

NO. 04-35210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU, et al.,
Plaintiff-Appellants,

v.

BLACKFEET HOUSING AUTHORITY,
and its Board Members, et al, and HUD,
Defendants-Appellees.

On Appeal From the United States District Court
for the District of Montana, Great Falls Division
D.C. No. CV 02-00073-GF-SEH

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* CONFEDERATED
SALISH AND KOOTENAI TRIBES AND THE SALISH KOOTENAI
HOUSING AUTHORITY'S BRIEF IN SUPPORT OF BLACKFEET
HOUSING AUTHORITY'S COMBINED PETITION FOR REHEARING
AND REHEARING *EN BANC*

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INTRODUCTION

Pursuant to the Federal Rules of Appellate Procedure with the Ninth Circuit (FRAP) 29(a), the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) together with the Salish Kootenai Housing Authority (SKHA) respectfully request leave to file an *amicus curiae* brief in support of Blackfeet Housing Authority's (BHA) Combined Petition for Rehearing or Rehearing *En Banc* in the matter of *Marceau v. Blackfeet Housing Authority and HUD*, 455 F.3d 974 (2006).

Pursuant to FRAP 29(d), the brief of amicus shall not exceed one-half the maximum length allowed for the principle brief from the BHA, or 2100 words. A copy of the proposed *amicus curiae* brief accompanies this motion.

STATEMENT OF AMICUS INTEREST

The Confederated Salish and Kootenai Tribes are a federally recognized tribe organized pursuant to the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. §§ 476-477. Through the 1855 Hellgate Treaty (12 Stat. 975) the CSKT reserved for themselves the Flathead Indian Reservation in northwestern Montana, within the jurisdiction of this Circuit. At the time of the 2000 census there were 6,964 enrolled members of the CSKT, the majority of whom reside on the reservation. The CSKT and its membership are directly impacted by any decision from this Circuit that sets precedent in federal Indian law, the federal-tribal trust relationship, and the management of tribal funds and resources.

The Salish Kootenai Housing Authority is the entity of the CSKT that is designated to receive federal funding pursuant to the Native American Housing and Self-Determination Act of 1996, 25 U.S.C. 4101, *et. seq.* (NAHASDA). The SKHA serves low and no income tribal members and currently has a housing inventory of over 700 units. The SKHA has a significant interest in the outcome of this case. This Circuit’s interpretation of Indian Housing legislation, waivers of sovereign immunity, and the extent of an Indian Housing Authority’s liability when carrying out program services and functions are all issues that have direct consequences for the future of SKHA operations.

In this case the Panel incorrectly found that by adopting the boilerplate “sue and be sued” language mandated by the U.S. Department of Housing and Urban Development (HUD), the BHA had effectuated a waiver of sovereign immunity from suit. The Panel decision contradicts the U.S. Supreme Court’s holding that waivers of tribal sovereign immunity must be clearly expressed and unequivocal. *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Furthermore, by following the superannuated Eighth Circuit decision in *Namekagon Development Co. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff’d*, 517 F.2d 508 (8th Cir. 1975), the Panel decision now places the Ninth Circuit in isolation from the circuit courts that have addressed identical “sue and be sued” clauses and found no waiver. *See, Ninigret*

Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000); *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2nd Cir. 2001) and *Dillion v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998)(overruling its own prior *Namekagon* decision).

Because the Panel decision conflicts with Supreme Court precedent and leaves the Ninth Circuit standing apart from the other circuit courts on these issues, amicus CSKT and SKHA support the BHA's Combined Petition for Rehearing and Rehearing *En Banc*. Amicus CSKT and SKHA write separately in order to bring this Circuit's attention to important issues not fully developed in the BHA Petition. The tribal-federal trust relationship - long a cornerstone of federal Indian law - has been misread by the Panel. The result is Ninth Circuit precedent that significantly alters the tribal-federal trust relationship in a manner that conflicts with Supreme Court precedent, and ultimately creates jurisdictional problems for federal courts faced with similar factual circumstances.

