

## FEATURE ARTICLE

**DEPARTMENT OF INTERIOR V. KLAMATH WATER USERS ASSOCIATION:  
AN END TO SECRET ADVOCACY BY TRIBES DURING  
WATER ALLOCATION PROCEEDINGS?**

By Andrew M. Hitchings

In *Department of Interior v. Klamath Water Users Protective Association*, the United States Supreme Court issued a unanimous decision this term limiting the scope of the federal government's ability to withhold documents under exemption 5 of the Freedom of Information Act (FOIA). See 532 U.S. 1, 121 S.Ct. 1060 (2001). This decision is particularly important in the context of water rights and water allocation disputes where the government is balancing the demands of Indian Tribes and other competing interests for this scarce resource. This article will discuss and analyze the Supreme Court's decision in this case, and evaluate its potential affect on the manner and methods of communications that Indian Tribes and the federal government utilize in consulting on trust resources, and particularly on water resources allocations in the Klamath River Basin.

**Background**

This case involves the Department of Interior's refusal to release under FOIA copies of correspondence between certain Klamath Basin Tribes and Interior. The documents relate to ongoing contentious water rights and water allocation proceedings in the Klamath River Basin involving the Indian Tribes, farmers, environmental interests, and state and federal agencies. The Klamath Water Users Protective Association (Association) sought copies of the correspondence to determine what the Indian Tribes were advocating before Interior, and how such advocacy may be influencing Interior's decisions in allocating

Klamath Project water supplies. The Association, a non-profit corporation, represents individual farmers and public agency irrigation districts, which divert water from the Upper Klamath Lake and the Klamath River. The Association originally filed its FOIA lawsuit against Interior in federal District Court in Oregon in 1996. The Association lost at the district court, but won its appeal of that decision in the federal Ninth Circuit Court of Appeals. See *Klamath Water Users Protective Association v. Department of Interior*, 189 F.3d. 1034 (9th Cir. 1999).

Throughout the litigation, Interior asserted that the withheld documents were shielded from disclosure pursuant to FOIA exemption 5. (5 U.S.C. § 552(b)(5).) This so-called "inter/intra-agency exemption" is one of nine enumerated exceptions to disclosure under FOIA. Exemption 5 permits federal agencies to withhold copies of communications that are within or between agencies, and which would otherwise be protected under any available privileges in civil litigation (i.e., attorney-client communications, etc.). Interior asserted that the withheld documents were shielded from disclosure under the deliberative process privilege, based upon Interior's trustee-beneficiary relationship with the Indian Tribes. The deliberative process privilege allows agencies to withhold internal agency memoranda and notes that relate to agency decisions, prior to those decisions being made final. The purpose behind this privilege is to promote candid and honest dialogue within the agency decision-making process.

The Association disputed Interior's withholding of

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the documents under this privilege. This challenge was primarily based upon the fact that the Indian Tribes are quasi-sovereign nations that are clearly not “within” the Department of Interior, and because the Tribes have a direct interest in the outcome of Interior’s decisions to which the withheld documents relate—namely, decisions addressing conflicting water rights claims between the Tribes and farming interests.

### **Oral Argument Before the Supreme Court**

In its brief on the merits, and during oral argument before the Supreme Court, the United States primarily emphasized the unique trust relationship that exists between Interior and Indian Tribes, and that this relationship provides a basis for withholding the documents under FOIA exemption 5. The United States argued that the Supreme Court should expand the rule adopted by several federal courts of appeals decisions that have broadly applied FOIA exemption 5 to protect communications with outside consultants. Several justices, in questioning the Solicitor General’s attorney, appeared concerned that the United States’ arguments required a departure from the plain language of the statute. The justices also expressed concern that Interior was not applying FOIA exemption 5 in an even-handed manner. The justices noted that in response to the Tribe’s own FOIA requests, Interior had freely provided to the Tribes copies of the Association’s correspondence to Interior on the very same issues.

The Association argued that FOIA exemption 5 simply does not apply to communications between federal agencies and outside, non-agency parties when the communications concern the government’s allocation of a valuable right or benefit among these non-agency parties. The Association asserted that this rule does not change due to the existence of a trustee-beneficiary relationship between the government and the non-agency party, particularly since that relationship does not give rise to a civil discovery privilege. The Association emphasized, moreover, that the Court’s decisions and Congress have consistently recognized that the dominant purpose of FOIA is disclosure, not secrecy, and that the FOIA’s exemptions must be narrowly construed. Justice Breyer was the only justice who expressed substantial concern regarding the Association’s position. While acknowledging that expanding FOIA exemption 5 to protect

the Tribes’ correspondence with Interior would be a stretch of the language, Justice Breyer was troubled by the potential to infringe on confidential communications between the Tribes and Interior. In contrast to Justice Breyer’s concerns, Justice Scalia provided one of the more lighter moments during the argument by questioning whether the:

the moral is you should never pick a trustee who enacts a Freedom of Information Act . . . [or an] [a]lternative moral, if you are a trustee you should not enact a Freedom of Information Act.

### **The Supreme Court’s Decision**

The Supreme Court’s unanimous opinion, written by Justice Souter, emphasized that the government’s position:

boils down to requesting that we read an ‘Indian Trust’ exemption into the statute, a reading that is out of the question . . . 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 . . .

