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SUNSHINE IN INDIAN COUNTRY: A PRO-FOIA VIEW OF *KLAMATH WATER USERS*

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I. Introduction

In *U.S. Department of the Interior v. Klamath Water Users Protective Ass'n*,[1] the U.S. Supreme Court examined the application of the Federal Freedom of Information Act[2] (FOIA) and its exemption for interagency and intra-agency communications to documents passing between Indian tribes and the Department of the Interior. The Court determined, for reasons to be discussed in greater detail below, that the documents were not exempt from disclosure as they were not inter- or intra-agency documents under any reasonable reading of the statute.[3]

This note will discuss why the Supreme Court was correct in finding that the exemption did not apply to the documents in question, despite concerns by some that allowing access to this information would hinder the federal-tribal relationship and the duties owed Indian tribes by the United States. This note will examine the policy behind FOIA, the policy behind the exemption for inter- and intra-agency documents, and the policy and impact of the federal-tribal trust relationship.

II. U.S. Department of the Interior v. Klamath Water Users Protective Ass'n

This action arose after the Klamath Water Users Protective Association requested FOIA access to documents generated and passed between the government and several tribes during two water-rights proceedings. One of the proceedings took place in the Department's Bureau of Reclamation and the other was adjudicated in the state courts of Oregon.[4] Before addressing the proceedings and the specific documents at issue in *Klamath Water Users*, it is first important to understand and identify the parties involved not only in this FOIA action before the U.S. Supreme Court, but also, to some limited extent, the parties involved in the two proceedings giving rise to this action.

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1. 532 U.S. 1 (2001).
2. 5 U.S.C. § 552 (2000).
3. *Klamath Water Users*, 532 U.S. at 4-5.
4. *Id.* at 5.

A. The Parties

Parties to this FOIA action include the Klamath Water Users Protective Association and several entities of the federal government. Several tribes, including the Klamath Indian Tribe, were parties to the underlying disputes leading to this action.

The government agencies involved in this litigation include the U.S. Department of the Interior, the Department's Bureau of Indian Affairs (BIA), and the Department's Bureau of Reclamation (Reclamation). In addition to being the "nation's principal conservation agency," the Department is charged with managing Indian lands and resources.[5] Much of the responsibility for managing Indian trust lands and natural resources is delegated to the BIA.[6] The BIA is the arm of the Department that is primarily charged with performing the government's duties within its trust relationship with Indian tribes.[7] The BIA's duties include managing tribal lands and resources, which includes management of tribal water rights.[8] One common complaint about the BIA, and one that is arguably present in *Klamath Water Users*, is the ever-present conflicts between the BIA and other units of the Department.[9] For instance, "Indian land and water interests frequently conflict with the activities or designs of the Bureau of Reclamation, the Bureau of Land Management, the National Park Service and, occasionally, the Bureau of Mines and the Office of Surface Mining Reclamation and Enforcement."[10] Each of these groups, however, is located within the Department.[11] The Bureau of Reclamation focuses its efforts on protecting and managing the nation's water resources.[12] Among its services, Reclamation provides irrigation water for farmers and operates hydroelectric power plants throughout the United States.[13] It is also the largest wholesale water supplier in the United States.[14]

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5. U.S. Dep't of the Interior, About the Department of the Interior: DOI Quick Facts, http://www.doi.gov/facts (last visited June 5, 2008).

6. Petition for Writ of Certiorari at 6-7 (citing 25 U.S.C. §1(a)), *Klamath Water Users*, 532 U.S. 1 (No. 99-1871), 2000 WL 33979569.

7. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 46 (3d ed. 1998).

8. *Id.* at 47.

9. *Id.* at 49.

10. *Id.*

11. *Id.*

12. Bureau of Reclamation Facts & Information, http://www.usbr.gov/main/about/fact.html (last visited June 5, 2008).

13. *Id.*

14. *Id.*

The Klamath Water Users Protective Association is a non-profit organization representing its members on matters dealing with "water resources, agriculture, and other resource issues in or affecting the Klamath River Basin."[15] In representing its members, the Association is a common adversary of tribes in the area.[16] The Klamath River Basin includes some ten million acres in northern California and southern Oregon, including the Upper Klamath Lake, the Klamath River, and the Klamath Reclamation Project, which are at issue in *Klamath Water Users*.[17] "Most members of the Association have contracts with the U.S. Bureau of Reclamation providing for the delivery of water through Klamath Reclamation Project facilities for irrigation use."[18] Many members are public agencies.[19] The Klamath Reclamation Project, which is at the heart of the Bureau of Reclamation proceeding in *Klamath Water Users*,[20] became one of the earliest reclamation projects in 1905.[21] The project included government-financed facilities that deliver water to arid portions of the project area.[22] Those who gain access to irrigation waters via the Klamath Reclamation Project "intensely compete for water in a number of inter-related forums" with four tribes — the Klamath, Yurok, Hoopa Valley, and Karuk tribes.[23] Each of these tribes is involved in the Bureau of Reclamation dispute, which specifically is related to a long-term plan for the Klamath Project.[24] Only the Klamath Indian Tribe is involved in the Oregon water-rights adjudication.[25] Because of its prominence in the litigation leading to this FOIA action, a look at the Klamath Indian Tribe is worthwhile.

The Klamath Indian Tribe is a small tribe in southern Oregon and northern California.[26] The tribe was originally "divided into about seven autonomous

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15. Brief for Respondent Klamath Water Users Protective Ass'n at 1-2, U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) (No. 99-1871), 2000 WL 1845944.

