Trust Counsel

ANSWERS TO QUESTIONS FOR JUSTICE DEPARTMENT WITNESSES

1. Has the Justice Department been derelict in performing its obligations to provide legal representation for Indian Tribes? If so, why?

ANSWER: The Department of Justice in its capacity as the litigating agent of the United States traditionally exercies an independent judgment and evaluation when any other Department proposes a litigating position in a given case. A principal standard in this judgment is the "national" or "public" interest.

The standard of the "national" or "public" interest may of course, in the opinion of the Department of Justice, involve factors not reflected in the considerations of the requesting Department or of its clientele among the public. The recommendations of the Department of the Interior and the desires of the Indians as a special clientele group may therefore be superseded when the Justice Department makes the independent judgment referred to. There would be nothing exceptional about this (as compared to recommendations coming from any other Departments) except for one thing: the natural resources rights of Indian people are the res of a trust, and the Government of the United States is the Trustee. As does any Trustee the Government bears a special responsibility to put forward and advocate the interests of its wards and to represent them forcefully when the substance of that trust is in any way threatened. While the interests of Indians generally, as a component of the citizenry at large, are undoubtedly served by that which is in the overall "national" or "public" interest,

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it is not at all clear that with respect to a particular resource claim the individual Indian or tribe concerned should be so limited.. Thus, the Government's trust responsibility may conflict with the Department of Justice's responsibility to act after its independent judgment and evaluation and according to the broader standard - - it is this which is the "inherent conflict of interest" to which the President referred in his Message to the Congress of July 8, 1970.

"When such situations arise" said the President, "the Indians are the losers." As the Attorney General said in a statement of October 29, 1971, as quoted in the NCIO News for October-November 15, 1971:

"This provided a very difficult problem for some of the government departments, particularly that of the Department of Justice, because when litigation arose in connection with these properties or the interests therein the Department of Justice was put in the area of conflict, having to represent the interests of the Indians on one side and of course of the public and the United States government on the other side."

Examples of this conflict could be researched over the last century of Indian litigation, but as Assistant Attorney General Kashiwa said in his testimony before the Senate Interior Committee on November 22, 1971, "I am not here this morning to defend the decades and Administrations of the past."

A very current example is the case Agua Caliente Band of Mission Indians, et al. v. The County of Riverside. The Solicitor of the Department of the Interior recommended

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that the United States in its Trustee capacity join as amicus in the Indians' petition for certiorari to the Supreme Court. The Solicitor General, using the standard referred to at the opening of this response, declined. The Supreme Court then requested an amicus brief from the United States. The Solicitor General disagreed with the recommendation of the Solicitor of the Department of the Interior and independently decided to file a brief which opposed the Indians' position. The Supreme Court thus is not separately advised of the position of the United States speaking as Trustee for the Indians.

A [second,] current example is the case of Brian L. Stevens and Brian L. Stevens as surviving spouse of Alma Stevens, deceased v. Commissioner of Internal Revenue. In the appeal to the Ninth Circuit, this Department and the Department of the Treasury intended to file a brief opposing the Indians' position and superseding the recommendations of the Department of the Interior, arguing as Trustee.

Recognizing the importance of having the Trustee's voice being heard by the Court, this Department and the Department of the Treasury agreed to expand the Government's brief to include the views of the Department of the Interior, speaking as Trustee. In this case, the Court was separately advised of the Government's views in its Trustee capacity, as well as of the contrary views of the Department of Justice and the Department of the

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Treasury. This particular brief was a rare exception, perhaps the first of its kind. (The Court ruled in favor of the Indians and of the Trustee.)

It is essential, in summing up this response, to emphasize that this exercise of independent judgment and evaluation by the Department of Justice is not being "derelict" as your question states, but is the proper discharge of what is a continuing and necessary responsibility of the Department of Justice. It is precisely because the Department must continue to judge and act independently, by those broad standards previously mentioned, that the Federal Government's responsibility as a Trustee, for litigation in the defense of Indian land and water rights, should be transferred from the Department of Justice to an Indian Trust Counsel Authority which would be unhindered in forcefully presenting the Trustee's arguments to any judicial or regulatory bodies before whom Indian natural resources rights may be challenged. Unless this Authority is created, Courts and regulatory bodies may continue to be unaware of the Trustee's voice for Indian rights, an unfair and unjust situation which the President's proposal aims to correct.

2. Are you aware of a Justice Department review of the transcript of the hearings held last year on this legislation and, if so, can you state the position of the Department in regard to the critical statements which were made concerning the Justice Department to demonstrate the need for this bill? Also, please comment as to your review of the hearings on November 22 and 23, 1971.

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Trust Council

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Brad Patterson

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☐
See remarks below	☐

FROM Lisa Gerard DATE 1/31/73

REMARKS

Attached is Interior's draft to create the Trust Counsel Authority. The draft itself is identical to what we have previously cleared. The Speaker letter has been revised (some phrases changed in order, others included in a sectional analysis), and I think it does read better.

I think we should direct Interior to hold back transmittal of this until we have a cluster of "Indian Package" drafts ready to go. (I expect the Asst Sec'y one shortly, and "Traders and Trespass" is ready for clearance.)

OMB FORM 4
REV AUG 70

Justice wanted to take another look at this, and I will hear from them

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within a day or two.

Is clearance of this OK with you?

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Mr. Speaker:

Enclosed is a proposal "To provide for the creation of the Indian Trust Counsel Authority, and for other purposes."

We recommend that the proposal be referred to the appropriate committee for consideration and that it be enacted.

Creation of the Indian Trust Counsel would provide independent legal counsel and representation on behalf of Indians and Alaska Natives in the assertion of their natural resource rights. Such an authority is needed to remedy a conflict of interests on the part of the Federal Government. President Nixon described this conflict in his Indian Message of July 8, 1970:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.
>
> "Every trustee has a legal obligation to advance the interests of beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

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"In order to correct this situation, I am calling on the Congress to establish an Indian Trust Counsel Authority to assure independent legal representation for the Indians' natural resource rights."

This proposal will carry out the policy enunciated in the President's message by establishing the Indian Trust Counsel Authority. The Authority will be free from control by any Executive Department. This independence will enable the Authority to protect the natural resource rights and interests of Indians untrammeled by any other interest.

A sectional analysis in the Appendix to this letter spells out the structure and functions of the Trust Counsel Authority in detail. Some of the special features of the proposal, however, require further explanation.

The Authority will be under the direction of a three-man Board of Directors, two of whom must be Indians. The Board is given the authority to hire necessary attorneys including the chief legal officer and his deputy and such other personnel as they deem necessary to carry out the functions given them by the proposal. Having majority control of the Board will assure Indians that they can determine the direction of the Authority's activities and that the people hired to carry out the Authority's functions are acceptable to them. Such assurance should make the Authority a body that from its inception enjoys the confidence and trust of Indians.

The proposal provides that the Indian Trust Counsel, who is the chief legal officer for the Authority, shall be a level V in the Executive Schedule. We feel that this level is necessary in order for the Authority to be able to obtain the kind of person that it needs to direct the legal activities of the Authority and in order to give him sufficient stature to be able to deal with cabinet and sub-cabinet members of the Executive Department. The Board of Directors is also authorized to hire, fix the pay, and prescribe the duties of such attorneys, including special counsel, as it deems necessary. These attorneys will be the working group that will carry out the responsibilities and functions of the Authority. It is the Administration's intention that the Authority will build up a cadre of well-trained and devoted attorneys whose energies will be turned to the protection and preservation of the Indians' natural resource rights and interests. The authority to hire special counsel

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is needed in those instances when the Authority must go outside of its own staff to hire someone uniquely qualified to assist in the preparation of trial or appeal material regarding a special case. The Board will have similar authority to hire outside experts.

The proposal authorizes the Authority, upon the request of an aggrieved Indian or group of Indians, to assist those Indians in the protection of their natural resource rights and interests in the courts and before administrative bodies. This authority will be used when a tribe has a justiciable claim and feels that it needs the assistance of the Authority for prosecuting that claim. The assistance rendered by the Authority is in addition to the responsibilities that the Department of the Interior has to protect Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and American Indians. Upon enactment of the proposal, the Department of Justice will be relieved of its responsibility to represent Indians in the area of natural resources but will continue to fulfill the responsibilities it has with regard to Indians generally (for example, its responsibility to advise the Secretary of the Interior with respect to the probate of Indians' wills). This relief of Justice is subject to the responsibility of Justice, in conducting any litigation that affects Indians' natural resource rights, to recognize the responsbilities of the United States which arise from its trust relationship to Indians.

Acting in the name of the United States as Indian trustee, the Authority will be able to initiate suits, upon request by an aggrieved Indian or group of Indians, to protect the rights of the Indians in their natural resources against the United States, or any of its departments, agencies, officers or employees as well as against the States, their subdivisions, departments and agencies or against any private or public person or corporation. The United States waives its sovereign immunity as to such litigation initiated by the Authority. (The Authority will use its power to initiate litigation in those cases where the Indians' rights or claims are of such a nature that Indians are precluded from bringing suit against the United States because of bars that the United States has as a sovereign to suits generally. These bars will be removed by the provision waiving the United States' sovereign immunity as it relates to actions brought by the Authority. The proposal clearly limits the waiver of sovereign immunity to the narrow area of litigation initiated by the Authority.)

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We wish to stress that the Authority will be barred from relitigating any claims that have been filed or should have been filed before the Indian Claims Commission. However, the Authority will be permitted to assist in claims that are still in the process of being litigated before the Commission.

American Indians have for long felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their natural resource rights adequate legal protection. We believe that enactment of this proposal will restore the confidence of the American Indian in the ability of our government to meet the legal obligation it has as trustee to advance the rights and interests of the beneficiaries of the trust without reservation and to the highest degree of its ability and skill.

The Office of Management and Budget has advised that this legislative proposal is in accord with the program of the President.

Sincerely yours,

Secretary of the Interior

Honorable Carl Albert
Speaker of the House
Washington, D.C. 20515

Enclosures

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APPENDIX

SECTIONAL ANALYSIS OF PROPOSAL

Section 1 of the proposal outlines its purpose, as described in the letter, supra.

Section 2 establishes in the Executive Branch an independent agency to be known as the Indian Trust Counsel Authority. The Authority will be governed by a three-man Board of Directors who will be appointed by the President by and with the advice and consent of the Senate. At least two of the members of the Board must be Indians. The term of members of the Board shall be 4 years except that the initial Board shall be appointed in a staggered manner. The President shall designate one of the members of the Board to serve as chairman. The members of the Board shall receive pay that is the daily equivalent to that of a GS-18 for each day they are engaged in the business of the Authority and shall be allowed necessary travel expenses.

Section 3 provides that the Board of Directors shall convene at the call of the chairman but must meet at least once each quarter to set policy for the Authority and to review its activities. This section requires the Board to report annually to the President and the Congress on the activities of the Authority.

Section 4 authorizes the Board, without regard to the civil service laws, to appoint and prescribe the duties of the chief legal officer for the Authority, who shall be called the Indian Trust Counsel, at level V of the Executive Schedule, and a Deputy Indian Trust Counsel, who shall be a grade GS-18.

Section 5 authorizes the Authority to appoint and fix the pay and prescribe the duties of attorneys it employs. It also authorizes the Authority to appoint and fix the compensation of needed special counsel and experts. Finally, it authorizes the attorneys or special counsel appointed by it to appear for and represent the Authority in any case before any court, commission or administrative proceeding pertaining to its responsibilities. In order to deal with conflicting requests for the Authority's assistance, the Board is provided with authority to hire experts or special counsel to represent one or all of the parties involved.

Section 6 authorizes the Authority to hire such other employees as it deems necessary.

Section 7 provides that the Authority shall be free of control by any Executive Department.

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Section 8 authorizes the Authority, with the consent of any aggrieved Indian or Indian tribe, band, or other identifiable group of Indians, to render legal services in regard to rights or claims of the Indians in relationship to their natural resources. The Section spells out the kinds of natural resource rights and interests to be protected by the Authority. The Authority's exercise of its responsibility to protect Indian resources does not absolve the Department of the Interior or the Department of Justice from their trust responsibilities to Indians, except that the Department of Justice is relieved of its responsibility to represent Indians with regard to natural resources--the same responsibility which the Trust Counsel Authority will assume. This section also provides that the Authority may perform such services as the investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of Indians in all courts and before Federal, State, and local commissions and administrative bodies.

Section 9 authorizes the Authority, with the consent of any aggrieved Indian, Indian tribe, band, or other identifiable group of Indians, acting in the name of the United States as trustee for the Indians, to initiate and prosecute to final judgment in all Federal courts against the United States or any of its officers or employees, or in the Federal or State courts against any of the States, their subdivisions, departments or employees or against any persons or corporations, public or private, all actions in law and equity for the protection of the natural resource interests and rights of the Indians. The United States waives its sovereign immunity to suit in connection with litigation initiated by the Authority under this section. Suits against the United States and its officers and employees shall be tried before the court without a jury.

Section 10 provides that the powers granted the Authority by this Act shall not extend to the filing or prosecution of or intervention in any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed before the Indian Claims Commission or under any special statute authorizing a suit to be brought against the United States but makes it clear that the prohibition does not include suits that could be brought under the provisions of sections 1346(a)(2) and 1491, title 28, U.S.C. The Authority can assist in cases pending before the Indian Claims Commission if so requested.

Section 11 enumerates the authorities of the Authority.

Section 12 authorizes the appropriation of funds necessary to carry out the provisions of the Act.

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A B I L L

To provide for the creation of the Indian Trust Counsel Authority, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in reaffirming the trust and treaty relationship between the United States of America and the American Indians, and between the United States and the Alaska Natives, which Indians and Natives are hereinafter referred to as "Indians", the purpose of this Act is to establish an Indian Trust Counsel Authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the Indians.

SEC. 2. (a) The Indian Trust Counsel Authority, hereinafter referred to as the Authority, is established as an independent agency in the Executive Branch.

(b) The Authority shall be governed by a Board of Directors composed of three members to be appointed by the President by and with the advice and consent of the Senate.

(c) At least two of the members of the Board of Directors shall be Indians.

(d) The terms of office of members of the Board of Directors shall be four years, except that, of the first three members appointed, one shall be appointed for a two-year term, one shall be appointed for a three-year term, and one shall be appointed for a four-year term.

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A member appointed to fill a vacancy occuring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. Upon the expiration of his term of office, a member shall serve until his successor has been appointed and qualified. A member of the Board of Directors may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(e) The President shall designate one of the Directors to serve as Chairman at his pleasure.

(f) The members of the Board of Directors shall receive pay at the daily equivalent of the rate provided for grade GS-18 in section 5332 of title 5, United States Code, for each day they are engaged in the business of the Authority, and shall be allowed travel expenses, including a per diem allowance as authorized by section 5703 of title 5, United States Code, in connection with their services for the Authority.

SEC. 3. The Board of Directors shall convene at the call of the Chairman, but must convene at least once each quarter, to set policy for the Authority and review its activities. The Board of Directors shall report to the President and the Congress annually on the activities of the Authority.

SEC. 4. The Board of Directors shall, without regard to the provisions of title 5, United States Code, governing appointments in

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the competitive service, appoint and prescribe the duties of a chief legal officer for the Authority, who shall have the title of Indian Trust Counsel, and who shall be paid at a rate equal to that provided for in level V of the Executive Schedule (5. U.S.C. 5316), and a Deputy Indian Trust Counsel, who shall be paid at a rate not in excess of that provided for grade GS-18 in section 5332 of title 5, United States Code.

SEC. 5. (a) The Board of Directors shall appoint, fix the pay of, and prescribe the duties of such attorneys as it deems necessary after consulting with the Indian Trust Counsel.

(b) The Board of Directors shall appoint and fix the compensation of such special counsel and experts as it deems necessary.

(c) Attorneys or special counsel appointed under this section may, at the direction of the Authority, appear for or represent the Authority in any case in any court, before any commission, or in any administrative proceeding.

(d) The Board of Directors may, in the event of a conflict between parties requesting the assistance of or the representation of the Authority under the provisions of section 8 or 9 hereof, hire special counsel or experts to assist or represent one or all of the parties.

SEC. 6. The Board of Directors shall, subject to the provisions of title 5, United States Code, appoint such employees

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as it deems necessary in exercising its powers and duties.

SEC. 7. The Authority, in the exercise of its functions, shall be free from control by any Executive Department.

SEC. 8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians, is authorized to render legal services in regard to rights or claims of the Indians to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to hunt and fish, within the United States' trust responsibility owing to the Indians, which services are now rendered by the Department of the Interior or by the Department of Justice, but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe: Provided, That the Department of Justice as of the effective date of this Act or as soon thereafter as practicable, is relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, minerals, and rights to hunt and fish. The legal services performed pursuant to this section may include, but shall not

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be limited to, the investigation and inventorying of Indians' land and water rights, and the preparation and trial and appeal of cases in all courts, before Federal, State and local commissions, and in all administrative proceedings.

SEC. 9. The Authority, with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians, acting in the name of the United States as trustee for the Indians, may initiate and prosecute to judgment in all courts of the United States suits against the United States, its officers and employees, and in all courts of the United States, and of the States, suits against any of the States, their subdivisions, departments and agencies, or against persons and corporations, public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication or administration of natural resources or interests therein had or claimed by the Indians, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to fish and hunt. The Authority is authorized to prosecute appeals in all courts of the United States and of the States, and to intervene in any Federal, State, or local administrative proceeding in order to protect the rights of the Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section.

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Any such suit against the United States, its officers, and employees shall be tried to the court without a jury.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of or intervention in any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other special statute authorizing a claims suit to be brought by Indians against the United States but shall extend to section 1346(a)(2) and 1491 of title 28, United States Code: Provided, however, that the Authority may assist any Indian tribe requesting such assistance in its claim pending before the Indian Claims Commission.

SEC. 11. The Authority is authorized to:

(1) Make such rules and regulations as it deems necessary to carry out its functions.

(2) Request from any department, agency, or independent instrumentality of the Government any information, personnel, services, or materials it deems necessary to carry out its functions under this Act; and each such department, agency or instrumentality is authorized to cooperate with the Authority and to comply with a request to the extent permitted by law, on a reimbursable or non-reimbursable basis.

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(3) Receive and use funds or services donated by others.

(4) Make such expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities under this Act.

SEC. 12. There are authorized to be appropriated to the Authority created herein such sums as may be necessary to carry out the provisions of this Act.

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July 27, 1973

Dear Bob:

In response to your letter to the President of July 19 transmitting the resolution of the Inter-Tribal Council of the Five Civilized Tribes, I would like very much to invite you to give me a call or drop in to the office so that we can discuss the problem to which the Inter-Tribal Council refers. I really am not aware of any "interference" or "hindering" as your resolution, and the duplicate resolution of the NTCA, mention. (Note my enclosed letter to NTCA Acting President Lewis, attached - he has not yet responded as of this date). May I respectfully ask you: what is it to which you refer? What examples from your own knowledge can you cite?

We are good enough personal friends to discuss this informally, and I earnestly invite you to do so. My telephone number is 202 456-2657.

Cordially,

Bradley H. Patterson, Jr.

Mr. B. Bob Stopp
President
Inter-Tribal Council of the
Five Civilized Tribes
Post Office Box 119
Tahlequah, Oklahoma 74464

attachment

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July 10, 1973

Dear Governor Lewis:

Bill Youpee has sent the President a copy of Resolution BD-6/73 - No. 30 which you signed on June 29.

In considering this matter, it would be helpful to Mr. Garment and me if you would be specific about the concern you have for "interference on internal policies, operating procedures and apparently on personnel selections" by "subordinates on the White House Executive Staff," and the allegation that the White House Staff has "hindered" Mr. Franklin.

Precisely in what ways, in the personal knowledge of National Tribal Chairmen's Association Board Members, has "interference" or "hindering" taken place? If you have some specific examples in mind, I would be happy to sit down with you or Webster or the National Tribal Chairmen's Association Board and discuss them.

As you know, I have always responded to National Tribal Chairmen's Association invitations to meet with your Board, and would consider an informal or executive session the right way to go over this supposed problem, rather than deal at arm's length through resolutions and press conferences.

Cordially,

Bradley H. Patterson, Jr.

Mr. Robert Lewis
Acting President, NTCA
Zuni Pueblo
Zuni, New Mexico 87327

BHP:dls

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The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

Organized February 3rd, 1950

Officers

President

B. Bob Stopp
Box 119
Tahlequah, Oklahoma 74464

Vice-President

Floyd L. Harjo
P.O. Box 745
Wewoka, Oklahoma 74884

Executive Secretary

Mrs. Elizabeth C. Smith
P.O. Box 1199
Muskogee, Oklahoma 74401

Treasurer

Miss Suzanne Heard
Box 344
Haileyville, Oklahoma 74746

Chaplain

Rev. Jonas L. Partridge
1216 East Bryan
Sapulpa, Oklahoma 74066

Sergeant-At-Arms

Mrs. Eula Doonkeen
1612 N.W. 4th St.
Oklahoma City, Oklahoma 73106

July 19, 1973

The President
The White House
Washington, D. C. 20501

Dear Mr. President:

In regular quarterly session of the Inter-Tribal Council of the Five Civilized Tribes held at Lake Texoma Lodge, Kingston, Oklahoma, on July 13, 1973, this Council unanimously adopted the enclosed resolution.

This Council action is respectfully submitted to you for your sincere consideration and action.

Respectfully,

B. Bob Stopp

B. Bob Stopp
President

Enclosure

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RESOLUTION

WHEREAS, The Nixon Administration came into office with great promise for pursuing programs that would be beneficial to Indians; and

WHEREAS, Indian people generally were heartened by the promise of these beneficial programs; and

WHEREAS, Delivery of the programs soon became blocked by an inability of the Administration to decide on the form and organization needed and a mania for reorganizing, restructuring, or realigning-

Witnesseth: October 9, 1969, NCAI Convention, Albuquerque, New Mexico. Commissioner Bruce saw restructuring of the BIA as a means of getting BIA "to be totally responsive to Indian needs; * * *"

January 9, 1970, Press Release. Secretary Hickel announces executive realignment of BIA. Commissioner Bruce is quoted: "With this new team, I hope to make the BIA totally responsive to your needs."

October 18, 1970, Press Release. Secretary Hickel announces appointment of 15 Indians to key BIA posts. Commissioner Bruce is quoted: "We are now prepared to make the Bureau totally responsive to the people it serves."

November 25, 1970, Press Release. Secretary Hickel unveils dramatic changes in BIA. Commissioner Bruce is quoted: "We are after a complete overhaul."

November 17, 1971, NCAI Convention, Reno, Nevada. Commissioner Bruce: "My executive staff in Washington and I have been working on a major reorganization of the Central Office structure aimed at providing a more responsive BIA program at the Washington level."

January 18, 1973, Press Release. Assistant Secretary Bodman announces steps taken to improve operations of BIA: "Immediate measures being taken are (1) realign the Bureau of Indian Affairs Central Office * * *"

May 15, 1973, Press Release. Secretary Morton announced realignment of Central Office functions of BIA, and the creation of a Steering Committee composed of Assistant Secretaries and the Solicitor "to review and make recommendations to him on a complete reorganization of the Indian Bureau of Indian Affairs."; and

WHEREAS, There are numerous other internal reorganizations that did not receive press coverage during the Bruce Administration; and

WHEREAS, The effect of devoting all of this effort to organizing, reorganizing, restructuring, and realigning has been to delay and prevent delivery of services to Indian people and the performance of the trust responsibility of the United States; and

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WHEREAS, The Senate Indian Affairs Subcommittee has now become involved in realignment that could be better utilized in actions on legislation vital and beneficial to Indian people; and

WHEREAS, A Cabinet level officer should be allowed to carry out the functions of a Bureau within his Department with broad, general policy guidelines from the President without interference from subordinates on the White House Executive Staff; and

WHEREAS, It has come to our attention that there has been White House interference on internal policies, operating procedures, and apparently on personnel selections.

WHEREAS, The proposed realignment is the outgrowth of discussions by tribal leaders for many years on that subject and in particular since the current proposal was first introduced to the NTCA on February 17, 1973, by Mr. Franklin in Tucson, Arizona.

NOW, THEREFORE, BE IT RESOLVED, That the Bureau of Indian Affairs proceed with the proposed realignment as announced in Assistant Secretary Bodman's directive of January 18, 1973, and Secretary Morton's order dated May 15, 1973, without any further interference or delay, and

BE IT FURTHER RESOLVED, That the Steering Committee and the implementation working group established by Secretary Morton on May 15, 1973, be dissolved as they are obviously designed and managed in a manner and fashion that is leading toward further disruption of services to Indian people which will ultimately result in termination of services to Indian people.

AND BE IT FURTHER RESOLVED, That the Subcommittee of the Interior and Insular Affairs Committee Chairman, James Abourezk, refrain from further involvement in the current BIA realignment and that he and the committee devote the time toward more meaningful efforts in assisting all Indian people.

AND BE IT FURTHER RESOLVED, That the President of the United States instruct his staff to assist but not interfere with or hinder Marvin Franklin and the Secretary of the Interior from promulgating and implementing the basic plan for restructuring the Bureau of Indian Affairs under directives of January 18, 1973, and May 15, 1973, and as further explained this 13th day of July, 1973.

AND BE IT STILL FURTHER RESOLVED, That the Inter-Tribal Council of the Five Civilized Tribes endorses the realignment of the Washington BIA office because:

> A completion of the Washington Office realignment will, hopefully, terminate some four years of realignment and reorganization of the BIA by the Bruce and Franklin administrations; and

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AND BE IT FURTHER RESOLVED, That the end of reorganization and realignment of the BIA will enable the BIA to concentrate on delivery of program and services to Indian people, which are very badly needed and which have suffered because of the above cited preoccupation with reorganization over the past four years.

CERTIFICATION

The foregoing resolution was unanimously adopted with a quorum being present, by the Inter-Tribal Council of the Five Civilized Tribes, at its meeting held at Lake Texoma, Kingston, Oklahoma, July 13, 1973.

B. Bob Stopp

B. Bob Stopp, President
Inter-Tribal Council of the Five Civilized Tribes

ATTEST:

Elizabeth C. Smith

Elizabeth C. Smith, Executive Secretary

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The Inter-Tribal Council
of the Five Civilized Tribes



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The President
The White House
Washington, D. C. 20501

W.H. Mail Reception & Security
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Date JUL 24 1973



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for achieving full employment. Evidently, the White House is little troubled by the notion that many Americans are out of work who might very well be gainfully employed to their own advantage and to the advantage of the Nation.

The administration has proposed a budget which ignores the urgent needs of our social sector while proposing substantial increases in military outlays—in spite of the fact that we have achieved a cease-fire in Vietnam.

As the report indicates, the administration's economic program offers no constructive agenda for the Congress or the American people. In addition to the defects that I have touched upon it fails to increase low- and middle-income housing; to provide adequate mortgage financing at reasonable rates; to reduce the great inequities in our tax system. It offers no proposals for reforming our costly and inequitable welfare system, a situation that was ably documented by another Joint Economic Committee report issued today under the leadership of MARTHA GRIFFITHS, the able chairwoman of the Joint Economic Committee's Fiscal Policy Subcommittee.

It cuts back on programs that would reduce poverty and offers no solutions for the deficiencies and rigidities that exist in our economy.

This is a most welcome document to those of us who are confronted daily with the grim realization that we must do the job here. The administration has failed and is failing to handle the job. It is up to us to decide the priorities in our Federal programs. It is up to us to decide on the stabilization measures needed. It is up to us to reform the tax programs. It is up to us to reverse the drastic scuttling of our poverty programs and resume the course of equitable, decent, and humane public policy.

REPORT OF JOINT ECONOMIC COMMITTEE

(Mr. PATMAN asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. PATMAN. Mr. Speaker, I filed with the Congress today the 1973 Joint Economic Report of the Joint Economic Committee. The committee is required by Public Law 304 to file a report on the President's economic policy and to make recommendations to the Congress by March 1. However, due to the late filing of the President's Economic Report this year, House Joint Resolution 299 extended the committee's filing date to March 31.

I commend to my colleagues the findings of our report. Given the resurgence of inflationary pressures and the possibility of a credit crunch later this year, our economic prospects toward the end of 1973 are highly uncertain. The Joint Economic Committee recommends a comprehensive policy to keep the economy on a course of economic growth with relative price stability that will reduce unemployment to 4 percent within 12 months.

A responsible fiscal policy that can be achieved with a budget ceiling of approximately $268 billion should be accompanied by a monetary policy that accommodates continued growth and maintains or lowers current interest rates. The committee urges the Congress to reorder priorities within the budget ceiling as the spending mix proposed by the administration is totally unacceptable and ignores many of our most pressing human needs. We also recommend a more vigorous price-incomes policy. The recent inflation well in excess of a 6-percent annual rate is evidence that phase III has been an utter failure. The budget and incomes policy issues will be before the Congress in the immediate future and the analysis of the committee should be valuable to us.

The report, in addition to the majority recommendations, also contains supplementary views, minority views, and joint views on international economic policy.

INDIAN SELF-DETERMINATION ACT OF 1973

(Mr. MEEDS asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. MEEDS. Mr. Speaker, I am introducing today four bills designed for the better administration of Indian affairs, improved tribal government and economic progress, and greater participation of Indians in planning their own future.

The four bills are the "Indian Self-Determination Act of 1973" expanding and facilitating the authority of Indian tribes to contract for BIA and Indian health services and programs; the "Indian Counsel Authority" proposed to increase the protection of Indian trust assets and eliminate conflicts of interest within the U.S. administration of Indian affairs; a bill to create an Assistant Secretary of the Interior for Indian Affairs; and a bill to amend or repeal inhibiting laws governing Indian affairs.

These bills are, in large part, adopted from the Indian legislative proposals submitted by the administration by executive communication of March 15. My four bills reach six of the seven areas covered by the administration's proposals. However, I have found it necessary to make several substantive changes in the proposals ot make them conform to Indian requests and to better implement the oft-stated administration goal of Indian self-determination. In fact, my self-determination bill stands in lieu of three of the administration proposals which either fall short of the necessary tribal flexibility or endanger tribal stability.

