exemption 5's Analytical Elements Together

Incorporating each of the exemption 5 variables into a coherent "withholding or disclosure" equation is more complex than is readily apparent from the text of the exemption. The D.C. Circuit Court of Appeals did an admirable job in *Ryan v. Department of Justice*, where the court succinctly stated, "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5."[90]

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84. *Id.* at 1124.

85. *Id.* at 1121.

86. *Id.* at 1122 (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

87. *Id.* (citing Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975)).

88. *Id.* (quoting Dudman Communications Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir.1987)) (alteration in original). The D.C. Circuit Court of Appeals also gives "deliberative" weight to a document that assists an agency in performing the precise functions that Congress directed it to perform. *Id.* at 1120. *See also* Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971). By contrast, documents that are not deliberative are those that simply introduce new data and facts into the decision-making formula, or those in which final expressions of agency policy are announced. *See, e.g.*, CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1160 (D.C. Cir. 1987); Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980).

89. 5 U.S.C. § 552(b)(5) (2000).

90. *Ryan*, 617 F.2d at 790.

That court placed particular emphasis on the deliberative nature of the document, judging that its submission by a temporary consultant is permissible, especially if the agency solicits the submission. After the *Klamath Water Users* opinion, however, the disinterested, independent contractor element trumps the solicitation element. An accurate exemption 5 analytical summary might now call for a deliberative document created either by agency personnel or by an independent temporary consultant commenting on matters in which she has no interest.

The pre-*Klamath Water Users* analysis suggested that exemption 5 offers sanctuary against disclosure more as a function of the document's role in an agency's deliberative processes rather than as a consequence of the document's creator. However, the *Klamath Water Users* Court directed its analysis nearly exclusively to the creators' identities and to their trust resource interests.[91] Because the federal-tribal relationship played a role in the *Klamath Water Users* opinion—albeit a role that gives short shrift to federal Indian law principles and government trust duties—the next Part examines the federal trust responsibilities and focuses on how administrative agencies may meet their fiduciary obligations to Indian tribes.

II. THE FEDERAL GOVERNMENT'S FIDUCIARY OBLIGATIONS TO INDIAN TRIBES

A. Background to the Trust Doctrine

Shifting the focus to the second major area of law relevant to this Note, this Part considers the federal government's fiduciary obligation to protect Indians' "property, treaty rights, and way of life."[92] Courts and scholars succinctly term this important obligation the trust responsibility, though the doctrine's origin and substance embrace some of the most amorphous concepts to emerge out of nearly two hundred years of Indian law jurisprudence.[93] In essence, the judiciary created the trust doctrine to "harness actions taken by the other two branches of government, and as a basis for compensating wrongs committed by those branches against the Indian people."[94] Like the legislative

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91. *See generally* DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060 (2001).

92. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 735 (1995) [hereinafter *Critique*].

93. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495 (1994) [hereinafter *Promise*].

94. *Id.*

and executive branches, however, the judiciary owes its own fiduciary duty to Indian tribes.[95]

Informal notions akin to the trusteeship concept appear in the earliest treaties between the federal government and the Indian tribes. These agreements specifically recognize tribal sovereignty and generally ensure "the perpetual availability of a sustained, land-based, traditional existence for the native nations[;]" some agreements expressly guarantee federal protection for the tribes.[96] This pre-judicial theory of "trusteeship" presumes tribal sovereignty and continued Indian separatism, rather than assimilation or abject dependency.[97]

In 1832, Chief Justice Marshall articulated what came to be known as the trust doctrine in *Worcester v. Georgia*.[98] Marshall explained the Cherokee Nation's relationship with the United States as

> that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master. . . . [The Treaty of Holston] thus explicitly recogniz[es] the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and of course, pledging the faith of the United States for that protection . . . .[99]

The *Worcester* sovereign-based trust model had promise for preserving tribal autonomy, but nineteenth- and twentieth-century federal Indian policies (relying on the increased strength of the U.S. military) largely aimed to exploit tribal resources and to dismantle tribal cultures, with little or no resistance from the judiciary.[100] Courts instead relied on the trust model fashioned in

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95. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 222-26 (1995) [hereinafter *Paradigm*].

96. *Promise*, *supra* note 93, at 1497.

97. *Id.* at 1498.

98. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Scholars regularly trace the origin of the trust doctrine to Marshall's earlier opinion in *Cherokee Nation v. Georgia*. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). There, Marshall wrote that Indian tribes were "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ." *Id.* at 17. Wood argues that "[t]he *Worcester* description of the federal-tribal relationship provides a preferable textual foundation for the trust doctrine. Moreover, the *Worcester* characterization of the federal-tribal relationship should carry more weight because that opinion was issued after *Cherokee Nation* and may have represented Justice Marshall's own evolving understanding of the trust obligation." *Promise*, *supra* note 93, at 1501 n.133.

99. *Worcester*, 31 U.S. at 555-56.

100. *Promise*, *supra* note 93, at 1501-02.

United States v. Kagama, which denigrated tribal sovereignty to mere dependency and cast the obligation of protection as a primary source of federal authority over Indian tribes.[101] After courts opted to replace the sovereign-based trust model with the *Kagama* dependency, or "ward-guardian" model, the trust doctrine was linked to the new plenary power doctrine, which justified "nearly total federal authority over tribal lands and internal tribal governance, even though such authority lacks any textual basis in the Constitution or treaties."[102]

Although the *Worcester* and *Kagama* trust models are polar opposites—*Worcester* relied on tribal sovereignty; *Kagama* followed a guardian-ward model, created congressional plenary power, and sought Indian assimilation—courts do not often differentiate between the frameworks.[103] Despite the doctrine's bipolarity, Professor Wood argues that the trust concept should not be jettisoned as paternalistic, but that it must be remodeled to promote a new paradigm of tribal sovereignty.[104] The law must detach notions of the guardian-ward relationship and plenary power from the trust framework so that the doctrine may effectively support Indians, their natural resources, and their sovereign separatism rather than federal dominion and assimilation policies.[105] Although decolonization efforts regularly seek to disassemble the entire concept of congressional plenary power within Indian law, Professor Wood insists that a complete rejection of the trust doctrine as part of that package discards a potent source of tribal power: "The outright dismissal of the trust responsibility effectively drowns any continuing special federal obligation toward tribes. . . . The trust responsibility should be recognized as a doctrine of federal restraint, not permission, and as an important source of protection for Indian rights."[106] The trust doctrine should enhance tribal sovereignty and hold the federal government to its fiduciary obligations rather than reject the trust framework and its paternalistic historical baggage wholesale, thereby permitting the government to escape the responsibilities to which the judiciary has ostensibly held it since 1831.[107]

Despite the debate over the precise nature of the federal government's trust obligation, the courts unanimously agree that such an obligation exists.

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101. United States v. Kagama, 118 U.S. 375 (1886). *See also Promise*, *supra* note 93, at 1503. The Kagama Court explained, "[f]rom [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Kagama*, 118 U.S. at 383-84.

102. *Promise*, *supra* note 93, at 1503.

103. *Id.* at 1503-05.

104. *Promise*, *supra* note 93, at 1504-05.

105. *Id.*

106. *Id.* at 1507-08.

107. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555-56 (1832). *See also Promise*, *supra* note 93, at 1550.

Apparently influenced greatly by *Kagama*, the Supreme Court stated unequivocally in Seminole Nation v. United States that "this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[108] The Court further held that, because of the federal government's trust responsibilities, it "should therefore be judged by the most exacting fiduciary standards."[109]

B. Federal Agencies' Fiduciary Responsibilities in Managing Tribal Resources

Were the judiciary to hold the federal government to this high level of fiduciary responsibility, Indian tribes might more effectively address the modern problems that they face as sovereigns. One set of contemporary issues with which tribes must deal includes managing natural resources and minimizing environmental degradation resulting from either off- or on-reservation development. The resolution of environmental disputes often occurs within a legal regime that can either bolster or undermine tribal self-government.[110] Therefore, it is important that the trust doctrine restrain federal actors and reinforce Indian sovereignty. Ignoring trust-based arguments "forecloses a potentially effective judicial avenue for requiring agencies to protect native lands and resources."[111]

Many federal agencies of the executive branch, key players in the modern administrative state, actively participate (either directly or indirectly) in tribal government when they regulate and manage the environment. The Bureau of Indian Affairs (BIA), within the Department of the Interior, has traditionally dominated Indian-agency contact, but, in response to the flourishing administrative bureaucracy, tribes today must routinely deal with various other federal agencies' programs and regulations.[112] Even though Congress' plenary power commands attention in Indian law,

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108. Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

109. *Id.* at 297. *See also* United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987) ("It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.").