16. *Id.* at 3.

17. *Id.* at 2 n.1.

18. *Id.* at 1.

19. *Id.*

20. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 5 (2001).

21. Brief for Respondent Klamath Water Users Protective Association, *supra* note 15, at 2.

22. *Id.*

23. *Id.* at 3.

24. *Klamath Water Users*, 532 U.S. at 5.

25. *Id.*

26. BARBARA A. LEITCH, A CONCISE DICTIONARY OF INDIAN TRIBES OF NORTH AMERICA

tribelets, with a common dialect and culture."[27] The tribe signed a treaty with the United States in 1864, leaving it with a reservation near the Upper Klamath Lake.[28] The tribe lost its reservation lands when it was terminated in 1954, although the tribe maintained its hunting, fishing, and gathering rights.[29] The tribe was restored as a federally recognized tribe in 1986.[30] The U.S. Court of Appeals for the Ninth Circuit has held that the hunting and fishing rights reserved to the Klamath in the 1864 treaty implicitly reserved water rights in an amount sufficient to exercise explicitly recognized hunting and fishing rights.[31] The *Adair* court also held that the right reserved by the Klamath "consists of the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies."[32]

Perhaps more important to an understanding of the issues in this case than the identities of the parties is an understanding of the underlying disputes that produced the seven documents giving rise to this FOIA action.

B. The Underlying Disputes

This case developed out of requests for documents that were generated and passed between tribes and the federal government during the two aforementioned water-rights proceedings. These disputes, one being in the Bureau of Reclamation and the other in Oregon state courts,[33] are examined below.

The Bureau of Reclamation proceeding involves long-term planning for the Klamath Irrigation Project. The project "uses water from the Klamath River Basin to irrigate territory in Klamath County, Oregon, and two northern California counties."[34] The Department began a long-term operations plan for the project in 1995, with the goal of allocating water among competing water users.[35] The Klamath, Hoopa Valley, Karuk, and Yurok tribes were all asked by the Department to consult with the Bureau of Reclamation regarding the

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224 (1979).

27. *Id.*

28. *Id.*; CARL WALDMAN, ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES 134 (3d ed. 2006).

29. Petition for Writ of Certiorari, *supra* note 6, at 9 n.2.

30. *Id.*

31. *Id.* at 8-9 (citing United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1984)).

32. *Id.* at 9.

33. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 5 (2001).

34. *Id.*

35. *Id.*

plans.[36] In doing so, the Department entered into a "memorandum of understanding" with the tribes in which it "recognized that '[t]he United States Government has a unique legal relationship with Native American tribal governments.'"[37] The Department of the Interior sought through its consultations with the tribes to assure "that the development of the [long-term plan] reflects the United States' trust obligations and Tribal rights."[38] The memo further recognized that the consultations were intended to assess what impact the plan would have on the tribes' trust resources.[39] Of the seven documents at issue in *Klamath Water Users*, four had ties to this long-term plan for the Klamath Irrigation Project.[40]

While the Reclamation proceeding was active, the BIA filed a water-rights claim on behalf of the Klamath Indian Tribe in the state courts of Oregon.[41] In the course of doing so, the BIA and the tribe exchanged various documents regarding the scope of claims that should be made on behalf of the tribe.[42] It is important to note that "the [BIA did] not . . . act as counsel for the Tribe, which [had] its own lawyers and . . . submitted claims on its own behalf."[43] In filing their claims, the U.S. government and Klamath Indian Tribe sought "the benefit of a federal reserved water right in Upper Klamath Lake to maintain lake elevations for the ostensible benefit of fisheries and other resources in the lake."[44] In other words, the parties to the Oregon adjudication disputed the amount of water needed within the lake to support specific fish species.[45]

C. The Documents

In the course of both proceedings, documents were generated and traded between the parties, including between tribes and the Department.[46] This case began after the Klamath Water Users Protective Association filed FOIA requests with the Department seeking documents "provided to, or received from, the Klamath Basin Tribes pertaining to water resources issues in the

36. *Id.* at 5.
37. *Id.*
38. Petition for Writ of Certiorari, *supra* note 6, at 11.
39. *Id.* at 10.
40. *Id.*
41. *Klamath Water Users*, 532 U.S. at 5.
42. *Id.*
43. *Id.* at 5-6.
44. Brief for Respondent Klamath Water Users Protective Ass'n, *supra* note 15, at 7.
45. *Id.* at 8.
46. *Klamath Water Users*, 532 U.S. at 4.

Klamath River Basin."[47] The documents involved were primarily submitted to the BIA by the Klamath Indian Tribe.[48] Remaining in dispute at the time the District Court in this case issued its ruling were seven documents.[49] The documents are described in Appendix A of the Association's brief [Appendix A] to the U.S. Supreme Court, including *Vaughn* index descriptions.[50] A *Vaughn* index is required whenever an agency claims an exemption under FOIA.[51] The index is in the form of an affidavit and must "[furnish] the court with enough information to determine the validity of a claimed exemption."[52] The index, an itemized list of requested records, also "usually detail[s] the author, date, number of pages, subject matter of each contested document, and a short explanation of why the document should not be disclosed."[53] In this case, Appendix A included a document identification number, document date, document originator and recipient, a *Vaughn* index description, the privilege claimed, and which proceeding the document concerned.[54]

The following is a synopsis of the documents involved, according to the submitted *Vaughn* Index.[55]

The first document on the Index was from the Klamath Tribe's Department of Natural Resources and addressed to an individual in the BIA and to the Office of the Solicitor, Division of Indian Affairs. The seven-page document described "legal theories concerning the water rights of the federally recognized Indian tribes of the Klamath Basin." The government claimed attorney work-product and deliberative process privileges, and the document referenced the Reclamation proceeding.

