

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DEPARTMENT OF THE INTERIOR AND :
4 BUREAU OF INDIAN AFFAIRS, :
5 Petitioners :
6 v. : No. 99-1871
7 KLAMATH WATER USERS PROTECTIVE :
8 ASSOCIATION :
9 - - - - -X
10 Washington, D.C.
11 Wednesday, January 10, 2001
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:03 a.m.
15 APPEARANCES:
16 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Petitioners.
19 ANDREW M. HITCHINGS, ESQ., Sacramento, California; on
20 behalf of the Respondent.
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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1871, Department of the Interior and Bureau of Indian Affairs v. Klamath, the Klamath Water Users Protective Association.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

This case involves the application of exemption 5 of the Freedom of Information Act to seven documents that pertain to the Federal Government's exercise of its responsibility to act as trustee for the property and natural resources of Indian tribes. Six of the seven documents were submitted by the Klamath tribes to the Department of the Interior at the Government's request. The seventh document was prepared by a DOI official and was provided to attorneys for the Klamath and --

QUESTION: By DOI, Department of the Interior?

MR. STEWART: That's correct.

The documents relate to the United States' representation of the tribes' interests in a pending Oregon stream adjudication as well as to the Bureau of

1 Reclamation's management of the Klamath reclamation
2 project during the period while that adjudication remains
3 pending.

4 QUESTION: Mr. Stewart, there was some long-
5 term plan for this water basin that was being considered?

6 MR. STEWART: At the time that the documents
7 submitted, the Department of Interior or Bureau of
8 Reclamation more specifically was attempting to prepare a
9 long-term operations plan for the Klamath project.

10 QUESTION: Has that been abandoned?

11 MR. STEWART: It has not been abandoned. The
12 long -- no draft long-term plan has yet been issued, but
13 the --

14 QUESTION: Is it still under preparation?

15 MR. STEWART: It is still under preparation.

16 QUESTION: Is it ongoing?

17 MR. STEWART: It is still ongoing on a year-by-
18 year basis the Bureau of Reclamation, or BOR, manages the
19 Klamath project based on water availability during the
20 course of that year.

21 The idea behind the long-term operations plan,
22 sometimes known as the Klamath project operations plan, or
23 KPOP colloquially, was to devise a methodology whereby the
24 Department would decide in advance how water would be
25 distributed in both wet and dry years, where current

1 practice has been at the beginning of the season to assess
2 the likely availability of water and make a determination
3 for that year.

4 The preparation of KPOP in a sense interacts
5 with the United States' representation of the tribes in
6 the Oregon general stream adjudication, because it's the
7 State of Oregon that will be making the final permanent
8 determination as to who has what water rights and in what
9 order of priority and, in connection with that
10 adjudication, the United States has filed claims on behalf
11 of the tribes, on behalf of the project, as well as on
12 behalf of other Federal interests.

13 QUESTION: So in the Oregon litigation I take it
14 that the United States is really acting as counsel for the
15 tribes?

16 MR. STEWART: We are not technically acting as
17 their attorney. That is, the tribes have their own
18 attorneys, but the United States acts as trustee. It has
19 filed claims in the Oregon adjudication --

20 QUESTION: Well, are the claims that the tribes'
21 lawyers are supporting the claims that the United States
22 filed, or are they separate claims?

23 MR. STEWART: The United States has filed claims
24 on behalf of the tribes. With regard to virtually the
25 entirety of the United States submission the tribes have

1 filed a document that simply says, we accept and
2 incorporate by reference the claims of the United States.

3 QUESTION: So --

4 MR. STEWART: With respect to a small fraction
5 of the case the tribes have filed their own claim that
6 differs marginally from that of the United States on their
7 behalf, but I think there is nearly a 100-percent
8 alignment of interests in the Oregon --

9 QUESTION: So your interests -- with that minor
10 exception, your interests are identical. Counsel,
11 technically, is separate?

12 MR. STEWART: That's correct.

13 QUESTION: Okay.

14 QUESTION: But isn't it true the United States
15 has an interest other than just representing the tribes'
16 interest?

17 MR. STEWART: That's correct. The United States
18 has also filed claims on behalf of the project and on
19 behalf of other Federal interests. For instance, there is
20 a wildlife refuge in the area for which the United
21 States --

22 QUESTION: If there were a separation of
23 responsibility within the United States presentations and
24 if these documents had been given to the right hand rather
25 than the left hand of the United States, would you still

1 say they were privileged?

2 MR. STEWART: I think we would certainly say
3 that to the extent the submission were submitted -- to the
4 extent the documents were submitted to the United States
5 in its capacity as trustee, that is, with regard to the
6 preparation of the United States' claims on the tribes'
7 behalf, they would be privileged and confidential.

8 QUESTION: But wasn't there some effort at the
9 time the FOIA was drafted or amended to put in an
10 exemption for a trustee which Congress turned down?

11 MR. STEWART: In 1976 there was a legislative
12 proposal that would have created a new FOIA exemption for
13 all documents in the possession of a Government agency
14 pertaining to the exercise of trust responsibilities, and
15 that bill was never acted on.