110. *Promise*, *supra* note 93, at 1505.

111. *Id.* at 1507. *See also Critique*, *supra* note 92, at 794 ("The trust obligation . . . is that constant, enduring obligation on the part of the government to affirmatively protect the treaty rights and other property rights of tribes. This federal trust duty of protection is a key part of the sovereign property expectations that underlie the tribal cessions of land that occurred two centuries ago.").

112. *Promise*, *supra* note 93, at 1505. Wood also argues that the agencies have fulfilled statutory mandates without "due regard to the special obligations owed to native nations." *Id.*

> [b]ecause the conflicts that arise between the federal government and the more than five hundred federally recognized tribes cannot all be dealt with effectively at the congressional level, the executive branch is, by default, the branch that largely defines many of the terms of the federal government's relationship with the native nations.[113]

Thus, while courts might resist forcefully applying trust obligations to Congress, the latent trust power to redress adverse agency actions (impacting all types of environmental activities) is a potentially vital tool to protect tribal interests.[114] Trust-based arguments may be more potent with respect to tribal challenges to agency actions, but the doctrine's inconsistent assertion within the agency realm has precluded it from achieving "its full theoretical potential."[115]

Every agency is bound by the federal government's trust obligations to Indian tribes.[116] The DOI oversees those agencies with the most direct impact on the tribes' natural resource management (the BIA, the Bureau of Reclamation, the U.S. Fish and Wildlife Service (USFWS), and the Bureau of Land Management (BLM))[117] and each agency must meet tribal trust responsibilities. Even so, these fiduciary responsibilities are often lost amid the multitude of objectives and interests that the expanding administrative bureaucracy serves. In short, agencies end up relegating unique tribal interests to the background.[118] Because mismanagement of natural resources (or federal intervention that falls short of demanding fiduciary standards) threatens both tribal sovereignty implicitly and reservation/territorial ecology explicitly, it is crucial that federal administrative policies recognize and meet trust obligations.[119] As Professor Wood suggests, "[w]ithout an ecologically viable

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113. *Critique*, *supra* note 92, at 738.

114. *Paradigm*, *supra* note 95, at 112.

115. *Promise*, *supra* note 93, at 1508.

116. Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990).

117. *Critique*, *supra* note 92, at 753-54.

118. *Id.* at 799.

119. "The federal fiduciary duty is enforceable through equitable, declaratory, or mandamus relief in a federal district court pursuant to the [APA] . . . The APA waives federal sovereign immunity for actions taken by federal agencies." *Promise*, *supra* note 93, at 1514-15. Although the trust doctrine was interpreted somewhat less favorably for tribal plaintiffs in two 1980s cases (*United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)), the opinions did reaffirm that the government's breach of its fiduciary obligation is a viable cause of action. *Promise*, *supra* note 93, at 1521. After the *Mitchell* cases, the "existence of a fiduciary obligation will be determined on a case-specific basis largely dependent on the framework of the statutes involved," with the congressional focus leaving "the trust doctrine on somewhat slippery footing." *Id.* Nonetheless, Professor Wood suggests that, "the trust doctrine is likely to retain its full potency in the post-Mitchell era as applied in the land-

land base and an adequate supply of corollary resources to support a tribal community and economy, the promise of true autonomy is beyond the grasp of the native nations."[120] Therefore, in order to uphold legal precedent and native sovereignty, courts must invalidate agencies' natural resource policies that fall short of trust obligations. Agency decisions, usually entitled to a good measure of deference from the courts,[121] should not so readily pass judicial scrutiny if trust obligations are in the balance.[122]

C. How Federal Agencies May Meet Their Fiduciary Obligations to Tribes

All federal agencies must meet fiduciary obligations, but there remains the question of what those obligations entail. The substantive mandate is less than clear.[123]

1. Trust Responsibilities Enhancing the Agencies' Statutory Requirements

In order to protect native separatism, "[t]he trust doctrine transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their ways of life."[124] The judiciary,

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management context." *Id.* at 1526. So, although the *Mitchell* cases "somewhat narrowed the application of the trust doctrine in the context of claims seeking monetary compensation for breach of fiduciary duty," the doctrine remains a very viable basis "for equitable relief against federal incidental action." *Id.* at 1516, 1527.

120. *Critique*, *supra* note 92, at 740.

121. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (limiting the scope of judicial review where administrative agencies' policy decisions are reasonable).

122. *Paradigm*, *supra* note 95, at 223.

123. As an alternative to reframing the trust doctrine, some scholars advocate returning the federal government and the tribes to a treaty relationship—the (theoretical) epitome of government-to-government consultation and decision-making. Vine Deloria, Jr. argues that, "what is required is a modernization of the old diplomatic treaty relationship between Washington and the various Indian nations . . . replacing the Trust Doctrine with the treaty settlement process." Vine Deloria, Jr., *Trouble In High Places: Erosion of American Indian Rights to Religious Freedom in the United States*, *in* THE STATE OF NATIVE AMERICA 286 (M. Annette Jaimes ed., 1992). In support of the treaty framework, Deloria, Jr. suggests that the trust doctrine "is . . . cited as the excuse for high-handed bureaucratic manipulations of reservation resources." *Id.* at 273. He does recognize, however, that the trust doctrine is the most workable when it emanates from the top of the executive agencies: "'[T]rust' exists as a viable factor only at the very highest level of the administrative pyramid, that is, at the secretarial and presidential level, as part of the 'climate' of responsibility." *Id.* at 278. Thus, the substantive, government-to-government, consultative mandate (embodied in both secretarial and presidential orders) that this Note argues must inform agency decision-making significantly contributes to both a paradigmatic shift of the trust model and to a revisited treaty framework. The thesis here is that mandatory, meaningful communication between the sovereigns will ultimately result in more expert decision-making, efficient use of agency and tribal resources, better-reasoned policies, less litigious parties, and substantial fairness to the tribal and federal interests behind the decisions.

124. *Promise*, *supra* note 93, at 1506.

then, may (and arguably must[125]) hold federal agencies to more stringent standards than those promises embodied in original sovereign-to-sovereign land transfer agreements.

Although fiduciary obligations further strengthen the federal government's treaty promises, whether the trust doctrine also operates to supplement directly agencies' statutory burdens is unclear. As Professor Wood argues,

> [i]nterpreting governmental fiduciary standards as coextensive with express statutory obligations in general laws is inappropriate. The Indian trust obligation centers exclusively on native interests, whereas environmental protection statutes as well as other general welfare statutes are enacted to protect the broader public interest. Often the statutory standards enacted to benefit the general public are inadequate to protect the unique interests of tribes.[126]

The courts are more equivocal. Despite the Supreme Court's "most exacting fiduciary standards" mandate in *Seminole Nation v. United States*,[127] the D.C. Circuit Court of Appeals subsequently held that the Secretary of the Interior met his trust obligations to the Inupiat tribe simply by meeting standards under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) in *North Slope Borough v. Andrus*.[128] That decision contradicts the notion that trust obligations exceed statutory directives. An earlier ruling by the D.C. District Court, though, implied that the trust doctrine does enhance agencies' statutory responsibilities. The court in *Pyramid Lake Paiute Tribe of Indians v. Morton* held that,

> [i]n order to fulfill his fiduciary duty, the Secretary [of the Interior] must insure, to the extent of his power, that [no water would be diverted from the reservation absent a court decree or contract right providing otherwise]. . . . [The Secretary] was further obliged to

125. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

126. *Paradigm*, *supra* note 95, at 118-19.

127. *Seminole Nation*, 316 U.S. at 296.

128. North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) ("[W]here the Secretary has acted responsibly in respect of the environment, he has implemented responsibly, and protected, the parallel concerns of the Native Alaskans. In sum, the substantive interests of the Natives and of their native environment are congruent. The protection given by the Secretary to one, as we have held, merges with the protection he owes to the other."). The court also stated that, "[i]t is worth noting that the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 et seq. (1976), arguably precludes the existence of a general federal trust responsibility to the Eskimoes." *Id.* at 612 n.151. The court proceeded, however, as if a trust responsibility existed. *Id.* at 612.