The second document was sent by a BIA employee to two other BIA employees, an attorney for the Yurok Tribe, and an attorney for the Klamath Tribe. The one-page memo "contain[ed] views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project." The government claimed a deliberative process privilege, and the document referenced the Reclamation proceeding.

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47. Brief for Respondent Klamath Water Users Protective Ass'n, *supra* note 15, at 8.
48. Petition Writ for Certiorari, *supra* note 6, at 8.
49. *Klamath Water Users*, 532 U.S. at 6.
50. Brief for Respondent Klamath Water Users Protective Ass'n, *supra* note 15, at app. A.
51. 37A AM. JUR. 2D *Freedom of Information Acts* § 531 (2005).
52. *Id.*
53. *Id.*
54. Brief for Respondent Klamath Water Users Protective Ass'n, *supra* note 15, at app. A.
55. *Id.*

The third document went from an attorney for the Klamath Tribe to the BIA, and "expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake management." The government claimed a deliberative process privilege, while the document referenced the Reclamation proceeding.

The fourth document appears to have been sent by an attorney for the Klamath Tribe to a regional solicitor of the Office of the Solicitor within the Department of the Interior. The document "concern[ed] the water rights claims being prepared on behalf of the Klamath Tribes." The government sought attorney work-product and deliberative process privileges, and the document referenced the Oregon proceeding.

The fifth document was sent by a representative of the Klamath Tribe to the BIA and discussed the contents of the fourth document. The government claimed a deliberative process privilege, and the document referenced the Oregon proceeding.

The sixth document was sent by an attorney for the Klamath Tribe to the BIA and concerned "the Klamath Tribes' resolution regarding the Tribes' water right claims in the Klamath Basin Adjudication." The government claimed a deliberative process privilege, and the document referenced the Oregon proceeding.

The seventh and final document was sent by a representative of the Klamath Tribe to the BIA and concerned "biological factors affecting trust resources." The government claimed a deliberative process privilege. The document referenced the Reclamation proceeding.

D. The Holding

Holding that FOIA's Exemption 5 did not apply to the documents in this case, the Supreme Court announced a two-part test to be used when faced with a claimed inter- or intra-agency exemption. The Court said that (1) the document's source must be a government agency and (2) the document "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."[56] Examples of such privileges include the attorney work-product and deliberative process privileges.[57] In recognizing a two-pronged approach to FOIA's Exemption 5, the Court made clear that it believed both prongs are of equal importance in

56. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

57. *Id.*

deciding whether the exemption applies.[58] The Court also recognized that some lower courts have previously applied the exemption in cases where outside consultants have been hired to provide information or documents to government agencies.[59] The Court found that the Department, in arguing that Exemption 5 should apply to documents passing between Indian tribes and the federal government, "[skipped] one step, for it ignores the first condition of Exemption 5, that the communication be 'intra-agency or inter-agency.'"[60] The Court also distinguished this case from the outside consultant line of cases because in those cases the outside consults were not acting on behalf of themselves, but were rather acting on behalf of the federal government.[61] "The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind."[62] The Court did not stop there, saying that in the case of the tribes "the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone."[63] In reaching its decision, the Supreme Court, however, seemed to narrowly tailor its opinion, saying "the intra-agency condition excludes, at the least, communications to or from an interested party seeking a Government benefit at the expense of other applicants,"[64] while refusing to address the validity of the outside consultant line of cases.[65]

The government also argued, to no avail, two lines of reasoning that the Court deemed equaled a request that an Indian-trust exemption be read into FOIA. The government argued that not permitting protection for the documents under Exemption 5 would hinder the trust relationship between tribes and the federal government.[66] Additionally, the government argued that FOIA was intended to open to view government practices, but that it should not be used in a manner that changes how agencies perform their duties.[67] The

58. *Id.* at 9 ("The point is not to protect Government secrecy pure and simple, however, and the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.'").

59. *Id.* at 10.

60. *Id.* at 12.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 12 n.4.

65. *Id.* at 12.

66. *Id.* at 15 ("Quite apart from its attempt to draw a direct analogy between tribes and conventional consultants, the Department argues that the compelled release of the documents would itself impair the Department's performance of a specific fiduciary obligation to protect the confidentiality of communications with tribes.").

67. *Id.*

Court refused to accept these arguments, finding that they were nothing more than an attempt to have the Court create an Indian-trust exemption.[68] In support of its position, the Court noted that Congress had twice considered, and rejected, proposed legislation that would have provided statutory protection to documents passing between tribes and the federal government.[69]

III. The Freedom of Information Act

Today's Freedom of Information Act began as an amendment to Section 3 of the Administrative Procedure Act of 1946.[70] A push to amend the section began in the 1950s when "newspapermen, legislators, and other Government officials were concerned about the mushrooming growth of Government secrecy."[71] Setting the tone for the overhaul of the public information law then in effect, the senator introducing the bill borrowed the words of James Madison, who had assisted in drafting the First Amendment:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.[72]

The history of FOIA reflects that, indeed, Congress believed Section 3 of the Administrative Procedure Act to be nothing better than "a farce or a tragedy or perhaps both."

A. Legislative History

In the words of the Committee on Government Operations in passing Senate Bill 1160 of the Eighty-ninth Congress, "The present statute . . . is not in any realistic sense a public information statute."[73] That bill, Public Law 89-487,

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68. *Id.* at 15-16 ("There is simply no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure.").