16 That bill would have accomplished an exemption
17 from the FOIA that is significantly broader than the
18 exemption we're asking for here. That is, the
19 applicability of that exemption would not have turned on
20 whether the documents came from the tribes initially and,
21 perhaps more important, it wouldn't have turned on whether
22 particular documents would be privileged from discovery in
23 civil litigation.

24 That is, the focus of the court of appeals'
25 concern -- perhaps I should turn to page 2 of our brief,

1 which sets forth the language of exemption 5 of the
2 Freedom of Information Act. Exemption 5 states that the
3 requirement of compelled disclosure does not apply to
4 matters that are, quote, interagency or intraagency
5 memorandums or letters which would not be available by law
6 to a party other than an agency in litigation with the
7 agency, and --

8 QUESTION: Certainly what you have here does not
9 literally fill that bill, does it?

10 MR. STEWART: It certainly doesn't fit within
11 the most common conception of what an interagency or
12 intraagency memorandum would be. The courts of appeals
13 have, over the past 30 years, devised a methodology for
14 determining when documents that were created by persons
15 outside the Government may nevertheless be regarded as
16 sufficiently internal from a pragmatic point of view that
17 they can qualify for the exemption.

18 QUESTION: Why would they go about that
19 business -- why wouldn't they simply read what the statute
20 says?

21 MR. STEWART: I think because they have come to
22 the conclusion that some documents submitted by outside
23 persons play a role in the agency's deliberations that is
24 so similar to the role that a staff memorandum would play.

25 QUESTION: Did they call it a consultative

1 privilege?

2 MR. STEWART: They haven't referred to it as a
3 consultative privilege, but they have certainly said that
4 they have used outside consultants as an example of --

5 QUESTION: People that the agency hires to do
6 work that the agency would otherwise do?

7 MR. STEWART: There are really two different
8 categories of cases in the courts of appeals, and one is
9 as you suggest. That is, there are situations in which a
10 person is consulted because he has preexisting expertise
11 but no particular institutional perspective on the matter
12 at issue, and there I think it is fair to say that the
13 basis for the arrangement is that this person is serving
14 in effect as a temporary employee, performing the role an
15 employee would perform. There are other cases in the --

16 QUESTION: Well, you don't assert that all
17 tribal communications with the Federal Government
18 concerning tribal resources are always exempt from
19 disclosure under FOIA, do you?

20 MR. STEWART: No. We would say that the
21 document needs to be submitted to the Government in its
22 capacity as trustee. So, for example, if the Fish &
23 Wildlife Service is making a determination as to whether a
24 particular species should be listed as threatened or
25 endangered under the Endangered Species Act it's possible

1 that the outcome of that listing decision might have a
2 practical effect on the way in which tribal land can be
3 used.

4 QUESTION: You say as a trustee. Where do you
5 get that out of the statute?

6 MR. STEWART: Oh, the statute refers to
7 interagency or intraagency memorandums and the courts of
8 appeals, in determining what can be properly regarded as
9 internal, have focused on the existence of a special
10 relationship between the outside person and the government
11 official, and in many instances the outside person, as I
12 say, is one who fulfills the role of an agency employee.

13 QUESTION: But that --

14 QUESTION: But the tribe is not an agency.

15 MR. STEWART: The tribe is not an agency.

16 QUESTION: So it's literally not covered.

17 MR. STEWART: It is not covered under the most
18 natural reading of that language. I think there is a
19 sense in which these submissions are properly
20 characterized as interagency, and that is when the Federal
21 Government actively solicits advice and assistance, when
22 it identifies the person from whom advice is sought, when
23 it constructs the decision -- when it constructs the
24 consultative process in a way that is reasonably designed
25 to further the Government's own interests, the resulting

1 document can be said to be internal in the sense that the
2 circle begins and ends with the Government.

3 QUESTION: Well, okay, but --

4 QUESTION: It isn't a matter of being -- it
5 seems to me all of -- almost all of the courts of appeals
6 cases you're referring to do deal with consultants who
7 have been hired by the Government to further the
8 Government's own interests. This is really part of the
9 Government's operating.

10 The tribe here was not seeking to further the
11 Government's interests at all. It was seeking to further
12 its own interests. I think it's a stretch beyond what
13 most of these courts of appeals cases -- which I agreed
14 with. I mean, I've spoken to that in an earlier case, but
15 this seems to take it a step further, and I can see how
16 you can get to the conclusion that a consultant who you
17 hire, any memorandum produced by that consultant who was
18 hired is an intraagency memorandum.

19 I do not see how you can leap to the conclusion
20 that anything that is given to you by a trustee, by a
21 trust, is an intraagency memorandum. I mean, maybe it
22 should be confidential, but I find it hard to call that an
23 intraagency memorandum.

24 MR. STEWART: Well, with respect to the existing
25 court of appeals case law, certainly the consultant

1 temporary employee is the paradigmatic example, but the
2 D.C. Circuit has also applied this approach in cases such
3 as Ryan and Public Citizen to Members of the Senate, to a
4 former President who was advising the archivist regarding
5 the proper disposition of records created during his term
6 of office, where the idea was not that the person outside
7 the Government was stepping into the shoes of an agency
8 employee, or adopting an employee's perspective.

9 QUESTION: No, but it was surely -- I mean, the
10 Senate didn't have its own ax to grind when it was giving
11 the Justice Department information about judicial
12 nominees. It was certainly trying to further the
13 Government's interest, not its own interest.