> assert his statutory and contractual authority to the *fullest extent possible* to accomplish this result.[129]

Courts have not resolved the extent to which the trust doctrine impacts agencies' statutory responsibilities. Logically, trust obligations must enhance agency duties so as to be more than empty rhetoric. On the other hand, casting the doctrine as a mere tool of statutory construction—or as a statutory "gap-filler"—misunderstands the import of the government's fiduciary obligations.[130] "Absent an express and direct conflict with a statutory provision, the trust doctrine should serve as a common law overlay to statutory regimes, supplying higher standards of protection where appropriate."[131] It follows, then, that unless a statutory directive or legal precedent clearly indicates that alternative approaches are mandatory, the trust doctrine ultimately requires agencies to implement their environmental regulatory programs so that tribal resources are substantially protected.[132]

2. Prioritizing Tribal Welfare in Conflict-of-Interest Situations

One commentator outlined the trouble with applying one judicially determined, monolithic trust "standard" to Indian tribes:

> [T]he real problem with the fiduciary obligation [toward Indian tribes] . . . suggests a more fundamental difficulty with all of Indian law and policy: no one, not even the Indians themselves, seems to know where the best interests of the Indians as a whole do lie amid the restricted range of options presented by the dominant culture.[133]

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129. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973) (emphasis added).

130. *Paradigm*, *supra* note 95, at 120.

131. *Id.* at 119-20.

132. *Critique*, *supra* note 92, at 744. The court in *North Slope Borough v. Andrus* contradicted this argument: "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *North Slope Borough*, 642 F.2d at 612. The Supreme Court's statement in *Seminole Nation* (that the federal government's trust responsibilities "should . . . be judged by the most exacting fiduciary standards") arguably displaces the *Andrus* court's limited notion. *Seminole Nation*, 316 U.S. at 297.

133. Book Note, *Indian Country*, 98 HARV. L. REV. 1104, 1105 (1985). Professor Wood extends this discussion by weighing the pros and cons of applying the "best interests" standard of the private trust context to the unique government-Indian fiduciary relationship. *See also Paradigm*, *supra* note 95, at 126-30. Wood fundamentally questions if courts are appropriate fora to attempt to decide tribes' "best" interests, but summarizes the debate by stating, "[t]he dominant tenet which emerges . . . is that the Indian interest lies in preserving the tribes' sovereign nation status and resisting assimilation forces." *Id.* at 128.

The "range of options" available in the modern environmental context exists in the framework of agency-conducted decision-making processes in developing natural resource policy. Frequently in the environmental arena, tribal interests are juxtaposed with opposing outside interests in the decision-making framework. The government, then, is often simultaneously (but unequally) accountable to each group.[134] The trust doctrine must inform agency decision-making processes if it is to effectively safeguard Indian resources. Thus, where an agency manages shared resources (e.g. water, wildlife, etc.), "[t]he Indian trust doctrine must . . . incorporate a standard to weigh or prioritize the obligation owed to the tribe against . . . countervailing public interests. The absence of such a standard leaves tribal interests vulnerable to de facto subordination through political processes traditionally dominated by powerful non-Indian constituencies."[135]

Support for this application of the trust doctrine emanates from several sources. A Montana federal district court, in *Northern Cheyenne Tribe v. Hodel*, held that

> [t]he Secretary's conflicting responsibilities . . . do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.[136]

Similarly, the *Pyramid Lake Paiute Tribe of Indians v. Morton* court stated that, in making policies to allocate shared water resources between the tribe and an irrigation project, "[i]t was not [the DOI Secretary's] function to attempt an accommodation. In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power that all water not obligated [be allocated to benefit the tribe]."[137] The Supreme Court spoke narrowly to this trust notion in *Nevada v. United States*.[138] Regarding the DOI's responsibility to manage water resources between Indian tribes and nearby federal reclamation projects, the *Nevada* Court stated that "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress

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134. *Paradigm*, *supra* note 95, at 116.
135. *Id.*
136. Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065, 3071 (D. Mont. May 28, 1985).
137. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973).
138. Nevada v. United States, 463 U.S. 110 (1983).

has obligated it by statute to do."[139] *Nevada* is rather narrow in scope, as the DOI was "obligated by [congressional] statute" to represent both the tribes and reclamation interests in litigation[140]—a rare "clear and precise, congressionally created conflict of interest."[141] The *Nevada* court stopped short of addressing whether, absent a congressional mandate to litigate on behalf of both interests, the trust doctrine requires agencies to elevate Indian tribes' interests over the competing interests of other parties.

Abiding by the judicial mandate in *Seminole Nation*,[142] "agencies should develop strategies to prioritize tribal property interests" when resolving regular disputes between tribes and outside parties competing for shared natural resources.[143] As Professor Wood notes, "[c]ourts have appropriately held that the trust obligation requires protecting tribal property interests against competing interests of other constituencies to which agencies may feel beholden."[144] Indeed, conflict-of-interest situations, common in the natural resource arena, are some of the most critical circumstances in which the government must meet its fiduciary obligations. These situations "present the most complex array of issues for the trust responsibility. In their efforts to establish general policy, agencies may take overly restrictive or simplistic approaches to the resolution of these issues."[145]

D. Incorporating Agency-Tribal Consultation in Administrative Decision-Making

1. A Requisite Element of the Federal Government's Fiduciary Obligations

If the trust doctrine is to safeguard Indian property, it must prioritize tribal welfare in conflict-of-interest scenarios and generally inform administrative agencies' basic decision-making processes. One essential method of incorporating trust principles into agency decision-making is providing for government-to-government consultation between tribes and agencies during natural resource policy development. This procedural element of the trust obligation should operate as a regular and ongoing exchange between government and tribal decision-makers during regulatory policy formation.[146] Recent administrative developments suggest that executive

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139. *Id.* at 128.
140. *Id.*
141. *Paradigm*, *supra* note 95, at 230.
142. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).
143. *Promise*, *supra* note 93, at 1535.
144. *Critique*, *supra* note 92, at 746.
145. *Id.* at 750.
146. *See Paradigm*, *supra* note 95, at 226-27.

departments have substantially incorporated such consultative methodologies into their regulatory mechanisms. Over the past decade, several federal agencies have adopted policies regarding how they may fulfill their fiduciary obligations to Indian tribes.[147] Whether the policy acts as simple, non-binding guidance or an innovative approach to federal-tribal cooperative natural resource management, a key component in each trust policy is agency-tribal consultation. Often in tandem with consultative directives, several trust policies emphasize that the government's fiduciary obligations compel agencies to keep the substance of the consultations confidential.

2. Federal Agencies' Trust Policies—The Focus on Consultation and Confidentiality

A letter from the DOI's Solicitor General contains one of the modern era's earliest agency statements on the precise relationship between departments' fiduciary obligations and confidential tribal information. Opining that the DOI may properly withhold a document submitted by the Seneca Nation to the DOI pursuant to FOIA's exemption 4,[148] the Solicitor General stated that, "withholding . . . is warranted when the agreement was submitted in confidence to the Department for approval. . . . [T]he fiduciary relationship between the Department and the Indian tribe was a sound ground for invoking the exemption."[149] The Solicitor General succinctly summarized the link between confidentiality and trust responsibilities, writing, "[i]n the discharge of this fiduciary obligation it is essential that a confidential relationship be established and maintained."[150]

a. The 1994 Executive Memorandum

Twenty years later, President Clinton's executive branch became the first administration to initiate "a systematic effort to develop a coherent, legally valid trust policy to guide implementation of agency programs."[151] Clinton's 1994 Executive Memorandum, Government-to-Government Relations With Native American Tribal Governments, directed all federal departments, agencies, component bureaus, and offices to implement their regulatory

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147. Trust policies are "fashioned as internal guidance documents or memoranda to agency officials. None are promulgated as formal rules under the APA." *Critique*, *supra* note 92, at 751.

148. FOIA exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure. 5 U.S.C. § 552(b)(4) (2000).

149. Non-Availability of Confidential Agreement of Indian Tribe Under Public Information Act, Op. Sol. Gen., M-36860 (1973), 1973 WL 31654.