69. *Id.* at 16 n.7 ("[T]hese proposals confirm the commonsense reading that we give Exemption 5 today, as well as to emphasize that nobody in the Federal Government should be surprised by this reading.").

70. *See* H.R. REP. NO. 89-1497 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418; S. REP. NO. 89-813 (1965), *available at* http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm.

71. H.R. REP. NO. 89-1497, at 23, *as reprinted in* 1966 U.S.C.C.A.N. at 2419.

72. S. REP. NO. 89-813, at 37-38.

73. H.R. REP. NO. 89-1497, at 26, *as reprinted in* 1966 U.S.C.C.A.N. at 2422.

would later be incorporated into FOIA via a 1967 amendment[74] and is therefore illustrative of congressional intent regarding FOIA. The push for greater public access to government information began in 1953 with a study responding to the growing concern about government secrecy that was published by the American Society of Newspaper Editors.[75] The author of the study identified three areas in which legislative inaction had contributed to "the weed of improper secrecy."[76] The third of these was the target of the modern-day Freedom of Information Act: Section 3 of the Administrative Procedure Act.[77]

One primary concern that prompted change was the ease under FOIA's predecessor of withholding information from the public, thanks at least in part to broad statutory exemptions. "Section 3 of the Administrative Procedure Act . . . though titled 'Public Information' and clearly intended for that purpose, has been used as authority for withholding, rather than disclosing information. Such a 180 [degree] turn was easy to accomplish given the broad language [of the Act]."[78] FOIA's predecessor had "become the major statutory excuse for withholding Government records from public view."[79] The Act was seen as being too lenient — information could be withheld if it were "in the public interest," "for good cause shown," or "if the records relate 'solely to the internal management of an agency.'"[80] The Act also restricted who could access government information by limiting that access to "'persons properly and directly concerned'" with the records.[81] Congress recognized that the broad exemptions contained in Section 3 of the Administrative Procedures Act were ripe for abuse and that it had been abused during the administrations of Republicans and Democrats alike.[82] One example offered by the Committee on Government Operations was that in 1962 the National Science Foundation "decided it would not be 'in the public interest' to disclose cost estimates submitted by unsuccessful contractors in connection with a multimillion-dollar deep sea study."[83] The winning contractor, it turns out, had not submitted the

74. 5 U.S.C. § 552 note (2000) (1967 Act) (" Section 1 [of Pub. L. 90-23] amends section 552 of title 5, United States Code, to reflect Public Law 89-487.").

75. H.R REP. NO. 89-1497, at 23, *as reprinted in* 1966 U.S.C.C.A.N. at 2419.

76. *Id.*

77. *Id.*

78. *Id.* at 25, *as reprinted in* 1966 U.S.C.C.A.N. at 2421.

79. *Id.* at 24, *as reprinted in* 1966 U.S.C.C.A.N. at 2420.

80. *Id.* at 26, *as reprinted in* 1966 U.S.C.C.A.N. at 2422.

81. *Id.*

82. *Id.*

83. *Id.*

lowest bid.[84] And, in 1961 the Secretary of the Navy withheld telephone books under the exemption for documents related to the "internal management" of an agency.[85] The Act was also used to prevent the disclosure of employee names and salaries.[86] Lastly, Congress found that the government had used the "good cause" language to exclude from public scrutiny mistakes by agencies and to exclude from disclosure records of votes by regulatory boards and commissions.[87] FOIA was passed to erase the vague language that permitted these abuses.[88] FOIA replaced broad exceptions "with specific and limited types of information that may be withheld."[89] Just as important was the deletion of the restriction on who could request records — specifically allowing access by the public. "For the great majority of different records, the public as a whole has a right to know what its Government is doing," the Senate Committee on the Judiciary reasoned.[90] The Judiciary Committee said that the amendments would "establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality."[91]

The courts have not lost sight of the purposes of FOIA expressed in the Act's legislative history. The U.S. Supreme Court has recognized that "Congress 'was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed [FOIA].'"[92] The Supreme Court also recognized FOIA mandates disclosure absent a clear statutory exemption.[93] In *EPA v. Mink*,[94] the Supreme Court said that FOIA aims to grant access to information that had been unnecessarily hidden from public view, and that the Act "attempts to create a judicially enforceable public right to secure . . . information from possibly unwilling hands."[95] In balancing public versus private interests in FOIA cases, the Supreme Court has said that "the only relevant 'public interest in disclosure' to be weighed . . . is the extent to which disclosure would serve the 'core purpose of FOIA,' which is

84. *Id.*

85. *Id.*

86. *Id.* at 27, *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2423.

87. *Id.*

88. S. REP. NO. 89-813, at 40 (1965), *available at* http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm.

89. *Id.*

90. *Id.*

91. *Id.* at 45.

92. Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 17 (1974) (quoting Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 466 F.2d 345, 352 (D.C. Cir. 1973)).

93. Dep't of the Air Force v. Rose, 425 U.S. 352, 360-361 (1976).

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

95. *Id.* at 80.