14 MR. STEWART: But it was consulted precisely
15 because it would have a distinct perspective on the proper
16 manner of accomplishing the Government's objectives, and
17 that's really --

18 QUESTION: In that view, if the Klamath Water
19 Users' Association had submitted these documents, would
20 they also be privileged from disclosure?

21 MR. STEWART: No, because the United States does
22 not act as a trustee for the Water Users Association.

23 QUESTION: So then it's not the deliberative
24 process privilege that we're talking about at all. It's
25 simply this trust relationship.

1 MR. STEWART: I think the trust relationship is
2 the thing that brings this case within a larger principle.

3 QUESTION: No, but --

4 QUESTION: And yet you concede that the trust
5 relationship in itself doesn't create any exemption under
6 FOIA, and Mr. Stewart, this is the problem that I have
7 with the picture here. It's the one-way-street aspect of
8 it. I mean, you said the United States has made claims on
9 behalf of the water association, too.

10 MR. STEWART: It has not made claims on behalf
11 of the water association. It has made claims on behalf of
12 the project, but the association and --

13 QUESTION: Where they have the same interest,
14 where there's an identity of interest between -- the
15 United States might agree with the users on some of the
16 questions, is that not so?

17 MR. STEWART: There are certainly aspects of the
18 case on which we and the users are in agreement.

19 QUESTION: What -- but, and the users and the
20 tribes are in, at least in tension on some of these
21 issues.

22 One of the statements made is that the United
23 States has been routinely turning over what it gets from
24 the water association to the tribes, so the information --
25 the tribes get information from one side that has a stake

1 in this venture, but that side doesn't get what the tribe
2 is giving to the Government, so it looks like it's not
3 evenhanded.

4 MR. STEWART: I think to understand why, in our
5 view, it is evenhanded, it's essential to explain that
6 there are several component agencies within the Department
7 of Interior, but two that are particularly important here,
8 the Bureau of Indian Affairs and the Bureau of
9 Reclamation.

10 Now, both the tribes and the water users
11 corresponded with the Bureau of Reclamation, or BOR, and
12 BOR received a FOIA request from both the tribes and the
13 users association asking for the documents that the others
14 had submitted, and for better or worse BOR turned
15 everything over. BOR was absolutely evenhanded in
16 divulging both tribal communications and the water users
17 association communications. It may be that under our
18 theory BOR should not have been quite so forthcoming, but
19 it was. There was no disuniformity with respect to BOR.

20 BIA was a different story. BIA is set up with
21 the special responsibility of exercising the Government's
22 trust responsibilities to the Indian tribes. It
23 essentially corresponds with the Indian tribes, and it
24 would be unusual for the water users to correspond with
25 BIA at all. BIA was the subagency within the Department

1 of the Interior that refused to disclose some of these
2 documents, with one exception of the seven. One of the
3 adjudication-related documents was addressed to the
4 Regional Solicitor of the Department of the Interior.

5 So primarily we are concerned with documents
6 that were submitted to a subagency within DOI whose
7 particular sphere of duty and expertise is the exercise of
8 trust responsibilities for the tribes, and this Court in
9 Nevada v. United States emphasized the BIA's unique
10 mission, its separate juridical status --

11 QUESTION: No, but isn't the value of that
12 emphasis, if it has any value at all, only proportional to
13 the independence of BIA from the rest of the Department of
14 Interior, because I think the questions of several of my
15 colleagues here have raised the same point. If the BIA is
16 not independent of them, then your analogy between the
17 tribes and the consultants fails. If we accept the
18 consultant situation as being inter- or intraagency, we
19 can rationalize it by saying, as several have said, that
20 the consultants really are doing something that the
21 Department itself might be doing. It's an extension of
22 the Department. It's reportable only to the Department.

23 But if, in fact, the Indian tribes are
24 consulting with an agency which is concerned not only with
25 the Indian tribes' interests, but in adjusting those

1 interests as against the interests of other claimants,
2 which seems to be the case here, then you don't have an
3 analogy with a situation in which the Department and the
4 consultant alone are involved, so it seems to me your
5 whole argument either stands or falls on the independence
6 of BIA, and we know that the BIA is not somehow totally
7 independent of the rest of the Department of the Interior,
8 whether it's preparing a KPOP or whether it's representing
9 the United States in Oregon litigation.

10 MR. STEWART: I mean, I guess I have two or
11 three responses to that. First, you're correct that the
12 BIA is not an independent agency. It is a subagency of
13 DOI, and therefore is ultimately subject to DOI control.
14 At the same time, the Government is attempting to deal in
15 a pragmatic fashion with the sort of combination of
16 responsibilities that no private party would ever be
17 given.

18 That is, things would certainly be cleaner from
19 our point of view of DOI could either say, we will treat
20 the tribes exactly like we treat everyone else, or it
21 could say, we will treat the tribes exactly as a private
22 trustee would treat the beneficiary, namely, show it a
23 duty of undivided loyalty.