150. *Id.*

151. *Critique*, *supra* note 92, at 748.

programs "in a knowledgeable, sensitive manner respectful of tribal sovereignty."[152] The memorandum emphasized that interactions between executive departments and tribes should operate on a government-to-government basis. Following this directive, several administrative agencies drafted policies aimed at "uniquely Indian concerns in the areas of environmental and natural resources management"[153] and at fulfilling their trust obligations to Indian tribes. The DOI,[154] the Department of Agriculture, and the Department of Energy each have policies that promote consultation between administrative and tribal decision-makers.[155]

The 1994 Executive Memorandum encouraged an administrative refocusing around a "new sovereign trust paradigm;" it reaffirmed the federal government's fiduciary obligations "without embracing the paternalism and dominance of the past."[156] Its inadequacies, though, lie in that it seemingly favors form over function regarding substantive trust results. Professor Wood cautions against viewing the order as a panacea:

> [I]t notably falls short of establishing any policy regarding the fulfillment of the government's trust obligation toward the tribes.... [T]he trust obligation forms a central duty in the federal-tribal relationship. The memorandum's silence with respect to that binding and enforceable obligation is a significant shortcoming and leaves an ill-founded impression that the full duty of executive agencies in dealing with tribes is simply a procedural one of consultation. This gives rise to the very real danger that symbolism will overtake substance in the area of Indian affairs. If federal officials believe that they need only provide tribes with special procedural access to agency decisionmaking, but then may disregard native rights after gaining tribal input, breaches of the trust obligation will become not only routine but seemingly sanctioned.[157]

If agency-tribal consultation is to further a realization of trust responsibilities, it must be a substantively meaningful and integral component of agency decision-making.[158]

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152. Exec. Mem., 59 Fed. Reg. 22,951 (Apr. 29, 1994).

153. *Critique*, *supra* note 92, at 737.

154. *See infra* Part II.D.2.c.

155. *Critique*, *supra* note 92, at 756, 758-61. Professor Wood notes that conspicuously absent are trust policies from the Department of Commerce and the Department of Defense.

156. *Id.* at 799.

157. *Id.* at 749.

158. *See infra* Part II.D.3.

b. The DOI's Secretarial Order No. 3175

The 1994 Executive Memorandum seemed to frustrate the consultative functions by suggesting that communications were to be "open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals."[159] This language may have been derived from the 1993 DOI Secretarial Order, Departmental Responsibilities for Indian Trust Resources.[160] Secretarial Order No. 3175 sought to protect Indian trust resources by specifically requiring consultation between "the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the [BIA], and the Office of the Solicitor . . . if their evaluation reveals any impacts on Indian trust resources."[161] Government-to-government consultations were to accomplish trust resources protection, and yet, couched in language nearly identical to the subsequent 1994 Executive Memorandum, the order jeopardized the confidentiality of the consultations: "All consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources."[162]

c. The 1995 Additions to the DOI Manual

The confluence of the "open and candid" statements in the 1993 Secretarial Order and the 1994 Executive Memorandum appear at first glance to foreclose agency-tribal consultative confidentiality. Such is not the case. In 1995, the DOI codified Secretarial Order No. 3175 in the DOI Manual.[163] Significantly, the final language that the DOI adopted regarding the open, candid nature of agency-tribal consultations restored the preference for confidentiality and placed a higher burden on the DOI itself. In section B ("Consultation") of chapter 2 ("Indian Trust Resources"), the DOI provided:

> In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices *must consult* with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department *shall*

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159. Exec. Mem., 59 Fed. Reg. 22,951 (Apr. 29, 1994).

160. Departmental Responsibilities for Indian Trust Resources, United States Department of the Interior, Secretarial Order No. 3175 (Nov. 8, 1993), *available at* http://www.doi.gov/oait/docs/policies.htm.

161. *Id.*

162. *Id.*

163. *Departmental Manual*, United States Department of the Interior, 512 DM 2.4B (Dec. 1, 1995).

> *be open and candid* with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, *may fully incorporate tribal views* in its decision-making processes. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty. Information received *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).[164]

In this significant policy shift, the DOI directed its bureaus to be "open and candid" with the *tribes* in mandatory consultations, to respect tribal sovereignty and resources, and to keep consultative information confidential. Flatly rejecting the preference for divulging agency-tribal communications to the public that it had previously promulgated, the codified DOI policy favors addressing trust resource issues by incorporating meaningful consultation into departmental decision-making.

Secretarial Order No. 3175 introduced mandatory consultation into the DOI's traditional decision-making processes through the usual conventions (i.e. codifying secretarial recommendations into internal regulations). In contrast, two other agency trust policies developed in the 1990s in the departments of Commerce and Interior incorporated consultative approaches in rather innovative fashions.

d. The Statement of Relationship Between the White Mountain Apache Tribe and the United States Fish and Wildlife Service

On December 6, 1994, Ronnie Lupe, Chairman of the White Mountain Apache Tribe, and Mollie Beattie, Director of the U.S. Fish and Wildlife Service (USFWS), concluded an "extraordinary series of negotiations," held outdoors and without attorneys.[165] Lupe and Beattie, seeking to defuse tension between the Tribe and the USFWS over whether or not the Endangered Species Act (ESA) applied within Indian Country, drafted and signed the "Statement of the Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service," which confirmed that the "Tribe and

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164. *Id.* (emphasis added).

165. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 732 (4th ed. 1998).

the Service have a common interest" in protecting wildlife.[166] In the Statement, the USFWS formally recognized its fiduciary responsibility to the Tribe, and, citing Secretarial Order No. 3175, acknowledged its requirement to consult with tribes when agency activities would affect trust resources.[167] Under a section entitled "Communication," the agreement specifies that the intended "government-to-government," or agency-tribal, relationship must be achieved through the "sharing of technical staffs and information," but that "[b]oth the Tribe and the Service recognize . . . that release of tribal proprietary, commercial, and confidential information may be restricted by either the Tribe or the Service."[168] The 1994 Statement ultimately mandates consultation while favoring the confidentiality of consultative information.

e. The Joint Secretarial Order No. 3206 from the Departments of the Interior and Commerce

Building from the 1994 Statement, several Indian leaders, tribal lawyers, and tribal resource managers convened a national conference on the Endangered Species Act (ESA) in 1996.[169] The conference, facilitated by the American Indian Resources Institute of Seattle, Washington, produced a working group that eventually recommended "to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the [1994 Statement]."[170] "The basic policy decision was that such an administrative system, if effective, might result in deference to tribal sovereignty and good working relationships with the federal agencies and, as well, obviate or greatly diminish the need for legislation or litigation."[171] The working group approached the DOI Secretary, who in turn involved the Secretary of the Department of Commerce (DOC).[172] The ensuing negotiations outlined the principles of what would become joint Secretarial Order No. 3206: "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act."[173]

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166. Statement of the Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (Dec. 6, 1994), *reprinted in* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 733 (4th ed. 1998).

167. *Id.*

168. *Id.* at 734.

169. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 735 (4th ed. 1998).

170. *Id.*

171. Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1075 (1997) [hereinafter *Bilateralism*].

172. *Id.* at 1075-77.

173. American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, U.S. Department of the Interior and U.S. Department of Commerce, Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.doi.gov/oait/docs/policies.htm.

The goal of the joint order was to further "the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members," employing the government-to-government framework "so as to avoid or minimize the potential for conflict and confrontation."[174] Acknowledging the full scope of its trust obligations,[175] the joint order also recognized the substantial interest and expertise that tribes can contribute to agency policy-making,[176] and the necessary incorporation of such knowledge if the order was to, indeed, promote tribal sovereignty.[177] In essence, the joint order emphasized cooperative decision-making based on meaningful agency-tribal consultation: "[T]he Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships . . . . Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems."[178]

Like the other aforementioned administrative protocols, the joint order's agency trust framework provided for both consultation and confidentiality. A key component of the first of the joint order's five governing principles states:

> Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, *they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable.* This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes.[179]

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174. *Id.*

175. "The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights." *Id.*

176. "The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities." *Id.*

177. "The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies . . . recogniz[e] and endors[e] the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. . . . The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources." *Id.*

178. *Id.*

179. American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, U.S. Department of the Interior and U.S. Department of Commerce, Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.doi.gov/oait/docs/policies.htm (emphasis added).