'contribut[ing] significantly to public understanding *of the operations or activities of the government.*'"[96] The Court went on to say that "official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose" of informing the public "about what their government is up to."[97] The U.S. Court of Appeals for the Fifth Circuit recognized that "disclosure of material in government files has now become the rule, not the exception."[98] The *Stokes* court also stated that FOIA's intent was to "increase public access to such records by the imposition of liberal disclosure requirements limited only by specific, narrowly construed exemptions."[99] The *Klamath Water Users* court recognized that the policy beyond FOIA was disclosure, not government secrecy.[100]

B. Exemptions

Recognizing there are instances in which nondisclosure does not violate the policy of FOIA, Congress included nine exemptions in the Act. Unless one of the exemptions applies, disclosure is required.[101] Courts have construed these exemptions narrowly to favor disclosure in furtherance of the policy behind FOIA.[102]

The exemptions include the following:

(1) Matters that are classified under an executive order; (2) internal personnel rules and practices; (3) matters that are exempt under another statute; (4) trade secrets and other privileged or confidential financial information that has been obtained from an individual; (5) inter- or intra-agency memorandums or letters; (6) personnel and medical files or other files whose disclosure would amount to an invasion of privacy; (7) law enforcement records under six specific situations; (8) certain reports and information from agencies that regulate or supervise financial institutions; and (9) geological and

96. U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989)).

97. *FLRA*, 510 U.S. at 495-96.

98. Stokes v. Brennan, 476 F.2d 699, 700 (5th Cir. 1973).

99. *Id.* at 701.

100. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976)).

101. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 150-51 (1989).

102. *Id.* at 151 ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."); *Rose*, 425 U.S. at 361 ("But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.").

geophysical information about wells.[103] The fifth exemption, that for inter- or intra-agency documents, was at issue in *Klamath Water Users*.

1. Exemption 5: Inter- and Intra-agency Communications

Exemption 5 is aimed at protecting the agency decision-making process. The exemption protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[104] FOIA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[105] The belief is that a "full and frank exchange of opinions would be impossible if all internal communications were made public."[106] Congress, in discussions about the exemption, said that a "Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation."[107] The U.S. Court of Appeals for the District of Columbia Circuit has said that Exemption 5 "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 . . . material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports."[108] In line with the policy behind the exemption, the *Klamath Water Users* court recognized the possibility that not protecting tribal-federal communications from disclosure could impact the quality of communications between tribes and the federal government.[109]

Exemption 5 has been construed narrowly, despite early concerns about the potential breadth and possible abuse it could carry. Not long after its passage, Exemption 5 was described as "potentially the most far-reaching" exemption in that "on its face, an exemption for intra-agency memoranda can encompass nearly anything an agency puts in writing."[110] However, courts have more

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103. 5 U.S.C. § 552(b)(1)-(9) (2000).

104. *Id.* § 552(b)(5).

105. *Id.* § 551(1).

106. H.R. REP. NO. 89-1497, at 31 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427.

107. *Id.*

108. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

109. *Klamath Water Users*, 532 U.S. at 11 ("Nor is there any doubt about the plausibility of the Government's assertion that the candor of tribal communications with the Bureau would be eroded without the protections of the deliberative process privilege recognized under Exemption 5.").

110. Harvard Law Review Association, *The Freedom of Information Act and the Exemption*

narrowly construed the exemption, specifically in relation to the requirement that the information be unavailable to a party other than an agency in litigation with the holding agency. The Supreme Court has interpreted this condition to mean "those documents, and only those documents, normally privileged in the civil discovery context."[111] Put another way, the statute's "language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[112] The categories of documents that are protected by Exemption 5 include those covered by the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.[113] But, courts could find that additional privileges apply, as "the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges."[114]

The deliberative process privilege is based on three policy considerations. The privilege is intended to "to encourage open, frank discussions on matters of policy" within the agency, to prevent the release of proposed policies before adoption, and to prevent "confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action."[115] Courts have attached to the deliberative process privilege two requirements: (1) "the communication must be predecisional," and (2) "the communication must be deliberative."[116]

The attorney work-product privilege "protects documents and other memoranda prepared by an attorney in contemplation of litigation."[117] This privilege aims to "protect the adversarial trial process by insulating the attorney's preparation from scrutiny."[118] For the privilege to attach, "litigation need never actually [commence], so long as specific claims have been identified which make litigation probable."[119]

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for Intra-Agency Memoranda, 86 HARV. L. REV. 1047, 1048-49 (1973).

111. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).

112. EPA v. Mink, 410 U.S. 73, 85 (1973).

113. 1 GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 1-258, 1-278, 1-288 (Justin D. Franklin & Robert F. Bouchard eds., 2d ed. 2001) [hereinafter GUIDEBOOK].

114. *Id.* at 1-291.

115. *Id.* at 1-258.

116. *Id.* at 1-259 to 1-260.

117. *Id.* at 1-278.

118. *Id.*

119. *Id.* at 1-279.

The attorney-client privilege protects from disclosure those "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[120]

Although some documents will clearly be inter- or intra-agency in that they were produced within the agency or another agency, a wrinkle in Exemption 5 jurisprudence is found when outside consultants are used by a government agency. In *Soucie v. David*, the U.S. Court of Appeals for the District of Columbia Circuit addressed the idea of an outside consultant being covered by FOIA's Exemption 5.[121] In *Soucie*, two citizens sought access to documents produced by outside experts related to the Office of Science and Technology's examination of the government's development of a supersonic transport aircraft.[122] After first determining that the Office was an agency under FOIA[123] and that the review of the aircraft development was within its purpose,[124] the D.C. Circuit said "consequently, any report prepared by the agency or its consultants in fulfillment of that function must be regarded as a record of the agency."[125] The D.C. Circuit did not reach the ultimate question regarding whether the documents at issue in *Soucie* were exempt from disclosure, however, and remanded to the district court for further proceedings.[126] The Supreme Court refused in *Klamath Water Users* to address whether reports of outside consultants are covered by the exemption.[127]

2. Proposed Indian Amendments

At least twice, Congress has considered legislation that would protect from disclosure documents that were the product of the federal-tribal relationship.[128] The attempts came two years apart, first in 1976 and again in 1978.