For the abovementioned reasons, amicus CSKT and SKHA respectfully request that this Motion for Leave to File as *Amicus Curiae* be granted pursuant to FRAP 29(a). The brief of the amicus CKST and SKHA accompanies this Motion.

Respectfully Submitted this ____ day of September, 2006.

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CERTIFICATE OF SERVICE

I certify that the foregoing “**Motion for Leave to File *Amicus Curiae***
Confederated Salish and Kootenai Tribes and the Salish Kootenai Housing
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Combined Petition for Rehearing and Rehearing *En Banc*" were also sent

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Act of 1996 (NAHASDA) 5, 6

I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Amicus Curiae Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) and CSKT Housing Authority respectfully submit this Brief in Support of the Blackfeet Housing Authority's (BHA) Combined Petition for Rehearing and Rehearing *En Banc* in the matter of *Marceau v. Blackfeet Housing Authority and HUD*, 455 F.3d 974 (2006). While the amicus parties are directly impacted by all holdings in this case, this brief focuses specifically on how this Circuit interprets the federal trust obligation to Indian tribes and their members.

Rehearing or rehearing *en banc* is necessary because this case involves three distinct questions of exceptional importance regarding the trust relationship between Indian tribes and the United States government. First, the Panel's examination of the federal trust doctrine fails to cite the most recent examination of this issue in *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). Second, the Panel's overly narrow focus on federal funds that passed through the BHA rather than HUD's central role in failing to provide the safe and adequate housing that tribal plaintiffs are entitled to under treaty, results in a misinterpretation of the "trust asset" at issue that excuses HUD from any trust obligation and inverts federal Indian law. Third, the Panel decision holds tribal entities liable for breaches of federal trust obligations, resulting in questionable federal court jurisdiction, as all remaining parties are tribal members or tribal entities and the litigation stems from a reservation-based project.

II. HUD HAS A FIDUCIARY TRUST OBLIGATION TO THE PLAINTIFFS AND BLACKFEET TRIBE PURSUANT TO MITCHELL AND ITS PROGENY.

When courts consider whether the federal government’s trust obligation to an Indian tribe rises to the level of a fiduciary duty, the Supreme Court’s holding in the *Mitchell* litigation “sets the stage.” Slip op. at 8090. While the Supreme Court first held that the General Allotment Act under which tribal land was taken into trust creates only a “general” trust duty, it subsequently held:

[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other document) about a trust fund, or trust or fiduciary connection.

United States v. Mitchell, 463 U.S. 206, 225 (1983) (*Mitchell II*) (quoting *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

The Court explained, “[a]ll the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). *Id.* The *Mitchell II* Court found that the statutes and regulations at issue clearly established a federal fiduciary duty to manage and operate Indian lands and resources, thus the Indian plaintiffs were entitled to compensation resulting from a breach of that duty. *Mitchell II*, 463 U.S. at 226.

In examining whether HUD’s trust obligations reach that of a fiduciary in this case, the Panel was correct to *start* with a discussion of this “*Mitchell* Doctrine.” However, the extent to which the federal government’s control over

trust resources rises to a fiduciary duty is best determined in relation to two post-*Mitchell* cases not considered by the Panel. Consequently, this case should be reheard or reheard *en banc* in order to analyze how *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) factor into the definition of HUD's trust obligations.

In *Navajo Nation* a divided Supreme Court refused to find that the Secretary of Interior's general trust obligation to approve coal leasing agreements rose to a fiduciary obligation. Instead, the Court stated the purpose of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a (IMLA) was to "enhance self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *United States v. Navajo Nation*, 537 U.S. at 508. Further, the IMLA and its regulations "do not assign to the Secretary managerial control over coal leasing. Nor do they even establish the 'limited trust relationship' existing under the [General Allotment Act]; no provision of the IMLA or its regulations contains *any* trust language with respect to coal leasing." *Id.*