The fifth governing principle's title is self-explanatory: "The Departments Shall Make Available to Indian Tribes Information Related to Tribal Trust Resources and Indian Lands, And, to Facilitate the Mutual Exchange of Information, *Shall Strive to Protect Sensitive Tribal Information from Disclosure*."[180] This principle indicates that, to the extent that FOIA is not contradicted, the agencies "shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments."[181] Finally, in the "Consultation" section of the appendix to joint Secretarial Order No. 3206, the DOI and DOC indicate that tribal consultative expertise will, in addition to furthering trust obligations, maximize agency efficiency. The departments are instructed to "[f]acilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process."[182]

The joint order was a victory for neither the agencies nor the Indians. One scholar suggests that it was "no dramatic breakthrough, no Olympian moment in federal Indian policy. It is just a sensible, fair approach to a thorny area of policy . . . . [T]his is exactly where progress is often made—in measured, collaborative approaches to particular problems."[183] Because the joint order is a good example of government-to-government natural resource policy-making procedures, though, there is discussion of using a similar framework to address other modern environmental issues such as tribal water rights.[184]

f. The 1998 and the 2000 Executive Orders

One recent executive pronouncement in this area of tribal rights came in 1998. In Executive Order No. 13,084, Consultation and Coordination With

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180. *Id.* (emphasis added).

181. *Id.*

182. Appendix, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, U.S. Department of the Interior and U.S. Department of Commerce, Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.doi.gov/oait/docs/policies.htm. "Services" refers to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, agencies whose national, regional, and field offices are largely responsible for implementing and enforcing the ESA. *Id.* Wilkinson emphasizes the amount of expertise that tribal leaders and tribal scientists can contribute to administrative environmental policy-making: "Nearly all tribes now have formal natural resources agencies, and most of the larger tribes have natural resources staffs of fifty, one hundred, or more. Importantly, tribes have worked hard to utilize traditions, values, and knowledge that have been gained over millenia." Wilkinson, *supra* note 171, at 1070.

183. Wilkinson, *supra* note 171, at 1088.

184. *Id.* at 1086.

Indian Tribal Governments, President Clinton confirmed parts of his 1994 Executive Memorandum and jettisoned others.[185] The order directed agencies to continue to "work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights."[186] Unlike the 1994 Executive Memorandum, the 1998 Executive Order noticeably does not refer to agency-tribal consultative information regarding trust resources being open to public scrutiny.[187] As the title suggests, the order unequivocally mandates agency-tribal consultation and collaboration in "the development of regulatory practices . . . that significantly or uniquely affect [Indian] communities."[188] Consultative procedures, moreover, must promote meaningful and timely contribution from Indian representatives,[189] and the background to the entire collaborative process must be the federal government's fiduciary obligations to safeguard Indian self-government and resources.[190]

Executive Order No. 13,175, issued on November 6, 2000, supplanted Executive Order No. 13,084 in early January of 2001.[191] This order, also titled Consultation and Coordination With Indian Tribal Governments, again emphasizes the desired government-to-government relationship between tribes and the federal government and mandates "regular and meaningful consultation and collaboration" between the sovereigns.[192] The language of the 2000 order, however, strengthens agency responsibilities significantly. Executive Order No. 13,175 replaces the 1998 mandate that agencies must have an "*effective* process to permit [tribal officials] to provide meaningful and timely input in the development of regulatory policies"[193] with requiring agencies to have an "*accountable* process."[194] Building upon this notion of

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185. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

186. *Id.* Although it supports tribes' "inherent sovereign powers over their members and territory," the order also refers to tribes as "domestic dependent nations under [the federal government's] protection," evoking notions of both the *Worcester* and the *Kagama* trust models. *Id.*

187. Departmental Responsibilities for Indian Trust Resources, United States Department of the Interior, Secretarial Order No. 3175 (Nov. 8, 1993), *available at* http://www.doi.gov/oait/docs/policies.htm.

188. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

189. *Id.* ("Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.").

190. *Id.* "[A]gencies shall be guided, to the extent permitted by law, by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." *Id.*

191. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000).

192. *Id.* at 67,249. Like its 1998 predecessor, Executive Order No. 13,175 also refers to tribes as "domestic dependent nations." *Id. See also* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

193. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (emphasis added).

194. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (emphasis added).

agency accountability and mandatory consultation, Executive Order No. 13,175 specifies that,

> Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.[195]

Executive Order No. 13,175, then, cements meaningful agency-tribal consultation as a foundational element of the federal government's fiduciary framework and, like its 1998 predecessor, does not suggest that agency-tribal trust consultations should be subject to public scrutiny.

3. Agency-Tribal Consultation—A Key Component to the Fiduciary Framework

The administrative policies of the 1990s regarding the government's trust obligations to Indian tribes significantly promoted government-to-government consultative procedures in agency natural resources decision-making. While such agency-tribal consultative mechanisms might be small cogs in the larger fiduciary machine, they are necessary components in a well-functioning trust system. As Professor Wood notes, "[t]rust guidance should be fairly specific in form so that agency officials of all ranks may fully incorporate their fiduciary duties into the other aspects of their work."[196] Similarly, Philip Frickey suggests that, "[d]ialogue and compromise among sovereigns . . . are likely to be superior methods of achieving anything remotely approaching a lasting solution [between tribes and the federal government]."[197] Isolating and correcting any deficiency in the trust system will help the federal government to realize its fiduciary obligations and will ultimately promote tribal sovereignty and the ecological vitality of tribal natural resources.

FOIA's exemption 5 precedent and agencies' consultative fiduciary mandates juxtapose two fairly different areas of law. This convergence in *Klamath Water Users* set the stage for key judicial commentary on the trust responsibility and on the operation of Indian law within the administrative bureaucracy.

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195. *Id.*

196. *Critique*, *supra* note 92, at 751.

197. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1, 85 (1999).

III. CASE STUDY: BACKGROUND OF THE KLAMATH WATER USERS CONTROVERSY

A. The Players: Agencies, Indian Tribes, Irrigators, and Shared Water Resources

The *Klamath Waters Users* controversy involves a water users association, federal agencies, and several Indian tribes. The context of the dispute deals with water allocation, but the precise issue the Court decided was what type of information must be available to the public under FOIA.

Klamath Water Users Protective Association (Association) is a nonprofit corporation that keeps its members informed of irrigation activities and water resource developments in the Klamath River Basin.[198] The Association's members primarily include irrigation districts, most of which are contractors of the Bureau of Reclamation's Klamath Project (a water distribution system). Members irrigate nearly 230,000 acres of land in southern Oregon and northern California. The Association itself undertakes neither water distribution nor commercial activities, but makes water resource information available to the public by holding meetings, presenting information at civic functions, and maintaining a library.

The Bureau of Reclamation (Bureau), which is part of the DOI, manages the water distributed through its Klamath Project. Both the Bureau and the DOI determined in the mid 1990s that the Klamath Project's water resources needed to be reallocated to protect the resource interests of local Indian tribes. In February of 1995, the Bureau announced that it would develop a long-term water allocation plan, the Klamath Project Operation Plan (KPOP), so that the DOI could meet its legal obligations regarding water resource management.

The DOI conducted several meetings to discuss the KPOP development. Participants at the meeting included the DOI, the Bureau, CH2M Hill (a consulting firm DOI hired to prepare technical papers), the Klamath Basin Tribes (Tribes),[199] and the U.S. Geological Survey (which reviewed various technical information submitted by CH2M Hill and the Tribes). Open meetings were also conducted to allow public participation, and were attended

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198. All of the information in Part III, unless another specific source is cited, comes from the Magistrate Judge's findings and recommendations in *Klamath Water Users Protective Ass'n v. DOI*, No. 96-3077-CO (D. Or. June 19, 1997), *available at* http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.html (visited Oct. 20, 2000).

199. The Klamath Basin Tribes are the Klamath tribes, the Hoopa tribe, the Karuk tribe, and the Yurok tribe. Some of the tribes sought high instream flows in the Klamath River; other tribes instead wanted high lake levels in Upper Klamath Lake.

by the DOI, the Tribes, the Association, environmental groups, and state agencies.[200]

Outside of the public meeting processes, the DOI consulted with the Tribes regarding the DOI's trust obligation to protect the Tribes' water resources in the context of the KPOP development.[201] The Tribes formalized this consultative relationship regarding the trust resource base by entering into a "Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan."[202]

In February of 1996, an employee of the Bureau contacted the manager of the Klamath Irrigation District (a member of the Association) to inform him that a draft plan of the KPOP had been completed for internal DOI review, but that persons outside the federal government would not be permitted to review the internal copy until a draft was released to the public. A draft KPOP was never publicly released. Subsequently, a Regional Solicitor's Office employee advised the Association's attorney that the DOI is obligated to file water resource claims on behalf of the Klamath Basin Tribes to protect their Klamath Project irrigation rights, and that the Tribes would have access to information submitted by the irrigation districts in an adjudication regarding local water rights.[203]

B. The FOIA Requests and the Exemption 5 Defenses

The Association made FOIA requests (in letters dated on February 27, March 18, March 26, and July 3, 1996) to the Bureau of Indian Affairs (BIA) and to the Office of the Assistant Secretary—Indian Affairs. The Association requested "any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes."[204] In addition, the nonprofit Association submitted a request for a fee waiver.