In 1976, Congress contemplated amending FOIA to add an exemption for "information held by a Federal agency as trustee, regarding the natural

120. *Id.* at 1-288 (quoting Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 258 (D.C. Cir. 1977)).

121. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

122. *Id.* at 1069.

123. *Id.* at 1075.

124. *Id.* at 1075-76.

125. *Id.* at 1076.

126. *Id.* at 1080.

127. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001) ("Once the intra-agency condition is applied, it rules out any application of Exemption 5 to tribal communications on analogy to consultants' reports (assuming, which the Court does not decide, that these reports may qualify as intra-agency under Exemption 5).").

128. *Id.* at 16 n.7.

resources or other assets of Indian tribes or bands or groups or individual members thereof."[129] In his opening statements before the Senate Subcommittee on Indian Affairs, of the Committee on Interior and Insular Affairs, Senator James Abourezk of South Dakota said tribal leaders had expressed concern that FOIA "has in several instances served to work against the best interests of the Indian community."[130] These situations occur, according to Senator Abourezk, when third parties seek the release of information related to Indian natural resources.[131] Such third-party requests, according to Senator Abourezk, places the Department "in the anomalous position by the Freedom of Information Act of being forced to violate its fiduciary relationship with the tribes."[132] The proposed amendment, Senator Abourezk said, "would resolve the dilemma of the Indians and their trustee by exempting information concerning the natural resources and assets of tribes from the Freedom of Information Act."[133]

The second attempt at protecting documents passed between tribes and the federal government came in 1978 when Senator Abourezk introduced the Indian Trust Information Protection Act.[134] The bill, if passed, would have prohibited "the release of any information held, obtained, or prepared by the Federal Government in the discharge of its Federal trust responsibility to the Indian people," subject to eight exemptions.[135] Although the bill was referred to the Senate Select Committee on Indian Affairs in March 1978, no further action was taken.[136]

IV. Federal-Tribal Relationship

The relationship between the federal government and Indian tribes has a long and winding history. The relationship has been described as a "guardianship, as a guardian-ward relationship, as a fiduciary or special

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129. *Hearing Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, U.S. Senate, on S. 2652*, 94th Cong., at 4 (1976), *available at* http://www.loc.gov/law/find/hearings/pdf/00143459937.pdf [hereinafter *Hearing on S. 2652*].

130. *Id.* at 1.

131. *Id.*

132. *Id.* at 2.

133. *Id.*

134. Indian Trust Information Protection Act, S. 2773, 95th Cong. (2d Sess. 1978), http://thomas.loc.gov/bss/d095query.html (by searching for "Indian Trust Information Protection Act").

135. *Id.*

136. *Id.*

relationship, or as a trust responsibility."[137] This relationship was first described by the U.S. Supreme Court in 1831 with *Cherokee Nation v. Georgia*,[138] an opinion authored by Chief Justice Marshall.[139] Marshall wrote that Indian tribes were not foreign nations, but, rather, "domestic dependent nations."[140] Marshall continued, writing that tribes were in a "state of pupilage" and that their relationship with the federal government resembled that of a guardian and ward.[141] Some fifty years after *Cherokee Nation*, the Court decided *United States v. Kagama*, in which it upheld a challenge to the Major Crimes Act.[142] *Kagama* has since been credited for the creation of the plenary power doctrine, which has been used to "justify nearly total federal authority over tribal lands and internal tribal governance."[143] For years the trust relationship was used as a shield of abuse by the federal government, rather than as a tool to protect tribal interests.[144] By the end of the twentieth century, however, the trust doctrine had developed into a congressional restraint, with "nearly every piece of modern legislation dealing with Indian tribes [containing] a statement reaffirming the trust relationship between tribes and the federal government."[145] The trust relationship has evolved into "one of the cornerstones of Indian law."[146]

By 1942, the Supreme Court had described the relationship as one requiring "the most exacting fiduciary standards."[147] However, executive actions regarding Indians have been judged at a higher standard than congressional

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137. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1213-14 (1975).

138. Cherokee Nation v. United States, 30 U.S. (1. Pet.) 1 (1831).

139. Chambers, *supra* note 137, at 1215-16.

140. *Cherokee Nation*, 30 U.S. (1. Pet.) at 17.

141. *Id.* ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

142. United States v. Kagama, 118 U.S. 375, 385 (1886). *See generally* 18 U.S.C. 1153 (2000).

143. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1502.

144. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 420 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN] ("The trust relationship served to bolster the exercise of a power that would be constitutionally suspect based solely on the enumerated powers of Congress, and served to immunize the United States from suit challenging these actions.") [hereinafter COHEN]; Wood, *supra* note 143, at 1472 ("But while touted as a cornerstone of Indian law, the doctrine frequently has allowed subordination of Indian interests to the whims of the federal government.").

145. COHEN, *supra* note 144, at 420-21.

146. *Id.* at 419.