I have introduced these bills primarily because the concept and intent of the proposals are good and is, in part, responsive to Indian-identified solutions to Indian problems and needs. As I said, I have made changes where appropriate and necessary. I will not, as yet, introduce a major important proposal expanding credit opportunities for Indians as I am not satisfied with many aspects of that administration proposal.

I also feel it necessary to introduce the legislation to gage the sincerity and will of the administration in moving forward with a sound, progressive Indian program. In a press conference of March 16 announcing the administration proposals, Under Secretary of the Interior John C. Whitaker stated that, had these bills been introduced and acted upon, the Wounded Knee seizure "just might" have been averted. He stated that—

> We need congressional action—not inconclusive hearings or an expression of sentiment at a press conference.

I sincerely hope that Mr. Whitaker and this administration do not view these proposals, whatever their value, as a panacea for the problems which beset Indians. It is clear that they will not solve all of the problems which Indians experience. It is unfortunate that Mr. Whitaker should take that position. As he becomes more familiar with Indians and their problems, he will find that there is ample blame for the administration and the Congress—past and present—to share for the mismanagement of Indian affairs extending over 100 years.

To attempt to make this a political issue is a serious mistake. These are extremely difficult problems that will necessitate bipartisan efforts in the Congress and cooperation—not recrimination—from the administration. Little is served by political rhetoric or "an expression of sentiment at a press conference."

I want to assure the Members of the House and the Indian people that the Subcommittee on Indian Affairs intends to take aggressive action on these proposals and on the many other problem areas in Indian affairs. I hope that the administration, having offered the proposals, will cooperate in arriving at the enactment of sound legislation and not forget the proposals. There follows the text of the first bill:

H.R. 6106

A bill to provide for the creation of the Indian Trust Counsel Authority, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in reaffirming the trust and treaty relationship between the United States of America and the American Indians, and between the United States and the Alaska Natives, which Indians and Natives are hereinafter referred to as "Indians", the purpose of this Act is to establish an Indian Trust Counsel Authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of Indians.

SEC. 2. (a) The Indian Trust Counsel Authority, hereinafter referred to as the Authority, is established as an independent agency in the Executive Branch.

(b) The Authority shall be governed by a Board of Directors composed of three members to be appointed by the President by and with the advice and consent of the Senate.

(c) At least two of the members of the Board of Directors shall be Indians.

(d) The terms of office of members of the Board of Directors shall be four years, except that, of the first three members appointed, one shall be appointed for a two-year term, one shall be appointed for a three-year term, and one shall be appointed for a four-year term. A member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. Upon the expiration of his term of office, a member shall serve until his successor has been appointed and qualified. A member of the Board of Directors may be removed by

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the President only for inefficiency, neglect of duty, or malfeasance in office.

(e) The President shall designate one of the Directors to serve as Chairman at his pleasure.

(f) The members of the Board of Directors shall receive pay at the daily equivalent of the rate provided for grade GS–18 in section 5332 of title 5, United States Code, for each day they are engaged in the business of the Authority, and shall be allowed travel expenses, including a per diem allowance as authorized by section 5703 of title 5, United States Code, in connection with their services for the Authority.

SEC. 3. The Board of Directors shall convene at the call of the Chairman, but must convene at least once each quarter, to set policy for the Authority and review its activities. The Board of Directors shall report to the President and the Congress annually on the activities of the Authority.

SEC. 4. The Board of Directors shall, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, appoint and prescribe the duties of a chief legal officer for the Authority, who shall have the title of Indian Trust Counsel, and who shall be paid at a rate equal to that provided for in level V of the Executive Schedule (5 U.S.C. 5316), and a Deputy Indian Trust Counsel, who shall be paid at a rate not in excess of that provided for grade GS–18 in section 5332 of title 5, United States Code.

SEC. 5. (a) The Board of Directors shall appoint, fix the pay of, and prescribe the duties of such attorneys as it deems necessary after consulting with the Indian Trust Counsel.

(b) The Board of Directors shall appoint and fix the compensation of such special counsel and experts as it deems necessary.

(c) Attorneys and special counsel appointed under this section may, at the direction of the Authority, appear for or represent the Authority in any case in any court, before any commission, or in any administrative proceeding.

(d) The Board of Directors may, in the event of a conflict between parties requesting the assistance of or the representation of the Authority under the provisions of section 8 or 9 hereof, hire special counsel or experts to assist or represent one or all of the parties.

SEC. 6. the Board of Directors shall, subject to the provisions of title 5, United States Code, appoint such employees as it deems necessary in exercising its powers and duties.

SEC. 7. The Authority, in the exercise of its functions, shall be free from control by any Executive Department.

SEC. 8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians, is authorized to render legal services in regard to rights or claims of the Indians to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to hunt or fish, within the United States' trust responsibility owing to the Indians, which services are now rendered by the Department of the Interior or by the Department of Justice, but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe: *Provided*, That the Department of Justice as of the effective date of this Act or as soon thereafter as practicable, is relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to hunt and fish. The legal services performed pursuant to this section may include, but shall not be limited to, the investigation and inventorying of Indians' land and water rights, and the preparation and trial and appeal of cases in all courts, before Federal, State, and local commissions, and in all administrative proceedings.

SEC. 9. The Authority, with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians, acting in the name of the United States as trustees for the Indians, may initiate and prosecute to judgment in all courts of the United States suits against the United States, its officers and employees, and in all courts of the United States and of the States, suits against any of the States, their subdivisions, departments and agencies, or against persons and corporations, public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication or administration of natural resources or interests therein had or claimed by the Indians, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to fish and hunt. The Authority is authorized to prosecute appeals in all courts of the United States and of the States, and to intervene in any Federal, State, or local administrative proceeding in order to protect the rights of the Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section. Any suit against the United States, its officers, and employees shall be tried to the court without a jury.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of or intervention in any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other special statute authorizing a claims suit to be brought by Indians against the United States but shall extend to section 1346(a)(2) and 1491 of title 18, United States Code: *Provided, however*, That the Authority may assist any Indian tribe requesting such assistance in its claim pending before the Indian Claims Commission.

SEC. 11. The Authority is authorized to:

(1) Make such rules and regulations as it deems necessary to carry out its functions.

(2) Request from any department, agency, or independent instrumentality of the Government any information, personnel, services, or materials it deems necessary to carry out its functions under this Act; and each such department, agency or instrumentality is authorized to cooperate with the Authority and to comply with a request to the extent permitted by law, on a reimbursable or nonreimbursable basis.

(3) Receive and use funds or services donated by others.

(4) Make such expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities under this Act.

SEC. 12. There are authorized to be appropriated to the Authority created herein such sums as may be necessary to carry out the provisions of this Act.

The Indian Trust Counsel Authority bill will establish an independent agency in the executive branch with three Directors, two of whom would be Indian, appointed by the President with the advice and consent of the Senate. The Board of Directors would appoint a Trust Counsel, Deputy, and such other attorneys and special counsel necessary to carry out its functions. It would be free of control of any executive department.

Section 8 provides that the Authority, at the request of the Indian or Indian tribe, is authorized to provide the broadest range of legal service and representation with respect to Indian claims or rights to natural resources within the trust responsibility. Neither Justice nor Interior would be absolved of its trust responsibility to Indians except that Justice would no longer be required to represent Indians in natural resource cases.

Section 9 authorizes the Authority, in the name of the United States as trustee, to sue any party, including the United States, to protect the trust interest of the Indians and to appeal or intervene in any such case. The sovereign immunity of the United States would be waived for the purposes of the section.

Section 10 prohibits the Authority from representing Indians in claims before the Indian Claims Commission except that it could provide certain incidental assistance in this regard.

While there are provisions of the bill which have met with Indian objections or questions which may require amendment, the concept has received wide Indian support.

The text of the second bill follows:

H.R. 6103

A bill to promote maximum Indian participation in the government of the Indian people; to provide for the full participation of Indian tribes in certain programs and services conducted by the Federal Government for Indians and to encourage the development of the human resources of the Indian people; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Self-Determination Act of 1973".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and it has denied to the Indian people an effective voice in the planning and implementing of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination through maximum involvement and participation in, and direction of, Federal services to Indian communities which are more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation of the Indian people in the planning,

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conduct, and administration of those programs and services.

DEFINITIONS

SEC. 4. For the purposes of this Act, the term—

(a) "Indian" means an Indian, Eskimo, or Aleut person who is a member of a tribe, band, nation or community, including any Alaska Native Community as defined in the Alaska Native Claims Settlement Act, for which the Federal Government provides special programs and services because of their identity as Indians;

(b) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native community as defined in the Alaska Native Claims Settlement Act, for which the Federal Government provides special programs and services because of its Indian identity; and

(c) "tribal organization" means the elected governing body of any Indian tribe or any legally established organization of Indians which is controlled by one or more such bodies or which is controlled by a board of directors elected or selected by one or more such bodies (or elected by the Indian population to be served by such organization). Such an organization shall include the maximum participation of Indians in all phases of its activities.

CONTRACTS BY THE SECRETARY OF THE INTERIOR

SEC. 5. The Secretary of the Interior is authorized, in his discretion and upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions, thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended and any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto.

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

SEC. 6. The Secretary of Health, Education, and Welfare is authorized, in his discretion and upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organizations of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended.

GRANTS TO INDIAN TRIBAL ORGANIZATIONS

SEC. 7. The Secretaries of the Interior and of Health, Education, and Welfare are each authorized, upon the request of any Indian tribe, to make a grant or grants to any tribal organization of any such Indian tribe for planning, training, evaluation, and other activities specifically designed to make it possible for such tribal organization to enter into a contract or contracts pursuant to section 5 and 6 of this Act.

DETAIL OF PERSONNEL

SEC. 8 (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized, upon the request of any tribal organization, to detail any civil service employee serving under a career or career-conditional appointment for a period of up to one hundred and eighty days to such tribal organization for the purpose of assisting such tribal organization in the planning, conduct, or administration of programs under contracts or grants made pursuant to section 5, 6, or 7 of this Act. The appropriate Secretary may, upon a showing by a tribal organization of a continuing need for an employee detailed pursuant to this section, extend such detail for a period not to exceed ninety days.

(b) The Act of August 5, 1954 (68 Stat. 674), as amended, is further amended by adding a new section 8 after section 7 of the Act, as follows:

"SEC. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, upon the request of any Indian tribe, band, group, or community, personel of the Service may be detailed by the Secretary for the purpose of assisting such Indias tribe, group, band, or community in carrying out the provisions of contracts with, or grants to, tribal organizations pursuant to sections 5, 6, or 7 of the Indian Self-Determination Act of 1973: *Provided*, That the cost of detailing such personnel is taken into account in determining the amount to be paid to such tribal organization under such contract or grant, and that the Secretary shall modify such contract or grant pursuant to subsection (c) of section 9 of the Indian Self-Determination Act of 1973 to effect the provisions of this section."

(c) Paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words "Environmental Science Services Administration" the words "or who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended,".

ADMINISTRATIVE PROVISIONS

SEC. 9. (a) Contracts with tribal organizations pursuant to sections 5 and 6 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended.

(b) Payments of any grants or under any contracts pursuant to sections 5, 6, or 7 of this Act may be made in advance or by way of reimbursement and in such intallments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this Act.

(c) Notwithstanding any provision of law to the contrary, the appropriate Secretary may, at the request or with the consent of a tribal organization, revise or amend any contract or grant made by him pursuant to section 5, 6, or 7 of this Act with such organization as he finds necessary to carry out the purposes of this Act.

(d) The appropriate Secretary may, in his discretion, enter into contracts pursuant to section 5 and 6 of this Act with tribal organizations, by negotiation, without advertising, for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items: *Provided*, That nothing in this Act shall be construed as authorizing or requiring a tribal organization to enter into an agreement, directly or indirectly, with a non-Indian party for the construction of buildings, roads, sidewalks, sewers, mains, or similar items without compliance with requirements of advertising and competitive bidding if the same would have been required had the agreement with the non-Indian party been entered into directly by the United States.

(e) In connection with any contract or grant made pursuant to section 5, 6, or 7 of this Act, the appropriate Secretary may permit a tribal organization to utilize, in carrying out such contract or grant, existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within his jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance.

SEC. 10. The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act.

SEC. 11. (a) The appropriate Secretary shall promulgate regulations relative to this Act no later than six months from the date of enactment of this Act.

(b) No later than sixty days prior to the promulgation of such regulations, the appropriate Secretary shall publish the proposed regulations in the Federal Register. No later than thirty days prior to the promulgation of such regulations, the appropriate Secretary shall provide, with adequate public notice, the opportunity for hearings on the proposed regulations, once published, to all interested persons.

SEC. 12. Nothing in this Act shall be construed as authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

The Indian Self-Determination Act authorizes the Secretary of the Interior to contract with Indian tribes and organizations to carry out his functions and authorities under the Johnson-O'Malley Act, the Snyder Act, and any subsequent acts. The Secretary of HEW is similarly authorized to contract his Indian health functions to Indian tribes and organizations.

The bill also provides for grants to such organizations to aid them in planning and implementing such contracts. It authorizes the detail of certain BIA and IHS personnel, including commissioned PHS personnel, to such organizations for up to 270 days; provides for limited exemption of such contracts from certain Federal contracting laws which might prove too restrictive on Indian contractors; authorizes such contractor to use Federal buildings, facilities, equipment, and personal property in carrying out the contract, and has a saving clause with respect to the continuation of the trust responsibility.

In testimony last year by Indian witnesses on the administration's "assumption and local control" proposal, it was apparent that the Indian people felt that this was another radical swing of the pendulum in Indian affairs without affording them the opportunity of experience in the middle ground. To them, Federal Indian policy seems to swing from rank paternalism to cruel termination. On the other hand, the proposed amendment of the Johnson-O'Malley Act does not go far enough. My proposal will provide this badly needed interim experience in Indian control of Indian programs.

The text of the third bill follows:

H.R. 6104

A bill to amend certain laws relating to Indians

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person owning or having in his charge or possession any horses, mules, burros, cattle, goats, sheep, or swine and who permits, drives, or otherwise conveys such livestock to range and feed on any trust or restricted land of any Indian or Indian tribe without the consent of said Indian or Indian tribe or otherwise to trespass thereon, shall be liable to a penalty of $5 per day for each animal in trespass, together with the reasonable value of the forage consumed during the period of trespass and any cost of gathering, handling, and caring for said livestock and cost of collecting the amount due under the authority of this section. Any livestock trespassing on any trust or restricted land may be im-

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pounded by the Secretary of the Interior. Notice of the impoundment shall be given as prescribed by regulation of the Secretary. Any animals impounded may be claimed by the owner within the time specified in the notice, upon payment of $5 per day for each animal impounded, the reasonable value of the forage consumed, and other costs allowed under authority of this section. An animal not so claimed shall be sold and net proceeds thereof, after payment of all necessary expenses and costs and the deduction of the $5 per day penalty and forage charge, shall be paid to the owner if claim and proof of ownership satisfactory to the Secretary are submitted within six months after the date of sale. The $5 per day penalty and forage charge, and the net proceeds of the sale if not paid to the owner of the animal, shall be deposited in the Treasury of the United States to the credit of the tribe, if tribal land is involved, or paid to the individual Indian owners, if individually owned land is involved. Any unbranded livestock over one year of age found running at large on trust or restricted land may be presumed to be in trespass and shall be subject to the provisions of this section.

SEC. 2. Indian tribal governments may enact laws and ordinances relating to the issuance of traders' licenses on their particular reservations. When a tribe has enacted such laws and ordinances, if it is so provided therein, the following Federal statutes relating to traders' licenses shall be inoperative as to that particular reservation: section 5 of the Act of August 15, 1876 (19 Stat. 200; 25 U.S.C. 261); section 1 of the Act of March 3, 1901, and section 10 of the Act of March 3, 1903 (31 Stat. 1066; 32 Stat. 1009; 25 U.S.C. 262); section 2132 of the Revised Statutes (25 U.S.C. 263, section 3 of the Act of June 30, 1834 (4 Stat. 729)); section 2133 of the Revised Statutes (25 U.S.C. 264, section 4 of the Act of June 30, 1834 (4 Stat. 729)), except that no business transaction, property or use of property shall be subject to taxation by virtue of this provision or by any tribe's laws or ordinances making Federal statutes relating to traders' licenses inoperative on its particular reservation.

SEC. 3. The following statutes or parts of statutes are hereby repealed:

(1) Section 2117 of the Revised Statutes, as amended, (25 U.S.C. 179).

(2) Section 2078 of the Revised Statutes (25 U.S.C. 68) and section 14 of the Act of June 30, 1834 (4 Stat. 738).

(3) Section 437 of title 18, United States Code, (62 Stat. 703).

(4) The Act of June 19, 1939 (ch. 210, 53 Stat. 840) (25 U.S.C. 68a, 87a).

The bill "to amend certain laws relating to Indians" is offered to eliminate Some of the day-to-day irritations and complaints of the Indian people on the reservation and to transfer authority from the Federal Government to the tribal government.

Section 1 reforms the 1902 Federal law prohibiting and penalizing livestock trespass on Indian lands which has proven inadequate to control this problem. It increases the penalty for livestock trespass from $1 per day per head to $5 per day per head; imposes forage charges and other costs; authorizes impoundment and sale of such animals if not claimed, and disposition of the proceeds.

It is interesting to note, in view of the administration's policy of Indian self-determination, that the power of consent to such trespass is placed with the Secretary of the Interior in the administration's bill while the obsolete 1902 law placed it in the aggrieved Indian tribe's hands. My bill restores this power to the Indians.

Section 2 authorizes tribal governments to enact their own laws or ordinances regulating trading on Indian reservations. In the event of such tribal regulation, Federal laws licensing traders on Indian reservations are suspended and made inoperative on that particular reservation with the proviso that such suspension will not affect the tax status of Indians on the reservation.

Section 3 repeals certain obsolete laws regulating trade between Indians and Federal employees. While this is generally desirable, paragraph (3) of that section repeals a law prohibiting a Federal employee from having an interest in government or Indian contracts on behalf of Indians. I intend to examine that very closely.

The text of the fourth bill follows:

H.R. 6105

A bill to establish within the Department of the Interior the position of Assistant Secretary of the Interior for Indian Affairs, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be hereafter in the Department of the Interior, in addition to the Assistant Secretaries now provided for by law, an Assistant Secretary of the Interior for Indian Affairs, who shall be appointed by the President by and with the advice and consent of the Senate, who shall be responsible for such duties as the Secretary of the Interior shall prescribe, and who shall receive compensation at the rate now or hereafter prescribed by law for Assistant Secretaries of the Interior.

"SEC. 2. Section 5315, title 5, United States Code, is amended by striking the figure "(6)" at the end of item (18) and by inserting in lieu thereof the figure "(7)".

"SEC. 3. Section 1, title 25, United States Code (4 Stat. 564), is hereby repealed.

The Assistant Secretary legislation would create an additional Secretary of the Interior for Indian Affairs and abolish the position of Commissioner of Indian Affairs. Although the executive communication transmitting this proposal indicates that the duties of the new Assistant Secretary would be limited to Indian affairs, their proposed bill does not make this statutory.

We are eliminating a position whose sole responsibility and identity is Indian affairs. Indian witnesses have stressed the need to make this a matter of law to avoid the possibility that this position will become the catchall of miscellaneous functions within Interior. If the administration can make such a statement in their communication, they should have no objection to making it a matter of law. I have so proposed.

Mr. Speaker, with the appropriate revisions I have recommended and with my intent to hold comprehensive hearings on these proposals soon, I offer them for introduction and urge enactment.

INTENSIVE FOREST MANAGEMENT

(Mr. WYATT asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. WYATT. Mr. Speaker, intensive forest management is the key, not only to increasing U.S. timber production, but also to improving the forest environment for wildlife habitat, hunting, fishing, camping, and every conceivable form of forest recreation.

It is often easiest to define a term by saying what it is not. Intensive forest management is not a method of stripping our forests of their trees. Nor is it a concept which excludes all activities other than tree harvesting.

Lack of forest management implies letting the life cycle of a tree take its course, leaving the trees to the elements, to resist age, insects, disease, rot, wind, and fire and then to die wastefully, neglected, and unutilized.

Intensive management is one of the crowning achievements of the science of forestry. Many of its methods are those of the gardener. Weak and inferior trees are thinned to let in the sunlight and remove competition for hardier specimens. Seedlings are planted and given the benefit of fertilizers and chemical protection from forest pests. Genetic selection insures that only the hardiest and fastest growing species populate the new forest.

Intensive management also means that when a tree is harvested another is planted immediately to take its place and that the new growth is properly spaced to maximize the growth of wood fiber. When all methods of intensive management are properly applied, the result can be three to five times the production of wood fiber possible in an unmanaged forest.

We need intensive management on every acre of land capable of sustaining commercial forests.

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(Mr. WAMPLER asked and was given permission to address the House for 1 minute, to revise and extend his remarks, and include extraneous matter.)

Mr. WAMPLER. Mr. Speaker, I want to call the attention of my colleagues to the wonderful victory enjoyed by the basketball team from my alma mater, the Virginia Polytechnic Institute and State University, Blacksburg, Va.

Yesterday, in tense and exciting overtime play, Virginia Tech defeated Notre Dame by one point, to win the National Invitational Tournament. This is the first national championship ever to be won by Virginia Tech in any sport.

Congratulations are in order for Coach Don DeVoe and the entire team. Their execution of the game was brilliant. They were good sports from start to finish, and showed remarkable persistence and discipline.

You can well imagine the sense of pride all Virginians feel in this great victory won through the proper application of skill and dogged determination. They have brought distinction in the best American tradition to Virginia Polytechnic Institute and State University. I salute them.

CRIMINAL CODE REFORM ACT OF 1973

(Mr HUTCHINSON asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

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THE WHITE HOUSE

WASHINGTON

May 22 1974

NOTE FOR THE RECORD

In a conversation today with Frank Ducheneaux of the Hous Interior Staff on a number of things, we discussed the Trust Counsel bill. He said the Committee hopes to push action on it soon.

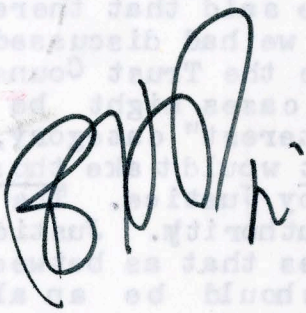
He said that there were two problems (one of which we had discussed long ago). Thisfirst one was to give the Trust Counsel the authority to identify which cases might be in the "potential conflict of interest" category, and to specify ahead of time that it would take those cases; the rest would be taken by Justice. The Committee bill will include this authority. Justice will oppose this, since it believes that as between Trust Counsel and Justice, there should be an all-or-none relationship; either the Trust Counsel takes all the Indian natural resource cases, or none. They don t like the "dividing up" provision. Personally I told Frank I would support a dividing-up provision as long as it mandated a decision before the case got started; one couldn't have Justice handle a case for a while and then have the Trust Counsel take it away from them half way through. Ducheneaux agreed, and the "dedding point" will be at the beginning.

Then Frank mentioned the second point: that his bill will authorize the Trust Counsel to intervene as counsel for the tribe in any case where Justice is already acting as counsel for the trustee (the government). (A Tribe can petition for intervention in any such case now, of course, but this provision would guarantee the possibility of intervention, instead of leaving it to the Court to decide.) I said that this implied that the Tribe --i.e. the Trust Counsel -- would do this whenever it felt that the Justice Dept. was dragging its heels or not doing a"good enough job" -- an ever-present implication and possibility. Of course Justice would oppose that and I told Frank I didn't think we would support it either; it would mean having one governmentagency alwaysscrapping with another one on pradtically any case at all., not just on a

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basis of representing the Trust well, but of a general judgement of effectiveness of ~~ZXZIXXZXZ~~ dilatoriness or whatever. I said I was quite sure we could not and would not want to try to sell that idea here.

Frank said that his second proposal perhaps could be traded off for the first, but some of us should come up informally and talk with Hosmer and other members about it at the right time. I said that this might be a good idea, and we left it there...



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LAW OFFICES
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1016 OLD NATIONAL BANK BUILDING
SPOKANE, WASHINGTON 99201
MADISON 4-4291

October 1, 1970

Mr. Brad Patterson
Executive Offices
The White House
Washington, D. C. 20500

Dear Mr. Patterson:

This is a copy of the statement I filed in the hearings on Senate Bill 4165.

I appreciated meeting you there and hope that I will have an opportunity to discuss Indian affairs with you on my next trip to Washington.

Sincerely yours,

DELLWO, RUDOLF & GRANT

By: Robert D. Dellwo

RDD:fb

Encl.

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December 10, 1971

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL KASHIWA

FROM: BRADLEY H. PATTERSON, JR.

SUBJECT: Senate Interior Testimony on the Indian Trust Counsel

Confirming our conversations and one today with Ed Lazowska, I would like to review with your successor the material your staff is preparing in response to the Committee's questions on pages 51, 55 and 57-58 of the November 22, 1971 transcript. This review is to be while the material is still in draft and before it is transmitted to the Senate Committee. I would suggest that this material be prepared in conjunction with Assistant Secretary Loesch and his staff in Interior and BIA and will be glad to help arrange this.

cc: Assistant Secretary Loesch

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cc: Assistant Secretary Loesch

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DEPARTMENT OF JUSTICE

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2. The White House Washington, D. C.			
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4.			

☐ SIGNATURE ☐ COMMENT ☒ PER CONVERSATION
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☐ SEE ME ☐ NOTE AND RETURN ☐ NOTE AND FILE
☐ RECOMMENDATION ☐ CALL ME ☐ YOUR INFORMATION
☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE Re: 11/22/71 hearing on S.2035
☐ PREPARE REPLY FOR THE SIGNATURE OF (Indian Trust Counsel Authority)

REMARKS

We have no yet received the transcript from the committee, but herewith is an advance copy which I have marked up in a preliminary way. Please let us have your suggestions. You may be especially interested in pages 51 and 55.

Incidentally, I am advised that the Quinault Indian case mentioned by Wilkinson didn't die out of conflict of interest but because neither the Quinault counsel nor Interior furnished facts upon which to base suit, although requested so to do.

P.S. - Sol. Gen. still working on the Agua Caliente brief. /Ed

FROM: NAME	BUILDING & ROOM	EXT.	DATE
Edward S. Lazowska	Main Justice Room 2607	2736	12/7/71
Ed			

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RETURN TO
LEGISLATIVE CLERK
LAND AND NATURAL RESOURCES DIV.

VOLUME 1

UNITED STATES SENATE

Committee On

Interior and Insular Affairs

Subcommittee on Indian Affairs

Washington, D. C.

MONDAY, NOVEMBER 22, 1971.

In the Matter of:

INDIAN TRUST COUNSEL AUTHORITY

Pages 1 through 85

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VOLUME 1.

INDIAN TRUST COUNSEL AUTHORITY

S. 2035

- - -

MONDAY, NOVEMBER 22, 1971

- - -

United States Senate,

Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs,

Washington, D.C.

The subcommittee met at 10:00 a.m., pursuant to notice, in room 3110, New Senate Office Building, Senator Clinton P. Anderson, presiding.

Present: Senators Anderson (presiding), Fannin, Gravel, Allott, Hansen.

Also Present: Messrs. Jerry Verkler, Claude Wood, Steve Quarles, Mike Daly and Forrest Gerard.

Senator Anderson. The hearing will come to order.

This is the first of a two-page open public hearing before the subcommittee on Indian Affairs to take testimony from public and private witnesses on S. 2035, to provide for the creation of the Indian Trust Counsel Authority, and for other purposes.

The purpose of this proposal, as set forth in section 1, is to establish an Indian Trust Counsel Authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the

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Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

Such counsel and representation for Indians and Alaska Natives is deemed necessary in light of apparent conflicts of interest between the various departments and agencies within government who by law are charged with the responsibility of protecting the Indians' natural resources and rights.

This measure was transmitted to Congress by the Administration and is considered one of the key proposals in the President's Indian legislative package.

The format for the hearing today will include witnesses from the Department of the Interior, the Department of Justice and a private attorney representing Indian tribes. Tomorrow's hearing will be devoted primarily to national and regional Indian organizations and their attorneys.

There being no objection, I shall order the executive communication and the full text of the bills, S. 2035, to be included in the record at this point.

(The documents referred to follow:)

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Senator Anderson. Mr. Secretary, we are happy to see you here again and we are glad to have your testimony at this time.

STATEMENT OF THE HONORABLE ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ACCOMPANIED BY ASSISTANT SECRETARY LAUEN AND FRANK SAKEN.

Mr. Morton. Thank you, Mr. Chairman. I have with me Assistant Secretary Lalah. His area of responsibility in the Department is primarily public lands and Bureau of Indian Affairs, and also Mr. Frank Saken, whose area of responsibility in the Department is that of a legislative counsel, drafting and preparing legislation and advising the Secretary on matters concerning legislation.

Mr. Chairman and members of the committee, I am pleased to appear here to support enactment of S. 2035. We have anxiously awaited action on the President's Indian message legislation and I welcome this opportunity to express my strong support for one of the most important items in that package. It is difficult to say which of the bills is most important. But there is no question in my mind that S. 2035 stands at least on an equal footing with S. 2036, the Indian financing bill, which would have immediate and substantial values to the Indian on the reservation, and S. 1573, the transfer of control bill, which would lend speed and flexibility to the implementation of the President's goal of Indian self-determination.

Senator Anderson. Mr. Secretary, could I interrupt for a

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second. There is a vote going on now. I think we are going to have to stop for a vote in the next few minutes. I hope you understand that.

Senator Allott. Mr. Chairman, if you wish, in order that we won't inconvenience the Secretary, I would be very happy to carry on here until I see those five lights and you can go over and I will recess the meeting to the first call of the Chair.

Senator Anderson. That would be very kind.

If you don't mind, Mr. Secretary, I am going to sneak out for a while and go and vote.

Mr. Morton. We will miss you, sir.

Senator Allot (presiding). All right, go ahead, Mr. Secretary.