On June 25, 1996, the BIA released three documents (the totality of two documents and one redacted document) in response to the Association's first three FOIA request letters. The BIA stated that it was withholding eighteen documents pursuant to FOIA's exemption 5. Further, the BIA denied the fee

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200. Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1041 (9th Cir. 1999) (Hawkins, J., dissenting), *cert. granted*, 121 S.Ct. 28 (2000).

201. *Id.*

202. *Id.*

203. In response to the Tribes' FOIA requests, the Bureau has disclosed correspondence and materials provided by the Association and irrigation districts to the Tribes.

204. Klamath Water Users Protective Ass'n v. United States Dep't of the Interior, No. 96-3077-CO (D. Or. June 19, 1997), *available at* http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.html.

waiver because the Association's request relied on its commercial interest in the water resources.

On July 18, 1996, the Association appealed the BIA decision to the DOI. The Association argued that it intended to make the information available to any member of the public by maintaining it in the Association's library, and that the Association would not profit from the information. On January 20, 1997, the DOI determined that disclosure of the eighteen documents would not further the general public's understanding of BIA operations, but would serve only a small group of interested persons. Finding additionally that the Association wanted to evaluate the proposals of the BIA and the Tribes concerning the KPOP because of its own interests, the DOI denied the fee waiver.

In response to the Association's fourth FOIA request letter, the BIA released nine documents (the totality of eight documents and the redacted portions of one document) and stated that it was withholding twenty-one documents. The BIA again denied the fee waiver. The Association appealed to the DOI on August 5, 1996. The DOI denied this appeal for the same reasons it denied the Association's July 18, 1996 appeal.

C. The District Court's Findings and Decision

The Association filed suit in the United States District Court for the District of Oregon to compel the DOI's and BIA's disclosure of the documents.[205] By the time the magistrate of that court issued findings and recommendations on the issue, the Association had stopped seeking some of the documents and the agencies had released others, leaving only seven documents in dispute. The magistrate found that the defendants properly withheld each of the seven documents under exemption 5 of FOIA.[206]

All seven documents dealt with the DOI's management of the Tribes' trust resources. The Tribes submitted six of the seven documents to the federal government, and the government had requested the submission of every one of these documents.[207] The magistrate found that disclosure of any one of the seven documents would expose the DOI's decision-making processes and discourage candid discussions within the DOI. Moreover, the findings determined that the DOI relied upon each of the documents in its deliberations concerning management of tribal trust resources with regard to the Tribes'

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205. *Id.*

206. *Id.* The magistrate also concluded that Documents No. 3 and No. 16 were protected by the attorney work-product exemption that is embodied by exemption 5 of the FOIA. *Id.*

207. The seventh document was produced by the BIA, circulated within the agency, and transmitted to the Yurok and Klamath tribal attorneys.

water rights.[208] Disclosure of any one of the documents, the magistrate found, would undermine the DOI's ability to address tribal water rights, to develop the long-term KPOP, or both.[209] Based on the findings, the magistrate recommended that the defendants' motion for summary judgment be granted. The District Court granted the motion and the Association appealed.

D. The Court of Appeals' Reversal

The Ninth Circuit Court of Appeals reversed the District Court's decision.[210] The majority held that the Tribes' direct interest in the documents' subject matter precluded the court from determining whether the function of the documents was deliberative and consultative.[211] According to the majority, the direct interest was dispositive and the DOI could not withhold the documents pursuant to exemption 5.[212] The court indicated that the ruling did not jeopardize the federal government's fiduciary obligation to Indian tribes because the DOI may not grant tribes greater rights than federal regulations afford them, and because Presidential and DOI Secretarial directives encourage candid, open consultations between agencies and tribes.[213]

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208. In addition to the Bureau's development of the KPOP, the BIA "represents some of the Klamath Tribes in Oregon state proceedings to adjudicate all claims to surface water in the Klamath River Basin in Oregon. These proceedings were initiated by the Oregon Water Resources Department pursuant to Oregon law. As well as asserting its own claims, the United States has an obligation to assert the rights of the Tribes." Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1041 (9th Cir. 1999) (Hawkins, J., dissenting), *cert. granted*, 121 S.Ct. 28 (2000). Both the Bureau and the BIA operate within the DOI.

209. The magistrate examined the documents in camera. *Document No. 3* discussed legal theories of water law concerning the rights of the federally recognized Indian tribes of the Klamath Basin; the Klamath Tribes Department of Natural Resources transmitted it to the BIA at the DOI's request. *Document No. 6* contained policy views on how the BIA could educate other governmental agencies regarding the obligation to protect Indian trust resources; the BIA circulated the document internally and transmitted it to the Yurok and Klamath tribal attorneys. *Document No. 10* expressed views on the impact on tribal trust resources that the USFWS proposals regarding endangered species and lake management might have; a Klamath tribal attorney transmitted it to the BIA at the BIA's request. *Document No. 16* discussed the water rights claim being prepared on behalf of the Tribes in the Oregon state proceedings; a Klamath tribal attorney transmitted it to the Regional Solicitor of the Pacific Northwest Region at the Office of the Solicitor's request. *Document No. 20* conveyed the Klamath Tribes' views of their rights in the Oregon state proceedings; the Klamath Tribes Chairman transmitted it to the BIA Area Director at the Office of the Solicitor's request. *Document No. 25* discussed the Tribes' water rights in the Oregon state proceedings; a Klamath tribal attorney transmitted it to the BIA Area Director at the Office of the Solicitor's request. *Document No. 27* expressed views on the biological factors affecting tribal trust resources; a tribal biologist transmitted it to a BIA water rights specialist at the BIA's request.

210. Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1039 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28 (2000).

211. *Id.* at 1038.

212. *Id.* at 1039.

213. *Id.* at 1038-39.

The dissent asserted that the predecisional and deliberative roles of the documents were the relevant factors and that the majority erred in concluding its analysis short of this inquiry.[214] Recognizing the consultative, expert nature of the documents, the dissent concluded that the DOI could properly withhold the documents under exemption 5.[215] The dissent reasoned that the majority's determination that the direct interest barred the application of exemption 5 used the government's fiduciary obligation to the Tribes to frustrate precisely that obligation.[216] The DOI and the BIA sought to have the Ninth Circuit Court of Appeals' decision overturned. The U.S. Supreme Court granted certiorari on September 26, 2000.[217]

IV. A CONFLUENCE OF ADMINISTRATIVE AND INDIAN LAW: WHAT THE COURT DECIDED

The precise issue before the Supreme Court in *Klamath Water Users* was whether the seven documents could shelter under exemption 5 of FOIA—the Court decided that they could not.[218] The circumstances, however, provided an interesting confluence of administrative and Indian law, which the Court addressed directly and indirectly in its decision.

A. Exemption 5 Does Not Protect the Documents

Because the unanimous Court determined that step one of the exemption 5 analysis was not satisfied, the opinion did not evaluate step two.[219] Deciding

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214. *Id.* at 1039-40 (Hawkins, J., dissenting).

215. *Id.* at 1039.

216. *Id.* at 1046.

217. Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28 (2000).

218. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1063 (2001).