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

action.[148] One explanation for this is that courts have viewed Congress' trust responsibility as largely a moral obligation "without justiciable standards for its enforcement."[149] Despite this, violations of the trust relationship by the executive or Congress can result in "equitable, declaratory, or mandamus relief in a federal district court . . . or in a suit seeking damages in the United States Claims Court."[150] It should be noted, however, that "the trust responsibility has never served as the basis of a judicial order forcing Congress to act or invalidating congressional action otherwise lawfully taken."[151] Duties owed by the government under the trust responsibility are commonly derived from statutes or regulations, so "it is rare that a decision is based solely on the general trust relationship between the federal government and Indians tribes, but courts have asserted that the common-law trust relationship can be the basis for a claim for specific relief."[152] If a plaintiff can establish that there is an actionable claim for breach of trust, courts have used the general law of trusts "to determine the extent of the government's duties."[153]

This trust relationship was not lost on the *Klamath Water Users* court, however, as it noted that "the existence of a trust obligation is not, of course, in question."[154] The Court went on to say that the relationship "has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources . . . as the trust corpus."[155]

V. Analysis

The *Klamath Water Users* decision is sound for several reasons, including the manner in which it upholds the preference under FOIA for government disclosure while also helping tribal members hold the U.S. government accountable for its actions under the trust relationship. FOIA was passed to combat a growing secrecy problem with its predecessor, Section 3 of the Administrative Procedure Act.[156] FOIA's aim is broad disclosure, absent the

148. Chambers, *supra* note 137, at 1230 ("Cases . . . have placed tighter fiduciary restrictions on the power of executive officials over Indian property than those imposed on Congress.").

149. *Id.* at 1227.

150. Wood, *supra* note 143, at 1514-15.

151. COHEN, *supra* note 144, at 423.

152. *Id.* at 425-26.

153. *Id.* at 433.

154. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001).

155. *Id.* (citing United States v. Mitchell, 463 U.S. 206, 225 (1983)).

156. *See* H.R. REP. NO. 89-1497, at 22 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418,

presence of one of the nine enumerated exemptions.[157] Even if one of the nine exemptions could apply, the exemptions must be construed narrowly to further the preference for broad disclosure.[158] To this end, the *Klamath Water Users* court developed a two-pronged approach to claimed Exemption 5 information — first, the "communication must be 'inter-agency or intra-agency,'"[159] and, second, the communication "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."[160] A plain reading of the statute would make this holding make sense — especially after a reading of the definition of "agency" contained within FOIA. "Agency" is defined by statute as "each authority of the Government of the United State, whether or not it is within or subject to review by another agency."[161] This holding helps make certain that FOIA-covered documents are not hidden behind Exemption 5 without cause by the use of simple, conclusory statements that documents are covered. Of course, as the Court recognized, some appellate courts have approved the use of Exemption 5 when outside consultants provide documents to agencies.[162] In distinguishing away those cases, by looking to the intent and interest of the third-party outside consultant, the Court seems to have a solid argument. In the instance of outside experts hired by the agency holding the records, it makes sense to allow their documents to be covered — they are simply an arm of the agency acting for the interests of the agency. "[The expert's] only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do."[163] In the case of Indian tribes communicating about water claims, the tribe is not concerned about the agency's interests, but, as the Court noted, they are "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone."[164] Protecting such communications by extending the outside consultant line of cases could shield from public scrutiny corruption

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157. Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976).

158. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 150-51 (1989).

159. *Klamath Water Users*, 532 U.S. at 9.

160. *Id.* at 8.

161. 5 U.S.C. § 551(1) (2000).

162. *Klamath Water Users*, 532 U.S. at 9 ("Although neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, 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.").

163. *Id.* at 11.

164. *Id.* at 12.

within the agency, or worse, a failure by the agency to live up to its trust obligations. Keeping these communications open allows tribal members and nonmembers alike to scrutinize the Department and the BIA in their dealings with Indian tribes.

A perfect example of how this ruling could help tribes rather than hurt them is seen in *Seminole Nation v. United States*.[165] In that case, the federal government had agreed by treaty in 1856 to establish a $500,000 trust fund, with the annual interest of $25,000 to be paid directly to individual members of the Seminole Nation.[166] However, from 1870 to 1874, the federal government failed to make these payments, albeit at the request of the tribal council.[167] The council requested that payments be made to the tribe's treasurer and creditors.[168] Theoretically, if a similar misdeed took place today, a FOIA-savvy tribal member who missed an expected annual payment could, under the holding in *Klamath Water Users*, discover that the tribal council had requested the change and that the United States had failed in its role to safeguard individual tribal members' interests. This holding serves the "'core purpose of FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'"[169] Certainly the government's treaty obligations "fall squarely within that statutory purpose" of informing the public "about what their government is up to."[170]

Klamath Water Users is not unique in holding that documents passing between Indian tribes and federal agencies are not covered by FOIA's Exemption 5. The Court of Appeals for the First Circuit addressed the issue in the early 1980s when attorneys for two New York counties sought documents sent by a tribe's counsel to the Department of Justice regarding settlement negotiations.[171] In *Madison County v. U.S. Department of Justice*, the parties were involved in two separate land-claims cases involving the Oneida Indian Nation.[172] The first was filed by the Oneidas against the United States in the Court of Claims, while the second was filed by the tribe against New York's Oneida and Madison counties in federal district court.[173] The

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

166. *Id.* at 294.

167. *Id.* at 294-95.

168. *Id.*

169. U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (internal citations omitted).

170. *FLRA*, 510 U.S. at 495.

171. Madison County v. U.S. Dep't of Justice, 641 F.2d 1036 (1st Cir. 1981).

172. *Id.* at 1038.