Conversely, the Supreme Court found the trust obligation to the White Mountain Apache Tribe to preserve the former Fort Apache military post from deteriorating rose to a fiduciary duty under the *Mitchell* Doctrine. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). The Court looked to a 1960 statute requiring that the fort be "held by the United States in trust for" the Tribe, "subject to the right of the Secretary of the Interior to use" the property. *United States v. White Mountain Apache Tribe*, 537 U.S. at 474-475. Justice Ginsburg,

concluded, contrasting the *White Mountain Apache* holding to the *Navajo Nation* decision she had penned, explaining that *Navajo Nation* “turns on the threshold question whether the IMLA and its regulations impose any concrete substantive obligations, fiduciary or otherwise, on the Government.” *Id.* at 480. Because the IMLA and its regulations assigned no managerial role over coal leasing, the tribe could not even show that a “limited trust relationship” existed. *Id.* The situation in *White Mountain Apache*, according to Justice Ginsburg, was closer to *Mitchell II* because the 1960 congressional action “in fact created a trust not fairly characterized as ‘bare’ given the trustee’s authorized use and management.” *Id.* Because the federal government had allowed the building to fall into ruin, Justice Ginsburg felt that a fiduciary duty had been breached and “a damages remedy is fairly inferable.” *Id.*

Viewing the *Mitchell* Doctrine under the lens of these recent decisions, this case squares more with *White Mountain Apache* than with *Navajo Nation*. First, as the Panel observed, HUD’s control over the housing structures “was pervasive.” Slip op. at 8090. HUD regulations set the minimum property standards for the housing project, retained authority to alter designs, and required the houses to follow HUD-mandated prototype costs for each area. *Id.*, at 8090-8091. The BHA was not permitted to enter any material or labor contracts without HUD approval. *Id.* As the homes at issue were constructed, every major aspect of the project was subject to HUD regulation and oversight. These crucial facts stand in stark contrast to the situation in *Navajo Nation*, where the IMLA and its regulations

provide for little more than a token presence of the federal government through the Secretary of Interior's ministerial approval of tribally negotiated lease agreements.

Additionally, by focusing on the simple passing of funds from the federal government to the BHA as the trust asset at issue the Panel missed the mark on its *Mitchell* analysis. The Panel narrowly defined the trust asset at issue in this case as the "funds" that the BHA received from HUD, then concluded that no fiduciary duty existed because "[p]laintiffs offered no argument as to why a grant of HUD funds should be considered a tribal resource or why the general trust responsibility between the federal government and American Indians was focused into specific fiduciary duties." Slip op. at 8091. Interestingly, Judge Pregerson follows this holding with a special concurrence that leaves little room for any inference *other* than the existence of HUD's fiduciary duty to American Indians. Slip op. at 8095-8100. Expanding beyond the HUD funding, the special concurrence traces the treaty-based right that requires the federal government to provide housing for the Blackfeet, the pervasive control that the government had (and continues to have) over tribal trust land and housing projects, as well as the express trust duty to provide housing contained in the congressionally enacted Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 (NAHASDA). *Id.* The statutorily expressed trust duty to provide Indian housing, coupled with the existence of a treaty-based trust resource subject to pervasive federal regulation is squarely in line with *White Mountain Apache*, and thus subject to a fiduciary duty pursuant to *Mitchell II*.

Although this case differs from *White Mountain Apache* in that there was no physical occupation of the housing project by HUD, the Panel was nonetheless incorrect to conclude that “[b]ecause Plaintiffs have not shown that HUD took a pervasive role in the management of a tribal resource, we hold that no *Mitchell* fiduciary duty existed.” Slip op. at 8091. Justice Souter’s *Navajo Nation* dissent places the *Mitchell* Doctrine’s “federal control” aspect in its proper context:

The comprehensiveness of the Secretary’s role just described is what made *Mitchell II* an easy case. *Mitchell II* did not say, however, that fiduciary duties can only be found where the Government has ‘elaborate control.’ Nor does *Mitchell II*’s reference to the statute’s explicit ‘best interests’ language foreclose the use of standard interpretive tools like legislative history to determine whether a statute establishes a fiduciary duty.

Navajo Nation, 537 U.S. at 517 (Souter, dissenting)(citations omitted).