219. "[W]e need not reach step two of the Exemption 5 analysis and enquire whether the communications would normally be discoverable in civil litigation." *Id.* at 1068 n.3. Despite the lack of analysis in the opinion, precedent situates the documents within the ambit of exemption 5 as deliberative. As discussed in Part I of this Note, when assessing the applicability of the exemption, the functional test is the correct legal evaluation. This test examines the role, if any, that the documents played in the agency's deliberative, decision-making processes. As determined by the magistrate in the Oregon District Court, each of the seven documents contained tribal recommendations that informed the DOI's deliberations concerning the trust resource policies it intended to develop. Klamath Water Users Protective Ass'n v. DOI, No. 96-3077-CO (D. Or. June 19, 1997), *available at* http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.html. Some materials discussed only the DOI's trust responsibilities from a tribal perspective, while others discussed the impact of certain federal policies on the hydrological and biological health of trust resources. *See supra* note 209. As subjective documents prepared to assist agency decision-makers in developing policy, the documents are predecisional. The magistrate additionally determined that each of the seven documents, if disclosed, would (1) expose the DOI's decision-making processes, (2) discourage candid, inter-departmental policy discussions, and (3) undermine the DOI's responsibility to address tribal

that the proper application of exemption 5 permitted agencies to withhold documents submitted by an outside consultant only if that consultant "does not represent an interest of its own . . . when it advises the agency that hires it,"[220] the Court declared the seven documents outside the ambit of exemption 5: "The Tribes . . . necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind."[221] The *Klamath Water Users* Court gave no weight to the fact that the agencies solicited six of the seven documents from the Tribes for inter-agency deliberations, and instead concluded that "the dispositive point is that the . . . object of the Tribe's [sic] communications . . . is necessarily adverse to the interests of competitors."[222]

According to rather settled precedent before *Klamath Water Users*, the documents produced by the Klamath Tribes qualify under exemption 5 for two primary reasons. First, agencies often need to rely on temporary consultants if they are to make policy adequately and efficiently.[223] The DOI, faced with difficult deliberations regarding water allocation, decided to seek advice from the Klamath Tribes as temporary outside consultants who were arguably the most expert at assessing their own trust resources.[224] Although water resources are necessarily shared in the basin, the agency-tribal consultations did not evidence absolute adversity. On the contrary, their existence suggested deliberation. The consultative documents can hardly be characterized as "ultimately adversarial . . . tribal submissions," as the *Klamath Water Users* Court determined.[225] Nothing in the factual scenario indicates an adversarial shift, and, absent such movement, a temporary consultant's independent interest in predecisional, deliberative documents should not instantly defeat an agency withholding the documents. To spontaneously engender such a barrier within the exemption 5 framework contravenes not only legal precedent, but also the "most exacting" fiduciary obligations that the federal government owes to the Indian tribes.[226] Because the Tribes themselves can best assist the DOI in "unraveling [the] knotty complexities" of the Department's trust

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water rights, to develop the long-term KPOP, or both. Klamath Water Users Protective Ass'n v. DOI, No. 96-3077-CO (D. Or. June 19, 1997), *available at* http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.html. Thus, each of the documents may properly be identified as deliberative.

220. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1067 (2001).

221. *Id.* at 1068.

222. *Id.*

223. Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980).

224. Wu v. Nat'l Endowment for Humanities, 460 F.2d 1030, 1034 (5th Cir. 1972). *See also Critique*, *supra* note 92, at 788-90; *Bilateralism*, *supra* note 171, at 1070 ("Nearly all tribes now have formal natural resources agencies, and most of the larger tribes have natural resources staffs of fifty, one hundred, or more. Importantly, tribes have worked hard to utilize traditions, values, and knowledge that have been gained over millennia.").

225. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1069 (2001).

226. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

obligations (after all, as the beneficiaries, the Tribes are the entities who would protest a "knot"), any predecisional, deliberative document produced as part of this process arguably should be privileged.[227]

Second, the Supreme Court's decision in *Klamath Water Users* "cannot overlook the fact that the documents here were generated by an initiative from" the DOI.[228] The documents should be exempt from FOIA disclosure because the Department specifically solicited trust resource recommendations from the Tribes and used the recommendations in its decision-making processes.[229] As the *Ryan v. Department of Justice* court stated, if a deliberative document is submitted to an agency by a temporary consultant, "and it was solicited by the agency, [it is] entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5."[230] As aforementioned, however, the *Klamath Water Users* Court determined otherwise.

The Court decided that exemption 5 does not protect the documents from disclosure and furthermore challenged Congress' own implicit approval. Congress has had ample time to watch the courts construe the reach of exemption 5 and to alter the statutory language if the judicial interpretations have strayed too far from congressional intent. Congress modified FOIA's exemption 1 after the Supreme Court's decision in *Environmental Protection Agency v. Mink*,[231] but after almost four decades of consistent precedent, Congress has not acted to expand or narrow exemption 5.[232] If, according to administrative law standards, exemption 5 shields the Klamath-DOI documents from FOIA disclosure, the *Klamath Water Users* decision compelling disclosure can be read as defying tacit congressional approval.

B. FOIA and Exemption 5 Eclipse the Government's Fiduciary Obligations to Tribes

The Supreme Court revealed its perception of the case by holding, "[a]ll of this boils down to requesting that we read an 'Indian trust' exemption into

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227. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987).

228. Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980).

229. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987).

230. *Ryan*, 617 F.2d at 790.

231. DOJ v. Julian, 486 U.S. 1, 22 (1988) (Scalia, J., dissenting).

232. The *Klamath Water Users* Court cites two instances of Congressional "legislative inaction" that failed to specifically protect Indian trust documents from disclosure in support of its "commonsense" exemption 5 reading. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1069 n.7 (2001). Although Congress did not specifically add to FOIA a textual foundation particular to tribal trust documents, this does not indicate that the Court's *Klamath Water Users* opinion reflects congressional will any more than the fact that Congress has *not* amended exemption 5 to include the independent contractor corollary suggests the opposite.

the statute, a reading that is out of the question."[233] Although the Court cited the obligatory language regarding the federal government's responsibilities to the Tribes,[234] it quickly communicated where the trust relationship ranks in comparison with FOIA. The *Klamath Water Users* Court admitted, "the candor of tribal communications with the Bureau would be eroded without the protections of the deliberative process privilege recognized under Exemption 5. The Department is surely right in saying that confidentiality in communications with tribes is conducive to a proper discharge of its trust obligation."[235] Even so, the Court decided that temporary consultants could have no interest in their consultative material if it was to be protected by exemption 5. This effectively forecloses tribal experts from assisting agencies with trust resources issues outside the glare of public scrutiny. The decision is somewhat justifiable according to a cursory understanding of the FOIA principles of disclosure. However, basing an opinion on that reason alone ignores the principles of the trust relationship and flatly forfeits Indian law for the sake of administrative law.

Quite obviously, tribes will always have an interest in their own natural resources. In addition, because the federal judiciary charges the government with trust obligations to Indians and to their lands, tribes are rightly concerned with how the government manages its trust responsibilities. Tribes, in general, should be able to consult on a sovereign-to-sovereign basis with the federal agencies regarding the government's fiduciary obligations with at least as much privacy from public inspection as any two governmental employees discussing agency policy may expect.

Moreover, recent executive branch mandates provide that government-to-government consultation is essential to agencies fulfilling their trust responsibilities and that such communications should remain confidential whenever possible.[236] Secretarial and executive orders issued in the 1990s indicate that agency-tribal consultative mechanisms are requisite components to a satisfactory trust system. The DOI itself formally adopted a policy of being "open and candid with tribal government(s) during consultations so that the . . . affected bureau(s) or office(s), as trustee, may fully incorporate tribal

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233. *Id.* at 1069.

234. *Id.* at 1067 ("The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law.'") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982)).

235. *Id.*

236. Departmental Responsibilities for Indian Trust Resources, United States Department of the Interior, Secretarial Order No. 3175 (Nov. 8, 1993), *available at* http://www.doi.gov/oait/docs/policies.htm; American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, U.S. Department of the Interior and U.S. Department of Commerce, Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.doi.gov/oait/docs/policies.htm.

views in its decision-making processes."[237] The DOI trust policy further provides that such consultations are to remain confidential.[238] Under the scope of these guidelines, the Klamath Tribes agreed to submit trust resource opinions and reports to the DOI, to its component Bureau of Indian Affairs, and to the Office of the Solicitor.[239] A ruling requiring mandated disclosure of the documents to the Klamath Water Users Association contradicts the DOI's trust policy, the Tribes' presumed knowledge of the trust policy, and administrative law precedent. Such a ruling ignores the weight of agency discretion, the executive consultative/confidential mandates, and the legal and moral responsibilities the federal government owes to Indian tribes.

C. The Supreme Court Opinion Addressed the Fiduciary Obligations Overtly and Implicitly

The Supreme Court's decision in *Klamath Water Users* spoke directly and indirectly to the federal government's fiduciary obligations to Indian tribes. However, the Court might have written a quite different opinion. This section contrasts the decisions and ramifications of various opinions the Court might have penned.