121 S.Ct at 1069. The Court acknowledged the value of “frank communication” between the government and tribal interests, but added that unlike government contractors that are retained by government agencies to provide expert objective advice, a tribe’s communication with the government is intended to advance the tribe’s own interests. *Id.* at 1067-68. The Court emphasized that this “distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.” *Id.* at 1068. The Court further noted:

the dispositive point is that the apparent object of the Tribe’s communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors. Since there is not enough water to satisfy everyone, the Government’s position on behalf of the Tribes is potentially adverse to other users . . .”

*Id.* The Court ultimately concluded that 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

Id. at 1068 n.4

The Court's opinion also recognizes the public's strong interest in knowing who is influencing government decision-making, and how that influence affects the government's ultimate decision. In this regard, the Court stated as follows:

In FOIA, after all, a new conception of Government conduct was enacted into law, "a general philosophy of full agency disclosure." [Citations omitted.] . . . Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'

[Citations omitted.] Id. at 1070.

Indeed, information relevant to water allocation decisions in the Klamath River Basin is critical to the current water supply concerns facing that region. The Bureau of Reclamation recently adopted and began implementing its operating plan for the Klamath Project for 2001, which has resulted in no water deliveries to 150,000 – 170,000 acres of land in the Klamath Project, including certain national wildlife refuges. This will have a devastating affect not only on the farming community, and the economies that rely on agricultural production, but also on the fish and wildlife resources that utilize the refuges. Accordingly, any information related to the government's water allocation decisions is vitally important to the public, and benefits the public.

The public benefits derived from the Supreme Court's ruling also extend far beyond the immediate circumstances of this case, primarily because the ruling clearly establishes that the government may not withhold certain information pursuant to FOIA exemption 5. The Court's ruling should strongly discourage, if not prevent, continued efforts by federal agencies to expand the definition of an "agency" for exemption 5 purposes. The ruling should also hinder efforts by government agencies to expand the scope of exemption 5 to include new privileges that have not otherwise been recognized as privileges in the civil discovery context. On this point, the Court's deci-

sion addresses Interior's assertion that the withheld documents should be protected because they were allegedly provided to Interior in its capacity as trustee. The Court flatly rejected this argument concluding "that even communications made in support of the trust relationship fail to fit comfortably within the statutory text." 121 S.Ct. at 1069 n.5. These delineations of the scope of FOIA exemption 5 are critical to many other requesters seeking access to government information, particularly those persons interested in determining the extent of tribal interests' advocacy before government agencies charged with decisions benefiting those interests.

Finally, the Supreme Court's opinion seriously calls into question whether Interior ever really had a reasonable basis upon which to withhold the requested documents. First, the Court did not grant certiorari in this case due to a conflict in the circuit courts of appeals or uncertainty in the law regarding the application of exemption 5 to communications with Indian Tribes. Rather, certiorari was granted because of "the decision's significant impact on the relationship between Indian tribes and the Government." 121 S.Ct. at 1065. There was no legal authority that reasonably supported Interior's assertion of FOIA exemption 5 to protect the withheld documents. In addition to flatly rejecting Interior's attempt to graft an Indian Trust exemption onto the statute (Id. at 1069), the Supreme Court was equally as dismissive of Interior's assertion that the Indian Tribes were the functional equivalent of hired consultants. In this regard, the Court stated,

[T]he Department would have us infer a sufficient justification for applying Exemption 5 to communications with the Tribes, in the same fashion that Courts of Appeals have found sufficient reason to favor a consultant's advice that way. But the Department's argument skips a necessary step, for it ignores the first condition of Exemption 5, that the communication be 'intra-agency or inter-agency.' The Department seems to be saying that 'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential. . . . There is, however, no textual justification for draining the first condition of independent vitality, and once the intra-agency condition is applied, it rules out

any application of Exemption 5 to tribal communications on analogy to consultants' reports . . .

Id. at 1067. The Court further emphasized that "[t]he position of the Tribe as beneficiary is thus a far cry from the position of paid consultant." Id. at 1069.

### **Conclusion and Implications**

The Supreme Court's decision should have a significant impact on the manner and methods of communications that Indian Tribes and the federal government utilize in consulting on trust resources, and particularly on water resources allocations in the Klamath River Basin. In this regard, Interior will be required to rely on other applicable exemptions under FOIA, if there are any, in the event that Interior decides to withhold copies of correspondence between tribal interests and Interior agencies. It also bears emphasis that the underlying FOIA requests in this case

only cover the time period from January 1 through July 3, 1996. Given the Supreme Court's decision, the Association may now request copies of relevant correspondence between the Tribes and Interior from July 1996 through the present, and Interior may no longer assert FOIA exemption 5 as a basis for withholding such documents. Requests for and the release of such information would shed light on how Interior's decisions in the Klamath Basin may be affected by its communications with tribal interests.

Finally, tribal interests have been discussing whether to approach Congress and pursue legislative changes to FOIA in order to provide for an exemption to disclosure for communications made under the Indian Trust relationship. Such an exemption was considered in previous sessions of Congress in 1976 and 1978, but failed to move beyond committee hearings. See 121 S.Ct. 1070 n. 7. Whether any such renewed effort will be successful at this juncture remains to be seen.

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