Here, the “federal control” aspect squares more with *White Mountain Apache* than *Navajo Nation*. Further, the special concurrence belies the Panel’s conclusion that there was “insufficient management of a federal resource”, in that it provides a detailed history of the pervasive regulatory role that HUD had over the housing project, the treaty-derived obligation to provide adequate housing for the Blackfeet, and the statutory language in NAHASDA recognizing the federal duty to provide housing for Indian Country.

Examining the *Mitchell* Doctrine in light of the Supreme Court’s recent decisions on this issue, the facts here clearly establish a fiduciary duty on the part of HUD. As with *Mitchell II* this case presents all the elements of a common-law trust: a trustee (the United States, through HUD), a beneficiary (Blackfeet Tribe

and Plaintiffs), and a trust corpus (tribal housing projects). The tone and text of the special concurrence leaves little doubt that the Blackfoot Tribe and the Plaintiffs were owed a fiduciary trust duty by HUD under the *Mitchell* Doctrine. This case is proper for rehearing or rehearing *en banc* in order to remedy the Panel's incorrect conclusions.

III. THE PANEL DECISION IMPROPERLY SHIFTS THE FEDERAL TRUST BURDEN TO TRIBAL PROGRAMS AND CREATES AN UNWORKABLE JURISDICTIONAL FRAMEWORK.

In its understandable desire to find a remedy for the Plaintiffs in this case, the Panel has inadvertently turned the principles of the federal government's trust obligation to Indians on its head. The Panel's decision establishes an unprecedented rule that tribal programs that receive funding from the federal government but remain subject to unwaivable, pervasive federal regulation in carrying out program goals, are nonetheless singularly liable for the performance of a federal trust duty. The legal conclusions the Panel draws would allow any federal agency to wash itself clean of trust obligations by simply requiring tribes to create tribal entities through which to funnel pervasively controlled federal funding. Moreover, the Panel's reasoning would allow the federal government to "pervasively regulate" a tribal program while remaining insulated from liability for breaches of trust obligations. This directly contradicts the "consistently recognized" fundamental right of tribes and tribal members to sue the United States for breaches of the tribal-federal trust relationship. *Mitchell II*, 463 U.S. at 226. By affirming the dismissal of HUD, the Panel has held that it is the *tribal program*

that should stand as the sole defendant, simply because the federal housing funds passed through tribal hands. Clearly this needs to be reconsidered on rehearing or rehearing *en banc*.

Finally, the practical result of the Panel's decision to excuse HUD creates a jurisdictional conundrum, as the only parties that remain are reservation-based tribal members or entities. The Panel has remanded the case back to the District Court, however federal jurisdiction is questionable. The District Court is now faced with Blackfeet tribal members suing the BHA over a housing project located on trust land within the Blackfeet Reservation. The dismissal of the federal party and the federal causes of action have most likely divested the District Court of any subject matter jurisdiction to hear this case. Such a result further contorts federal Indian law trust principles, in as much as federal courts will have no ability to hear breach of trust claims raised by tribal members when, as here, the tribal program must stand as the defendant instead of the United States.

IV. CONCLUSION

For the reasons stated in the BHA Petition, and above, the amicus parties

respectfully request that this case should be reheard or reheard *en banc*.

Respectfully Submitted this ____ day of September, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing **“*Amicus Curiae* Confederated Salish and Kootenai Tribes and the Salish Kootenai Housing Authority’s Brief in Support of Blackfeet Housing Authority’s Combined Petition for Rehearing and Rehearing *En Banc*”** is proportionally spaced, has a 14-point typeface, and as determined by the undersigned’s word processing program, contains 2094 words, not including the Table of Contents, Table of Authorities, and Certificate of Service.

Dated this ____ day of September, 2006.

By: _____
John T. Harrison

CERTIFICATE OF SERVICE

I certify that the foregoing “*Amicus Curiae* Confederated Salish and Kootenai Tribes and the Salish Kootenai Housing Authority’s Brief in Support of Blackfeet Housing Authority’s Combined Petition for Rehearing and Rehearing *En Banc*” was mailed on this ____ day of September, 2006, via U.S. mail, postage pre-paid to the following counsel of record:

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