24 It's clear, I think from first principles and
25 from this Court's decision in Nevada v. United States,

1 that the Department can't pursue either of those courses.
2 It must on the one hand fulfill its trust responsibilities
3 but on the other hand it has other responsibilities that
4 would be considered conflicting if they were imposed on a
5 private person, so giving BIA primary responsibility for
6 the carrying out of the Department's trust mission is a
7 pragmatic response to an admittedly messy situation.

8 The other thing I would say is, we don't contend
9 that the tribes are analogous to a consultant in the sense
10 of stepping into the shoes of an agency employee or doing
11 what an agency employee would otherwise do. To the
12 contrary, we think the input from the tribes is essential
13 if the Department is to carry out its trust
14 responsibilities, but that's precisely because the tribes
15 have an expertise and a perspective that no agency
16 employee would have.

17 QUESTION: Well, that's true, but I mean the
18 problem comes because the Department has responsibilities
19 to other people, too and it is -- in effect, on your view
20 of the Freedom of Information Act, it is able to favor one
21 side with information while denying an equal, in effect an
22 equal access to another side, and --

23 MR. STEWART: Well, certainly --

24 QUESTION: -- that's the real rub in deciding
25 whether we should stretch the Freedom of Information Act

1 language broadly enough to in effect allow the United
2 States to grant privileges to one of the interest groups
3 it's supposed to favor, the Indians, as against the other
4 interest groups, water users, the general public, what-
5 not, and that's a great stretch.

6 MR. STEWART: Well, again I would say, for
7 better or for worse, the BOR did not favor the tribes vis-
8 a-vis the water users. It was equally responsive to both
9 FOIA requests. The only --

10 QUESTION: But I think your position here today
11 is, it didn't have to be, that it could claim an exemption
12 with respect to whatever it gets from the tribes.

13 MR. STEWART: Not whatever it gets from the
14 tribes, but whatever the tribes submit to it in its
15 capacity as trustee, so yes, our position would be, if the
16 tribes approach BOR and say, in order to fulfill the
17 United States' duties as trustee, the BOR must take the
18 following management steps.

19 QUESTION: Well, Mr. Stewart, your argument
20 would be very convincing if Congress had enacted that
21 trustee thing, but it didn't.

22 MR. STEWART: I mean, I think it's -- obviously,
23 one of the arguments advanced in favor of the legislation
24 that was proposed in 1976 was that the legislation would
25 clarify the ambiguity, would make it unnecessary to

1 resolve difficult questions concerning the application of
2 existing FOIA exemptions, but I think the Court has long
3 taken the position that the FOIA should be implemented in
4 a practical way, that it should be implemented in a way
5 that doesn't interfere with the Government's performance
6 of its substantive --

7 QUESTION: But also that the exemption should be
8 narrowly construed. The Court has said that repeatedly.
9 the main rule is, disclose unless you fit into one of
10 these exemptions, and the exemptions are to be tightly
11 construed.

12 MR. STEWART: I mean, certainly, if we are able
13 to persuade the Court that the threshold language is
14 satisfied here, that is that these documents are properly
15 regarded as interagency or intraagency memorandums or
16 letters, we would still have to persuade presumably the
17 court of appeals on remand that the documents would be
18 privileged --

19 QUESTION: But the question is whether it fits
20 within -- the words for the exemption are interagency.
21 That's what has to be strictly construed.

22 MR. STEWART: And in the past --

23 QUESTION: Once you get past that, then there's
24 an issue that isn't even before us now whether these are
25 deliberative and whatever else.

1 MR. STEWART: I mean, with respect, I think the
2 Court's general methodology has been to construe the
3 threshold language of the various exemptions in a way that
4 would protect the values that the body of the exemption is
5 intended to protect, and the Court has said, in a
6 shorthand formulation admittedly, that exemption 5
7 protects those documents, and only those documents that
8 would be privileged in civil discovery.

9 I mean, the point is, most of the work here is
10 supposed to be done by the inquiry into whether there is
11 actually an applicable privilege. It maybe that the
12 threshold language will screen out some things that would
13 be privileged in discovery, but there's no indication,
14 either in the legislative history or in this Court's
15 decisions, that the threshold language is supposed to
16 screen out a lot.

17 To take another example --

18 QUESTION: No, but we can't construe the
19 exemption as if it were an exemption only for privileged
20 material, because we've got inter- or intraagency language
21 that has somehow got to be satisfied before we get to the
22 question of privilege.

23 MR. STEWART: But I think it's also worth
24 emphasizing that the one alternative that I think is not
25 clearly on the table is to give the threshold language an

1 absolutely rigid literal interpretation. That is to say,
2 nothing can be --

3 QUESTION: Okay, and we've been assuming in our
4 arguments, at least for the sake of argument, that we
5 wouldn't be so literal as to exclude the relationship
6 between the consultant and the agency, but the analogy
7 between the consultant and the agency fails here because
8 the agency here is in fact wearing more than one hat.
9 It's in the role of an advocate, or the role of an
10 adjudicator, vis-a-vis the tribe, so that analogy doesn't
11 work, and it seems to me the only way you can win is to
12 say, well, come up with anew exception, or a new
13 interpretation of inter- or intraagency, and I haven't
14 heard what that is yet.

15 If we don't accept the analogy with the
16 consultant --

17 MR. STEWART: I mean, I think the --

18 QUESTION: -- and we don't have another model
19 for a construction or an exception, then I think you're --
20 then I think you have to lose.