Mr. Morton. I am not naive enough to assert that any of its parts, or the entire proposed package will cure all the Indian ills and the problems in the administration of Indian affairs which we face. But I do believe that these bills will establish a framework within which Indians can help themselves to protect and preserve their resources, raise their standard of living, and commence the cure of the other ills from which they suffer.

As you know, the U.S. Government is charged with a "trust responsibility" with regard to Indians. This term is often misunderstood. It applies to resources, not to persons. This trusteeship is tied to the protection, preservation, and

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development of tribal and individual Indian resources, such as land, water, fishing and hunting rights, mineral development, and timber. This trust responsibility is frequently compared to the duties of a private trustee, such as the administrator of an estate. But the analogy is faulty because of a unique feature in the United States Indian trust responsibility: the assets of this trust must be managed and administered with the consent of the beneficiary -- that is, the tribe or individual Indian. This factor complicates the decisions which must be made and at times makes a wholly satisfactory decision almost impossible to reach.

But as the federal officer most directly charged with the responsibility of adhering to the conditions of the Government's trust, I have a more difficult problem. Both in appearance and in fact and both for the Department of the Interior and the Department of Justice, there is frequently an inherent conflict of interest between the requirements of the trusteeship and the broader responsibility to the people of the United States. It is frequently difficult and again sometimes impossible to be a single-minded advocate of a claim or demand arising under the trusteeship, when that claim or demand runs counter to what appears to be the general public interest.

It is to assist in resolving this difficulty that S. 2035 is designed. This bill established an independent entity, the Indian Trust Counsel Authority. The sole objective and duty of

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the Trust Council would be the active advocacy of the trust resource rights and interests of Indians, unfettered by other considerations of public policy. The Counsel would provide in this area the skilled and partisan service which a private individual would have a right to expect for his lawyer.

You are aware of this Administration's desire to accomplish a thoroughgoing reorganization of the Executive Branch of government. Periodically, creaking machinery in government must be repaired, overhauled, or replaced. I believe that the machinery which we now have for carrying out our trusteeship responsibilities to Indians is inadequate. It needs a substantial addition. Since the Department of the Interior, the Department of Justice, and indeed all other agencies of the Federal Government will continue to be charged with responsibility in this field, the establishment of the Trust Counsel Authority will furnish additional machinery to serve the Indians.

While the establishment of the Trust Counsel will by no means limit the ability or the right of the tribe or the individual to retain attorneys for any purpose, we are faced with the fact that in many instances, and unfortunately in all the most important ones, the necessary money or talent to make this a practical reality is simply not available. The Trust Counsel Authority will fill this gap.

I would be even more delighted than I am to appear before you today if I were testifying on behalf of the entire Indian

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legislative package submitted to you for consideration by this administration. I urge you to give early consideration to the other bills which make up the portfolio but, in the meantime and for a start, I urge your prompt and favorable consideration on S. 2035, the Trust Counsel Authority bill.

Thank you.

Mr. Chairman, I would like to include in the record a recent statement by the Attorney General at the NCAI meeting in the office of the Vice President on October 29, 1971. I would like to quote one paragraph from his statement:

"We in the Justice Department fully support this legislation. We believe that our current position is untenable, and regardless of the practice of bureaucracies in the past to maintain each and every vestige of power representation that they can, we in this case are glad to give it up. We believe it is an important step forward and we would certainly hope that all of you here lend what efforts you can in order to induce the Congress to pass this legislation and put it into effect, so that the interest of the Indian nation and the Indian people as such may be more fully protected henceforth."

I appreciate the opportunity to testify, I will be glad to answer any questions.

Senator Allott. Mr. Secretary, the documents that you have will be placed into the record in full at the conclusion

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of your remarks or testimony here.

Could you stay a few minutes, Mr. Secretary?

Mr. Morton. Sure, you bet.

Senator Allott. Mr. Secretary, I hate to disconsode you, I think there would be a few questions but we now have a vote on the floor and from the situation on the floor it appears that there would be a constant running to vote today.

I notice that we have on the witness list Mr. Shiro Kashiwa, Assistant Attorney General. We are glad to welcome him. Is he here? Yes. Also Mr. Paul Bloom, who is here, and these people will be expected to be heard as quickly as we can hear them. Do you have any questions?

Senator Fannin. Just a couple of questions.

Senator Allott. If you will excuse me, Mr. Secretary, I will go and make the vote.

Senator Fannin (presiding). I note in your statement you state that the Department of Interior and Justice will continue to be charged with responsibility in the Indian field. How do you reconcile this with the bill? This is rather inconsistent with the statements that were made in that area.

Mr. Morton. I don't feel that the establishment of the Trust Counsel in any way ameliorates or diminishes the trust responsibility that exists in either the Department Interior or the Department of Justice. I think what we are dealing with here is an opportunity for the Indians to shore up their

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representation in matters where Indian rights are, let us say, in conflict with the rights of others or, better said, Indian interests are in conflict with other interests. I think what we must be careful to remember is that we are not establishing here an administration of any kind, we are establishing here a representation. A representation for the Indian in legal matters. The creation of an advocate's position as opposed to an administrative position.

Therefore, I feel that perhaps the Department of Interior could be more vigorous, perhaps, in pursuing policies and in pursuing actions in which there might be some conflict of interest, where as now there is a temerity on the part of the Department sometimes because they feel that there will be a conflict in representation of the rights of various groups involved.

We don't do things. Perhaps we don't pursue the development of water resources in areas where water resources are needed to the extent that we should because there is this fear that the Indians won't be properly represented.

Senator Fannin. Mr. Secretary, I don't mean to cut you short but I have to make a race over there to get in on the vote.

I wonder if it would be possible to submit the questions to you in writing, either that or if you would rather remain/

Mr. Morton. Well, what is your time schedule? We are

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perfectly willing to recess for half an hour.

Senator Fannin. Well, it is rather difficult to give you that information because the votes are on a 30 minute schedule, thirty minutes on each side, but they are not taking that length of time so I don't know whether they will be voting again in 30 minutes.

Mr. Morton. Well, if it suits you we would be most happy to take the questions and analyze them and submit the answers in writing if you would like.

Senator Fannin. Thank you very much.

Could the Assistant Secretary stay for a few minutes?

Mr. Morton. Sure.

Senator Fannin. Thank you very much, I have about one minute.

Senator Anderson (presiding). This is one question you might consider now, what is your concept of how the operation in the solicitor's office and your department will operate after the formation of this proposed authority?

Mr. Morton. We think the solicitor's office will operate very much as it does now. I think obviously, there would have to be some slight change in procedureal matters as they are handled and I would think also these slight changes would have to be made in the modus operandi as far as things are concerned in the Department of Justice.

But basically the Trust Counsel in no way reduces our trust

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responsibility. It simply provides a mechanism and an easier way in which conflicts of interest can be resolved in the courts and in not way interferes with the Indian's position in the Court of Claims.

So I feel that the existence of the Trust Counsel somewhat makes the solicitor's job an easier one.

I would like to have Secretary Laish, who is a lawyer and who is very familiar with this, responde to that question because I think he probably visualizes it in more detail than I do.

Senator Anderson. Well, I would like to make this one further elaboration before the Assistant Secretary respondes, and that is that there has been some concern expressed that if such an agency like this is established, that the federal agencies now, Interior and Justice, primarily, will feel relieved of any responsibility that they now have toward protecting the Indian's interest and this is a small agency that is going to be established, especially at the beginning and arrayed against the power of the Department of Interior and Justice, the Indians may feel their rights would be further prejudiced than they are now.

Mr. Laish. In response, Mr. Anderson, let me say that first of all the only true procedural change that I see is when a matter in which the Department or Bureau was interested was to go to suit, the request for such suit would be made by the Department, the solicitor's office of the Trust Counsel would

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have the authority rather than have the Justice Department as the case is now. On an administrative level the bill contemplated that the Trust Counsel would, at the request of its Indian clients, take part in the administrative matters within the Department as well as after it left the Department.

I don't see, myself, that it is going to -- certainly I am sure that the Department now has no idea that its own responsibilities as trustee will be in any way diminished by the act.

As a matter of fact, as you are well aware, the thrust for greater responsibility in the Department at this time is clear and I think it will remain clear.

Mr. Hoxton. I think there is one other aspect.

For the record, I think we ought to recognize certain things, we ought to stipulate certain facts. I don't see how you can say, if you use the yardstick that we currently use to measure the progress of a given segment in the society, such as the economical yardstick which is now in vogue as the poverty level, also we have the level of job opportunities, we also have the level of education and the general welfare of the community.

I don't think it can be said that the Indians have come out of the last 200 years in a position of equity with other segments of the society. I think it is most important that we recognize this and I think we might call it a failure on the part of the syatem. I don't think we can point a finger at any segment of government, but it is the failure of government

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across the board. It is the failure of the Congress, failure of the executive, the failure of perhaps the state and local governments in their responsibility to the Indian people.

I think what this Trust Counsel is a step forward in bringing about an equity which has not existed for a great many years and will give the Indians a better opportunity to fight their battles, to preserve for them for their own welfare those rights and those elements which are essential in their development and essential in bringing them up to a position equal to other segments of our society.

Senator Anderson. I think that is a good statement, Mr. Secretary, and it helps clarify it.

Senator Allott has some more questions, six, but these are the ones they could submit if they couldn't get back. Unless Secretary Laish wants to wait a few minutes to do it that way.

Mr. Laish. I am at your pleasure, Mr. Chairman.

Senator Anderson. Do you have any further statement to make?

Mr. Laish. No, I have no statement.

Senator Anderson. I think we had better wait for Senator Allot.

Senator Gravel. I just want to say good morning to the Secretary.

Mr. Morton. Good morning.

Senator Gravel. I have no questions, I just wanted to say

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good morning.

Mr. Morton. One of the questions I think, Senator Gravel, you might be interested in and one of the factors within this whole thing that we have given a great deal of thought to, is what the position of the Trust Counsel will be, vis-a-vis the native claim situation, assuming the bill passes or assuming it doesn't pass. Perhaps it might be good for me to put my thoughts on the record as far as that is concerned.

Senator Gravel. We would appreciate that very much.

Mr. Morton. We feel in the first place, outside of the Alaskan native group, that any claims, aboriginal claims that could be thought about really don't exist in the reservation community. Those claims have been settled by the formation of the reservation and have been settled by treaty. So if there is any concern that this Trust Counsel would either diminish the claims that exist as far as the aboriginal claims of the Alaska natives are concerned, we just don't feel that is so, and that those claims are separate and apart. They are best handled by the Congress in another way, if the bill fails to pass, then the Trust Counsel could very well defend the rights of the Alaskan native group as far as these aboriginal claims are concerned. But we are not looking toward the Trust Counsel as a way of opening up an issue which we don't feel exists in the other area.

Senator Gravel. Very good.

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Senator Anderson. Mr. Fannin.

Senator Fannin. Thank you, Mr. Chairman.

As you see it, under Section 8, who makes the decision that the time has been reached for the Trust Counsel's responsibility to begin and the Justice Department's responsibility to end?

Mr. Laish. I didn't get the question.

Senator Fannin. As you see it, who makes the decision under Section 8 that the time has been reached that the Trust Counsel's responsibility begins and the Just Department's responsibility ends?

Mr. Laish. Senator, if I may reply to that, I think it is quite clear from the bill that the responsibility for actual litigation will be with the Trust Counsel authority, after the bill passes.

Section 8 is designed for the purpose of relieving the Justice Department from actual litigation on trust matters. As the Secretary said, we don't feel that relieves the Justice Department from responsibility other than actual litigation in connection with the trust.

Now, does that answer your question?

Senator Fannin. Well, on page 5 of the bill, on line 6, it says the Department of Justice as of the effective date of this act or as soon thereafter as practicable is relieved of its responsibility to represent Indian Tribes with regard to their rights.

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Mr. Laish. Yes, that is what I am saying. I think it is the responsibility, after the passage of this bill, of the Trust Counsel authority to represent Indians or Tribes with regard to their claims in connection with natural resources and not the responsibility of the Justice Department.

But all I am getting at is, in my view, this is a change in Justice's responsibility in lawsuits, period.

Senator Fannin. Well, there is concurrent responsibility in part of the bill, is there not?

Mr. Laish. Yes.

Senator Fannin. Another question, this bill has an open ended appropriation authorization but it terminates responsibility in the Justice Department regardless of whether the authority has sufficient funds.

What would happen, as they did in natural resources claims representations, if the funds appropriated should not be sufficient?

Mr. Laish. Well, Senator, of course, it is just like everything else in the government, there is never enough money to do everything that you want to do all at once. I presume priorities would have to be ordered to fit the budget. But I have no notion but what the appropriation process would be responsible in this regard.

Senator Fannin. Well, the question I think was because the Indians are entitled to existing water, land or minerals

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in the country though the public pressure might demand a cutback of the funds in the authority. That is the reason evidently for the question.

Mr. Laish. Yes.

Mr. Morton. Mr. Fannin, I would like to add here that that is the responsibility of the Secretary as far as the trusteeship to the Indians is concerned, and the responsibility of the Department of Justice is in no way in total reduced in any way. This is a device which I think the President will have the opportunity to monitor because he will appoint the Counsel to serve at his pleasure.

I don't feel that the Trust Counsel is a substitute for the responsibility of the Secretary of the Interior to carry out the Indian trusteeship. I think it is a mechanism by which that trusteeship can be enhanced. I think if you got into that situation you would have to do something about it and I think the Secretary would be in a position to do something about it.

Senator Fannin. There seems to be some question on this. On line 1, page 5, you state nothing in the act absolves Interior or Justice of any responsibility including trust responsibility and the question is, how can Justice perform its responsibility when subsequent provisions release it of representation of the Indians. Do you think it is clear in this bill just what is the intent?

Mr. Laish. For example, if I may answer, Senator Fannin,

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one of the responsibilities of the Justice Department at this point in time is to referee, if you will, differing opinions between general counsel for the respective departments. Between those differing opinion referring to Indian trust rights, or claims of rights, I see, as I look at it, I think the Attorney General would still have that responsibility and it would only be if the matter came to litigation that the Department would then be relieved.

Senator Fannin. Well, Mr. Secretary, one of the questions, will the Trust Counsel authority be subject to any control by the office of Management and Budget?

Mr. Leish. Presumably so, Senator Fannin.

Senator Fannin. The same as any other administrative agency?

Mr. Leish. Yes.

Senator Anderson. Do you agree with that, Mr. Secretary?

Mr. Morton. Yes, any administrative agency appointed by the President is subject to budgetary and management influence of the President's own Department of Management and Budget. I do agree with that.

Senator Fannin. The reason I ask that, on page 4, and I realize there is some flexibility, the sentence "in the exercise of its functions shall be free from control by any executive department".

Mr. Morton. I think perhaps the bill is -- we might shore it up in that regard because just the same as any other independent

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agency has to reflect its responsibility to the budget and to its own administrative housekeeping. I think what was intended here is that it is not to be subordinated by any other mission agencies which have an interest that will may be in conflict with this.

Senator Fannin. I take it you think the clarifying language should be inserted to properly explain that the situation exists as far as this section is concerned?

Mr. Morton. I think the intended Section 7 is, as far as the policy decisions and wherein the Trust Counsel is to litigate and things like that, that won't be subject to control of any other executive department. The function of OMB, of course, would come into play as far as the funding and monetary aspects. I think that would be their only function.

Senator Fannin. Well, I do think we need clarification on that point, it could cause difficulty at a later date if it is not clarified.

Mr. Morton. Yes.

Senator Fannin. I have no further questions.

Senator Anderson, Mr. Gravel.

Senator Gravel. I have some questions.

Number one, I want to compliment your office and whoever is responsible for initiating this. I understand it is the Administration's bill. I think the advocacy principle really offers people an opportunity to make connections in society that

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government appears unable to do. So, let me just underscore my compliment to the Administration in that regard.

I don't have a copy of the article that appeared in this morning's Post, but I was in Alaska and did come across the situation at Fort Yukon that seemed to touch on it. At Fort Yukon I was very happy to see BIA move to a situation of contracting with local authorities. I applauded that action publicly when it came up for hearing.

What happened at Fort Yukon, because they have on member of the city council at Fort Yukon, they refused to contract with the only local government, the only viable organization in that area. I thought that was most unfortunate.

What was because a very purist attitude was adopted. Unless it is 100 and 1 percent Indian, they won't contract such authority. I thought that was a mistake, since the population of Fort Yukon is probably 99 percent Indian.

Since the only vehicle in that town worth sustaining at this point was the city council, the BIA in Anchorage refused to do that contractual service for Fort Yukon.

I already voiced my opinion to your representative in Anchorage on that matter, and he felt there were some bureaucratic problems, but I want to underscore that view right now.

I think you share the same view that I have if I recall the testimony at that time. To hang on to the fact that only one person was not a native, I think that would be a very specious

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way of avoiding what is a good principle, that is, the contracting with the natives.

Secretary Morton. One of our problems on this whole contracting situation is that we are operating under very old legislation as far as authority is concerned. We have been chastised a little bit by the corresponding committee in the House, as you know. The General Accounting Office has taken a hard look at the whole matter of contracting. We feel that the passage of the control bill will clarify this and I feel we need a clearer direction and a clearer authority from the Congress in the form of a mandate of how to proceed.

I think we have proceeded perhaps more vigorously than the authority we have from the Congress would indicate that we should. But, nevertheless, the spirit of the Congress has been pretty much with us on this.

We would like to see those other bills heard so that we can clarify the very thing you are talking about, and can develop a much clearer way to go.

Senator Gravel. Well, if anybody would offer something, Mr. Secretary, I would be happy to put it up.

Secretary Morton. It is right up there with you.

Senator Gravel. Well, I will look at it.

The other question I have, I don't recall specifically, you probably read the Post item this morning concerning Mr. Bruce and the elevation of some of the younger Braves to positions of

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importance. Is there any rhubarb that we should know of in this regard?

Secretary Morton. No. In the first place, we are trying to get a greater sense of the notion in the department. We are trying to get a greater sense of notion in the bureau towards the development of a better infrastructure for the reservation, for more beneficial programming, and I think the Assistant Secretary and the Deputy Assistant Secretary and the Commissioner are all trying to accomplish the same thing.

It just seems that in this area of Indian Affairs that the personalities become sometimes more important to a lot of people than the actual mission and the actual program. But the President said in a press conference out on the West Coast, he said to me in answer to a question, he said: "Shake the Bureau of Indian Affairs."

Well, we shook it now. It is fluttering a little bit and I think it will level out and we will develop a better sense of motion. The people that have been selected by the Commissioner represent his view of how he wants to carry this out. The method by which it was done perhaps is not out of the Harvard Business School, but I am for getting the job done and I believe we will get settled down and you will see a greater sense of motion.

The only thing that can hold us back now is a failure of the Congress to act on the legislation that we need to give us

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the real authority to move ahead in these areas.

Senator Gravel. Let me just say, I am not one to compliment the Administration at great length, but I think in this area I have felt that some good work has been done, both in the Indian community and in the Administration of this. I am very happy. I think the leadership that the Administration has shown with respect to Indian claims certainly is what has led the Congress to a very unusual subject, and I think you people should share in this.

Secretary Morton. We appreciate a compliment.

Senator Fannin. Mr. Chairman, I certainly join in commending the Secretary. The Secretary knows I have been working with him, we have made great progress and I am very proud of what has been happening in handling our Indian Affairs. We have had difficulties as all of you realize for some years, we have seen the light and it is very encouraging.

Secretary Morton. We appreciate that, Senator, very much. I really think and I hope that in the partisan time that we are coming into when politics will be a part of our American life, we don't let the Indian community, particularly the reservation community over which we have a direct responsibility, in becoming victimized by that. I am very proud in the bipartisan way in which the Alaka Native Claims bill was handled both in the Senate and in the House. I think it showed a great maturity on the part of Congress to go about the way they did.

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There is still quite a resolution to be achieved in that bill to come up with a document that the President will sign and putting together the interest of both Houses, but I believe that we are beginning to finally really move in the direction of developing a better way of life and a better way to go and a better leadership for the American Indian on the reservations.

I urge this committee, many of whom are engaged in the political activities of the day, to rise above any kind of partisanism that could develop in their minds or on the surface to really do something for the American Indians. Over the years he has perhaps suffered from not either being a Democrat or a Republican. When the Democrats and Republicans get together and nail at each other, he has suffered. I am, just on the basis of plain old patriotism to this group of Americans, I just feel that the day for the American Indian is here. We should be ashamed to do anything short of being first class in our approach to him, regardless of partisan politics. I want to thank this committee for the way they have worked with us on the Alaskan Native Claims issue, the way they are taking this bill and I am sure, giving it its most careful study. Because we just can't tolerate, in our conscience any longer, the failure of the American people and its government to do right by the Indians. Here is an opportunity.

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Senator Ervin. Well, I wholeheartedly agree, and I think you are giving us such an opportunity and I am sure we will take advantage of the chance to consider all of the legislation you have advocated and the programs you have advocated. A great step forward.

Senator Gravel. Mr. Chairman, at this time may I insert in the record the article to which I was referring?

Senator Anderson. Any objections? Hearing no objections, it will be inserted into the record.

(The document referred to follows:)

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Senator Anderson. Are there any further comments, Mr. Morton?

Secretary Morton. We would be most happy, Mr. Chairman, and we would solicit from the committee questions of the broadest nature as well as very specific questions as to the bill, that we might respond to that so that they would be in the record and would be available for study, not only by the members themselves but the staff groups who will be working on this legislation. So we would look forward to receiving questions and the opportunity to respond to those in complete detail.

Senator Anderson. Thank you, Mr. Secretary.

Secretary Morton. Thank you very much, Senator.

Senator Anderson. Senator Allot has further questions and he will submit them to you in writing.

Secretary Morton. Thank you.

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Senator Anderson. Our next witness is the Honorable Shiro Kashiwa, Assistant Attorney General, Land and Natural Resources Division, Department of the Interior.

Will you please come forward, Mr. Kashiwa?

STATEMENT OF THE HONORABLE SHIRO KASHIWA, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY DAVID R. WARNER AND FLOYD L. FRANCH.

Mr. Kashiwa. I am here in response to the request of this subcommittee for testimony from the Department of Justice concerning the bill, S. 2055. With me are David R. Warner, the long-time Chief of the General Litigation Section of the Land and Natural Resources Division, and Floyd L. France, Assistant Chief of the same section.

So far as the interests of the Department of Justice are concerned, the bill would create an independent Indian Trust Counsel Authority to provide to Indians and Indian tribes legal counsel, and legal representation in litigation, in matters relating to their natural resources.

The bill would carry out the recommendation of the President for the creation of such an authority, as set forth in paragraph 8 of his message to the Congress of July 8, 1970. It is part of the President's legislative program for this Congress, and has the full support of the Department of Justice.

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The bill provides in Section 8 that "nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe: Provided, That the Department of Justice as of the effective date of this Act or as soon thereafter as practicable, is relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, minerals, and rights to hunt and fish."

So far as the Department of Justice is concerned, this language is intended to provide a transition period, which is to be as short as practicality will permit the Authority to assume the pertinent responsibilities, during which the department is to continue rendering legal counsel, and representation in litigation, to Indians and Indian tribes in natural resource matters.

It should be noted that this bill affects only natural resource matters arising out of the United States' trust responsibility owing to the Indians. The responsibilities which the Department of Justice otherwise has with respect to Indians would continue unaffected, whether owing to the Indians as citizens of the United States or arising out of

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their status as Indians, by treaty or otherwise.

It should also be noted that by section 10 the United States would waive its sovereign immunity in connection with litigation initiated by the authority. This is necessary if the courts are to be enabled to pass on the United States' fulfillment of its trust responsibilities in Indian natural resource matters. And since the Department of Justice will need to represent the United States in any such suits, it is fitting that its responsibilities be terminated as soon as practicable with respect to all Indian natural resources matters.

The Department of Justice pledges its full support to the orderly transition of the responsibilities which would be transferred by enactment of the bill.

Senator Anderson. Do you have any additional statement?

Mr. Kashiwa. No, that is our statement.

Senator Anderson. Mr. Fannin?

Senator Fannin. On line one, page 5, it is stated that nothing in the Act ~~resolves~~ relieves Interior or Justice of any responsibility, including trust responsibility. I notein your statement you say an interim period. How can Justice perform its responsibilities where the subsequent provision relieves it of representation of the Indians?

Mr. Kashiwa. That is a proviso attached to the first portion. In other words, as to the representation of Indians with

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relation to natural resources, we will be relieved. That is the intent of that. But, of course, this cannot be done instantaneously and there will be a period whereby something should be worked out between the Authority and the Department of Justice.

Mr. Fannin, with relation to these matters, these involve mostly pending cases, and we will have a transition gradually and I am sure that can be worked out. It couldn't be done overnight, I admit that. But with the Authority in existence we can very easily work this thing out.

Senator Fannin. I see.

Another question: Why does this bill in Section 9 grant a waiver of the sovereign immunity of the United States in the event a natural resource claim is filed? This would only be in a case pertaining to the natural resources?

Mr. Kashiwa. Yes.

Senator Fannin. That is your answer in that regard?

Mr. Kashiwa. There is a waiver provided in the bill. Otherwise, the Authority would not be allowed to file suit in the area provided for.

Senator Fannin. And this waiver is only when it is filed by the Trust Council Authority, but not if the lawsuit is filed by a private attorney chosen by the tribe, is that right?

Mr. Kashiwa. That is so.

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Senator Fannin. I see. Why is that stipulation necessary?

Mr. Kashiwa. Well, it is rather narrow, but I think it could be what you are referring to, Senator. There are cases where the tribe may want to have a private attorney. It could develop under this Act because under certain circumstances the Authority has the right to hire private attorneys.

Senator Fannin. But would they have that same waiver?

Mr. Kashiwa. I think there should be a clarification made.

Senator Fannin. If the tribe for some reason doesn't want the Authority to represent it or have anything to do with it, why should we require this section to have it? I think that is something you think should be corrected?

Mr. Kashiwa. Yes.

Senator Fannin. If this isn't it going to put the tribe at the mercy of the Authority?

Mr. Kashiwa. That is right. We will try to clarify that section.

Senator Fannin. Under this bill the tribe believes the Trust Council will not or cannot properly represent it, will it be able to request the Justice Department to do so?

Mr. Kashiwa. No. Under this situation we would have the same problem if we do that.

Senator Fannin. So, of course, you feel that they

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have the right to go to private counsel if they desire to do so, but you feel with this stipulation they could not have the Justice Department represent them. Do you feel that is fair and equitable?

Mr. Kashiwa. I think so, because the main thing is to clear the conflict-of-interest situation, and we don't want to be in this again. But, on the other hand, the Trust Authority under this bill does have the right, if it cannot represent -- if the Trust Counsel cannot represent the tribe -- to go and hire outside attorneys, and funds will be provided for it. I think that is a pretty fair arrangement.

Senator Fannin. Yes. Of course, we are referring to the viable -- the Trust Counsel cannot properly represent it, and your answer was the Justice Department could not under those circumstances represent the tribe, but the private counsel could and you think they should have the right to do so, private counsel should have the right to do so?

Mr. Kashiwa. I think so.

Senator Fannin. Section 8 says the Justice Department at the earliest possible date is relieved of representation. Would it be fair to the Indians to keep the Justice Department expertise available to them?

Mr. Kashiwa. Expertise in the sense of law, is that it?

Senator Fannin. Well, they have long years of performing this service. In other words, work of this nature.

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Wouldn't their expertise be valuable to the Indian tribes?

Mr. Kashiwa. Senator, in this area of law, there is always the problem of developing facts, and all that. That expertise is in Interior. As far as the law itself is concerned, I assume competent legal counsel would be appointed as for the Trust Counsel, and the bill gives great leeway in the hiring of many attorneys. I think that sufficient legal ability could be developed.

Now, we don't want to be in a position where I come here and say, the Justice Department keeps on further giving advice. Then the whole picture would be clouded again. It should be clear cut.

Of course, if it is something very elementary, I would be very glad to help. But in the problem areas, I think this is the very purpose of giving this Authority great leeway. I am sure they would be able to hire competent men. For example, in your jurisdiction, Senator, there are men who know water rights and they could be hired.

Senator Fannin. Your answer then is that you do not feel it would be necessary to retain the right of the Justice Department to make their expertise available. There are other attorneys available and counsel available that could provide that service?

Mr. Kashiwa. That is right.

Senator Anderson. Mr. Gravel?

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Senator Gravel. How would the funding take place? In other words, if the trustees say they can't handle this case, what is the guarantee of funding and what will be the funding? Who will determine the rates and all of that? Because if that is not nailed down, it will be unclear.

Mr. Kashiwa. I guess, like with any other agency, there will be regulations set up, on how to select counsel and so forth. It will be something which should be watched with caution, but I think proper regulations have to be set up.

Senator Gravel. Would there be the possibility of taking the report of the Indian claims in to court and letting the court make a decision on the amount of money spent and the propriety of the money spent ---

Mr. Kashiwa. That is correct, in many cases the court has the right to approve the amount the parties agree upon or something of that nature, if it is a type of case where there is ~~sufficient~~ recovery, like in ~~the~~ Indian claims cases. We do -- the Indian Claims Commission -- now does approve the total amount of fees.

Senator Gravel. Well, if you have the situation where Justice is the one that sets up the rules and regulations and payment of those who will turn around and effect the adversary situation, it would seem unfair.

So, if we could structure either by rule or by law and let the courts establish the fees as far as counsel is concerned.

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Mr. Kashiwa. ~~In the beginning~~ I meant to say these regulations could be established by the Trust ~~Council~~ agency.

Senator Gravel. Oh, itself?

Mr. Kashiwa. Yes, that would be sufficient.

Senator Gravel. Thank you, Mr. Chairman.

Senator Anderson. Mr. Fannin?

Senator Fannin. Well, I think you clarified it and I think you for that clarification. I was going to ask just about the same, if the Justice Department could step in if it became necessary and, of course, this doesn't preclude them from doing so.