The most favorable outcome for the Indian tribes in *Klamath Water Users* would have been a well-reasoned opinion clarifying the corners of exemption 5 law and discussing the confluence of agency decision-making and fiduciary obligations. That sort of opinion would have resolved any confusion that the Ninth Circuit's new "direct interest test" might have spawned among the lower courts, and it would have affirmed the body of exemption 5 law that has developed since the Court's exemption 5 ruling in 1988.[240] The Court might have confirmed that the predecisional and deliberative roles of a document qualified it for exemption 5 withholding and that FOIA must protect the documents of temporary consultants because they enhance administrative efficiency. Moreover, a principled and competent decision would have situated the fiduciary obligations to Indian tribes as a prominent feature for courts to address. Relying on executive and secretarial mandates stressing the government's trust obligation to tribes, the judiciary would bolster rather than frustrate application of the trust obligation in both statutory and common law. The opinion might have stressed that the judiciary must not dismiss the principles unique to Indian law for the sake of harmonizing those principles

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237. *Departmental Manual*, United States Department of the Interior, 512 DM 2.4B (Dec. 1, 1995).

238. *Id.*

239. Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1039 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28 (2000).

240. *See* DOJ v. Julian, 486 U.S. 1 (1988).

with other legal areas.[241] The decision might also have suggested that, rather than administrative law subsuming elements of the trust relationship, federal policies must accommodate tribal interests if the fiduciary obligation is to be more than rhetoric. Finally, and most optimistically, the Court might have indicated that the judiciary itself must not perpetuate the colonial face of Indian law, but instead must limit federal legal impositions in order to further tribal sovereignty. Such an opinion would have given lower courts a navigational chart to steer through the complexities of Indian law while preserving tribes' abilities to consult and negotiate with the federal government as autonomous entities.[242]

Slightly less favorable to tribes would have been a Supreme Court opinion that permitted the documents to shelter under exemption 5, but that relied narrowly on administrative law. This type of decision would have construed tribes as situated like other temporary agency consultants—likely ignoring the identities of the parties and their relationships in the instant case as much as possible—and would have resolved swiftly that exemption 5 applies to predecisional, deliberative documents even if the consultant has an interest in the agency's decision. Although the decision would have promoted agency-tribal collaborative policy-making (a win-win situation for both sovereigns), the Court would not have addressed directly the unique fiduciary relationship between the federal government and the tribes. Such an overt judicial omission consequently would have undermined the argument that trust obligations enhance agencies' statutory responsibilities.

Unfortunately, the Court selected the least favorable opinion to tribal interests (and, arguably, for the federal government as well). The decision was narrowly circumscribed and denied the application of exemption 5. The reasoning relied greatly on administrative precedent, distinguishing cases discordant with the new independent contractor element,[243] while relegating trust principles to a background position. Adopting the Ninth Circuit's theory that a temporary consultant's interest in the subject at issue automatically precludes the exemption, the *Klamath Water Users* Court prohibited tribal consultants from submitting documents regarding trust resources to their fiduciary agencies with any guarantee of confidentiality in the future.[244] Immediately after citing the trust responsibility as a "cornerstone" of the law, the Court unabashedly recognized that its decision would erode the candor of

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241. *See* Frickey, *supra* note 197, at 75. Frickey suggests that synchronizing Indian law with the general public law would be "judicial colonization of the first order." *Id.* at 76.

242. *See id.* at 80.

243. DOI v. Klamath Water Users Protective Ass'n, 121 S.Ct. 1060, 1068 n.4 (2001).

244. *Id.* at 1068 ("Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.").

communication between tribes and agencies and would interfere with a proper discharge of the trust obligation.[245] Touting its resolution as "the commonsense reading," the Court signaled to the judiciary and to the federal government as a whole how fiduciary obligations owed to tribes rank with respect to administrative policy: "[N]obody in the Federal Government should be surprised by this reading."[246]

CONCLUSION

The *Klamath Water Users* Court should not have narrowed exemption 5 of FOIA to prevent Indian tribes from participating in communications that would be privileged from public disclosure if undertaken by another temporary consultant. If anything, the exacting fiduciary obligations owed to the tribes require each branch of the federal government—no less the judiciary—to find that the law accommodates Indian tribal interests where there is, indeed, room for accommodation. Sound administrative law precedent and trust responsibilities each favored exemption before the *Klamath Water Users* opinion.

If applying exemption 5 to the disputed documents would have supported the federal government's far-reaching and somewhat amorphous trust responsibilities, it just as surely would have furthered many of the sweeping policies behind FOIA in its entirety and exemption 5 in particular. Congress, in enacting FOIA, ultimately sought to promote responsible agency action.[247] Permitting the DOI to consult with tribes without public scrutiny before finalizing policies that will affect tribal trust resources would only increase the possibility of responsible Departmental conduct. Agencies might best fulfill their trust obligations[248] by consulting with the tribes, perhaps the only expert consultants available. Although FOIA aims for broad agency disclosure, withholding certain documents from the public to promote free discussion and information flow within the agencies is an equally important goal under the Act.[249] Exemption 5 was designed specifically to allow agencies to achieve this FOIA objective.[250] According to the magistrate's findings in the instant case, disclosing any one of the seven documents at issue would frustrate precisely what the exemption sought to protect: open and candid agency

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245. *Id.* at 1067 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982)).

246. *Id.* at 1070 n.7 (2001).

247. *FOIA Memoranda*, *supra* note 5, at 1047.

248. Every agency is bound by the federal government's fiduciary obligations to Indian tribes. *See, e.g.*, Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990).

249. *FOIA Memoranda*, *supra* note 5, at 1052-53.

250. *Id.*

decision-making.[251] Applying exemption 5, then, would have been the proper judicial resolution.

Because the Supreme Court has established new precedent in holding that the *Klamath Water Users* documents do not qualify for exemption 5 protection, litigation will likely increase. Presumably, increased litigation is undesirable under FOIA, yet the judicial narrowing of exemption 5 in *Klamath Water Users* could set off a litigious chain of events. Tribes, knowing that departments must disclose agency-tribal communications at the submission of any FOIA request, may simply refuse to consult with the executive departments when they develop policies affecting trust resources. Instead of collaborating during decision-making phases, Indian tribes may simply challenge any objectionable final policy in the courts. Without tribal perspectives, the agencies are poorly equipped to fulfill their trust obligations. Tribes may file suits claiming that the departments breached their fiduciary duties in response to inadequate environmental policies.[252] Cutting off the channels of communication may move both parties away from the bargaining table and into the adversarial system, causing relations between the tribal and federal sovereigns to spiral downward.

Finally, a ruling requiring disclosure of Indian-agency documents in response to a FOIA request will ultimately reduce federal and tribal efficiency. Both entities will collect natural resource information, thereby doubling expenditures, and funds that might have been spent on common goals will be allocated to cover litigation expenses. Bureaucratic processes will ultimately be stymied because the Court has compelled the federal and tribal governments to work non-collaboratively (during agency policy-making phases) or litigiously (after final policies have been adopted).

Of course, Indian tribes may elect to consult with agencies during natural resource policy development even now that exemption 5 does not protect their communications. Federal agencies, operating under secretarial and departmental mandates to incorporate tribal participation into decision-making, will certainly seek such consultative relationships as part of their trust obligations. Nonetheless, federal entities recognize (in executive orders, departmental manuals, etc.) that tribal information regarding trust resources is often sensitive enough that the government should strive to keep it

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251. Klamath Water Users Protective Ass'n v. DOI, No. 96-3077-CO (D. Or. June 19, 1997), *available at* http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1871.pet.aa.html (holding that disclosure of any one of the documents would expose the DOI's decision-making processes, discourage candid policy discussions, and undermine the agency's water allocation responsibilities).

252. The federal government's fiduciary duties are enforceable in district court under the APA. *See Promise, supra* note 93, at 1507-08.

confidential.[253] Without exemption 5's protections, the agencies now cannot guarantee such confidentiality. The more likely outcome is that tribal governments will prefer keeping such information from the federal government rather than sharing it (potentially) with any private citizen. The Supreme Court might have avoided these consequences. Instead, agencies and tribes now must bridge a communication gap of the new millennium.

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253. *See, e.g.*, Exec. Mem., 59 Fed. Reg. 22,951 (Apr. 29, 1994); *Departmental Manual*, United States Department of the Interior, 512 DM 2.4B (Dec. 1, 1995); American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, U.S. Department of the Interior and U.S. Department of Commerce, Secretarial Order No. 3206 (June 5, 1997), *available at* http://www.doi.gov/oait/docs/policies.htm.