21 MR. STEWART: I mean, I think the best analogy
22 from the existing case law is to the Senators in Ryan and
23 to the former President in Public Citizen. That is, these
24 are people who were not literally part of any FOIA agency,
25 and who were consulted not because they were expected to

1 perform exactly the same role as an agency employee.
2 Rather, they were consulted because they were believed to
3 have a distinct institutional perspective.

4 QUESTION: Okay, was the United States in that
5 case in a position of, formally or informally of
6 adjudicating the interests, say of the President vis-a-
7 vis somebody else?

8 MR. STEWART: I mean, certainly the archivist
9 was ultimately going to be making the determination
10 whether particular documents would be made public or not,
11 and in other private individuals such as Public --

12 QUESTION: But at the time the privilege was
13 recognized, or the exemption was recognized, was the
14 archivist in the situation of saying, well, I have the
15 President telling me to do one -- or whoever it was --
16 telling me to do one thing and a bunch of historians want
17 me to do something else, so I'll consult with the
18 President, and my consultation with him should be exempt.
19 Was that the situation?

20 MR. STEWART: I don't know that it had
21 progressed to quite that point, but certainly the point of
22 the scheme was that private parties would like to have as
23 much information as possible from the former President's
24 records in order to do whatever type of research they
25 wanted to do, and the former President was being consulted

1 because of his own distinct perspective, and --

2 QUESTION: Well, maybe the exemption shouldn't
3 have been recognized in that situation, then.

4 MR. STEWART: Well, I think the -- certainly
5 Congress over the years has revisited, has amended the
6 FOIA in various respects. It's not --

7 QUESTION: But you are asking for a stretch even
8 beyond that, because this -- the adversary nature of the
9 tribes' interests versus the water users' interests.

10 MR. STEWART: I mean, I think we are not -- I
11 think we're not asking for a stretch, because the United
12 States in its capacity as trustee, and in particular the
13 Bureau of Indian Affairs, owes a duty of loyalty to the
14 tribes, and certainly Federal policy for most of the 20th
15 Century has been to exercise the trusteeship in a way that
16 will promote values of tribal self-determination, so if
17 the United States as trustee --

18 QUESTION: What I mean is, that's a new element
19 that wasn't -- it's not like the paid consultant who's
20 substituting for an employee, it's not like the Senate
21 that's representing the U.S. Government, and it's not like
22 the President. You are asking for something that no other
23 case is like.

24 MR. STEWART: I would agree that the tribes'
25 potential financial interest in the income of the

1 decision, the various decisionmaking processes is unlike
2 interests that have been recognized in the past, but the
3 United States is supposed to act as the trustee. One of
4 the central duties of a trustee in virtually every context
5 is to preserve a duty of confidentiality to the
6 beneficiary, and so it would be strange to say that the
7 tribe's status as a beneficiary, the tribe's interest in
8 the trust corpus, is the very thing that causes its
9 submissions to lose the confidentiality that they might
10 otherwise have.

11 QUESTION: It's not completely clear that that
12 confidentiality is also a defense to discovery in
13 litigation.

14 MR. STEWART: I mean, certainly in litigation
15 the particular needs of an individual requestor would be
16 relevant in a way that they would not be relevant under
17 the FOIA, so I think your question -- the premise of your
18 question is correct in two different respects.

19 First, the fact that these are in our view
20 interagency documents doesn't automatically mean that they
21 would even satisfy the second part of the FOIA test.
22 Second, even if they satisfied the second part of the FOIA
23 test in the sense that they would not be routinely
24 discoverable, that wouldn't by itself eliminate the
25 possibility that they could be discovered by a litigant

1 with a particular need.

2 If I may, I'd like to reserve the remainder of
3 my time.

4 QUESTION: Very well, Mr. Stewart.

5 Mr. Hitchings, we'll hear from you.

6 ORAL ARGUMENT OF ANDREW M. HITCHINGS

7 ON BEHALF OF THE RESPONDENT

8 MR. HITCHINGS: Mr. Chief Justice, and may it
9 please the Court:

10 FOIA exemption 5 does not apply to
11 communications between the Government and outside
12 nonagency parties when the communications concern the
13 Government's allocation of a valuable right or benefit
14 among these nonagency parties. This rule does not change
15 due to the existence of a trustee-beneficiary relationship
16 between the Government and the nonagency party, a
17 relationship that itself does not give rise to a civil
18 discovery privilege.

19 As we heard in the discussion preceding this,
20 this Court's decisions and Congress itself have
21 consistently recognized that the dominant purpose of FOIA
22 is disclosure, not secrecy, and that FOIA exemptions must
23 be narrowly construed.

24 QUESTION: If an ordinary person has a
25 trustee -- in fact, any one of millions of Americans

1 indeed do have a trustee they have to give confidential --
2 they give confidential documents to, it would be
3 privileged in litigation, like attorney-client work
4 privilege. There's no way for adversaries to get those
5 documents, is there?

6 MR. HITCHINGS: In the context of civil
7 litigation there is not a recognized --

8 QUESTION: So if you're an Indian, however, a
9 member of an Indian tribe, you do exactly the same thing
10 because your Government happens to be the trustee,
11 opponents in litigation could get it, so the court
12 privileges would be useless to them. I mean, insofar as
13 they have to give documents to the trustees, all the court
14 privileges would be useless. I'm not saying that means
15 you'd lose, but I want to be sure that's the consequence.