In line one, page 5, it states nothing in the Act ~~relieves~~ absolves the Interior Department and the Justice Department of any responsibility, including the trust responsibility. I asked this before. But how does Justice perform its responsibility to the subsequent release of representation of the Indians? I don't mean to be repetitious, but I just wonder how you justify handling it on that basis?

Mr. Kashiwa. Now, it says nothing in this Act shall absolve the Justice Department of ~~their~~ its responsibilities. We have responsibilities aside from the natural resources field. Our present area of responsibility is much greater than that. For example, even in the making of a will by an Indian, the Secretary of the Interior goes through certain procedures, and we ~~even~~ look after him in certain litigations other than in the natural resource field.

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Now, the purpose is not to ~~forget~~ terminate that function of the Department of Justice.

Senator Fannin. Well, last year, I believe, didn't the Justice Department review the transcript of hearings on this legislation and have criticism of the legislation?

Mr. Kashiwa. I think this was ---

Senator Fannin. Whether or not the bill was needed or whether or not the statutes now provide the protection that this bill does provide?

Mr. Kashiwa. Senator, when an idea is set forth -- of course, this is the first time we are appearing before a committee on this bill. Whenever any new idea is brought forth in the Department of Justice, we send it back and forth among our men to see what is the best idea. In other words, we bounce it around here and there, and we have men who have been in this field for years, and then we ~~finally~~ discuss the problem, and if there is a bill prepared, we work on it and that is how some of the words in this bill have been developed.

So, I would say just because certain arguments are made, ~~that~~ they do is not necessarily represent the views of the Department of Justice.

Senator Fannin. Well, I have a letter here that did review some of the concerns and I think it was more to the point of criticism leveled against the department in handling ~~the bureau as~~ litigation than it was a criticism of the bill. So, I will not

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push that any farther. You do support the legislation at the present time?

Mr. Kashiwa. I do, Senator.

Senator Fannin. I have no further question, Mr. Chairman.

Senator Anderson. Senator Gravel?

Senator Gravel. Thank you, Mr. Chairman.

Could you provide us with the number of cases the Department of Justice has filed for the Indian tribes during the past three years?

Mr. Kashiwa. The number of cases?

Senator Gravel. That Justice has filed and worked on on behalf of the Indian tribes? Let's break it up, let's say how many worked on and how many were filed? How many are in litigation?

Mr. Kashiwa. Is this only in the natural resources field, because we have many other cases?

Senator Gravel. Why don't you break it up into all cases?

Mr. Kashiwa. We will try to submit that, yes.

Senator Gravel. I think it would be valuable to the Congress in its deliberations. It will give us an idea of where we are. This bill seems to stop all land cases. There are some outside of land cases.

Mr. Kashiwa. Well, not only land, but natural resources.

Senator Gravel. Right. At the present time representation

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has tried to maintain of Indians has been in the Land Division. Since this division is already involved as defense for the government in the cases Indian tribes have filed in the Indian Claims Division Commission, does this not represent a double conflict of interest to your department? Do you believe the representation for Indians should be retained in this specific division -- obviously not, because the bill will take it out. But up to this point in time, do you feel that has been a conflict of interest?

Mr. Kashiwa. This problem of conflict of interest, this has been imposed by statute. The problems we deal with in that particular area of cases before the Indian Claims Commission are separate and apart from the problems in some of the other areas. We may have had one or two cases where those two responsibilities may have conflicted. But our lawyers have been meticulously careful not to create any situation where it becomes a problem.

Senator Gravel. Would you define the role the United States has as trustee in litigation involving Indian tribes?

Mr. Kashiwa. That is a very broad duty.

Senator Gravel. Yes, just a broad sketch definition will be sufficient.

Mr. Kashiwa. Well, whatever matters the Department of Interior, or the United States, in other words, acts as trustee for, we try to take care of the beneficiaries' interests under the trust.

Senator Gravel. The setting up of this bill, the authority to set up here, will that abbrogate this trustee responsibility?

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Mr. Kashiwa. No, it won't.

Senator Gravel. So, there still exists on one side a duality, but the first course of action will be by the Authority and if that were not broad enough, the Federal Government's role does things on behalf of this?

Mr. Kashiwa. Yes.

Senator Gravel. I think that is slightly a different point and I would reconcile the two of them. If under this bill litigation was not raised, what you are saying was that they could go out and hire attorneys to do it. If that is not done, what you just said now, that Trust Authority is still there with the Federal Government and the Justice Department as a last resort who could go provide litigation helping the natives?

Mr. Kashiwa. If it finally ends up that the Indian group is not protected in any way in specific litigation with the court sitting there, a would question the Trust Authority, what is its counsel doing, and if there is some disability or some lack of funds, or some other reason they can't handle it, I am sure the court will delay the case until the remedy, whatever is necessary, is supplied. That is a very remote situation.

Once the Authority is established, I think the problem it will take care of itself. As I said, there is authority to hire private counsel if necessary.

Senator Gravel. What about the situation in the bill now

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where the counsel can charge native tribes a legal fee for the work in question, and since the counsel may be initiating a lot of the litigation, don't you have the situation with attorneys chasing branches in this regard?

Mr. Kashiwa. Well, this is a difficult situation.

Senator Gravel. Why not have no charge at all to the tribes? Why not insist upon the counsel and whatever litigation takes place ---

authority for Indians or tribes to retain and pay private counsel is contained in existing law.

Mr. Kashiwa. In many of these cases there is a recovery of a substantial sum for the tribe. In those cases the fees are allowed out of the recovery. This is the usual proceeding ~~method~~ in equity, where the court approves the fee out of the amount recovered. This type of thing may come about. For example, if the Trust Counsel feels that there is an amount to be recovered, instead of its doing the work, ~~here is another~~ it may recommend that a private law firm ~~who competently handled us and let them~~ handle it, and a percentage of the fee would cover this. These things could happen. I don't know what the regulations would be that would be promulgated eventually ~~come up.~~ So, I cannot definitely say what would occur. ~~is fair or unfair, what may lead to bad practices.~~ It is a very broad and difficult field, but it could be readily controlled by regulations established by the Trust Authority. I am sure they could do that.

Senator Gravel. There is no question that the end product of most of this litigation would be some wealth or other. But

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the wealth may not be transferable into cash flow. If you are talking about water rights, I am sure that the retention of the water rights may be the end product of litigation. How do you transfer that into some cash flow so you can pay your attorneys for keeping what you already have? You can get yourself into a bind and yet they can spend just as much time on that case as they would on a case that might turn back two or three million dollars. You are right, you could take a portion of that and pay off the litigating counsel.

So, you could have the situation where the same amount of legal effort may produce money that would be used to pay for the litigation and in another situation this may not generate any money at all and they may end up with some economical liability or it might be a strain upon them to pay.

Mr. Kashiwa. In the latter situation this bill does provide the trust counsel may hire or it may have deputies of their own, and they could hire water rights -- or whatever rights are involved -- experts in that field and they can pay out of the appropriation to this agency.

So, there will not be that problem if that method is used.

Senator Gravel. What you are saying, then, is that they don't have to charge the native tribes a dime if they don't want to, if they don't feel it is necessary?

Mr. Kashiwa. That is correct.

Senator Gravel. So, if there is some monetary return, it

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can be done, but it doesn't have to be done?

Mr. Kashiva. Yes.

Senator Gravel. As long as there is that possibility that they don't have to return it, I think it is equitable.

Are there any other types of advocacy ~~type~~ situations wherein government lets someone else act or is this the first time that this concept is being initiated? Now, I am aware of NEPA, which permits people like the Sierra Club to go hire attorneys to see that they comply with the law, but to my knowledge this is the first time I have seen it. Do you know of any other instances in government, an advocacy force in government to represent them?

Mr. Kashiva. Well, the Trust Counsel would still be government I don't know of any other specific instances. ~~For example,~~ Cases have come up in the Department Of Justice, and some of the Attorneys General have run into this problem, because of some difficult position the government is in. ~~They~~ they cannot advocate a ~~their~~ position and they have appointed special ~~assistant~~ attorneys ~~or deputies they call them~~ to handle the case, ~~to represent the other side.~~

Now, those are very special instances. I think the Attorney General does have authority in certain of those instances, but as to legislation to meet ~~the entire~~ a broad area problems, I think this is about the first. But I do know of cases where even state attorneys general do hire outside attorneys to handle a situation which becomes difficult.

unless you count TVA and some government agencies which handle their own litigation.

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Senator Gravel. What about legal services initiated under OEO, is that a similar concept where the government pays for attorneys?

Mr. Kashiwa. That has risen under the OEO set-up.

Senator Gravel. That is the same concept as this?

Mr. Kashiwa. Yes. I don't see the advantage, but it is the same concept of some of the work being done by outside attorneys.

Senator Gravel. Isn't there one of your colleagues who is familiar with the legal services set up who could give us a thumbnail description of the way it is set up now?

Mr. Warner. Senator, as I understand the OEO concept, it is simply a program for federal funding of, in effect, legal aid lawyers to perform certain functions. Some of the OEO money goes to the employment of lawyers by agencies which are specifically set up for the purpose of working with respect to Indian matters. But I do not understand that in the OEO arrangement the lawyers are functioning as officers of the United States as such. They are paid by the United States but aside from that I guess they are on their own.

As I see the Trust Counsel Authority, it will be an agency of the United States. It will be authorized to take actions in the name of the United States and it will be carrying out the United States obligation with respect to the representation of Indians. In that regard, it will be a

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different agency from the present agency which will be providing the legal services for the Indians in the matters that the authority is authorized to function with respect to. But the employees, as I ~~guess~~ see it, are going to be employees of the United States. They will be carrying out directly the government's trust responsibilities.

Senator Gravel. I wonder if you could supply for the staff the legal differences showing the developments of the OEO concept, its degree of independence, so we can make a comparison with the degree of independence we have here. I would like to be able to make a comparison as to how much independence we want to arrive at. This may have something to do with how drastically the Indian interest is represented.

Mr. Warner. I assume we can undertake to do this, but our experience with the OEO lawyers at this point is having them on the other side of litigation where they are taking us to task. That is, we do not get into the operation of the OEO program.

Senator Gravel. Wouldn't that be the same thing that would come about if this counsel truly would represent the Indian interest? Wouldn't it be in the same position of the OEO, always taking the government to task for not fulfilling their responsibilities? That is the way I view it, not to work out accommodations within Justice and the Interior.

We are paying these people to go out and find out what the

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Indian interest is and bring it to light whether it bothers people in the establishment or not. So, if we could be provided ---

Mr. Kashiwa. We will do our best under the circumstances, sir.

Senator Gravel. Yes; a statistical record as I asked for and a comparison with OEO. I think that would be something definitive.

Senator Anderson. How long have you been in the Department of Justice?

Mr. Kashiwa. Oh, about two and a half years.

Senator Anderson. Do you recommend sovereign immunity be withheld from the tribes?

Mr. Kashiwa. Well, that is one of the ~~purposes~~ essentials of giving them the authority to enforce. If they can't sue, how can they enforce ~~it~~? That is a portion of this bill.

Senator Anderson. I don't see how they could enforce it. There are Indians' attorneys time after time representing the power of sovereign immunity. With Indian tribes you would enjoin the sovereign immunity as you see it?

Mr. Kashiwa. I didn't get the question, Senator.

Senator Anderson. You are completely disregarding sovereign immunity. The Navajo Tribe for a long time has been arguing for sovereign immunity. How do you reconcile that?

Mr. Kashiwa. We may be confused about sovereign immunity.

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You mean United States sovereign immunity or tribal sovereign immunity?

Senator Anderson. Tribal sovereign immunity, in the Navajo Tribe.

Mr. Kashiwa. We are not ~~talking about~~ touching that in this statute. The tribal immunity, if any, will not be affected by this bill. We are ~~talking about~~ affecting the immunity of the United States.

Senator Anderson. Will we have a new contract for Indian care, Indian responsibility? You said a while ago about the mission of the tribes, do you have a problem there on contracts with the Indian tribes or not?

Mr. Kashiwa. That is a ~~detailed~~ matter for Interior, how they manage their affairs, and it depends on the situation, what kind of contract they have. I do not know. But they do have all kinds of contracts there and I would prefer to leave it to Interior as to what type of contracts they have and what they don't have. I am not very familiar with them.

Senator Anderson. Well, the Interior Department has to approve of these contracts. Do you know whether they have approved them in the past?

Mr. Kashiwa. Well, what you are referring to, I do not know the scope, but we don't go into the area of approval or non-approval. We are involved only in the case when something is litigated and for that reason sent over to the Department of Justice. So, the administrative

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functions you can get a better view of by inquiring of the people in the Department of the Interior.

Senator Anderson. All of your contracts are administered through the Department of Interior as far as the legal affairs are concerned?

Mr. Kashiwa. They are all approved in the Department of Interior, not in the Department of Justice.

Senator Anderson. You speak here about water rights. Do you have some specialists in water rights?

Mr. Kashiwa. I have Mr. Warner here who is a very well-known expert on water rights, and others.

Senator Anderson. What sort of relationships in the contemplated legislation is concerned? Are you satisfied with the water rights as of the contracts that were made between water rights on the one hand and Indians on the other? Does that satisfy you?

Mr. Warner. Senator Anderson, as I understand the way in which this bill will operate, in water rights matters, after the transition period is concluded, and the Trust Counsel Authority is set up and ready to go and able to take on the litigation, the responsibility with respect to asserting the Indian interest in water rights will be handled by the Trust Counsel Authority.

Any other federal interest involved in the particular litigation as to water rights will continue to be handled by the Justice Department.

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Senator Anderson. In this suit on the water cessation, there was certain stipulations on the part of the Indians prior to filing that suit. Have you examined that at all? Would you care to comment on that, as to whether it is good or bad?

Mr. Warner. I missed the first part of the question, I am sorry.

Senator Anderson. At one time certain provisions were made to transfer water rights on a commission basis from the general tribe to other areas. In the West water is very troublesome and suits are being filed at different times. Are you unhappy with those suits which have been filed now?

Mr. Kashiwa. With reference to particular suits, sir, we have quite a few suits in the State of Colorado. Unless you point your finger to these particular suits, it would be very difficult for us to answer the question.

Mr. Warner. I am only too glad to answer the question if I can make sure I understand the question, and if I have the answer.

Senator Anderson. Well, let's take another view at the moment with respect to uranium. Are you now criticizing the field of uranium rights?

Senator Hansen. Mr. Chairman, I note that there is a vote pending and as you are aware there may not be much time left. I was wondering if the representatives from the Justice

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Department might be willing to respond in writing to some questions that I would like to propose and perhaps you have others too that we might both include. Would that be agreeable?

Senator Anderson. Yes, as far as I am concerned. I do have questions on water rights and uranium rights, mining properties. Are they being handled properly? What is the theories behind this bill which is what I am trying to find out?

Mr. Kashiwa. Well, these are very general questions. We would like to have questions in particular. Otherwise, they are very difficult to answer.

As Senator Hansen has suggested, if there are any questions listed and given to us, we would be only too happy to answer the questions.

Senator Anderson. Very well.

Senator Hansen. There will be a recess until this roll call vote is over. We will be back.

(Recess.)

Senator Anderson. All right, we are back in session.

Senator Hansen?

Senator Hansen. Why should this bill provide that tribes are not entitled to have a jury to adjudicate disputed fact situations or to determine the value of a resource as is provided in Section 9?

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Mr. Kashiva. Well, in the usual case of this type, jury trial is not provided. That is the reason I think the bill is drafted in that way.

Senator Hansen. Because it is customary, is that what you are saying?

Mr. Kashiva. Yes, it involves a ~~and furthermore it is the~~ type of ~~hearing~~ case which is not the old common law type where you had a jury, so it develops ~~in this way~~ that unless heretofore you had juries, ~~then~~ you don't provide for them. That is the way it developed.

Of course, I am saying you could have it the other way, but that would be contrary to precedent.

Senator Hansen. Do you have any cases where the Indians have not received proper representation from the Justice Department and, if so, what are they? Maybe you would like to submit a written answer to that, if you would.

Mr. Kashiva. We would prefer to submit a written answer to that.

Senator Hansen. Very good. Any further questions I may have, then, may I say to the representatives of the Justice Department, I will submit them in writing.

Senator Anderson. All right.

Mr. Kashiva. We will be happy to answer them.

Senator Hansen. One further question. Why does this bill provide for law suits against individual officers and employees of the Federal Government in Section 9?

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Mr. Kashiwa. Senator, there are many instances where a suit is against an officer or an employee because the officer or employee is not following the duties delegated to him by law. There are many, many cases where the officer or employee is personally sued to make him comply. That is the situation which this is intended to cover.

Senator Hansen. If two or more tribes have a dispute over a natural resource, isn't the Trust Counsel going to be in a situation where it is claimed to have a conflict of interest, even though it hires and pays outside attorneys to represent one or both of the tribes?

Mr. Kashiwa. There is that inherent effect because the person who hires is the same person. One would be the tribal counsel and the attorney hired as such counsel would still be under the control of the Trust Authority. But this is an area where there is a difficult situation. But ~~there could be an instance where~~ could go and hire Counsel. the tribe itself ~~goes and hires.~~ We have had those cases and that ~~may clarify~~ can solve the situation.

Senator Hansen. Is there going to be a conflict in what attorneys are hired and how they are paid? I think you probably already responded to that question. You are saying that charge could be brought. Was that your response, essentially?

Mr. Kashiwa. I want that question straight, please.

Senator Hansen. Isn't there going to be a conflict

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in deciding which attorneys are hired or how much they are paid?

Mr. Kashiwa. I won't say there is a conflict. There could be a difference of opinion as to how much is to be paid. Those things could be settled by the Authority.

Senator Hansen. As you see it in such a case, would the Authority have to decide whether there are merits on both sides or would it proceed with any law suit against another tribe paying out all funds the tribe wants to spend?

Mr. Kashiwa. Gentlemen, I don't get the purport on that question. Would you read that again?

Senator Hansen. As you see it in such a case where there might be a conflict or a difference of opinion as to which attorneys should be hired and how much they might be paid, with that as the background, as you see it in such a case, would the Authority have to decide whether there were merits on both sides or would it proceed with any law suit against another tribe paying out all funds the tribe wants to spend?

Mr. Kashiwa. That question doesn't hit me very clearly.

Senator Hansen. I should have said, perhaps, that this question refers back to my first question, if two or more tribes were in a dispute over some natural resources, say, a strip of land, isn't the Trust Counsel going to be in a situation which could be claimed to involve a conflict of interest, even if it hires and pays outside attorneys to represent one or both of the tribes? It was with this basic question as

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background to which I ask the most recent question.

Mr. Kashiwa. And that was?

Senator Hansen. As you see it in such a case, would the Authority have to decide whether there were merits on both sides or would it proceed with any law suit against another tribe, paying out all funds the tribe wants to spend?

Mr. Kashiwa. Well, I am sure any responsible person would not bring any law suit without basis -- there must be some basis, but if there is some basis between two tribes, I think the Authority could say, attorney so and so could represent tribe A, attorney so and so would represent tribe B, and I think that could be worked out.

Senator Hansen. I have another question corollary to the first basic one. If the Authority refused to file a case or to hire an attorney to sue another tribe, or refuses to give the tribe all the money and assistance it says it needs, that tribe can claim the reason for not doing so is because the Authority is protecting the second tribe, can it not?

Mr. Kashiwa. That could happen, yes.

Senator Hansen. As you see it, who would determine when the time would arise under Section 8 for the trust counsel to have exclusive responsibility for all Indian natural resource claims and would the Justice Department be willing to proceed for an indefinite transition period with both the trust counsel and the Justice Department performing the legal duties

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for the Indians?

Mr. Kashiwa. The way I look at it, if the trust authority is formed, we will try to transfer the duties of representing the tribes or the Indians as soon as possible. What I have stated before, these are pending cases from court and they don't have to be instantaneous, and I am sure the people who will be appointed to authority, the three who are to be appointed, they will be reasonable people, and we can work out a fair transition.

Senator Hansen. Yes.

Thank you, Mr. Chairman.

Senator Anderson. Well, we appreciate your testimony.

Mr. Verkler. I am posing several questions here in behalf of Senator Anderson.

First, can you provide the committee with an example of where there has been a conflict of interest in which the conflict has resulted in damage to the Indians?

Mr. Kashiwa. As far as I know, we do not have any such cases, because we have been very meticulously careful, but if we do know of any instances, we will be glad to supply the Senator with them.

Mr. Verkler. In the Winters Doctrine Case, this was in favor of the Indians and we were again interested in an example of where Justice had sacrificed the rights of the Indians.

Mr. Kashiwa. That is a very important question. Will you

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repeat that?

Senator Gravel. In the Winters Doctrine Case, he refers to that as being one in the interest of the Indians and we are again interested in an example where Justice has sacrificed the interest of the Indians on water.

Mr. Warner. We know of no such case.

Mr. Verkler. Then I presume the follow-up question, why the need for the bill if there is no such case?

Mr. Kashiwa. Well, it is not only under the cases you mention, but there are other natural resource cases which do come up and they ~~may~~ pose some problems.

Mr. Warner. I might add a little bit to my very terse answer to the question that preceded. We know of no such case where there has been such a sacrifice of the Indian interest under the Winters Doctrine because of any conflicts between government's representation of the Indian interest and other governmental interests.

Now, there are cases in which it can be argued, it has been argued and brought to the attention of this committee, in which it is claimed that what seems to be an adverse result is a natural consequence of this theoretical conflict of interest. It is on matters of that kind that we don't agree.

There are many, many judgments that have to be made in the handling of any particular litigation. The practice in the department over the years with respect to handling water rights, as well as

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other cases in which there have been involved Indian interests, has been so to attempt to give paramountcy to Indian rights. We don't always succeed, we may get a bad result, or we may have to make a judgment that a particular position should not be taken should not be asserted because we think it is not in the best interest of the Indians, and it is not likely to get ~~tremendous~~ results that we would like to see obtained. But, as I say, these are judgment factors and whenever you have to exercise judgment, anybody who disagrees with the judgment that has been exercised can argue it was bad judgment or you can argue it is somehow related to the inherent conflict of interest.

So, ~~I suppose~~ from this you ~~could~~ came conclude that separate representation of the Indians through a body such as the Trust Counsel Authority is desirable simply to get away from the charges and the claims that are made over the conduct of litigation under the present system.

Mr. Verkler. Would it then be possible to receive a list of the kinds of cases that you just alluded to?

Mr. Warner. Over how long a period of time? Do you start with 100 years ago, 60 years ago?

Mr. Verkler. This leads me to the next question, again by Senator Anderson. He would like to have for the record a list of cases handled by Justice to protect the rights of Indians and showing the outcome in each case for the previous ten years.

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Now, Senator Gravel asked for a three-year reporting period. Senator Anderson is requesting that you report for the previous ten years.

Mr. Warner. Are we talking about just water rights cases, or all Indian cases?

Mr. Voelker. All rights, natural resources and others.

Mr. Warner. I suspect it can be done. It may take some time.

Senator Anderson. Well, it is urgent so that we may pass on this law. If there is no conflict of interest, why pass thelaw? You are taking the department and changing it. What is the cause of it? Why is this change made?

Mr. Kashiwa. Senator, in this field of law, sometimes there may not be actual injury but the fact that there is a possibility that this may arise, this is enough to legislate in the area. This is the principles of ethics in the legal profession that is carried into legislation in this manner.

Senator Anderson. Well, we thank you, we appreciate this and if we have additional questions we will submit them in writing for your answers.

Mr. Kashiwa. Thank you very much.

Senator Anderson. Thank you.

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Senator Anderson. Mr. Glen A. Wilkinson will be our next witness.

STATEMENT OF GLEN A. WILKINSON, PARTNER, LAW FIRM OF WILKINSON, CRAGUN & BARKER, WASHINGTON, D. C.

Mr. Wilkinson. Mr. Chairman, members of the committee, my name is Glen A. Wilkinson. I appear today to present the views of my law firm, Wilkinson, Cragun & Barker, on S. 2305, a bill to provide for the creation of the Indian Trust Counsel Authority.

For more than 35 years our firm has been involved in representing American Indians, Indian Tribes and Indian organizations. We now represent 21 Indian tribes in claims against the United States and five Indian tribes as general counsel -- the Three Affiliated Tribes of the Fort Berthold Reservation, the Hoopa Valley Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Arapahoe Tribe and the Quinault Tribe.

We are also general counsel to the National Congress of American Indians as well as counsel to the Northwest Alaska Native Association. In the past, I served for a while as a member of the Board of Directors of Arrow, Inc.

We believe that our long contact with Indians and Indian tribes, our interest in their welfare and our daily observations of the problems the United States Government has experienced in serving as trustee for the Indians especially

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qualify us to comment on S. 2035.

I ask that my statement be made a part of the record and I will testify only on the high spots of my statement as brief as possible.

Senator Anderson. Without objection, that will be done.

(The full statement of Mr. Wilkinson follows:)

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Mr. Wilkinson. I would like to go to Section 8 of the bill relating to the future responsibilities of the Department of Justice. As we read the bill, the Department of Justice as of the effective date of this Act or as soon thereafter as practicable will be relieved of the responsibility to render legal services to any Indian tribes in any subject dealing with the field of natural resources.

I submit to the committee that the field of natural resources is the major field with which Indian tribes are concerned. We believe that neither the Department of Interior or the Department of Justice should be relieved of the responsibility to continue its obligation to represent Indian tribes when that is necessary or feasible.

In our statement on page 11, we have furnished some proposed langauge for modification of both Sections 8 and 9, and on 16 of the statement we submitted some reasons why we think it is necessary and advisable to keep both departments on the job.

One example comes to my mind in response to one of the questions I believe asked by Senator Hansen. That is, whether or not there will be a conflict still if the trust authority is given the authority to hire outside counsel; there is a controversy between two tribes and it chooses separate counsel to represent each of these tribes. That is a potentially possible conflict.

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It is not as bad as we have now, I submit, but it does exist. In that situation if the Department of Interior and the Department of Justice had not been relieved of their responsibility, they could take the responsibility for representing one or the other of those tribes.

We support the concept of an Indian Trust Counsel or some similar organization as embodied in the bill which is before this committee. We think there is no doubt that the Congress and all the people of the United States have a great interest in the welfare and advancement of the American Indians. The main problem is the failure to translate that feeling into action and action which the Secretary of the Interior this morning so eloquently indicated to this committee is required for all the Indian tribes of the United States. This was, in fact, part of the theory and content set forth in the message of the President of the United States last year.

The reason for this bill in brief, as we see it, is that governmental agencies do undertake to represent conflicting interests in the Indian field on regular and continuing basis. We submit that will continue so long as we do not have a change in our present situation.

We remember well one instance in one tribe we represented, the Quinault Tribe which has since been the subject of termination. Earlier, about the turn of the century, the United States had given permission to the California-Oregon

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Power Company to erect a dam and in order to preserve the salmon run of the Quinault Indians, that company was required to build fish ladders so that salmon run was not disturbed. Either those ladders were not installed, or they didn't work. The fish runs stopped. The Indians were deprived of that valuable right and resource. It was too late when we were hired to bring a suit on behalf of the tribe because we would face a defense of the statute of limitation. That defense did not apply if the United States acted on behalf of the tribe.

We asked the Department of Interior for such action. The Department of Interior recommended such action. That sat in the Department of Justice, to my knowledge, for at least 12 years, and finally it dissolved in the whole process of termination. That process was never brought against the California-Oregon Power Company.

Now, the President and the Secretary of Interior have dealt prominently with the question of water rights. Anybody with a western background knows how important water rights are. The basis of Indian rights, of course, is the case of Winters against the United States, decided in 1908.

Now, all competent observers, in our judgment, realize that the Secretary of the Interior is empiring a tug-of-war between several bureaus within his department. The Bureau of Indian Affairs tries its best to protect the interest of the Indians, but then we have the Bureau of Reclamation. It has another

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mission. Its mission is the development of reclamation and irrigation projects. Many of these requirements, sometimes we have felt, have degraded the Indian rights in reaching the goals of the Department through the Bureau of Reclamation.

Now, if I might say a word about sS. 2035, which would separate and end the outside of any government -- I dealt previously with our proposed amendments to Sections 8 and 9 and we have attached to our statement a list of four technical amendments we will provide. I won't take the time of the committee now because I know it is late, but I could commend a reading of those technical amendments as well as our language dealing with the provisions for improvement and clarification, largely, in Sections 8 and 9, which to us seem to be the meat of the proposed bill.

We do want to offer one word of caution. As we see it, this bill would not and should not create a large bureaucracy. We think it should be a modest organization with lawyers experienced in the intricate field of Indian affairs. This is the reason why we think this modest organization should have the opportunity to utilize expertise of the Department of Interior and the Department of Justice in all of its activities.

We think this authority should have the opportunity to be in on Executive Department decisions from the beginning. We all know that much litigation could be avoided if people can sit down and talk and reason before any litigation is instigated.

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We believe this would be an important factor.

We also believe that guidelines or standards should be established in the statute so that there could be a fair balance of the potential benefit to Indian tribes and the nation as a whole. Thus, we think the major consideration in the authority's decision to accept the case should be the nature of the issue and the ability of the tribe to obtain its own legal counsel.

If there is a case where one tribe is involved and no other tribe has an interest in the issue involved in that case, it seems to make only common sense, if that tribe has the means and the ability and eagerness, to let that tribe litigate that claim.

On the other hand, even if a tribe has the wherewithal to pay attorneys, and it has a case which involves issues which are important to many tribes, perhaps it is justifiable for the authority to make funds available or to hire outside experts to litigate those issues because of the importance to all.

Section 10 has been dealt with, too, in some respect. It provides that the authority may not file, prosecute or intervene in any action which has been filed or could have been filed under the Indian Claims Commission Act. It provides that the authority could assist where assistance is requested.

We think there might be some confusion arising from this because of the inconsistency in prohibiting authorities from

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filing and prosecuting of, or intervention in any action before the Indian Claims Commission.

We think the sensible solution to this would be to allow the authority to make its information available to tribes and to tribal attorneys if requested by the tribe.

The third major area in which we would recommend that Sections 8 and 9 be amended would be to authorize the authority to hire outside counsel and experts whenever it thinks this is proper. Some people may say this would be expensive, but it is our feeling that in the long run where important issues are involved, this might be less expensive than building a large organization to prosecute such claims on behalf of Indian tribes.