173. *Id.*

Oneidas and federal government had entered into settlement negotiations, but the tribe was apprehensive about settling the case because of fears that such an agreement would adversely affect its claims against the counties.[174] Upon learning of these discussions, the counties' attorney filed a FOIA request so that he could "be provided with all documents relating to this tentative Court of Claims case settlement."[175] The district court found that the documents passing from tribal attorneys to the Department of Justice were not covered by Exemption 5.[176] The district court also found that although correspondence from the Department of Justice to the tribal attorneys did not fit Exemption 5, "the public policy encouraging nonlitigious solutions of disputes . . . and the necessary candor that such a process contemplates militates against disclosure of these records."[177] This public policy reasoning was rejected by the First Circuit, as was the reasoning that the tribe served as an outside consultant to the Department of Justice.[178] The court wrote that it felt that it must be certain that even appealing policy arguments be "grounded in a reading of statutory language that fairly reconciles rather than simply ignores the FOIA's phrasing."[179] The court went on to say, "We perceive of no way, however, to describe the Oneida's lawyers as 'intra-agency' that is to say 'within the Department of Justice' that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends."[180] Regarding the consultant argument, the court distinguished the *Madison County* case by looking toward the interest of the outside third party, saying that in previous cases "the agency contacted nonpayroll individuals to obtain information for the benefit of the agency."[181] But, much like in *Klamath Water Users*, the Oneidas "were past and potential adversaries, not co-opted colleagues."[182] In other words, the Oneidas in *Madison County* and the tribes in *Klamath Water Users* were in communication with federal agencies to seek benefits for themselves, not for the agency or federal government. To extend Exemption 5 to this scenario, the *Madison County* court held, "would do more violence to statutory language than Congress' direction permits."[183] This reasoning, which came twenty years

174. *Id.*
175. *Id.*
176. *Id.* at 1039.
177. *Id.*
178. *Id.* at 1040-41.
179. *Id.* at 1040.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 1041.

before *Klamath Water Users*, is sound and nearly identical to the Court's reasoning here.

The decision by the Court not to read into FOIA an Indian-trust exemption[184] seems to have followed congressional intent while also signaling who to turn to for relief. This was a wise decision, as Congress has twice considered legislation that would achieve this purpose, with both proposals failing.[185] Although, as the Court points out, it is not common practice to interpret statutes such as FOIA based on congressional inaction, it seemed appropriate in this case because "these proposals confirm the commonsense reading that we give Exemption 5."[186] This appears to be a camouflaged indication to tribes and tribal advocates that there is a legislative solution to this problem — lobby Congress for a specific "Indian trust" exemption. The failed attempts at passing "Indian trust" exemptions indicate Congress understands it can pass such amendments, but that it has chosen not to.

Anther potential approach the Court could have taken is seen in *Great Northern Paper, Inc. v. Penobscot Nation*.[187] In that case, the Supreme Judicial Court of Maine decided a similar case, in which paper companies sought documents from two tribes under the state's open records law.[188] Clearly there are differences in that *Great Northern Paper* was a state case and dealt with a state open records act. However, the reasoning is sound. Maine's top court resolved the matter by concluding that the state's open records act did not apply to internal tribal documents, however, the act did apply if the Tribe was interacting with other governments or agencies while acting within its municipal capacity.[189] This appears to be a proper framework and its reasoning is on par with that of the Supreme Court in *Klamath Water Users*. FOIA, it seems, could never reach internal tribal documents. But, it makes sense to extend FOIA to documents sent by tribes to the federal government in their role as independent governmental entities. And, if the tribes are viewed as such, they could not be considered agencies or true outside consultants when acting in their governmental capacities.

From a strictly Indian law point of view, *Klamath Water Users* is understandably problematic. As the Court in *Klamath Water Users*

184. U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15-16 (2001).

185. *Id.* at 16 n.7.

186. *Id.*

187. Great Northern Paper, Inc. v. Penobscot Nation, 770 A.2d 574 (Maine 2004).

188. *Id.* at 577.

189. *Id.*

acknowledged, the holding could erode the candor of tribal communications with the federal government.[190] But, again, that is where advocacy aimed toward Congress would come into play. *Klamath Water Users* is obviously a strictly FOIA-based decision with little consideration of the trust relationship between tribes and the United States. Although private trust law principals have been used to analyze how the government has performed its trustee duties, "not every aspect of private trust law can properly govern the unique relationship of tribes and the federal government."[191] This appears to be one of those cases. The Department of the Interior is constantly balancing its duties to tribes and its duties to others.[192] As Senior Judge Canby points out, threats to the Department's efforts to protect trust assets come from various offices and bureaus within the Department itself.[193] Although it would be preferable from an Indian law and perhaps trust law standpoint that these communications remain confidential, allowing public access to them, and communications from other interested third parties who do not qualify as outside consultants, will permit the public to determine if the Department is living up to its duties to all concerned, or if it is ignoring its constituents. This, again, would help fulfill the basic aim of FOIA to have a more transparent government.

VI. Conclusion

The decision in *Klamath Water Users* upholds the core purpose of FOIA, namely a more transparent government, while also giving tribal members the power to monitor the government's actions under the trust relationship. The decision also upholds the idea behind the nine enumerated exemptions to FOIA's general mandate of disclosure by narrowly construing Exemption 5's elements — primarily by following the statutory definition of "agency" and refusing to expand it to self-interested third parties. Although it might be preferable for documents traded between tribes and the federal government under the trust relationship to remain confidential, the appropriate way to achieve this is through legislative means — not by having the Supreme Court read into FOIA such an exemption.

190. *Klamath Water Users*, 532 U.S. at 11.
191. COHEN, *supra* note 144, at 434-35.
192. CANBY, *supra* note 7, at 49.
193. *Id.*