16 MR. HITCHINGS: Well, the consequence should be
17 looked at within the context of --

18 QUESTION: But that is the consequence.

19 MR. HITCHINGS: The consequence, yes.

20 QUESTION: All right. If that's the
21 consequence, then what I'm looking for is, it seems an
22 undesirable consequence, and therefore I wonder if their
23 status isn't unique enough to analogize them to
24 consultants.

25 That's basically -- I mean, it's like nothing

1 else. The Indian tribe relationship is totally unique,
2 and there's a choice of analogies, and I agree with you
3 that it's a stretch of the language, but consultants is a
4 stretch of the language, so shouldn't we try to see if
5 that can't be done in order to prevent the consequence
6 that I just described?

7 MR. HITCHINGS: Well, I think when you are in a
8 situation, granted the Indian tribes are unique, and
9 they've been recognized that way throughout history, but
10 in the same instance, in Nevada v. U.S., this Court's
11 decision in that case did recognize the unique nature that
12 the Government has to deal with, competing interests
13 within water rights adjudications, and while the
14 relationship that the Government and Interior may have
15 with project water, irrigation water users may not
16 approach that of a trustee, certainly Nevada said that the
17 Government is obligated to undertake substantial
18 obligations on their behalf.

19 And when you're talking about the Government
20 making decisions regarding these competing interests, and
21 it's not just the interests of the irrigation interests
22 and of the tribes, it's also competing Federal interests
23 for other federally reserved water rights, one thing
24 that --

25 QUESTION: It didn't seem to me that's what

1 would be relevant to the questions that I'm asking, or
2 necessarily to the holding of the case. That is, if we
3 held they're not within the agency exception, they are not
4 within it, and therefore whatever documents they give to
5 the trustee, whether it happened to be your situation or
6 any other situation in the world, would be absolutely --
7 other people would get them.

8 The court privileges would be useless to the
9 Indians, and that would be not only true in your
10 situation, it would be true in every situation, if they
11 don't fall within this. Now, that's what's worrying me.

12 MR. HITCHINGS: Well, I think that one of the
13 potential off-ramps to that is that there may be other
14 FOIA exemptions that would apply in other cases. For the
15 purpose of FOIA exemption 5 our position is that it does
16 not where you have the Government allocating a valuable
17 privilege amongst competing nonagency parties.

18 QUESTION: Mr. Hitchings, I guess you believe
19 that the moral is you should never pick a trustee who
20 enacts a Freedom of Information Act.

21 (Laughter.)

22 MR. HITCHINGS: I don't know if that's quite the
23 moral of the story, but it's -- certainly the --

24 QUESTION: But I'm not sure the Indians had a
25 choice. I mean, the Congress --

1 QUESTION: Alternative moral, if you are a
2 trustee you should not enact a Freedom of Information Act.

3 MR. HITCHINGS: Well, I think one of the other
4 points regarding Your Honor's question was, what other
5 circumstances may apply. I think in many circumstances it
6 is going to be the Government competing, or balancing, or
7 allocating amongst a number of competing interests, but
8 there certainly may be circumstances where Indian tribes
9 will communicate with BIA or Interior, and the Government
10 is not in this position where they actually are
11 balancing --

12 QUESTION: Is there any way to work with that,
13 because I would normally think, you know, that people get
14 sued, and tribes get sued like any other entity for
15 millions of things, accidents, contracts, who knows? I
16 mean, there are 30 million lawsuits, or I don't know, 10
17 million anyway, and in each of those lawsuits they would
18 be unable to use the privileges that are given to every
19 other litigant if they turned over documents, as they
20 normally would in the course of business, to their
21 trustee.

22 Now, is -- you say, well this is a special
23 situation as described. Is there any way to work with
24 that that would make a difference?

25 MR. HITCHINGS: I think the rule that I

1 articulated in the first sentence here is that FOIA
2 exemption 5 does not apply to communications between the
3 Government and outside nonagency parties when the
4 communications concern the Government's allocation of a
5 valuable benefit or privilege amongst those interested
6 nonagency parties.

7 QUESTION: Don't the tribes generally, in
8 matters of contract or tort, refer to -- they have their
9 own attorneys, don't they?

10 MR. HITCHINGS: They do, and they have their own
11 attorneys in this circumstance too, both in the Klamath
12 project operations plan as well as in the adjudication.

13 QUESTION: Mr. Hitchings, I think that
14 Mr. Stewart said that this case, if we got past
15 interagency, would be on the deliberative process. Nobody
16 is claiming in this case that the United States has an
17 attorney-client relationship that would bring forth a
18 privilege. I think that Mr. Stewart agreed with that, so
19 if we -- if exemption 5 applied at all, we would be
20 looking to the deliberative process privilege but not to
21 attorney-client or work product, is that right?

22 MR. HITCHINGS: Well, in this case the
23 Government has asserted the deliberative process privilege
24 protects all seven documents that remain in dispute.