If I might, I will deal briefly with just some more recommendations we have. On page 19 of our statement we suggest that the number of three for the Board of Directors be enlarged so that a greater cross-section of representation can be had.

Section 11, dealing with production and availability of documents to counsel we think is quite deficient. It provides that counsel may request information, personnel, services or material in prosecution of a claim. We believe this language should be mandatory and that the departments and agencies must be required to furnish that material.

In all jurisdictional acts with which we are acquainted --

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in fact, in the Indian Claims Commission Act itself -- the government departments and agencies are required to demand such information and we think it should be provided to the authority.

In line with the thought that the authority should be involved in the process of negotiation or consultation, at least, while early decisions and policies are being formulated by the Executive Department, we suggest that the bill include a provision that the authority be informed by the appropriate departments and agencies before decisions have been made so that it will have the opportunity to make the wishes, desires, and rights of the Indian tribes known to the department or agency before the decisions are polarized, and before they get in a position where it is impossible or improbable that legislation can be avoided.

Finally, we submit to the committee that the authority must have adequate funding if it is to accomplish the job which we believe the Congress and the Administration desire to have accomplished.

Thank you, gentlemen. I will be happy to try to answer any questions you may have.

Senator Anderson. Fine. Senator Fannin?

Senator Fannin. Thank you, Mr. Chairman.

Mr. Wilkinson, I commend you for a very comprehensive statement, and for your recommendations. I think you were here

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when I asked a question about Section 7 on page 4 of the bill.

I assume from your recommendation that you did not consider that that particular section is workable? In other words, where it says authority to exercise these functions. After studying it, do you feel that would be setting precedents, that it is almost unworkable to have that stipulation?

Mr. Wilkinson. As I understand that, Senator, the reference would be to any bureau or organization within the Executive Department. But considering the method by which appropriations are made by Congress each year, I cannot conceive that this would prohibit the Office of Management and Budget from limiting the functions through that avenue of this authority.

I think the power of OMB will supercede what this seems to imply from a straight reading. So, I think there would be that check on the authority.

Senator Fannin. So, rather than have that conflict, you make the recommendation that you revise Section 8 or 9, is that right?

Mr. Wilkinson. Yes, sir, coupled with the request that adequate funding can be made so that it can do its job.

Senator Fannin. Yes.

Well, you have covered many questions that have been before us this morning. I commend you for that. I will read with a great deal of interest, and I have no further questions

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at this time.

Senator Hansen. Mr. Wilkinson, the bill contains specific directions about law suits, their preparation and profit. I find no endeavor to make compromises or peacefully resolve disputes. As long as the specific language is in about the duties of lawyers to file law suits, wouldn't it be consistent with the duties of attorneys to also put in some specific words about first trying to resolve the cases peacefully and to compromise wherever possible?

Mr. Wilkinson. Senator Hansen, I think 99 times out of 100 it is advisable to settle a law suit. Seldom people win through litigation. If you think it is necessary to have this and if that authority is not implied, then I would favor such an amendment.

Senator Hansen. You think that such authority may be implied?

Mr. Wilkinson. It may be implied in the very fact that litigation is involved and I think when people litigate there is always a presumption that they can settle the litigation at some stage, but I certainly would favor such an amendment if there is any doubt that that implication or presumption is not present.

Senator Hansen. Do you agree that the fact that a person is going to have to pay his attorney's fees serves to keep needless litigation out of the courts, as Chief Justice Berger

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has been quoted as indicating when he expressed concern about the volume of litigation in our courts filed by publicly paid lawyers?

Mr. Wilkinson. If you are making an analogy between the authority which would be created by this bill and the so-called public interest law firms, I don't see a danger in this, that that situation would be reached.

Senator Hansen. You don't think this has inherent in it the possibility of encouraging needless law suits as you understand the bill?

Mr. Wilkinson. That is my understanding, especially if you provide some standards to guide the Board of Directors and the authority in the conduct of this business. I think many legal principles in the Indiad field can be settled quite definitely with a minimum amount of litigation. At least I would hope so.

Senator Hansen. Section 11 pertains to non-reimbursable or imbursable cooperation by all federal departments, agencies, et cetera. The authority indicates they will provide information, personnel, services or materials to the authority.

Based on your knowledge of the expense and complications concerning a law case, would you agree it would be unfair for the Indians alone to have the three attorneys plus all of these government resources when it is suing a state, county, city or private individual and that we should provide both sides of the

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dispute would receive equal treatment in this regard?

Mr. Wilkinson. If I understand the question correctly, it is whether the Indian tribes should be favored by having federal funds available to them when states, counties and municipalities, who may be the other parties in the litigation, do not have federal funds available to them?

Senator Hansen. That is the question.

Mr. Wilkinson. I think the favoratism, if we might call it that, is justified because of the obligation of the United States as trustee for Indian tribes.

Senator Hansen. Thank you very much, Mr. Wilkinson.

Senator Fannin. Just to follow up on that, you make some reference to that on pages 14 and 15. You feel that the authority should exercise a great deal of discretion in choosing which cases to litigate or the authority will be unable to institute every action that is requested. Then this is something of concern, is it not?

Mr. Wilkinson. Yes, sir. I can visualize a situation where, if the authority is not selective and it takes cases almost on a first come, first serve basis, it could be spending a lot of time, energy and money in issues which are not as important as many other issues and I think it was Secretary Lais this morning who emphasized that some form of priority should be established.

I think this should be a major function of the Board of

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Directors of the organization and there should be a very selective process in what litigation is pursued.

Senator Fannin. I realize the importance of that because we have one tribe in the STate of Arizona that now is involved in some litigation on the environment. They are trying to go forward with their project but the problem they have is that some of the members of the tribe -- I think a limited number -- have been bringing charges that the development of these resources would be so detrimental to the environment and here we have a great need for jobs and for the development of the resources on that reservation, but it is being held up.

We could get into many cases which could just be construed as necessary by the authority if they did not use discretion, which would just forever hold up the development of resources on the reservations.

Mr. Wilkinson. That is correct, and I also can see it would discourage the Congress and the Appropriations Committee from making adequate funds available if the authority is not careful and selective in the types of litigation it chooses to pursue, and if the money is not made available it can't do a good job.

Senator Fannin. We all want to protect the environment but we also feel there should be a balance. This is one of the most serious problems facing us today, and I know it could be one of the very serious problems in this field of endeavor, and

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I am glad you do make that recommendation.

Mr. Wilkinson. Yes, sir.

Senator Anderson. Thank you very much, gentlemen.

Mr. Wilkinson. Thank you, gentlemen.

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Senator Anderson. The next witness is Paul Bloom.

STATEMENT OF PAUL BLOOM, GENERAL COUNSEL, NEW MEXICO INTERSTATE STREAM COMMISSION, AND STATE ENGINEER.

Mr. Bloom. Thank you, Mr. Chairman. I am Paul Bloom, Special Assistant Attorney General for the State of New Mexico, and I am General Counsel for two New Mexico state agencies, the State Engineering Office and the New Mexico Stream Commission. Those agencies have authority over the intrastate and interstate water concern of the State of New Mexico.

I have submitted several copies of a prepared statement, in the interest of brevity I will try to summarize that statement and with the permission of the Chairman, I would like to comment briefly, if I may, on some of the points developed by earlier questions and the statements of earlier witnesses.

Senator Anderson. Without objection that will be done.

Mr. Bloom. Mr. Chairman. I appear on behalf of these New Mexico agencies essentially in opposition of the proposed legislation.

The reason for that opposition is set out in detail in the statement of the New Mexico Stream Commission which I already referred to. By way of background, perhaps I should explain that I have been personally and the State of New Mexico has been deeply involved in questions of determination of Indian rights, In this case, Indian water rights, for the last six years of my tenure as counsel for the State Engineering

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and Interstate Stream Commission. I believe this has given me some prospective other problems under discussion today. I believe, as a general matter, that the Administration's case for this bill is based essentially on emotionalism. It is not supported by a sound, logical analysis, it is in fact totally without documentation as, Mr. Chairman, you and other Senators developed by your questions this morning of representatives of the Justice Department. They were entirely unable to cite one specific case in which they conceded that there had been an actual sacrifice, an actual detrimental effect, an actual injury to any Indian Tribe resulting from the large conflict of interest.

Now, it is common knowledge, Mr. Chairman, that a great public concern has been manufactured, and I use that word advisedly, in the nation in the last two or three years concerning allegations of conflict of interest within the United States and how these conflicts have grievely sacrificed the interest of the Indians in regard to their natural resource claim.

It is my contention, Senator, that while I cannot and it wouldn't be appropriate for me to try to endorse every judgment decision that the Justice Department has made, as a matter of fact, far from endorsing every judgment decision and not being authorized to speak for them, I would point out that I am presently involved in six or seven lawsuits against the Justice Department right now involving the determination of the Government rights and in five of those cases, the rights of Indian

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Reservations and Indian Pueblos.

I believe I have some personal experience of the manner in which the Justice Department makes these decisions. I don't agree with every one of those decisions, as a matter of fact, many of their claims the State of New Mexico is earnestly resisting, but we believe the appropriate forum for settling these things is in the courts.

I do repudiate and I feel I must for my own personal experience the insinuations and allegations that have been made in the public media and in testimony last month before another subcommittee of the Senate of the United States, involving a large conflict of interest, some of which went to the cases that I, myself, am involved in.

I believe, Mr. Chairman, that a careful reading of the record will demonstrate beyond a shadow of doubt that these allegations of a conflict of interest, and I speak particularly as they relate to the New Mexico litigation now pending on water rights, have been grossly and deliberately exaggerated and I believe I can demonstrate to the committee's satisfaction that that is the case and that, in fact, the Justice Department has within the limitations of the budget and within the limitations of ethical legal practice has striven manfully and honestly and devotedly to represent Indians of the United States, to discharge its trust functions in regard to Indian natural resources, honorably and as I say on individual matters of judgment as far as claims

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go, I cannot say I agree with the Justice Department case by case, but I shouldn't have to.

The point is the courts determine questions of judgment on what are legal rights of Indians and what are not. The basic allegation made to support this legislation laid before this subcommittee is the allegation that the government is systematically sacrificing the interest of the Indians to that of other federal agencies and entities as far as claims are going and as far as my experience goes, I must report that is simply not true.

The Justice Department is attempting to the best of its ability, sometimes arguing legal theories that I don't agree with, and that the state is resisting, but manfully attempting to vindicate the rights of Indians as they see them and I submit the basic difficulty is, and this is a very common thing in law practice, that there are attorneys both within and without the government who disagree with the Justice Department's construction and interpretation of certain cases. This is a purely natural and normal situation.

But I believe this disagreement on how to interpret certain cases and rules of law have been blown up artificially into a case for inherent conflict of interest which is unreasonable.

Let me attempt to give a couple of examples. In New Mexico when we brought the first of the series of water rights adjudication suits which arose off of the San Juan-Chama project which

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you had so much to do with initiating, when we did this in order to provide lawful administration of these projects, we were aware that among the principal beneficiaries of these projects are the Indian people of New Mexico, I could and I stress that because I want to demonstrate the good faith of the State of New Mexico in taking the position that it does today.

This should not be understood-- The San Juan-Chama Project and the Navajo Indian Irrigation Project jointly approved by Congress in 1962 are now and will be when completed of immense effect to the Indians and non-Indian people of New Mexico. Therefore, I am not speaking out of any partison interest on the part of state agencies to take advantage of Indian Tribes or deprive them of any resource. As a matter of fact, a quick summary of what is happening in these projects I think will refute that.

Right now we have two major irrigation water related projects under way in New Mexico. One involves a diversion from the San Juan River into the Rio Grande. Its total cost, when all the tributaries are built in 10 or 20 years, will be considerably less than $100 million.

Incidentally, that project which benefits the people of Albuquerque, the middle Rio Grande and half of the people of New Mexico live in that valley. That cost less than $100 million and involves only 100 acre feet a year diversion. At the time that was approved a project was authorized for the exclusive benefit of the Navajo Tribe. That involves 550,000 acre feet of

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water, new water with land leveled and canals dug to bring the water right to the land. I cite this in order to document that the State of New Mexico, far from opposing the vindication and exercise of Indian water rights, has support this fully.

It was because we recognized the Navajo Tribe clearly had a Winters Doctrine claim that the State of New Mexico, as you know, Mr. Chairman, has strongly supported this project for the Navajo Tribe, and, as a matter of fact, when that project is completed, and it is authorized now at a cost of $206 million, compared to less than $90 million for a project that benefits half the polulation of New Mexico and the Rio Grande Valley, that project, Mr. Chairman, will ultimately use 5/7 cents of New Mexico's share allocated in the Upper Colorado River Contract.

That ought to be sufficient to document that New Mexico is strongly in support of Indian claims and exercising and enjoying the benefits. There is so much emotion in this field that it is always assumed that the State or private interests are trying to take something away from the Indians.

I want to document this point in order to comment on a point raised by Mr. Wilkinson, and which also has been raised by statements before other committees of the Congress and in the press in the past.

The statement is very frequently made that the Bureau of Reclamation is the greatest enemy of the Indians. In fact, this statement was made to Senator Dennedy's subcommittee investigating

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conflicts of interest and Indian water rights last month. It was also said that the San Juan-Chama Project is causing a genocide or has caused a genocide of the Pueblos in New Mexico. The State of New Mexico deplores very strongly the use of this emotional and unreliable vocabulary. Almost hysterical references to things like genocide and statements like the Bureau of Reclamation is the greatest enemy of the American Indians.

In New Mexico neither of these statements remotely is true. As a matter of fact, the Bureau of San Juan-Chama Project has been authorized by Congress to bring water for new irrigation to 2,000 acres of land for one Pueblo, the San Juan Pueblo, and they will not have to pay a dime to reimburse for that project. Yet people come before the committees of the Congress and say, and I am quoting now in substance testimony given last month to a committee and say, I have stood there and seen this water diverted and what has happened to the Pueblo Indians is genocide.

There is no foundation for this and we deplore very strongly the fact that extremely important and beneficial water resources projects, projects beneficial for both the Indian and non-Indian people of New Mexico have been brought into debate suggesting that the Bureau of Reclamation and the State of New Mexico could have been involved in some way in systematically sacrificing some Indian rights. There is simply not a word of truth in that.

At the cost of being repetitive, let me point out in some more detail what I am talking about. In a committee print of the

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Committee on the Judiciary of the United States, put out this year, a certain study was made and allegations were made concerning inherent conflicts of interest. Now, I dwell on this point, Mr. Chairman, because it is generally known that this is the reason why the Administration in its present statements has supported this bill and, of course, needless to say, it is because the President has endorsed it, that the representative of the Justice and Interior Department who must be obedient to the White House have been here today. I think their own testimony has documented the lack of enthusiasm in these departments, the lack of genuine enthusiam for it.

The gentlemont from Interior and Justice have come today and argued a brief and they have done the best they can with a very poor brief. They tried to come here and tell you that because of some conceivable contingent possibility of interest we should make a radical substantive fundamental departure in law.

Now, I ask, has that very seriously been used by the Congress as a basis for a fundamental change in law. The feeling of some federal people in response to a White House commitment that there is some possibility of future conflict and in consequence of that we should abandon the practice of 120 years of settled legal practice, settled tradition in which the Justice Department and the Indians clearly understood their role? Yet, this morning we hear high government officers come here and seriously argue that

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although they cannot document a single case of sacrifice of Indian interest, nevertheless because of the contingent possibili a radical departure in the law should be made.

Let me point out how specious and superficial some of the argument has been. I read from this study that was published by the Senate Judiciary Committee purporting to document well known and recognized conflicts of interest. It refers here on page 11 to water right litigation. They are talking here about suits which the State of New Mexico has brought through my office and the Attorney General's office in order to provide lawful administration of the projects which this Congress has authorized in order to construct the San Juan-Chama Project.

There are two illustrations of conflict of interest seriously offered here. The first one is that we have brought suits on tributaries of the Rio Grande and not on the main strea of the Rio Grande. Therefore, they say we have left several Pueblos on a tributary in a position where they cannot maintain water rights on the main stream of the Rio Grande. As a matter of geology, this is true. But I ask you to recall the recent Eagle County decision of the United States Supreme Court and the common sense situation that would result if it were necessary in order to get an adjudication of water rights on any part of the Rio Grande to determine any water rights of the Rio Grande. Even if we cut off the river between the northern and southern boundary of New Mexico. In my section the State and virtually half of the polulation we have is related to the Rio

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Grande system.

Senator, I stress this point because I want to document that a lot of superficial reasoning has been used to try to work up an emotional atmosphere in which to justify legislation of this kind by such allegations as this. We have 18 Pueblos in New Mexico, they are on the main stream and main tributaries of the Rio Grande. A suit to determine all rights at the same time would cost conceivably millions of dollars, take decades and is unnecessary. As a matter of fact, several of the Pueblos in New Mexico presently oppose it because they have a favorable situation today without an adjudication and don't want it.

Recently the same issue was litigated in the United States District Court in New Mexico where two Pueblos in the main stream of the Rio Grande, represented by an attorney who made an appearance on behalf of the Department of Interior, when these Pueblos asked that the suits be enlarged or dismissed, the federal courts looked at that and laughed and they told the government and the private attorneys it is not necessary, your rights are not involved, you are not prejudiced in any way, you are not a part and not within the scope of this lawsuit. Your claims are reserved for another day to determine at the proper time.

Yet this statement expressly says that the failure to join the mainstream claims is a conflict of interest. The other is even shabbier. They say because the Government simultaneously represents the natural forest claim and the Indian claim there

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is an apparent conflict of interest. We submit, your Honor, and I document this in my statement, the conflict of interest, if there is one, has wrked to the detriment not of the Indians but of the natural forests. Because, in fact, under the Winters Doctrine, the same document that nan asked about earlier, the government claims 1908 and 1909 on rights by it has claimed prehistoric rights, paramount rights of all of the tributaries for the Rio Grande for the Indians. Does that sound like genocid or betrayal of interest?

Senator Fannin. Mr. Chairman, we certainly have a very informed constituent and very fine witness I very much appreciate what he has given us and if there are any questions we could submit to him in writing, I would certainly like to do that.

Senator Hansen. I have just one, do you think this bill overall will help or hurt the Indians?

Mr. Bloom. I think it will seriously hurt the Indians in the long run for the reasons I set out in my statement.

Senator Hansen. Thank you.

Senator Anderson. Well, if you will wait a while, I will go over and vote and come back for the additional material. Than you.

Senator Anderson. Mr. Bloom, if you will submit the rest of your testimony, it is getting late and we have another hearing this afternoon on a different subcommittee.

Mr. Bloom. Fine, I will do that.

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Senator Anderson. We will file any questions later on.

(Whereupon, at 12:50 p.m., the hearing was recessed, subject to the call of the Chair.)

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-113634 February 25, 1972

Dear Brad:

As per our phone conversation of February 15, 1972, I am enclosing a copy of my letter of today to the Attorney General on the Indian tribal accounting matter. I have also sent George Shultz a copy.

Sincerely,

Comptroller General
of the United States

Enclosure

The Honorable Brad Patterson
Executive Assistant to
The Honorable Leonard Garment
Special Consultant to the President
Executive Office Building

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-113634

FEB 25 1972

Dear Mr. Attorney General:

We have given very careful consideration to your letter of January 24, 1972, concerning Indian claims litigation against the United States which at this point in time involves the need for bringing up-to-date certain accounting reports with regard to the fiscal affairs of the Indian tribes.

As pointed out in your letter, this type of work was performed by the General Accounting Office from 1928 until early in 1965, when by mutual agreement of the agencies concerned (GAO, GSA, and BOB), it was transferred to the General Services Administration. The transfer included records, equipment, and personnel, as well as related funds.

It has been suggested by the Deputy Director, OMB, that the new requirements of the Indian Claims Commission for accounting reports go beyond the Archives' normal records repository function and would put GSA in the business of investigative accounting. OMB has suggested that an attempt be made to have GAO reassume the responsibility for producing new accounting reports or, as an alternative, that the task be assigned to the Bureau of Indian Affairs.

While we appreciate the importance of this work being undertaken there are at least two factors which mitigate against GAO reassuming this responsibility. First, our expertise in this area was lost when our personnel were transferred to GSA in 1965. Second, the many new responsibilities which have been given us by Congress such as those under the Legislative Reorganization Act of 1970, the Federal Election Campaign Act, and the Presidential Election Campaign Fund Act, the Emergency Loan Guarantee Act, and the Comprehensive Health Manpower Training Act, to name a few, make it most difficult for us to assume any new duties in other areas. Under the circumstances, we cannot agree to reassume the Indian tribal accounting responsibility, as suggested.

With reference to OMB's suggestion that as an alternative the task be assigned to the Bureau of Indian Affairs your reasons for not considering this practicable have merit. As another alternative, we suggest that consideration be given to having the work done by the internal audit group of the Department of Interior which is under the Assistant Secretary for

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Management and Budget. This group is independent of the Bureau of Indian Affairs and, therefore, should not be subject to the criticism you anticipate if the Bureau of Indian Affairs performed the work.

Sincerely,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable
The Attorney General

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DJ-187
(Ed. 7-29-71)

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

FEB 2 1972

Honorable George P. Shultz
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Shultz:

Enclosed are copies of a proposed communication to be transmitted to the Congress relative to: Hearings on S. 2035 held on November 22, 1971. Please expedite. A copy was sent to Mr. Brad Patterson at the White House.

Please advise this office as to the relationship of the proposed communication to the Program of the President.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

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OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Honorable Henry M. Jackson
Chairman, Senate Committee on
Interior and Insular Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Jackson:

At the Senate Committee Hearing on S. 2035 on November 22, 1971, Senator Gravel requested that we compare the legal representation of Indians by groups funded by the Office of Economic Opportunity (OEO) with the representation which would be provided by the Indian Trust Counsel Authority under S. 2035.

Under the provisions of sections 221 and 222 of the Economic Opportunity Amendments of 1967, as amended, 42 U.S.C. 2808 and 2809, the OEO is authorized to make grants to community action programs and components and to other groups or organizations to provide legal services for persons living in poverty. The individuals and organizations providing the legal services under the OEO programs are not employees or agents of the OEO or the United States. The only control exercised over those performing the legal services is in the limitations and conditions placed on the uses that may be made of the funds granted by OEO. Grants have been made to several non-profit organizations established for the purpose of providing legal services to Indians. Examples of this are the D.N.A. on the Navajo Reservation and the California Indian Legal Services in California.

Under the Indian Trust Counsel Authority bill, legal services would be provided by an agency of the United States through its employees. This would result in certain differences in actions brought for the protection of Indian property rights.

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The Indian Trust Counsel Authority bill expressly waives the defense of sovereign immunity in actions brought by the Trust Counsel Authority against the United States. In actions brought by OEO funded legal assistance groups on behalf of Indians there is no waiver of sovereign immunity except as has been provided by other laws for Indians or the general public as a whole.

In some instances the statute of limitations could be raised as a defense to actions brought by Indian individuals or groups where this defense would not be available if the actions were filed by the Trust Counsel Authority in the name of the United States.

Legal assistance provided through the use of funds granted by the OEO are limited to those qualifying by virtue of their poverty level income. Legal assistance may not be provided to some Indian individuals and groups through the use of funds granted by the OEO because of the income level of the Indians seeking legal assistance. There is no such limitation, however, placed on the legal assistance that would be provided for the protection of Indian property rights under the Indian Trust Counsel Authority bill.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DATE: 10 February 1972

REPLY TO ATTN OF: Lisa Gerard - LRD

SUBJECT: Justice's Letter re S. 2035 to Senator Jackson

Brad Patterson - White House

Interior would like to revise your proposed last paragraph to the Justice letter so that it would read:

"In the last analysis the trust responsibility of the United States for Indian land and resource rights precludes ~~complete~~ Executive reliance upon non-government legal representation to ~~enforce~~ assert Branch those rights. Although S. 2035 leaves tribes perfectly free to employ their own attorneys, the Trust Counsel, absent a conflict of interest with another tribe, would still be available to a tribe which requested its help no matter how well represented the tribe might be." But of the two, only the Trust Counsel would speak with the voice of the United States and thus discharge the trust responsibility of the United States.

Interior also suggests the deletion on page one, paragraph two, of the sentence "The only control exercised over those performing the legal services is in the limitations and conditions placed on the uses that may be made of the funds granted by OEO", believing that the sentence implies that more authority and control would be exercised over the Trust Counsel.

May I have your comments, please-

by Legal Services resources.

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THE WHITE HOUSE
WASHINGTON

February 4

Lisa -

Justice's letter re S2035 is cleared providing the enclosed paragraph is inserted as a new 4th paragraph.

Brad

PS: Pls inform Justice we want to review their answers to the other Kennedy questions posed to Kiechel on November 30.

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The principal difference of course is that it is the United States, not Legal Services organizations, which bears the trust responsibility for Indian land and natural resources rights. Thus only an agency of the United States, speaking in this trustee capacity, can discharge the federal responsibility, no matter how well a tribe may also be represented by private or Legal Serfices counsel.

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ATTENDANCE LIST--OTHER GUESTS--Cont.

from p. 7

Mr. Robert E. Cowley
General Manager
Dallas Manufacturing Plant

WICKES CORPORATION
Mr. Daniel M. Fitzgerald
Chairman and Chief Executive Officer

XEROX CORPORATION
General Charles T. Lanham (USA-Ret.)
Consultant to the President

GENERAL DYNAMICS CORPORATION
Mr. George G. Troutman
Assistant General Manager and Vice President
Washington, D.C.

Staff:

Mr. C. D. Ward
Assistant to the Vice President

Mr. Bob Robertson
Executive Director
National Council on Indian Opportunity

Mr. Dan McDonald
Assistant Executive Director
National Council on Indian Opportunity

Mr. Marsh Thompson
Office of the Vice President

Other guests:

Mr. J. Bradway Butler
Arnold & Porter

Mr. Myron P. Curzan
Arnold & Porter

Mr. Paul Driscoll
Plant Manager, Fairchild Corporation
Shiprock, New Mexico

Mr. V. Frandsen
Arizona Area Manager
William Lyon Development Company

Mr. Thomas D. Hinkleman
Vice President – Planning
Fairchild Camera & Equipment Company

Mr. Frederick M. Hoar
Vice President – Communications
Fairchild Camera and Equipment Company

Mr. Keith A. Johnson
Eastern Regional Manager
William Lyon Development Company



Attorney General John N. Mitchell as he spoke at Indian economic development meeting October 29.

REMARKS OF ATTORNEY GENERAL JOHN N. MITCHELL AT INDIAN ECONOMIC DEVELOPMENT MEETING OCTOBER 29

One of the contents of the Message of July 8, 1970, that the President sent to the Congress relating to Indian affairs had to do with the creation of an independent Indian Trust Counsel Authority.

As I am sure many of you know, a substantial number of the assets of the Indian tribes are lands held in trust for their benefit by the public by the United

(Continued on p. 9)

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REMARKS OF ATTY. GEN. MITCHELL--
Cont. from p. 8

States government. And this imposes a major responsibility upon the United States government to see that those lands are properly administered and that the rights of the Indians therein are fully protected.

This provided a very difficult problem for some of the government departments, particularly that of the Department of Justice, because when litigation arose in connection with these properties or the interests therein the Department of Justice was put in the area of conflict, having to represent the interests of the Indians on one side, and of course of the public and the United States government on the other side.

That, as the President said in his Message, is an untenable position that no good law firm would ever find itself in. Accordingly, the Department of the Interior sent to the last Congress, and Secretary Morton again to this Congress has submitted legislation for the purpose of creating the Indian Trust Counsel Authority which would provide independent legal ability entirely representative of the Indian interest.

This should have been done years ago and we are most helpful that the Congress will act on it speedily at this session.

The substantive changes, of course, will in addition to providing counsel in the matter, also bestow upon the Indian interest the right to sue the United States where their conflicting interests appear, and the legislation of course contains the necessary waiver of government immunity so that this may be carried out to the fullest extent and for the fullest advantage of the protection of the Indian rights.

We in the Justice Department fully support this legislation. We believe that our current position is untenable and regardless of the practice of bureaucracies in the past to maintain each and every vestige of power representation that they can, we in this particular case are glad to give it up.

We believe it is an important step forward and we would certainly hope that all of you here lend what effort you can in order to induce the Congress to pass this legislation and put it into effect so that the interests of the Indian tribes and the Indian people as such may be more fully protected henceforth.

REMARKS OF DR. C. LESTER HOGAN PRESIDENT, FAIRCHILD CAMERA AND INSTRUMENT COMPANY

Mr. Vice President–members of the Cabinet–distinguished guests: I'm delighted to be here today and appreciate this opportunity to discuss with you Fairchild Camera's business experience on the Navajo reservation in Shiprock, New Mexico.

We at Fairchild have grown to consider our work with the Navajo people much more than simply a business venture. It has been a cultural experience . . . and sometimes an emotional one as well. And while there have been problems, the rewards and satisfactions of Shiprock have far outweighed them. In 1965 and during the years immediately following, when Fairchild was building up its semiconductor assembly operations on the reservation, the project was often referred to as the "Shiprock experiment." Today the word "experiment" as it relates to Shiprock has disappeared from our vocabulary. In fact, our plant in New Mexico is now among the most productive and efficient of any Fairchild operation in the world.

Let me emphasize that my company does not–and cannot–take credit alone for this success. Our effort in Shiprock has, from the beginning, involved a working relationship between Fairchild, various Federal agencies, the Navajo Tribal Council, and–most important–residents of the Navajo community itself.

I'd like to divide my remarks this morning into two basic areas. First, I will give you a brief review of Fairchild's history at Shiprock–acknowledging our problems and detailing actions we have taken to solve them.

Then I will suggest the extent to which this experience points the way to opportunities which exist for all American industry to conduct profitable and productive programs on the nation's Indian reservations. The fact that the American Indian is today the fastest-growing minority group in the United States dictates that those of us in business give this bypassed segment of society our utmost attention.