25 They have also asserted that the attorney work

1 product privilege protects two of those seven, and that's
2 an additional basis for withholding those documents within
3 the rubric of FOIA exemption 5, and those two documents
4 for which the attorney-client privilege was claimed -- I'm
5 sorry, the attorney work product privilege was claimed,
6 one of them specifically discusses the Klamath project
7 operations plan, one of them specifically discusses the
8 adjudication.

9 So there is somewhat of a mix in the privileges
10 that have been claimed here, but it is true that the
11 primary thrust of the Government's argument in this case
12 has been that all of the documents are protected by the
13 deliberative process privilege within FOIA exemption 5.

14 QUESTION: If the Government cannot prevail
15 under section 5, are there as to these two documents as to
16 which work product was -- will the work product privilege
17 protect those independently of section 5?

18 MR. HITCHINGS: Our position is that it does
19 not, and it's because they do not -- for the same reasons
20 that it does not work within the deliberative process
21 analysis it does not work within the attorney work product
22 analysis either. They do not have a common goal, a common
23 defense or prosecution against a common adversary here.
24 The Government again, Interior itself has many obligations
25 and many competing interests.

1 QUESTION: In fact, they may even be adverse to
2 each other in certain respects, I guess.

3 MR. HITCHINGS: Correct and, in fact, as far as
4 the Klamath project operations plan, there are a number of
5 interests that the tribes are adverse to the Government
6 on, as well as adjudication, too, and the adjudication
7 contests were filed in May of this year, where the tribes
8 themselves have filed contests to claims filed on behalf
9 of the Fish & Wildlife Service for wildlife refuges up
10 there. That's within the Department of Interior.

11 The same is the case for the Bureau of
12 Reclamation's claims that have been filed. The same is
13 the case for the Klamath project operations claim. The
14 tribes contest the manner in which the project is operated
15 if the Government is operating in a manner to benefit
16 project irrigation users, perhaps wildlife refuges,
17 whatever the other Federal interests may be in that case.

18 One of the points that was brought up by the
19 Solicitor General's argument was this alternative test of
20 what the role of the document might play, and our position
21 has been throughout this that that would pretty much bring
22 within the purview of FOIA exemption 5 any document that
23 is submitted to the Government.

24 If the Government was able to withhold a
25 document based upon its affidavit of the role that

1 document played within its discussion, that would include
2 just about anything, and it would provide the opportunity
3 for Federal agencies to cloak all types of discussions
4 based upon that type of assertion.

5 QUESTION: Well, now I don't understand that. I
6 thought that in order to work, 5, you have to satisfy two
7 things. First, you don't even get there unless it's
8 interagency, and if you are there, it's still not
9 protected unless you can assert a privilege that you could
10 assert in a litigation. Am I wrong about that?

11 MR. HITCHINGS: That's correct, there are those
12 two tests to that.

13 QUESTION: All right, so in other words, the
14 only things that you -- the only -- if it applies, it only
15 creates privacy in respect to the following things, those
16 things that, independently, litigation privilege creates
17 privacy for. Now, am I right about that, or not?

18 MR. HITCHINGS: Correct. You would need to
19 satisfy that threshold test of whether it is inter or
20 intraagency and then meet the secondary test, which is
21 whether it is normally privileged within the civil
22 discovery context.

23 QUESTION: That's -- you see, that's why I'm
24 worried, because we're only talking about things that
25 would otherwise be privileged, and now they lose that

1 privilege. I'm just repeating myself, but I'm explaining
2 why I'm worried to try to get from you something that will
3 make me less worried.

4 MR. HITCHINGS: Well, I understand that, the
5 worry that is caused by that, but again, I think there may
6 be other circumstances where other FOIA exemptions may
7 apply. It may be in other circumstances that FOIA
8 exemption 4 could apply, because it's a commercial
9 privilege that is -- or involves commercial information,
10 or financial information that is otherwise privileged and
11 confidential.

12 In fact, amici in support of the petitioner in
13 this case brought that very point up, so there may be
14 circumstances where the Government could assert other
15 privileges.

16 QUESTION: Medical records, are medical records
17 privileged under FOIA?

18 MR. HITCHINGS: That would be within unwarranted
19 invasion of personal privacy, perhaps, or one of the other
20 exemptions --

21 QUESTION: I think they're specifically
22 mentioned in that provision, medical records and other --
23 whose disclosure would constitute an unwarranted invasion
24 of privacy, but that provision letters that would not be
25 available, memorandums or letters that would not be

1 available by law to a party other than an agency in
2 litigation, that isn't -- that goes well beyond just
3 attorney-client material, doesn't it?

4 I mean, I thought that was a fairly expansive
5 provision, and if it were not routinely available in
6 litigation, it benefits from that.

7 MR. HITCHINGS: Correct. There are other
8 examples, and it is the discovery privilege that have been
9 historically noted, and those would be attorney-client,
10 attorney work product, deliberative process, if there are
11 specific, maybe psycho -- psychiatrist-patient, doctor-
12 patient, those types of discovery privileges, but in this
13 case there is no recognized trustee-beneficiary privilege.

14 There has not been recognized within -- there
15 has not been one recognized within the civil discovery
16 context, and FOIA is not a means to create a new civil
17 discovery privilege. This Court's decision in Weber
18 Aircraft explicitly stated that, and that's cited in our
19 brief.