My company's initial interest in establishing a plant at Shiprock–a decision made before I arrived, incidentally–was encouraged by an ample supply of workers there. Unemployment in the area was, as it still is, a critical problem.

The Fairchild story at Shiprock officially began in 1965 with a small pilot transistor assembly line employing some 50 persons. At the time, products were assembled in the Shiprock Community Center, made available to us by the Navajo Tribal Council.

We quickly learned, however, that Indian employees can readily adapt to relatively complex working conditions. And despite a number of cultural differences which I will discuss in a moment, the business results at Shiprock since 1965 have far surpassed the company's original objectives.

By 1968, our work force numbered 300 persons and the project had become so successful that–with the

(Continued on p. 10)

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THE WHITE HOUSE
WASHINGTON

Date 12-16-71

To Brad

From Karen Shirasch

187-2136

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WASHINGTON

K 2701

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THE WHITE HOUSE

WASHINGTON

November 22, 1971

MEMORANDUM FOR LEONARD GARMENT

FROM: BRADLEY H. PATTERSON, JR.

SUBJECT: Department of Justice Testimony for the President's Trust Counsel Authority Bill

I am concerned at the answers to questions given by one of Mr. Kashiwa's assistants during the Senate Interior Committee's testimony on S 2035 this morning.

Senator Anderson asked an obvious question: in effect, how have Indian people been damaged by our handling of natural resources rights cases in the past? The answer was in effect "not at all". Senator Anderson came back with the inevitable comment that if there has been no harm, there is no need for the bill.

The important point in defending the President's position on the Indian Trust Counsel bill is not so much what has happened with the suits filed on behalf of Indian natural resources rights as what has happened to the requests made by Indians and Interior to have suits instituted but which Justice has held up from instituting because of competing claims from other areas of the government's interest. This is the "inherent conflict of interest" the President referred to in his July 8, 1970 Message -- in which "the Indians are the losers when such situations arise."

I suggest perhaps Dick Kleindienst might ask Mr. Kashiwa to broaden the scope of his supplemental response for the record to Senator Anderson to include the question I have just raised, and to send the draft material to OMB for review by them and this office before it is dispatched to the Committee.

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I am concerned at the answers to questions given by one of Mr. Kashiwa's assistants during the Senate Interior Committee's testimony on S 2035 this morning.

Senator Anderson asked an obvious question: in effect, how have Indian people been damaged by our handling of natural resources rights cases in the past? The answer was in effect "not at all". Senator Anderson came back with the inevitable comment that if there has been no harm, there is no need for the bill.

The important point in defending the President's position on the Indian Trust Counsel bill is not so much what has happened with the suits filed on behalf of Indian natural resources rights as what has happened to the requests made by Indians and Interior to have suits instituted but which Justice has held up from instituting because of competing claims from other areas of the government's interest. This is the "inherent conflict of interest" the President referred to in his July 8, 1970 Message -- in which "the Indians are the losers when such situations arise."

I suggest perhaps Dick Kleindienst might ask Mr. Kashiwa to broaden the scope of his supplemental response for the record to Senator Anderson to include the question I have just raised, and to send the draft material to OMB for review by them and this office before it is dispatched to the Committee.

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United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

September 10, 1971

SEIZURE OF INDIAN LAND AND RIGHTS TO THE USE OF WATER BY
THE INTERIOR DEPARTMENT AND AGENCIES OF THAT DEPARTMENT*

William H Veeder

Direction has been received to prepare a list of present day losses of Indian land and rights to the use of water. Western Indian lands and rights to the use of water have a common denominator: They are, have been, and will continue to be, lost, abridged or abandoned through the Interior and Justice Departments' failure to fulfill their trust responsibilities as defined by the President.

RESERVATIONS - NAVAJO, JICARILLA, UTE MOUNTAIN, SOUTHERN UTE -

San Juan River Drainage - Tributary of the Colorado River

On June 7, 1971, I witnessed Navajo River and Rio Blanco waters trans-mountain exportation away from the above-mentioned Reservations through the San Juan-Chama Federal Reclamation Tunnels, under the direction of Interior Department officials. Those streams are tributaries of the San Juan River.

Immediate consequence of exportation of water away from Indian lands:

Navajo River, only viable stream on Jicarilla Reservation; Reduction of a flow in excess of 500 c.f.s. diminished to 55 c.f.s.

Destruction of Jicarilla fish culture and recreation attributes of Navajo River.

Cumulative adverse effects to Rio Blanco non-Indians and ultimate destruction of Indian lands and values subject of investigation in which I am presently engaged.

RIO GRANDE MAIN STREAM AND TRIBUTARIES - PUEBLO INDIANS -

Intentional modern-day irreparable damage to all Pueblo rights to the use of water:

Failure of Justice and Interior to fulfill Congressional mandate contained in Pueblo Land Act of June 7, 1924 (43 Stat. 636).

---

* See attached request for hearing in re ultimatum of "Phoenix" or "firing".

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Failure of Interior and Justice to fulfill Congressional mandate respecting Pueblo rights to the use of water has two aspects (1) original damage, (2) present and continuing damage.

Seizure by Reclamation Bureau of Pueblo rights for sub-units of San Juan-Chama Federal Reclamation Project.

Final irony: Seizure by Interior of Jicarilla and other Indian water allegedly to replace seizure of mainstream Pueblo rights.

Interior and Justice acting in concert in multiplicity of tributary cases to obtain judicial confirmation of seizure of Pueblo rights.

COLORADO RIVER - LOWER BASIN RESERVATIONS: COLORADO RIVER TRIBES, FORT MOJAVE TRIBE, FORT YUMA TRIBE

Main threat:

Seizure for Central Arizona Federal Reclamation Project of gravely short polluted water supply in Colorado River. (Anyone who contests this statement is requested to put in writing the basis upon which denial is made; suggest interrogation into record of anyone making denial)

Polluted Colorado River water immediate threat to all Colorado River Indian Reservations.

Innumerable long-time trespasses upon Colorado River, Fort Mojave and other Indian lands.

Failure to act on repeated requests to interpose Indian interests in litigation involving Colorado River Indian lands.

Resistance by the Bureau of Indian Affairs to Indian requests: (1) That they be provided with funding to construct irrigation systems to exercise decreed rights; (2) That they be assisted in subjugation of their lands to be irrigated with decreed entitlements to water.

Consequences to Fort Mojave and other Colorado River Indian Tribes, of failure to provide systems to exercise Indian decreed rights to the use of water: Irreparable damage, past, present and future, through loss of gravely needed income.

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RESERVATIONS - FORT APACHE, SAN CARLOS, CAMP VERDE, YAVAPAI -

Salt River Agreement

History is repeating itself: (1) Acting in concert the Secretary of the Interior and Attorney General in 1910 denigrated, with the infamous Kent Decree for the benefit of the Salt River Federal Reclamation Project, Salt River and Camp McDowell Indian Salt River rights; (2) In 1935 the Secretary of the Interior and the Attorney General acting in concert, entered the stipulated Gila River Decree likewise denigrating Gila River Indian rights for the benefit of non-Indians with junior priorities.

(3) 1971 proposed Salt River Agreement would (a) subject above-named Indians to the immediate threat of a multiplicity of suits; (b) charge 100% depletions - totally unreasonable - against Indians for municipal and industrial uses; (c) limit, for example, Fort Apaches who have in excess of 1,000,000 acres, to 36,000 acre-feet annually, when Salt River Federal Reclamation Project's reservoirs' evaporation, project and stream-bed losses in all probability exceed the allowance to the Fort Apaches.

DESTRUCTION OF PYRAMID LAKE AND ATTENDANT DESTRUCTION OF PYRAMID LAKE TRIBE OF INDIANS

Seizure by Reclamation officials, without right, of Truckee River water required for Pyramid Lake as a permanent viable body of water; waste of huge quantities of the waters thus seized and diverted away from Pyramid Lake is:

(a) a long-term invasion of Indian rights;

(b) a continuing trespass upon Indian rights;

(c) continued increase in the seizure of water to which Pyramid Lake Tribe of Indians is legally entitled;

(d) final destruction of Pyramid Lake with completion of now-abuilding Washoe Federal Reclamation Project.

Classic failure of the Bureau of Indian Affairs properly or adequately to represent Indians. Principal Bureau of Indian Affairs employee attempts to (a) represent Department of Interior; (b) purports to represent Pyramid Lake Tribe of Indians - intolerable conflict of interest justified by ridiculous statement that he is required to wear "two hats" - an impossibility all as proved by irreparable damage to Pyramid Lake Tribe of Indians over 15 year period of "two hats."

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MISSOURI RIVER BASIN

RESERVATIONS: MONTANA'S CROW INDIAN - WYOMING'S WIND RIVER

Seizure and sale of Big Horn River water by the Bureau of Reclamation. (Wind River is same as Big Horn, only has different name in upper reaches in Wyoming)

> Sales of water by Reclamation Bureau proceeding today - can have no other effect than irreparable damage to Crows and the Arapahoes and Shoshones on Wind River.
>
> Classic example of Area officials aiding in sale of water Indians require to meet present and future development; failure to fulfill trust responsibility by Bureau of Indian Affairs.

RESERVATION: FORT PECK

> Seizure by Reclamation Bureau of prior and paramount rights of Fort Peck Indians in Milk River;
>
> Failure of Bureau of Indian Affairs to protect Milk River rights; Indians being charged for unreliable water from Missouri River - a continuing damage - today.

RESERVATIONS: FORT BERTHOLD, PINE RIDGE, ROSEBUD: ALL OTHERS IN MISSOURI RIVER BASIN:

Corps of Engineers, Reclamation Projects combine throughout the States of North and South Dakota to occupy and inundate Indian Reservations.

There are numerous cases in which Indian rights to the use of water have been and are now being exercised without benefits accruing to the Indian people. For example: (1) Electric power is being generated without, it is understood, any returns to the Indians though their lands have been occupied and no payment made for Indian rights to the use of water. (2) Recreational facilities are bringing in revenue to which the Indians in reasonable equity are entitled; (3) Water is being committed for numerous uses in disregard of Indian present and future requirements; (4) Reservations have been fractionated and lands inundated in total disregard of Indian rights and requirements. (5) Reclamation works have invaded Indian rights in the Cheyenne River, in disregard of the Pine Ridge Reservation; (6) Streams rising in Nebraska and flowing into South Dakota's Pine Ridge and Rosebud Reservations are being appropriated in Nebraska in total disregard of Indian rights.

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COLUMBIA RIVER BASIN

From the top of the Columbia River Basin within the United States, there is now, had been, and there will be unless stopped, continued invasion of Western Indian rights to the use of water either (1) with cooperation of the Bureau of Indian Affairs; (2) token objection to continued seizure of Indian rights to the use of water in a manner tantamount to acquiescence.

1. Flathead Indian Reservation:

Seizure of Flathead Indian rights to the use of water for 90% non-Indian project, with continued invasion by seizure of water for non-Indian purposes is a growing and continuing invasion of Flathead rights. Vigorous assistance to non-Indians by the Bureau of Indian Affairs failure fully to assist Indians is the hallmark of Bureau of Indian Affairs policy on Flathead Reservation.

Seizure of Indian rights; denigration of Winters Doctrine Rights by "Secretarial Rights" now enforced against Indians constitutes a continuing trespass against Indians.

Loss of Flathead Lake frontage and continued losses of that nature demonstrate failure of Bureau of Indian Affairs to function as Indian trustee and advocate.

(Efforts to inventory Indian rights is under way, but non-Indian expansion of water uses with Bureau of Indian Affairs assistance continues)

2. Fort Hall Indian Reservation, Idaho:

A magnificent Reservation is being irreparably damaged by (1) Pollution of major streams; (2) Huge erosion losses of Indian land by Reclamation's American Falls Reservoir; (3) Failure to ascertain and determine Indian rights; (4) Failure adequately to use Indian rights (Indians are conducting their own inventory).

A prime example of failure to utilize, preserve and protect a Reservation.

3. Coeur d'Alene, Nez Perce and Kalispel Reservations:

Time and space do not allow for full review. However, there has been almost total neglect to preserve and protect basic land and rights to the use of water on these Reservations. Immediate attention in all phases of Trust obligation to these Reservations an imperative need.

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4. Spokane and Colville Reservations:

Irreparable damage to both Reservations by operation of Roosevelt Reservoir causing violent fluctuations of water without plans for land use in contemplation of Indian interests. Immediate attempts must be made at adjustments in fluctuations to preserve land and water for Indian benefits.

Failure to protect Spokane Indian rights in Chamokane Creek - need for immediate assistance in preparation and prosecution against non-Indian seizure of Indian rights to the use of water.

Colville Indian Reservation: Neglect by Bureau of Indian Affairs to ascertain, determine, protect invaluable Indian rights to the use of water; innumerable present day non-Indian developments in total disregard of present and future land and water requirements of Colville Indians must be rectified.

Spokane and Colville Reservations suffer from failure of Bureau of Indian Affairs to protect and preserve Indian rights in the past and present in regard to developments on Columbia River and tributaries.

5. Yakima Indian Reservation:

Yakimas in last quarter century have moved to protect themselves against Interior Department and others.

Present threat: Interior Reclamation Bureau constitutes threat to Yakimas by overbuilding the Yakima River and its tributaries, thus committing Indian water to non-Indian uses.

Kennewick Extension Project must be stopped.

Immediate aid to Yakimas against non-Indian occupants committing Yakima ground water to non-Indian uses, is imperative.

(Yakimas well advanced in carrying out inventory of rights, but need financial aid)

Puget Sound, Olympic Peninsula Reservations; Lummi and others:

Indescribable neglect of Lummi and other Puget Sound Reservations demonstrates that the Bureau of Indian Affairs is either incapable of fulfilling its Trust responsibility or fails to comprehend it.

These Indians until within recent months, had neither knowledge or information respecting their invaluable rights under (1) Winters Doctrine, or (2) Winans Decision.

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(1) Immediate action must be taken to ascertain Indian rights which have been wholly neglected;

(2) Immediate steps to correct and control pollution on Nooksack River on Lummi Reservation and other Reservation rivers.

SOUTHERN CALIFORNIA INDIANS

Agua Calientes, Pala, Rincon, LaJolla; Others:

Typical of total neglect of Puget Sound and Olympic Peninsula Indian Reservations has been the failure to take action to preserve and protect the Indian rights in Southern California.

Great present need:

1. Immediate action to prevent falling ground water table at Palm Springs.

2. Protect Agua Caliente Whitewater River rights.

3. Determine rights of all Mission Indians on San Luis Rey before irreparable damage occurs to Pala and other Indian rights on that stream.

A great amount of immediate effort is required particularly in light of litigation among some but not all of the Indians whose rights cannot be separately determined, acted upon or considered.

This is only a tentative list, subject to revision.

William H. Veeder

Enclosure

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

AUG 31 1971

Memorandum

To: William H. Veeder

From: Deputy Commissioner of Indian Affairs

Subject: Reassignment to Phoenix Area

Your memorandum of August 30 shocks me by its distortion of the issues involved in your reassignment.

I will expect you to report in Phoenix by September 19.

John Crow
Deputy Commissioner

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

September 9, 1971

Memorandum

To: Secretary of the Interior Rogers C. B. Morton

Commissioner of Indian Affairs Louis R. Bruce and
John O. Crow, Deputy

Civil Service Commission

From: William H. Veeder

Subject: Rejection of "reassignment" commencing September 19, 1971, to the Phoenix Area Office, Bureau of Indian Affairs, in the form of a grievance statement

Request for full hearing: I request a full hearing to offer into the record facts and reasons in support of this rejection of "reassignment" to the Phoenix Area Office, Bureau of Indian Affairs:

Statement

(a) Good conscience dictates that I reject the Phoenix "reassignment" on moral and legal grounds for that "reassignment" commencing September 19, involves my participation in and being a party to the seizure of the rights of the Colorado River Indian Tribes, the Fort Mojave Tribe, Fort Yuma Tribe, the Chemehuevi Tribe, and Cocopah Tribe of Indians to the use of water in the Colorado River and, in the words of John O. Crow, Deputy Commissioner, my assistance in the "apportionment" of the waters to which those Indian Tribes and others are legally entitled, for the benefit of the Central Arizona Federal Reclamation Project, the construction of which is soon to be initiated by the Interior Department.

(b) A National scandal exists in the area in which you propose my

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"reassignment", by reason of the grave loss of Indian lands bordering upon, and rights to the use of water in, the Colorado River, stemming from the failure of the Bureau of Indian Affairs to preserve, utilize, and protect those Indian lands and rights to the use of water. That failure of the Bureau of Indian Affairs properly to administer and protect those Indian properties, based upon many years of legal endeavor regarding Indian lands along, and rights to the use of water in, the Colorado River, is now and has been for many years past in furtherance of the Central Arizona Federal Reclamation Project and similar Federal reclamation projects constructed and administered by the Interior Department, to the irreparable damage of the Indian people.

(c) Destruction of Pyramid Lake and the attendant disaster to the Pyramid Lake Tribe of Indians in furtherance of the Newlands Federal Reclamation Project, the now abuilding Washoe Federal Reclamation Project, Fish and Wild Life projects, and other Interior Department activities, is entailed as part of the endeavors which I would be required to undertake in the "reassignment" to Phoenix, and which I, in good conscience, reject.

(d) Suppression of facts and law to which the Colorado River Indians and other Indians in the Phoenix Area are legally entitled, is necessarily entailed in my "reassignment" to Phoenix. I have been threatened with "disciplinary" action and have been repeatedly precluded from making available to Western Indians, including but not

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limited to the Pyramid Lake Tribe of Indians, facts and law which they must have and to which they are entitled. Part of the threatened "disciplinary" action in furtherance of the suppression by the Bureau of Indian Affairs of facts and law to which the Indians are entitled and must have if they are to survive, has been threatened "reassignment" to Phoenix which I now reject and concerning which this grievance is directed.

(e) Denial of my legal assistance and my endeavors to correct innumerable wrongs imposed by the Interior Department upon Western Indians in the Columbia, Rio Grande, Missouri, Colorado, Lahontan (Pyramid Lake) Basins, and elsewhere, is a prime objective of my "reassignment" to the staff of the Phoenix Area Office. Indeed, the Area Director, I am reliably advised, has informed the Indian people I would be "controlled". It is unworthy of a Department of the Federal Government; an evidence of total disrespect to members of the Senate, to assert, as has been done, that I would be permitted to perform services for the Indian people of Western United States if I were to accept the proposed "reassignment."

(f) Efforts at the suppression of legal advice and analysis; denial of means to provide pertinent factual data requisite for the protection of rights of the Indian people in the Colorado River Basin and elsewhere in the Western United States by the Interior and Justice Departments will be accomplished by my "reassignment" to the Phoenix Area Office.

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(g) Official reprisals, and threats of official reprisals for activities on behalf of Indian people foreshadowed the punitive "reassignment" to Phoenix or alternatively being "fired", all in accordance with the ultimatum served upon me by John O. Crow, Deputy Commissioner, who advised that the ultimatum of Phoenix or "firing" was the "parameter" of his newly acquired position of Deputy Commissioner. That parameter of "Phoenix" or "firing" was established by Harrison Loesch, Assistant Secretary, Public Land Management.

(h) Harrison Loesch has repeated erroneous statements; made declarations that he would or should fire me because of my efforts on behalf of Indian people; his lack of restraint in making contumacious attacks against me to the press, are unfitting from the standpoint of this Nation's dignity and the dignity of the Indian people whose rights and interests he has failed properly and adequately to protect.

Conclusion: Death of the Western Indians must ensue from the conduct of the Interior Department, and its agencies, including but not limited to the Bureau of Indian Affairs, if its conduct is not drastically and immediately corrected.

Recommendations: 1. The Interior and Justice Departments should immediately undertake to fulfill - cease and desist the present violations of - this Nation's Trust obligation to the American Indians in keeping with the President's declaration to Congress that:

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"The United States Government acts as a legal trustee for the land and water rights of American Indians. * * *

"Every trustee has a legal obligation to advance the interests of the /~Indian~/ beneficiaries of the trust without reservation and with the highest degree of diligence and skill."

2. I be joined in fulfilling the Presidential direction, rather than subjected to personal reprisals and "reassignment" by the Commissioner of Indian Affairs, his staff, Harrison Loesch and his staff, to the end that the program now in progress against the Western Indian people be reversed and their survival as viable communities be assured.

3. Immediate cancellation of the "reassignment" to Phoenix which I reject and against which this "grievance" is directed.

Respectfully,

William H. Veeder

William H. Veeder

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THE WHITE HOUSE

WASHINGTON

Gila R & Kent 1910

Decrees

K Justice & Interior abandoned Salt R. rights to Waters Dating Water -- limiting them to their then diversions.

Gila - 1935

AG & Int - for ex non-Indian

Gila R - San Carlos project.

BIA silent or went along

Indians were not informed

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THE WHITE HOUSE

WASHINGTON

Abandonment of Indian Right

1949 Ore Water Dists

Justice abandoned
Ind Right to Fishery
Maintain Pyramid Lake

Walter R Darcee 1940

Against Indians --
Court limited right to
historic uses - did not
do more.

Interior & Justice did not
try to preserve Lake & Fisheries

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THE WHITE HOUSE

WASHINGTON

3/24/80 - Carson R.

Alpine Decree

Not enforced -

would reduce call from Truckee

Gallatin Dam -

paid In nothing to

Utes water.

Canyon Dam condemnation

proceedings - no problems for

Fort Berthold.

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JERRY C. STRAUS 1616 H STREET, N. W. WASHINGTON 6, D. C. NATIONAL 8-4400

Dear Brad

attached is the material I promised to send you.

I will be sending you a memo detailing additional conflicts of interest in a day or so.

Jerry

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91st Congress
2d Session

COMMITTEE PRINT

A STUDY OF ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES

PREPARED FOR THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
53-766 WASHINGTON : 1971

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91st Congress
2d Session

COMMITTEE PRINT

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MICHAEL ARD PULLIAM, *Minority Counsel*
THOMAS M. SUSMAN, *Assistant Counsel*

LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., December 15, 1970.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: For some months now the Subcommittee on Administrative Practice and Procedure has been looking into the issue of administrative conflicts of interest in the protection of Indian natural resources. It came to my attention that the California Indian Legal Services had sponsored a study that was paralleling ours, and I instructed my staff to cooperate with CILS in the preparation of its study. The final paper, written by Mr. Reid Chambers, brings together full documentation of numerous instances of conflicts of interest within the Federal Government, involving the Departments of Interior and Justice, that have resulted in erosion of the natural resource base of American Indians and, in one case, Alaska Natives. That paper is attached.

President Nixon indicated a concern with this situation in his Indian Message last July, and the Administration prepared legislation (S. 4165) to deal with this problem. Initial hearings on the bill were in September, but it appears that it will be some time before any action will be taken on the proposal. In the interim, the case studies discussed by Mr. Chambers present a strong case for immediate institution of new practices and procedures designed to minimize conflicts and maximize protection of Indian rights and resources. Some of these practices and procedures are outlined in my foreword to the paper.

I am sure that my colleagues on the Judiciary Committee, as well as other members of Congress and persons interested in Indian affairs, will find the Chambers' paper useful, and I ask that it be printed as a Committee print.

Sincerely,

EDWARD M. KENNEDY.

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THE WHITE HOUSE

WASHINGTON

Pima Maricopa
Dammed at
DoT's request

To ICC

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Senator Allott:

The attached document provides answers to your letter of November 24, 1971.

I am pleased to have the opportunity to be of assistance in regard to the questions concerning S. 2837, the Trust Counsel bill. I hope that I have answered these questions to your satisfaction. Please do not hesitate to call upon me for further elaboration on any of the answers or if you have additional questions.

Sincerely yours,

Secretary of the Interior

Hon. Gordon Allott
Committee on Interior
and Insular Affairs
United States Senate
Washington, D.C. 20510

Enclosures

1/3/71

DDrabelle:fyj

cc:
Secy RF (2)
Mr. Hitt - Secretary's ofc
Under Secretary
CL - Mr. Laird
BIA
Assoc Sol - IA
Dennis Drabelle
HOLD
OLRF
Asst Secy--PLM
White House - Brad Patterson
SCCO

CL-25586

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QUESTIONS FOR INTERIOR DEPARTMENT WITNESSES:

1. Please explain the background of the proposed legislation, including the role of the National Council on Indian Opportunity beginning, I believe, in 1967 or 1968?

2. Isn't it true that Mr. William Veeder played a major role in formulating the concept for this legislation and in its acutal drafting?

3. In last year's hearings on this legislation, Mr. Veeder testified in favor of the legislation and was questioned concerning the article he had written proposing a similar approach which had been republished by the Senate Judiciary Committee, sub-committee on Administrative Practices and Procedures.

Mr. Veeder stated that the complete response to the situation this bill is intended to meet was not just the creation of a separate agency to sue the Interior Department and others to protect the Indians and natural resource rights, His article said the complete step which should be taken would be to create a separate agency which would peform all of the trust duties of the United States including filing necessary lawsuits. The logic being, of course, that if the Interior Department does have these unresolvablable conflicts of interests, the Indian responsibility should be given to an agency which does not have such conflicts.

My question is:

(1) Why hasn't this concept been followed to its logical conclusion with a proposal to take the Indian trust duties as to natural resources now assigned to the Interior Department and transfer them to some other agency?

4. Why does this bill (sec. 9) grant a waiver of the sovereign immunity of the United States in the event a natural resource claim is filed by this independent trust counsel authority?

(a) Why should there be waiver only when it is filed by the Trust Counsel Authority but not if the lawsuite is filed by a private attorney chosen by the tribe.

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(b) If the Tribe, for some reason, doesn't want the Authority to represent it, or to have anything to do with it why should it be required by this Section to use the Authority in order to have the waiver of sovereign immunity available?

(c) Isn't this going to put a tribe at the mercy of the Authority so, say one tribe or one Indian wants to sue to overturn a decision in a court case, the Authority may have just obtained, the Authority can stall, delay filing, that case (or having it filed) or, even if it is filed, be less than diligent in moving ahead with it?

5. Under this bill, if a Tribe believes the Trust Counsel Authority will not or cannot properly represent it, will it be able to request the Justice Department to do so?

6. Section 8 says the Justice Department at the earliest date practicable is relieved of responsibility to represent Indian natural resource claims. Wouldn't it be fairer to the Indians to keep the Justice Department expertise available to them?

(a) If the Trust Counsel Authority should prove to be incompetent or unwilling, generally, or in regard to a specific instance, this Section would keep the Justice Department from stepping in to help the Indians with a case even if you request it, wouldn't it?

7. As you see it, who makes the decision under Section 8 that the time has been reached that the Trust Counsel responsibility begins and the Justice Department responsibility ends?

(a) Is it contemplated that both of these events would occur simultaneously or do you propose that there could be a transition period of indefinite length in which both the Trust Counsel Authority and the Justice Department have concurrent responsibility?

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8. In Line 1, page 5 it is stated that nothing in the Act absolves the Interior Department and the Justice Department of any responsibility, including trust responsibilities.

(a) How can Justice perform its responsibilities when the subsequent provision relieves it of representation of Indians?

(b) As to both Interior and Justice, how can either see to it that their trust duties are carried out insofar as necessary litigation is concerned when Section 7 specifically stipulates that no Executive Department shall exercise any control over the Authority?

(c) Nothing precludes the Trust Counsel from exercising authority over the Interior Department or the Justice Department. Isn't this, taken together with Section 7, an indication that the Authority may have such authority?

9. Would the President have control over the authority in the exercise of its functions?

10. As an example, Section 7 seems to mean the Authority would not be subject to the Environmental Policy Act, the Environmental Protection Agency created by Reorganization Plan No. 3 of July 9, 1970 pursuant to Chapter 9 of the U.S. Code and the duties each carries out.
Is there precedent for providing such exemptions to any other federally created body?

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11. Will the Trust Counsel Authority be subject to any control by the Office of Management and Budget?

12. In what ways has the conflict of interest in the Interior Department and the Justice Department prevented or delayed the proper treatment of Indians in the past?

13. Is it your position that the Bureau of Indian Affairs has not properly done its duty in taking necessary action to protect Indian natural resource rights or is it that other interests in the Department which are also concerned with natural resource interests on behalf of the entire United States, have prevailed. Or, would you say that the fault lies with the Justice Department?

14. In the administration of the Interior Department, the job of the Secretary, each day, I am sure, involves the consideration of "conflicts" between alternate courses of action and the resolution of those conflicts with the best information, pro and con, by coming to a decision. Just as an example, we know the Department has decisions to make involving the production of oil and gas from sources offshore of the United States. We know that on the one hand you are told that it is your duty to take whatever action within your power to assure this country of a continuing supply of energy without which much damage would be done such as no energy for hospitals.

On the other hand, we know you are told that the United States is the Trustee of the natural resources of our public lands, waters and oceans and it is your duty to see that they remain environmentally sound and in tact so that no offshore oil production should be permitted.

Litigation, of course, is a very real possibility in such cases and no matter which way your decision goes, when that litigation is filed you will still have duties and interests on both sides of the case. Those duties often involve treaties, laws that make you a trustee by charging you with responsibilities and make the lives of people dependent upon how your decisions.

My questions are:

(1) What is the logic which dictates that the duty you have to our Indian citizens will not permit you to make proper decisions concerning their natural resource claims including whether or not it is a matter which

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should be decided in Court by a referral to the Justice Department?

(2) If there must be an independent and separate agency to maintain litigation to preserve Indian natural resource claims why shouldn't there be such a body to preserve parks, wilderness areas, etc and independently represent the other responsibilities of the Department such as seeing to it that there is adequate water and energy for the country?

15. We recently held hearings on the administration's bill to extend the life of the Indian Claims Commission. In those hearings the Commission placed a large part of the responsibility for its failure to complete it's work on alleged failures of the Justice Department to proceed in an expeditious manner.
Do you agree?

16. Last year, the administration's bill for this Trust Counsel Authority specified that the Authority would not be involved in cases before the Indian Claims Commission.

This year's bill, however, modifies and really reverses, that provision (Sec. 10). It permits the Authority to enter into and take over the representation in any pending case before the Commission and, of course, there aren't supposed to be any cases remaining which are not pending as the cut off date for filing them has passed.

Would you please explain why this amendment was made?

17. This bill has an open ended appropriation authorization but it terminates the responsibility of the Justice Department regardless of whether the Authority has sufficient funds. What would happen to the Indian natural resource claims representation if the funds appropriated should not be sufficient?

(a) It is conceivable that if the Indians should tie up significant waters, lands or minerals in the country through the Authority that public pressure might demand a cut back of funds for the Authority isn't it?

(b) The Justice Department, on the other hand, doesn't get its funds for use in specified areas and it would be more difficult for Congress to "shut down" its Indian natural resources division wouldn't it?

(1) This has been a concern of the tribes, has it not?

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18. Please tell the Committee of the existing specific cases of which you now know in which the Administration believes this Trust Counsel Authority would initiate lawsuits, if Congress enacts this law? (Note: Also have him submit a complete list for the record.)

19. If this Trust Counsel Authority is created it will pretty well be incumbent upon it to file the lawsuits the Indians want filed won't it?

(a) It will be the advocate of the Indian's side of the case so if the Indians want to initiate a lawsuit to have Yellowstone National Park, the Colorado River, Manhattan Island, certain oil and gas reserves or any other natural resource declared to be theirs, the Authority is going to file it, isn't it?

(b) As a corollary, can you unequivocably state that the Interior Department and the Justice Department are going to vigorously defend all those cases at least where there are public lands waters and other natural resources involved?

(c) If not, who will represent the public?

(d) Mr. Secretary, nobody, or agency, (even if they are lawyers) is right 100% of the time and from what you say, the federal government hasn't been coming close to that in the past concerning Inidan natural resources. It is certainly possible therefore, that the Indians could now have some natural resources: land, water, minerals and so on, or the use of them which by all rights they shouldn't have and which should be part of the public domain.

My question is, if Congress creates this independent agency to vigorously persue these Indian natural resource claims, at your request, can we be assured that the rest of the American public will get the same sort of representation from the Interior Department, which is the custodian or trustee of the public resources as well as from the Justice Department, so that if any mistakes have been made in the past or are made in the future, we can expect them to be corrected, even if it means filing a lawsuite against a tribe or an Indian to get it accomplished?

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20. Mr. Secretary, to get to my next question, a hypothetical case, I think, would be helpful to see if this bill really is going to result in merely the open advocacy in Court of different positions with a decision based thereon as in other cases: Assume that a Tribe files a lawsuit against the United States Department of Defense to have it declared that part of a missile range or a military base belongs to the tribe. The Defense Department of course might not take kindly to that because attorneys are convinced the Defense Department title is clear.

Ordinarily, of course, there are court procedures whereby anybody suing the government claiming they own that land could have pertinent documents and data produced for inspection but in this case the Defense Department may find out that the Trust Counsel Authority is building the case of the tribe not from their own research and investigations but with the free full time assistance of personnel from the United States Geological Survey, from the General Services Administration and, perhaps, 10 or 20 other federal agencies. They may produce a pile of maps, charts and documents 50 feet high, all of which tend to show that the Indians do own the land. The Defense Department is convinced it is not true but it is forced to either give up the land or to devote the same amount of time and work to refute the case which is built.

My questions are:

(a) Isn't this what Section 11 (2) (as well as 11 (1)) permits?

(b) Is this going to be well received at the Defense Department?

(c) Because of the influence the Indian cause has, are the other agencies going to be able to turn down the requests for personnel data services and materials etc. which Section 11 (2) authorizes?

(d) The Defense Department is a big federal agency but how is a State, a county, a city or even private individuals going to be able to counter such a collection of resources to properly defend themselves?

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21. Do you agree with the principle of our Anglo Saxon system of jurisprudence that the difficulty, time and most of all, the expense of litigation is a deciding factor in keeping unfounded litigation from being filed and, thus, unnecessarily burdening others in the society from having to defend unnecessary litigation?

(a) What type of controls or safeguards does this bill contain to guarantee that the tribes and individual Indians will not be instituting non meritorious lawsuits?

(b) Doesn't the present system, even though the tribe's rights are represented without charge by the Justice Department, have controls in that the Interior Department and the Justice Department in the first instance, make a judgment as to whether requested litigation is meritorious before it is instituted?

(c) Why do you believe we can expect such an exercise of responsibility from an independent agency whose apparent primary function is to represent the tirbes in litigation or prospective litigation and won't the duration and status of those working for the Authority depend upon how much "business" it is doing?

22. Is the intent of the wording of Sections 8 and 9 to preclude a duty to provide legal respresentation from arising if a tribe, group or individual requests it -- I refer to the beginning language of those sections where the legal service and litigation duties are set out. Instead of beginning "at the request of ...", I would like to know why those sections begin: "The Authority with the consent of the tribe . . . is authorized" to provide those services?

(a) Is the true intent to make it the duty of this new agency to "hunt up" cases where legal services and litigation could be provided or filed and to go ahead with it subject only to getting the agreement of the tribe, individual Indian, etc.?

23. Why does Section 9 rule out jury trials?

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24. Don't the tribes have other sources of legal assistance besides the Justice Department such as OEO Legal Services, California, Legal Services, their own private attorneys, Legal Aid societies and so on and, if so, why isn't it better to rely on these resources?

(a) I have a November 17th Washington Post Article which I am placing in the record. It relates a new For Foundation grant to a program to represent Indian legal rights. The beginning grant is for $1.2 million dollars and the article goes on to relate that two thirds of the program funds are presently coming from federal sources. Can you tell me why this program will not be doing the same job as the Trust Counsel Authority?

(1) Isn't the Trust Counsel Authority going to serve to discourage private foundations etc. from using private funds to help with legal services, leaving this to the taxpayer instead.

25. Mr. Secretary are you aware of Title IX of S.2007 (O.E.O Extension bill) which recently passed both Houses of the Congress and is now in conference, which establishes the "National Legal Services Corporation" to provide free legal services to all segments of our society in need of them?

(a) It is my understanding that this Corporation will be available to Indians and will provide much the same benefits as are provided in the bill before this Committee. Why do we need another separate agency exclusively for Indians?

(b) As I understand it, the only way an Indian might not be eligible for the free services of that corporation would be if he should exceed its criteria relating to income and assets. If this is a possibility and you believe these services should be provided even if the Indian exceeds the eligibility criteria, wouldn't it be more administratively sound to have all free legal services being performed by ust one separate independent agency, rather than having a separate independent legal services corporation for Indians.

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26. Last year, after this Trust Counsel bill was submitted, the National Council on Indian Opportunity which has supported it and other administration bills, held "field hearings" on them. One of the complaints voiced by the Indians was that there had been no prior consultation with them. The Indians were told to submit their proposed changes and the bill would be amended for this Congress in order to reflect the desires of the tribes. What changes appear in this bill as a result of the requests and suggestions of the tribes?

(a) Were any not included and if so what were they?

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ANSWERS TO QUESTIONS IN SENATOR ALLOTT'S LETTER OF NOVEMBER 24, 1971

1. The concept of an independent legal body to protect the natural resources rights of Indians has been circulating in the Indian community for some time. This concept was the subject of some testimony in the hearings held by the first board of the National Council on Indian Opportunity. When discussion of a Presidential message on Indians was started, the NCIO, along with other agencies of the Government that had direct dealings with the Indian community, began to make recommendations as to the items that should be included in any such message. The job of coordinating the activities and recommendations for the Indian message was undertaken by the NCIO. The legislative package that followed the President's Indian Message was drafted in this Department. Included in the legislative proposals were recommendations and ideas from a number of sources, including resolutions from various Indian organizations, items taken from testimony before the NCIO, discussions with persons with contacts in the Indian community, and recommendations of the various Government departments and agencies.

2. Mr. Veeder did not draft the proposal on the Indian Trust Counsel or any of the other bills, but did play a role in the conceptualizing of some of them. In no sense, however, can this bill or any of the others in the package be considered the work of one man.

3. Placing the Indian trust responsibilities in another Federal agency would not alter the fact that ultimately any decision with regard to Indian resources must be consistent with the National interests. Even if all the trust responsibilities with regard to Indians were placed in a separate agency, that agency would still have to reconcile its decisions with regard to Indian rights with the general public welfare, and the Office of Management and Budget would have to insure that these decisions were consistent with the Administration's overall program, including the programs of bureaus in the Department of the Interior. Thus, the conflict of interests would simply be elevated from Interior to a higher level in the Federal Government. We do not believe that this would be in the Indians' best interest or that they would support it. There is an advantage of having conflicts surface at the ground level before the bureaucratic process has become too rigid and where the merits can be explored in greater detail. As a general rule, the higher up in the process a decision is made the narrower must be the focus. Issues must be streamlined and relevant detail is often left behind.

Our bill proposes to deal with the conflict of interests by providing independent advocacy of the Indians' position in court, where a final decision can be made. This, we feel, gives the Indians the best of both worlds, so to speak. To go any further than this, we believe, would simply create another conflict at another level of Government, and sacrifice the advantages of being in on the ground floor of the decision-making process.

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4. The reason for limiting the waiver of sovereign immunity in section 9 to actions in which the Trust Counsel is participating is to discourage frivolous suits. The Trust Counsel Authority will have the responsibility to act in the best interests of all Indians who have trust resource rights. Thus, we believe the Trust Counsel will channel its resources only into substantial claims and suits. Attorneys for individual tribes or Indians do not have a similar broad interest or responsibility, and sovereign immunity is retained as to them.

5. Section 8 of the bill declares that the Justice Department will be "relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources...". Assistant Attorney General Kashiwa's testimony has made it clear that Justice would not honor such a tribal request, pointing out that the very problem that the bill is designed to remedy would arise again if Justice took on such cases (Transcript of Hearings on the Indian Trust Counsel Authority, November 22, 1971, page 32).

6. This question was also addressed by Assistant Attorney General Kashiwa. Pointing out that to make the expertise of the Justice Department available to Indians would cause "the whole picture /to be/ clouded again" (transcript, page 32), he stated that the Trust Counsel Authority would be able to hire competent counsel who would develop Indian law expertise. I concur in Mr. Kashiwa's opinion and want to stress that insofar as possible, all vestiges of the present conflict of interest should be eliminated.

(a) I consider it highly unlikely that the Counsel would refuse to represent Indians in a bona fide non-frivolous claim, or that it would not be competent to do so. But I agree with Assistant Attorney General Kashiwa that the Department of Justice would not step in, since that would put us back where we are now.

7. I believe that the decision as to when authority is actually transferred should be made jointly by the Department of Justice, this Department, and the Trust Counsel Authority. The transfer should occur just as soon as the counsel is ready to operate, and I do not foresee a period of concurrent responsibility.

8. (a) The Justice Department presently has very few trust responsibilities to Indians other than that of legal representation. An example given in the testimony of Mr. Kashiwa (transcript, page 36) is advising the Secretary of the Interior in matters pertaining to Indian wills. The bill would not relieve Justice of such trust responsibilities as this.

(b) Since Justice will no longer be called on to litigate on behalf of Indian resource rights, where litigation is necessary to carry out an Interior trust responsibility, we will have to depend on the Trust Counsel for that.

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(c) Section 7 was inserted to protect the counsel from influence from the Executive Branch. I do not consider this an indication that the counsel can itself assert any control over the Executive Branch.

9. The answer to this question is simply "no". Section 7 is meant to exclude all Executive Branch control over the Counsel Authority save the normal budgetary considerations. However, it should be recalled that the members of the Board of Directors will be appointed by the President, with the advice and consent of the Senate.

10. Although the Act does not specifically exempt the Trust Counsel Authority from the provisions of NEPA, we do not believe that the Trust Counsel would be covered by the requirements of that Act. This is consistent with and follows from the position of this Department that the Federal Government, in its capacity as trustee for Indian resource rights, is no subject to the requirements of NEPA. Those resource rights are private rights. The sole task of the Trust Counsel would be the independent advocacy of those rights. This position is supported by a recent Federal District court decision in a case of first impression Davis v. Morton No. 9190, December 21, 1971, (DC N.M.). That decision held that the Secretary of the Interior's approval of a lease of Indian restricted land was not subject to NEPA, because among other things, the United States was acting as a fiduciary or guardian of the interests of the Indians.

11. As I indicated in answer to this question at the hearing, the Trust Counsel Authority will be subject to the budgetary control of the Office of Management and Budget, just like any administrative agency. However, OMB will not have any policy control over the Counsel because this would be at odds with the concept of independent representation and advocacy of Indians trust resources interests.

12. I believe that the answer to this question has been covered in the oral testimony. In addition, it is my understanding that the Department of Justice, with the assistance of officials of this Department, is preparing additional material for the record which will answer the question.

13. This bill is directed at overcoming a problem created by a conflict of interests, not a neglect of duty. The point is that the Department of the Interior and the Department of Justice are faced with conflicting duties. I would not say that any Bureau or Department is at fault. The "fault" is in the fact that the Federal Government has many responsibilities. The most serious impact of these conflicts is perhaps the credibility damage among Indians suffered as a result of them. Nor would I say that the other Bureaus have always prevailed. We have some very able and persuasive people in the Bureau of Indian Affairs. It is far from a weak sister in relation to the other Bureaus.

14. (a) This Department's trust responsibilities to Indians and our other responsibilities sometime conflict. I believe that the situation we are faced with has been best described by President Nixon in his July 8, 1970, Indian message, where he stated:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of

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extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

"Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in precisely this position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists."

(b) First, the United States has definite treaty obligations to Indians, a situation that does not obtain with respect to other responsibilities of this Department. One of the most important of these obligations is to protect Indian resource rights. Second, we believe it is quite appropriate that Indians be singled out for this separate treatment because, unlike resources, they have their own views as to how their future should be determined. The Trust Counsel will enhance the ability of the Indians to have their voices heard. This rationale does not apply to any other responsibility of this Department.

15. No. I believe that the primary reason for the failure of the Indian Claims Commission to complete its work has been that the claims it has heard have turned out to be far more complex than could have been anticipated. To my knowledge, the Department of Justice under this Administration has proceeded as expeditiously as possible.

16. This amendment was made because on reflection it seemed artificial to give the Trust Counsel Authority the responsibility of representing Indians in land and resource claims and yet to bar it from a forum where a great many of these claims are pending. We could see no sound reason for requiring the Trust Counsel to stay out of ICC claims in which the claimants wished to utilize the Counsel and the Counsel agreed that the matter was important enough to warrant its participation.

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17. If the funds appropriated for the Authority were not sufficient, it, like any other entity dependent on governmental appropriation, would have to reassess its priorities. The important thing is that Indians would make the decision for themselves as to what those priorities should be.

(a) The situation you describe is certainly conceivable. However, I would not expect the Congress to "punish" the Authority for carrying out its statutory responsibilities.

(b) The answer to both questions in this section is "yes". However, again, the Indians and I do not believe that Congress will attempt to undermine the Authority in this way.

18. The one specific case which we would anticipate the Trust Counsel Authority would take over is the matter of Pyramid Lake, upon which this Department and the Department of Justice have been working. The following is a list of relevant projects to be undertaken by this Department's new Indian Water Rights Office. Although we have no way of knowing for certain, we believe it is possible that one or another of these projects would germinate a suit by the Authority.

(a) studies of Indian water needs in the Central Arizona Project;

(b) study of effect of proposed reclamation project on Colville Reservation rights in the State of Washington;

(c) study of irrigable water uses on Chamokane Creek in the State of Washington on behalf of Spokane Reservation Indians;

(d) study of water uses on Jicarilla Reservation in New Mexico to determine effect of San Juan-Chama Reclamation Project;

(e) study of potential land and water uses on Wind River Reservation in Wyoming;

(f) study of ground water on the Yakima Reservation in the State of Washington.

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problem that pervades the entire range of law and one that unfortunately has no easy solution. Once again, however, it should be borne in mind that, as the President has stated, it is Indians who are generally the losers under the existing situation because their pleas do not reach the courts.

21. (a) and (b) As indicated in the answer to Question 19, I believe that there will be ample incentive for the Trust Counsel Authority to decline to take on frivolous claims. The incentive is that every man-hour spent on a claim that has no merit is a manhour lost to those claims that are substantial. I believe that this awareness on the part of the Counsel will constitute a deterrence to his accepting insubstantial claims. I think it very unlikely that the Counsel will squander his resources in non-meritorious actions.

(c) I think it is unrealistic to think that the Authority will have time to kill by pursuing frivolous claims. I am convinced that there will be more than enough solid "business" for the Authority to insure that its attorneys do not have to create work to justify their existence.

22. I can assure you that the intent of sections 8 and 9 is not to require or encourage the Authority to foment litigation. This is not to say that the Authority could not -- if, say, it discovered an unknown Indian claim or right in the course of its business -- suggest to a tribe that action might be taken. However, I expect that in most instances, the Counsel will be responding to Indians, not the other way around. Certainly the intent of the language in sections 8 and 9 is to assure that the Authority acts in consonance with the wishes of Indians, not to urge it to stir up litigation.

23. Traditionally, the jury system has worked best in resolving questions of fact involving conflicting evidence. It has worked less well in dealing with complex questions of mixed law and fact, in which category Indian trust resource rights surely fall. We believe that these issues can best be handled by judges in trials without jury and a great deal more expeditiously, which is in the interest of all parties concerned.

24. It is true that other agencies and private attorneys give legal aid to Indians, but this occurs in a rather unsystematic way: these agencies and groups have many other responsibilities and clients to take care of. We do not believe that the United States can depend on private groups to carry out Federal responsibilities to Indians.

(a) The specific programs and grants mentioned cannot do the same job as the Trust Counsel Authority because they are not able to sue the United States in its capacity as sovereign and thus cannot protect Indian trust resource rights.

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19. (a) This question comes down to this: will the Trust Counsel Authority prosecute frivolous suits for Indians? Initially, I think it is clear that, like any attorney, the Counsel does not have to take any given case -- he has the discretion to refuse frivolous suits and to concentrate on matters involving legitimate and significant disputes. Secondly, I believe that the Counsel will recognize a grave responsibility to utilize his resources in the best possible way. I believe that the realization that any resources committed to frivolous claims will simply detract from legitimate ones, with Indians the losers, will be sufficient insurance that those resources are used wisely.

(b) and (c) Yes, I can state this unequivocally.

(d) Again, the Department of the Interior will vigorously advance the public welfare with regard to natural resources, including taking steps to correct past mistakes that may have been made.

20. (a) Section 11 is a "permissive" section. It authorizes the Authority to make requests and authorizes Federal agencies to cooperate with the Authority "to the extent permitted by law". I do not think it likely that any agency would commit itself to "free full-time assistance" to the Counsel Authority simply because its limited resources would not permit this.

(b) Although I cannot speak on behalf of the Defense Department, I would expect that all Federal agencies would cooperate as far as possible with reasonable requests of the Authority.

(c) I am not sure what is meant by "the influence the Indian cause has." Certainly there is a growing awareness of the wrongs that have been done to Indians over the years. If this awareness will tend to make agencies sympathetic to Authority requests for information and assistance, I see nothing improper in this. If by the phrase is meant political clout, I am skeptical about the suggestion that Indians have a great deal of this.

(d) I do not believe that the Trust Counsel Authority is likely in any given case to have on overwhelming advantage of resources over the party it is opposing. The limited resources of the Authority will not permit it to present a massive array of legal artillery against, say, a small private landowner who is arguably encroaching on Indian rights. As for States and cities, I believe they would be fully capable of marshalling sufficient resources to match the Authority's commitment to any one case. In any event, I do not see any way to equalize the accidental disparities in legal representation that various groups or persons can obtain. It is a

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(b) It is possible that the existence of the Trust Counsel Authority will discourage private donations. However, it should be noted that the Counsel will act only in the area of trust resource rights. There are many other Indian legal interests as to which there will be no lack of incentive for foundation support. Moreover, the Trust Counsel Authority is authorized to accept donations of funds and services. Rather than discouraging private help, the Authority may in fact attract it.

25. In light of the fact that the President vetoed S. 2007 on December 9, 1971, I shall not address myself to its provisions in detail. I would reiterate that Indian trust resource rights are a unique matter, totally unrelated to income level, which was the basic qualifying factor for the assistance of the National Legal Services Corporation. Regardless of whether disadvantaged Indians, like other disadvantaged Americans, are eventually given the kind of legal aid that such a Corporation would provide, the Government's trust responsibilities with regard to the resources of all Indians should be carried out free of conflicting interests.

26. The following suggestions were made concerning the Trust Counsel bill at the National Council on Indian Opportunities field hearings:

(a) The Board of Directors should be composed of seven members rather than four;

(b) The President should appoint the Board members from lists of Indians provided by Indians;

(c) The requirement that two Board members be Indians should be made more specific: i.e., "Indians" should be defined as "enrolled members of federally recognized tribes";

(d) The manner in which conflicting requests for the Trust Counsel's assistance are handled should be clarified;

(e) Justice should not be released of all Indian trust resource obligations;

(f) Make adjustments in the waiver of sovereign immunity;

(g) Clarify Section 10, which limits the past claims that can be sued upon by the Trust Counsel.

(h) Other agencies should be required, not merely authorized, to cooperate with the Trust Counsel Authority's requests for information;

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(l) Delete that provision of the bill which authorizes the Trust Counsel Authority to charge fees to Indian clients.

Items d, e, g, and i are suggestions which we adopted and which are reflected in S. 2035.

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ATTENDANCE LIST--OTHER GUESTS--Cont.

from p. 7

Mr. Robert E. Cowley
General Manager
Dallas Manufacturing Plant

WICKES CORPORATION
Mr. Daniel M. Fitzgerald
Chairman and Chief Executive Officer

XEROX CORPORATION
General Charles T. Lanham (USA-Ret.)
Consultant to the President

GENERAL DYNAMICS CORPORATION
Mr. George G. Troutman
Assistant General Manager and Vice President
Washington, D.C.

Staff:

Mr. C. D. Ward
Assistant to the Vice President

Mr. Bob Robertson
Executive Director
National Council on Indian Opportunity

Mr. Dan McDonald
Assistant Executive Director
National Council on Indian Opportunity

Mr. Marsh Thompson
Office of the Vice President

Other guests:

Mr. J. Bradway Butler
Arnold & Porter

Mr. Myron P. Curzan
Arnold & Porter

Mr. Paul Driscoll
Plant Manager, Fairchild Corporation
Shiprock, New Mexico

Mr. V. Frandsen
Arizona Area Manager
William Lyon Development Company

Mr. Thomas D. Hinkleman
Vice President – Planning
Fairchild Camera & Equipment Company

Mr. Frederick M. Hoar
Vice President – Communications
Fairchild Camera and Equipment Company

Mr. Keith A. Johnson
Eastern Regional Manager
William Lyon Development Company



Attorney General John N. Mitchell as he spoke at Indian economic development meeting October 29.

REMARKS OF ATTORNEY GENERAL JOHN N. MITCHELL AT INDIAN ECONOMIC DEVELOPMENT MEETING OCTOBER 29

One of the contents of the Message of July 8, 1970, that the President sent to the Congress relating to Indian affairs had to do with the creation of an independent Indian Trust Counsel Authority.

As I am sure many of you know, a substantial number of the assets of the Indian tribes are lands held in trust for their benefit by the public by the United

(Continued on p. 9)

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REMARKS OF ATTY. GEN. MITCHELL--
Cont. from p. 8

States government. And this imposes a major responsibility upon the United States government to see that those lands are properly administered and that the rights of the Indians therein are fully protected.

This provided a very difficult problem for some of the government departments, particularly that of the Department of Justice, because when litigation arose in connection with these properties or the interests therein the Department of Justice was put in the area of conflict, having to represent the interests of the Indians on one side, and of course of the public and the United States government on the other side.

That, as the President said in his Message, is an untenable position that no good law firm would ever find itself in. Accordingly, the Department of the Interior sent to the last Congress, and Secretary Morton again to this Congress has submitted legislation for the purpose of creating the Indian Trust Counsel Authority which would provide independent legal ability entirely representative of the Indian interest.

This should have been done years ago and we are most helpful that the Congress will act on it speedily at this session.

The substantive changes, of course, will in addition to providing counsel in the matter, also bestow upon the Indian interest the right to sue the United States where their conflicting interests appear, and the legislation of course contains the necessary waiver of government immunity so that this may be carried out to the fullest extent and for the fullest advantage of the protection of the Indian rights.

We in the Justice Department fully support this legislation. We believe that our current position is untenable and regardless of the practice of bureaucracies in the past to maintain each and every vestige of power representation that they can, we in this particular case are glad to give it up.

We believe it is an important step forward and we would certainly hope that all of you here lend what effort you can in order to induce the Congress to pass this legislation and put it into effect so that the interests of the Indian tribes and the Indian people as such may be more fully protected henceforth.

REMARKS OF DR. C. LESTER HOGAN PRESIDENT, FAIRCHILD CAMERA AND INSTRUMENT COMPANY

Mr. Vice President--members of the Cabinet--distinguished guests: I'm delighted to be here today and appreciate this opportunity to discuss with you Fairchild Camera's business experience on the Navajo reservation in Shiprock, New Mexico.

We at Fairchild have grown to consider our work with the Navajo people much more than simply a business venture. It has been a cultural experience . . . and sometimes an emotional one as well. And while there have been problems, the rewards and satisfactions of Shiprock have far outweighed them. In 1965 and during the years immediately following, when Fairchild was building up its semiconductor assembly operations on the reservation, the project was often referred to as the "Shiprock experiment." Today the word "experiment" as it relates to Shiprock has disappeared from our vocabulary. In fact, our plant in New Mexico is now among the most productive and efficient of any Fairchild operation in the world.

Let me emphasize that my company does not--and cannot--take credit alone for this success. Our effort in Shiprock has, from the beginning, involved a working relationship between Fairchild, various Federal agencies, the Navajo Tribal Council, and--most important--residents of the Navajo community itself.

I'd like to divide my remarks this morning into two basic areas. First, I will give you a brief review of Fairchild's history at Shiprock--acknowledging our problems and detailing actions we have taken to solve them.

Then I will suggest the extent to which this experience points the way to opportunities which exist for all American industry to conduct profitable and productive programs on the nation's Indian reservations. The fact that the American Indian is today the fastest-growing minority group in the United States dictates that those of us in business give this bypassed segment of society our utmost attention.

My company's initial interest in establishing a plant at Shiprock--a decision made before I arrived, incidentally--was encouraged by an ample supply of workers there. Unemployment in the area was, as it still is, a critical problem.

The Fairchild story at Shiprock officially began in 1965 with a small pilot transistor assembly line employing some 50 persons. At the time, products were assembled in the Shiprock Community Center, made available to us by the Navajo Tribal Council.

We quickly learned, however, that Indian employees can readily adapt to relatively complex working conditions. And despite a number of cultural differences which I will discuss in a moment, the business results at Shiprock since 1965 have far surpassed the company's original objectives.

By 1968, our work force numbered 300 persons and the project had become so successful that--with the

(Continued on p. 10)

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United States Senate
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
WASHINGTON, D.C. 20510

November 24, 1971

Action Office OL
For info only
S-Hitt
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Honorable Rogers C. B. Morton
Secretary
Department of Interior
Washington, D. C. 20240

Dear Secretary Morton:

In your November 22nd appearance before the Indian Affairs Subcommittee of the Interior and Insular Affairs Committee, of which I am the ranking minority member, in regard to S. 2035, to establish an Indian Trust Counsel Authority, you agreed to answer in writing further questions of the minority members of the subcommittee. Those answers are to be included in the record of the hearing for consideration in connection with subsequent action.

I am, therefore, enclosing those questions herein.

I believe that several of these questions were asked at the hearing but you may further explain your answers if you wish.

In addition, I might tell you that at the conclusion of the hearings on November 23rd, the Subcommittee directed that the transcript of the hearings be submitted to you so that you may reply to each of the specific charges against your department which were made during the course of the hearings. The subcommittee further directed, at that time, that it receive comments from you on each of the recommendations for amendments to S. 2035 which were made during these hearings.

INTERIOR DEPT.

DEC 1 1971

LEGISLATIVE COUNSEL

CL-25586

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The hearing record will be held open for at least 30 days, therefore, please submit your responses to the Committee not later than December 21st so that they may be included in the hearing record. If you do not receive the transcript by a time sufficient for you to comply with the subcommittee's directive, please notify the Committee staff so that it can be made available to you.

Best regards.

Sincerely yours,

Gordon Allott

Gordon Allott
United States Senator

GA:jd
Enclosures

cc: Senator Jackson
Senator Anderson
Senator Fannin
Jerry Verkler
Attorney General John Mitchell

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QUESTIONS FOR INTERIOR DEPARTMENT WITNESSES:

1. Please explain the background of the proposed legislation, including the role of the National Council on Indian Opportunity beginning, I believe, in 1967 or 1968?

2. Isn't it true that Mr. William Veeder played a major role in formulating the concept for this legislation and in its acutal drafting?

3. In last year's hearings on this legislation, Mr. Veeder testified in favor of the legislation and was questioned concerning the article he had written proposing a similar approach which had been republished by the Senate Judiciary Committee, subcommittee on Administrative Practices and Procedures.

Mr. Veeder stated that the complete response to the situation this bill is intended to meet was not just the creation of a separate agency to sue the Interior Department and others to protect the Indians and natural resource rights, His article said the complete step which should be taken would be to create a separate agency which would peform all of the trust duties of the United States including filing necessary lawsuits. The logic being, of course, that if the Interior Department does have these unresolvablable conflicts of interests, the Indian responsibility should be given to an agency which does not have such conflicts.

My question is:

(1) Why hasn't this concept been followed to its logical conclusion with a proposal to take the Indian trust duties as to natural resources now assigned to the Interior Department and transfer them to some other agency?

4. Why does this bill (sec. 9) grant a waiver of the sovereign immunity of the United States in the event a natural resource claim is filed by this independent trust counsel authority?

(a) Why should there be waiver only when it is filed by the Trust Counsel Authority but not if the lawsuite is filed by a private attorney chosen by the tribe.

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(b) If the Tribe, for some reason, doesn't want the Authority to represent it, or to have anything to do with it why should it be required by this Section to use the Authority in order to have the waiver of sovereign immunity available?