20 QUESTION: So you say that the petitioner would
21 ultimately lose, even though satisfying the interagency
22 requirement, because of the routinely available of
23 discovery product.

24 MR. HITCHINGS: Our position is that the
25 Government simply cannot meet that threshold interagency

1 test here, because you have a circumstance where they are
2 not serving as a neutral outside, objective consultant.
3 They are -- in this case the tribes are an interested
4 party. The Government is allocating a valuable benefit or
5 privilege amongst not only that interested party but many
6 others, including other Federal interests, and our
7 position is that test just simply is not met here because
8 of those circumstances.

9 Now, granted, there are circumstances where you
10 do have a paid outside consultant that is providing
11 information to the agency because it may be outside of
12 that agency's expertise, but the paid consultant has no
13 direct interest in the decision that the Government is
14 making for which those correspondence are provided, and
15 that's clearly distinguishable from this case.

16 QUESTION: Suppose that we thought -- I may be
17 taking it out of context, but Justice Scalia once wrote
18 that that's exemption -- said something about including
19 any agency document that is part of the deliberative
20 process. Just taking that phrase, suppose it was possible
21 to read section 5 in that way, would your documents come
22 into that, too, not the ones you want, but your own
23 submissions?

24 MR. HITCHINGS: From the Klamath water users,
25 members themselves?

1 QUESTION: Yes. Yes. Yes.

2 MR. HITCHINGS: I don't think so. We're not
3 asking for that. Granted, we would love to have the
4 opportunity to have secret communications with Interior on
5 the decisions that we're making here, but we recognize
6 that FOIA exemption 5 just is not read that broadly, and
7 should not be read that broadly, and I think in Justice
8 Scalia's dissent, I believe that was in the Julian case,
9 he specifically stated that it talks about a consultant in
10 a governmentally conferred capacity, and that seems to
11 indicate that you're talking about the traditional
12 relationship where you have a consultant that's paid by
13 the Government to give it expert advice.

14 QUESTION: I wasn't dissenting on this point. I
15 just had to reach this point because of my dissent,
16 whereas the majority didn't have to reach it, so --

17 MR. HITCHINGS: Correct. In that case --

18 QUESTION: The Court hasn't really addressed --

19 MR. HITCHINGS: Right, exactly. In that case,
20 the -- whether the documents were intraagency was not
21 raised below and was not part of the majority's opinion.

22 If the Court has nothing further, that would
23 conclude my statement.

24 QUESTION: Thank you, Mr. Hitchings.

25 Mr. Stewart, you have 2 minutes remaining.

1 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

2 ON BEHALF OF THE PETITIONER

3 MR. STEWART: I'd like to address the question
4 of the role of the Government in allocating a scarce
5 benefit, and particularly with regard to the Oregon
6 general stream adjudication.

7 I think as the Court is certainly aware, the way
8 that a priority system of water rights works is the most
9 senior water user gets whatever rights it's entitled to,
10 and then if there's water remaining the next most senior,
11 and so forth down the line, and the position of the United
12 States in the Oregon adjudication, and a position which
13 was upheld by the Ninth Circuit in Adair, is that the
14 tribes have a priority date earlier than that of the
15 Klamath project.

16 And there are questions remaining as to the
17 quantification of that right, but when the United States
18 presents claims on behalf of the tribe, if the United
19 States believed that the tribes was entitled to a certain
20 amount of water but nevertheless asserted claims for a
21 lesser amount in order that more should be left over for
22 the project, we would be breaching our fiduciary duty to
23 the tribes.

24 QUESTION: The more difficult question, if you
25 want to take 30 seconds, is how do you get the tribe

1 beneficiary into interagency even if you couldn't get
2 consultants in there?

3 MR. STEWART: Again, we think that the ultimate
4 question should be whether the Government has solicited --
5 in this case whether the Government has solicited input
6 from a person technically outside the four walls of the
7 Government based on a distinct perspective which is
8 particularly useful to the Government, and an analogy --

9 QUESTION: Why doesn't that cover the water
10 users association, distinct perspective, technical, why
11 not?

12 MR. STEWART: It's not the same sort of
13 relationship between the Government and the water users
14 that exists between the Government and the tribe. That
15 is, the --

16 QUESTION: You're arguing for a trustee
17 exception, basically, just --

18 MR. STEWART: Certainly we are arguing that the
19 trust relationship is, we would say is one example of a
20 broader principle. Another analogy would be to our
21 representation of current and former Federal employees in
22 Bivens suits, where the Federal employee obviously has a
23 personal stake in the outcome of the litigation.

24 QUESTION: Attorney-client.

25 MR. STEWART: But the attorney-client privilege

1 would kick in only if the threshold language of
2 interagency or intraagency were satisfied, so certainly
3 with respect to former employees I think the necessary
4 implication of the opponents' test is, no matter how
5 privileged the communications were, they would
6 nevertheless be disclosable under FOIA because they could
7 not be characterized as interagency or intraagency
8 documents.

9 Thank you, Your Honor.

10 CHIEF JUSTICE REHNQUIST: Thank you,
11 Mr. Stewart.

12 The case is submitted.

13 (Whereupon, at 11:49 a.m., the case in the
14 above-entitled matter was submitted.)

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