(c) Isn't this going to put a tribe at the mercy of the Authority so, say one tribe or one Indian wants to sue to overturn a decision in a court case, the Authority may have just obtained, the Authority can stall, delay filing, that case (or having it filed) or, even if it is filed, be less than diligent in moving ahead with it?

5. Under this bill, if a Tribe believes the Trust Counsel Authority will not or cannot properly represent it, will it be able to request the Justice Department to do so?

6. Section 8 says the Justice Department at the earliest date practicable is relieved of responsibility to represent Indian natural resource claims. Wouldn't it be fairer to the Indians to keep the Justice Department expertise available to them?

(a) If the Trust Counsel Authority should prove to be incompetent or unwilling, generally, or in regard to a specific instance, this Section would keep the Justice Department from stepping in to help the Indians with a case even if you request it, wouldn't it?

7. As you see it, who makes the decision under Section 8 that the time has been reached that the Trust Counsel responsibility begins and the Justice Department responsibility ends?

(a) Is it contemplated that both of these events would occur simultaneously or do you propose that there could be a transition period of indefinite length in which both the Trust Counsel Authority and the Justice Department have concurrent responsibility?

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8. In Line 1, page 5 it is stated that nothing in the Act absolves the Interior Department and the Justice Department of any responsibility, including trust responsibilities.

(a) How can Justice perform its responsibilities when the subsequent provision relieves it of representation of Indians?

(b) As to both Interior and Justice, how can either see to it that their trust duties are carried out insofar as necessary litigation is concerned when Section 7 specifically stipulates that no Executive Department shall exercise any control over the Authority?

(c) Nothing precludes the Trust Counsel from exercising authority over the Interior Department or the Justice Department. Isn't this, taken together with Section 7, an indication that the Authority may have such authority?

9. Would the President have control over the authority in the exercise of its functions?

10. As an example, Section 7 seems to mean the Authority would not be subject to the Environmental Policy Act, the Environmental Protection Agency created by Reorganization Plan No. 3 of July 9, 1970 pursuant to Chapter 9 of the U.S. Code and the duties each carries out.
Is there precedent for providing such exemptions to any other federally created body?

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11. Will the Trust Counsel Authority be subject to any control by the Office of Management and Budget?

12. In what ways has the conflict of interest in the Interior Department and the Justice Department prevented or delayed the proper treatment of Indians in the past?

13. Is it your position that the Bureau of Indian Affairs has not properly done its duty in taking necessary action to protect Indian natural resource rights or is it that other interests in the Department which are also concerned with natural resource interests on behalf of the entire United States, have prevailed. Or, would you say that the fault lies with the Justice Department?

14. In the administration of the Interior Department, the job of the Secretary, each day, I am sure, involves the consideration of "conflicts" between alternate courses of action and the resolution of those conflicts with the best information, pro and con, by coming to a decision. Just as an example, we know the Department has decisions to make involving the production of oil and gas from sources offshore of the United States. We know that on the one hand you are told that it is your duty to take whatever action within your power to assure this country of a continuing supply of energy without which much damage would be done such as no energy for hospitals.

On the other hand, we know you are told that the United States is the Trustee of the natural resources of our public lands, waters and oceans and it is your duty to see that they remain environmentally sound and in tact so that no offshore oil production should be permitted.

Litigation, of course, is a very real possibility in such cases and no matter which way your decision goes, when that litigation is filed you will still have duties and interests on both sides of the case. Those duties often involve treaties, laws that make you a trustee by charging you with responsibilities and make the lives of people dependent upon how your decisions.

My questions are:

(1) What is the logic which dictates that the duty you have to our Indian citizens will not permit you to make proper decisions concerning their natural resource claims including whether or not it is a matter which

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should be decided in Court by a referral to the Justice Department?

(2) If there must be an independent and separate agency to maintain litigation to preserve Indian natural resource claims why shouldn't there be such a body to preserve parks, wilderness areas, etc and independently represent the other responsibilities of the Department such as seeing to it that there is adequate water and energy for the country?

15. We recently held hearings on the administration's bill to extend the life of the Indian Claims Commission. In those hearings the Commission placed a large part of the responsibility for its failure to complete it's work on alleged failures of the Justice Department to proceed in an expeditious manner.
Do you agree?

16. Last year, the administration's bill for this Trust Counsel Authority specified that the Authority would not be involved in cases before the Indian Claims Commission.

This year's bill, however, modifies and really reverses, that provision (Sec. 10). It permits the Authority to enter into and take over the representation in any pending case before the Commission and, of course, there aren't supposed to be any cases remaining which are not pending as the cut off date for filing them has passed.

Would you please explain why this amendment was made?

17. This bill has an open ended appropriation authorization but it terminates the responsibility of the Justice Department regardless of whether the Authority has sufficient funds. What would happen to the Indian natural resource claims representation if the funds appropriated should not be sufficient?

(a) It is conceivable that if the Indians should tie up significant waters, lands or minerals in the country through the Authority that public pressure might demand a cut back of funds for the Authority isn't it?

(b) The Justice Department, on the other hand, doesn't get its funds for use in specified areas and it would be more difficult for Congress to "shut down" its Indian natural resources division wouldn't it?

(1) This has been a concern of the tribes, has it not?

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18. Please tell the Committee of the existing specific cases of which you now know in which the Administration believes this Trust Counsel Authority would initiate lawsuits, if Congress enacts this law? (Note: Also have him submit a complete list for the record.)

19. If this Trust Counsel Authority is created it will pretty well be incumbent upon it to file the lawsuits the Indians want filed won't it?

(a) It will be the advocate of the Indian's side of the case so if the Indians want to initiate a lawsuit to have Yellowstone National Park, the Colorado River, Manhattan Island, certain oil and gas reserves or any other natural resource declared to be theirs, the Authority is going to file it, isn't it?

(b) As a corollary, can you unequivocably state that the Interior Department and the Justice Department are going to vigorously defend all those cases at least where there are public lands waters and other natural resources involved?

(c) If not, who will represent the public?

(d) Mr. Secretary, nobody, or agency, (even if they are lawyers) is right 100% of the time and from what you say, the federal government hasn't been coming close to that in the past concerning Inidan natural resources. It is certainly possible therefore, that the Indians could now have some natural resources: land, water, minerals and so on, or the use of them which by all rights they shouldn't have and which should be part of the public domain.

My question is, if Congress creates this independent agency to vigorously persue these Indian natural resource claims, at your request, can we be assured that the rest of the American public will get the same sort of representation from the Interior Department, which is the custodian or trustee of the public resources as well as from the Justice Department, so that if any mistakes have been made in the past or are made in the future, we can expect them to be corrected, even if it means filing a lawsuite against a tribe or an Indian to get it accomplished?

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20. Mr. Secretary, to get to my next question, a hypothetical case, I think, would be helpful to see if this bill really is going to result in merely the open advocacy in Court of different positions with a decision based thereon as in other cases: Assume that a Tribe files a lawsuit against the United States Department of Defense to have it declared that part of a missile range or a military base belongs to the tribe. The Defense Department of course might not take kindly to that because attorneys are convinced the Defense Department title is clear.

Ordinarily, of course, there are court procedures whereby anybody suing the government claiming they own that land could have pertinent documents and data produced for inspection but in this case the Defense Department may find out that the Trust Counsel Authority is building the case of the tribe not from their own research and investigations but with the free full time assistance of personnel from the United States Geological Survey, from the General Services Administration and, perhaps, 10 or 20 other federal agencies. They may produce a pile of maps, charts and documents 50 feet high, all of which tend to show that the Indians do own the land. The Defense Department is convinced it is not true but it is forced to either give up the land or to devote the same amount of time and work to refute the case which is built.

My questions are:

(a) Isn't this what Section 11 (2) (as well as 11 (1)) permits?

(b) Is this going to be well received at the Defense Department?

(c) Because of the influence the Indian cause has, are the other agencies going to be able to turn down the requests for personnel data services and materials etc. which Section 11 (2) authorizes?

(d) The Defense Department is a big federal agency but how is a State, a county, a city or even private individuals going to be able to counter such a collection of resources to properly defend themselves?

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21. Do you agree with the principle of our Anglo Saxon system of jurisprudence that the difficulty, time and most of all, the expense of litigation is a deciding factor in keeping unfounded litigation from being filed and, thus, unnecessarily burdening others in the society from having to defend unnecessary litigation?

(a) What type of controls or safeguards does this bill contain to guarantee that the tribes and individual Indians will not be instituting non meritorious lawsuits?

(b) Doesn't the present system, even though the tribe's rights are represented without charge by the Justice Department, have controls in that the Interior Department and the Justice Department in the first instance, make a judgment as to whether requested litigation is meritorious before it is instituted?

(c) Why do you believe we can expect such an exercise of responsibility from an independent agency whose apparent primary function is to represent the tirbes in litigation or prospective litigation and won't the duration and status of those working for the Authority depend upon how much "business" it is doing?

22. Is the intent of the wording of Sections 8 and 9 to preclude a duty to provide legal respresentation from arising if a tribe, group or individual requests it -- I refer to the beginning language of those sections where the legal service and litigation duties are set out. Instead of beginning "at the request of . . .", I would like to know why those sections begin: "The Authority with the consent of the tribe . . . is authorized" to provide those services?

(a) Is the true intent to make it the duty of this new agency to "hunt up" cases where legal services and litigation could be provided or filed and to go ahead with it subject only to getting the agreement of the tribe, individual Indian, etc.?

23. Why does Section 9 rule out jury trials?

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24. Don't the tribes have other sources of legal assistance besides the Justice Department such as OEO Legal Services, California, Legal Services, their own private attorneys, Legal Aid societies and so on and, if so, why isn't it better to rely on these resources?

(a) I have a November 17th Washington Post Article which I am placing in the record. It relates a new For Foundation grant to a program to represent Indian legal rights. The beginning grant is for $1.2 million dollars and the article goes on to relate that two thirds of the program funds are presently coming from federal sources. Can you tell me why this program will not be doing the same job as the Trust Counsel Authority?

(1) Isn't the Trust Counsel Authority going to serve to discourage private foundations etc. from using private funds to help with legal services, leaving this to the taxpayer instead.

25. Mr. Secretary are you aware of Title IX of S.2007 (O.E.O Extension bill) which recently passed both Houses of the Congress and is now in conference, which establishes the "National Legal Services Corporation" to provide free legal services to all segments of our society in need of them?

(a) It is my understanding that this Corporation will be available to Indians and will provide much the same benefits as are provided in the bill before this Committee. Why do we need another separate agency exclusively for Indians?

(b) As I understand it, the only way an Indian might not be eligible for the free services of that corporation would be if he should exceed its criteria relating to income and assets. If this is a possibility and you believe these services should be provided even if the Indian exceeds the eligibility criteria, wouldn't it be more administratively sound to have all free legal services being performed by ust one separate independent agency, rather than having a separate independent legal services corporation for Indians.

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26. Last year, after this Trust Counsel bill was submitted, the National Council on Indian Opportunity which has supported it and other administration bills, held "field hearings" on them. One of the complaints voiced by the Indians was that there had been no prior consultation with them. The Indians were told to submit their proposed changes and the bill would be amended for this Congress in order to reflect the desires of the tribes. What changes appear in this bill as a result of the requests and suggestions of the tribes?

(a) Were any not included and if so what were they?

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ANSWERS TO QUESTIONS IN SENATOR ALLOTT'S LETTER OF NOVEMBER 24, 1971

1. The concept of an independent legal body to protect the natural resources rights of Indians has been circulating in the Indian community for some time. This concept was the subject of some testimony in the hearings held by the first board of the National Council on Indian Opportunity. When discussion of a Presidential message on Indians was started, the NCIO, along with other agencies of the Government that had direct dealings with the Indian community, began to make recommendations as to the items that should be included in any such message. The job of coordinating the activities and recommendations for the Indian message was undertaken by the NCIO. The legislative package that followed the President's Indian Message was drafted in this Department. Included in the legislative proposals were recommendations and ideas from a number of sources, including resolutions from various Indian organizations, items taken from testimony before the NCIO, discussions with persons with contacts in the Indian community, and recommendations of the various Government departments and agencies.

2. Mr. Veeder did not draft the proposal on the Indian Trust Counsel or any of the other bills, but did play a role in the conceptualizing of some of them. In no sense, however, can this bill or any of the others in the package be considered the work of one man.

3. Placing the Indian trust responsibilities in another Federal agency would not alter the fact that ultimately any decision with regard to Indian resources must be consistent with the National interests. Even if all the trust responsibilities with regard to Indians were placed in a separate agency, that agency would still have to reconcile its decisions with regard to Indian rights with the general public welfare, and the Office of Management and Budget would have to insure that these decisions were consistent with the Administration's overall program, including the programs of bureaus in the Department of the Interior. Thus, the conflict of interests would simply be elevated from Interior to a higher level in the Federal Government. We do not believe that this would be in the Indians' best interest or that they would support it. There is an advantage of having conflicts surface at the ground level before the bureaucratic process has become too rigid and where the merits can be explored in greater detail. As a general rule, the higher up in the process a decision is made the narrower must be the focus. Issues must be streamlined and relevant detail is often left behind.

Our bill proposes to deal with the conflict of interests by providing independent advocacy of the Indians' position in court, where a final decision can be made. This, we feel, gives the Indians the best of both worlds, so to speak. To go any further than this, we believe, would simply create another conflict at another level of Government, and sacrifice the advantages of being in on the ground floor of the decision-making process.

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4. The reason for limiting the waiver of sovereign immunity in section 9 to actions in which the Trust Counsel is participating is to discourage frivolous suits. The Trust Counsel Authority will have the responsibility to act in the best interests of all Indians who have trust resource rights. Thus, we believe the Trust Counsel will channel its resources only into substantial claims and suits. Attorneys for individual tribes or Indians do not have a similar broad interest or responsibility, and sovereign immunity is retained as to them.

5. Section 8 of the bill declares that the Justice Department will be "relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources...". Assistant Attorney General Kashiwa's testimony has made it clear that Justice would not honor such a tribal request, pointing out that the very problem that the bill is designed to remedy would arise again if Justice took on such cases (Transcript of Hearings on the Indian Trust Counsel Authority, November 22, 1971, page 32).

6. This question was also addressed by Assistant Attorney General Kashiwa. Pointing out that to make the expertise of the Justice Department available to Indians would cause "the whole picture /to be/ clouded again" (transcript, page 32), he stated that the Trust Counsel Authority would be able to hire competent counsel who would develop Indian law expertise. I concur in Mr. Kashiwa's opinion and want to stress that insofar as possible, all vestiges of the present conflict of interest should be eliminated.

(a) I consider it highly unlikely that the Counsel would refuse to represent Indians in a bona fide non-frivolous claim, or that it would not be competent to do so. But I agree with Assistant Attorney General Kashiwa that the Department of Justice would not step in, since that would put us back where we are now.

7. I believe that the decision as to when authority is actually transferred should be made jointly by the Department of Justice, this Department, and the Trust Counsel Authority. The transfer should occur just as soon as the counsel is ready to operate, and I do not foresee a period of concurrent responsibility.

8. (a) The Justice Department presently has very few trust responsibilities to Indians other than that of legal representation. An example given in the testimony of Mr. Kashiwa (transcript, page 36) is advising the Secretary of the Interior in matters pertaining to Indian wills. The bill would not relieve Justice of such trust responsibilities as this.

(b) Since Justice will no longer be called on to litigate on behalf of Indian resource rights, where litigation is necessary to carry out an Interior trust responsibility, we will have to depend on the Trust Counsel for that.

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(c) Section 7 was inserted to protect the counsel from influence from the Executive Branch. I do not consider this an indication that the counsel can itself assert any control over the Executive Branch.

9. The answer to this question is simply "no". Section 7 is meant to exclude all Executive Branch control over the Counsel Authority save the normal budgetary considerations.

10. I do not believe there is precedent among other Federally created bodies for the exemption from the Environmental Policy Act that section 7 in effect provides. However, it should be remembered that no other Federally created body has as its sole task the independent representation of rights and interests. I believe that subordination of the Trust Counsel Authority to the restrictions of the EPA would be inconsistent with the goal of independent advocacy of Indian resource interests that we are seeking. Also, since the Trust Counsel Authority's functions will be to litigate and negotiate on behalf of Indians, not to make Executive policy recommendations or decisions, it does not seem out of place for the Authority to be freed from the restrictions of the EPA.

11. As I indicated in answer to this question at the hearing, the Trust Counsel Authority will be subject to the budgetary control of the Office of Management and Budget, just like any administrative agency. However, OMB will not have any policy control over the Counsel because this would be at odds with the concept of independent representation and advocacy of Indians trust resources interests.

12. I believe that the answer to this question has been covered in the oral testimony.

13. This bill is directed at overcoming a problem created by a conflict of interests, not a neglect of duty. The point is that the Department of the Interior and the Department of Justice are faced with conflicting duties. I would not say that any Bureau or Department is at fault. The "fault" is in the fact that the Federal Government has many responsibilities. Nor would I say that the other Bureaus have always prevailed. We have some very able and persuasive people in the Bureau of Indian Affairs. It is far from a weak sister in relation to the other Bureaus.

14. (a) It is not that we have conflicting duties vis-a-vis Indians. It is that our trust responsibilities to Indians and our other responsibilities sometime conflict. I believe that the situation we are faced with has been best described by President Nixon in his July 8, 1970, Indian message, where he stated:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of

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extensive legal despute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

"Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in precisely this position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists."

(b) First, the United States has definite treaty obligations to Indians, a situation that does not obtain with respect to other responsibilities of this Department. One of the most important of these obligations is to protect Indian resource rights. Second, we believe it is quite appropriate that Indians be singled out for this separate treatment because, unlike resources, they have their own views as to how their future should be determined. The Trust Counsel will enhanve the ability of the Indians to have their voices heard. This rationale does not apply to any other responsibility of this Department.

15. No. I believe that the primary reason for the failure of the Indian Claims Commission to complete its work has been that the claims it has heard have turned out to be far more complex than could have been anticipated. To my knowledge, the Department of Justice under this Administration has proceeded as expeditiously as possible.

16. This amendment was made because on reflection it seemed artificial to give the Trust Counsel Authority the responsibility of representing Indians in land and resource claims and yet to bar it from a forum where a great many of these claims are pending. We could see no sound reason for requiring the Trust Counsel to stay out of ICC claims in which the claimants wished to utilize the Counsel and the Counsel agreed that the matter was important enough to warrant its participation.

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17. If the funds appropriated for the Authority were not sufficient, it, like any other entity dependent on governmental appropriation, would have to reassess its priorities. The important thing is that Indians would make the decision for themselves as to what those priorities should be.

(a) The situation you describe is certainly conceivable. However, I would not expect the Congress to "punish" the Authority for carrying out its statutory responsibilities.

(b) The answer to both questions in this section is "yes". However, again, the Indians and I do not believe that Congress will attempt to undermine the Authority in this way.

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19. (a) This question comes down to this: will the Trust Counsel Authority prosecute frivolous suits for Indians? Initially, I think it is clear that, like any attorney, the Counsel does not have to take any given case -- he has the discretion to refuse frivolous suits and to concentrate on matters involving legitimate and significant disputes. Secondly, I believe that the Counsel will recognize a grave responsibility to utilize his resources in the best possible way. I believe that the realization that any resources committed to frivolous claims will simply detract from legitimate ones, with Indians the losers, will be sufficient insurance that those resources are used wisely. the ones cited are frivolous

(b) and (c) Yes, I can state this unequivocally.

(d) Again, the Department of the Interior will vigorously advance the public welfare with regard to natural resources, including taking steps to correct past mistakes that may have been made. ^ get views with Lamt

20. (a) Section 11 is a "permissive" section. It authorizes the Authority to make requests and authorizes Federal agencies to cooperate with the Authority "to the extent permitted by law". I do not think it likely that any agency would commit itself to "free full-time assistance" to the Counsel Authority simply because its limited resources would not permit this.

(b) Although I cannot speak on behalf of the Defense Department, I would expect that all Federal agencies would cooperate as far as possible with reasonable requests of the Authority.

(c) I am not sure what is meant by "the influence the Indian cause has." Certainly there is a growing awareness of the wrongs that have been done to Indians over the years. If this awareness will tend to make agencies sympathetic to Authority requests for information and assistance, I see nothing improper in this. If by the phrase is meant political clout, I am skeptical about the suggestion that Indians have a great deal of this.

(d) I do not believe that the Trust Counsel Authority is likely in any given case to have on overwhelming advantage of resources over the party it is opposing. The limited resources of the Authority will not permit it to present a massive array of legal artillery against, say, a small private landowner who is arguably encroaching on Indian rights. As for States and cities, I believe they would be fully capable of marshalling sufficient resources to match the Authority's commitment in any one case. In any event, I do not see any way to equalize the accidental disparities in legal representation that various groups or persons can obtain. It is a

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problem that pervades the entire range of law and one that unfortunately has no easy solution. On this point the Indians, as the President said, have been the losers because they plain have not reached the courts at all.

21. (a) and (b) As indicated in the answer to Question 19, I believe that there will be ample incentive for the Trust Counsel Authority to decline to take on frivolous claims. The incentive is that every manhour spent on a claim that has no merit is a manhour lost to those claims that are substantial. I believe that ~~the~~ the knowledge on the part of "~~conscience~~" of the Counsel, ~~if you will~~, will ~~replace the normal~~ constitute deterrent to acceptance of unsubstantial claims. ~~Since the Counsel will be chosen by and beholden to Indians,~~ I think it very unlikely that he will squander his resources in non-meritorious actions.

(c) I think it is unrealistic to think that the Authority will have time to kill by pursuing frivolous claims. I am convinced that there will be more than enough solid "business" for the Authority to insure that its attorneys do not have to create work to justify their existence.

22. I can assure you that the intent of sections 8 and 9 is not to require or encourage the Authority to foment litigation. This is not to say that the Authority could not -- if, say, it discovered an unknown Indian claim or right in the course of its business -- suggest to a tribe that action might be taken. However, I expect that in most instances, the Counsel will be responding to Indians, not the other way around. Certainly the intent of the language in sections 8 and 9 is to assure that the Authority acts in consanance with the wishes of Indians, not to urge it to stir up litigation.

23. Traditionally, the jury system has worked best in resolving questions of fact involving conflicting evidence. It has worked less well in dealing with complex questions of law ~~and fact~~, in which category Indian trust resource rights surely fall. We believe that these issues can best be handled by judges in trials without jury and a great deal more expeditiously, which is in the interests of all parties concerned.

24. It is true that other agencies and private attorneys give legal aid to Indians, but this occurs in a rather unsystematic way: these agencies and groups have many other responsibilities and clients to take care of. We do not believe that the United States can depend on private groups to carry out Federal responsibilities to Indians.

(a) The specific programs and grants mentioned cannot do the same job as the Trust Counsel Authority because they are not able to sue the United States in its capacity as sovereign and this cannot protect Indian trust resource rights.

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(b) It is possible that the existence of the Trust Counsel Authority will discourage private donations. However, it should be noted that the Counsel will act only in the area of trust resource rights. There are many other Indian legal interests as to which there will be no lack of incentive for foundation support. Moreover, the Trust Counsel Authority is authorized to accept donations of funds and services. Rather than discouraging private help, the Authority may in fact attract it.

25. In light of the fact that the President vetoed S. 2007 on December 9, 1971, I shall not address myself to its provisions in detail. I would reiterate that Indian trust resource rights are a unique matter, totally unrelated to income level, which was the basic qualifying factor for the assistance of the National Legal Services Corporation. Regardless of whether disadvantaged Indians, like other disadvantaged Americans, are eventually given the kind of legal aid that such a Corporation would provide, the Government's trust responsibilities with regard to the resources of all Indians should be carried out free of conflicting interests.

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Lawyers on the Reservation: Some Implications for the Legal Profession

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Lawyers on the Reservation: Some Implications for the Legal Profession

Among the many projects of the Office of Economic Opportunity has been the provision of legal services for Indian reservations. The position of the lawyer on a reservation is much different from that of the lawyer for the urban poor, both because of the Indian culture and because of the vast potential and actual natural resources held by Indians. Professor Price, who is closely connected with California Indian Legal Services, examines the program and some of its unique cultural problems and obstacles. He then discusses the proper role of the legal services lawyer on the reservation and concludes that he must assist as architect in helping to define and to effect economic development of the reservation's resources.

Monroe E. Price*

This is an essay on a tiny corner of the legal profession, a small but growing band of lawyers financed by the Office of Economic Opportunity to provide legal services for American Indians. But, as is sometimes the case, a part can illuminate the whole; and here, in the hot house of the reservation context, important questions about the law and lawyers can be treated in a comparative way within a domestic setting. The experience of the OEO lawyers provides some insight into the relationship between law and economic development and also into the role of a lawyer where there is substantial social and institutional change.

The lawyers, about 40 in number, are distributed throughout the country: there are OEO programs at the Choctaw Reservation in Philadelphia, Mississippi; at Cheyenne River, Crow Creek,

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and Rosebud in South Dakota; at Zuni Pueblo in New Mexico, Papago and Navajo in Arizona, Wind River in Wyoming; and in a statewide program in California. In addition, the Alaska, Montana, and Wisconsin statewide OEO programs have a heavy Indian emphasis. These OEO lawyers have been at large in a setting where the major question is the creation of a climate where the tribal governments, long blighted, weakened by heavy-handed intervention and by an intolerably ambiguous role, are beginning to show signs of health and strength. The lawyers are in an environment where the tools of a legal system designed to assist in the representation of individuals against one another or against the state may not contribute, and may in fact conflict, with OEO's primary strategy of hastening the process of tribal development and independence. The activities of these lawyers, the cases they bring, and the difficulties they face provide opportunities for analysis of long-standing problems from a new perspective. In some ways, the lawyers in the legal services programs have represented a significant infusion of new influences into a closed society composed of government officials and Indians.

It would be repetitious in this article to include the usual litany of statistics about the conditions of poverty among American Indians. There is general agreement on the matter.[1] Yet a few introductory words about the legal systems involved will be helpful. We expect that the relationship between government and citizenry is normally controlled by systematized law, at least in theory, and this has been true – also in theory – of the relationships between the federal government and the tribe and between the federal government and the individual Indian.[2] Indeed, the spillover or hang-

1. *See generally* COMMISSION ON THE RIGHTS, LIBERTIES, & RESPONSIBILITIES OF THE AMERICAN INDIAN, REPORT: THE INDIAN: AMERICA'S UNFINISHED BUSINESS 67-72, 138-41, 159-70 (W. Brophy & S. Aberle eds. 1966).

2. The best justification of United States policy towards Indians as consistent with a rule of law is contained in Felix Cohen's collection of essays, THE LEGAL CONSCIENCE (1953). While Cohen's views will always remain a landmark contribution to the understanding of American Indian legal history, it is time for an attempt at revisionism. As a crusader for increased justice, Felix Cohen sought to build on what he perceived to be a consistent strain of fair dealings (with unfortunate aberrations) beginning with the Northwest Ordinance of 1787, Ch. 8, 1 Stat. 50. It is possible, however, that the unfortunate aberrations were the rule and the fair dealings the exception.

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over of this lengthly relationship is a mountain of dusty regulations, obsolete doctrine, unique theories of supervision, and subtle and pervasive over-regulation and dependence. Because the very existence of Indian organizations is now dependent on the pleasure of Congress, law has taken on a role in the life of Indians that it has thankfully not assumed over the life of almost any other group except for those involved in subversive activities. The government's power is of life and death dimensions. When Congress, in a fit of rancor, decides there shall be no more Menominee Tribe, then it can, as it did in 1954, alter Menominee existence;[3] if it thinks that the small pieces of land set aside in California have served their purposes and should now be distributed in a way that will make the land (if not its owners) come into the mainstream of American society, it can unilaterally do so.[4] And the draconian power of law stretches far beyond the land. If the Congress decides that the internal law administered by the tribal authorities is not good enough for American citizens, it can decree that those laws will be of no effect unless they comport with federal standards or are approved by the Secretary of Interior. The Secretary of Interior, through his minions, intervenes in the activities of reservation governments and individual decisions in intimate and debilitating ways.[5]

What all this power means is that the legal system, as a whole, has done exactly what law is usually intended to prevent: it has contributed uncertainty and provided an abrasive influence. It has been invoked as a weapon of denial – the agent of the Bureau of Indian Affairs decreeing what a group of people cannot do, what action it cannot take.[6] In that sense, it has impeded the develop-

3. Menominee Termination Act of 1954, 68 Stat. 250, *as amended*, 25 U.S.C. §§ 891-902 (1964).

4. *See, e.g.*, the Rancheria Act of 1958, Pub. L. No. 85-671, 72 Stat. 619, which governed the mechanism for dissolving certain Indian land collectives in California. The most expansive legislation governing internal tribal organization is the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1964).

5. *See, e.g.*, 25 C.F.R. pt. 52 (1969).

6. Reported authority on the spirit of negativism is sparse, but examples abound. Local agents tell the Indian governments what laws they cannot pass, what rights they do not have, what trust moneys they cannot reach. The most tangible evidence of negativism is the recurring theme in presidential and secretarial statements declaring a "new way," allowing Indians

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ment of political organization. Federal law has also damaged the normal growth of relationships between persons because of its definitions of crimes, its scheme of remedies, and its establishment of status, for it has been the legal system of an alien culture, imposing rules about behavior that may have been at odds with customary practice.[7] If the genius of the common law at large has been its ability through slow growth to conform ideals to societal mores, then that genius has not had a chance to flourish in the reservation setting; the goal, virtually from the beginning, was to use law to mold behavior – to make Indians more like white men – rather than to make a law that codified or respected behavior.[8]

This history accounts, in large part, for what might be called the rustiness of the legal process. A principal feature of the legal system has been the fact that the usual adversary, the Bureau of Indian Affairs, is unused to combat and, as a consequence, does not always respond in the expected fashion. For example, when a lawyer for a small tribe called a local official of the Bureau in California to protest a decision, the official suggested that he did not have to talk to the lawyer; it was the official, and not the attorney, who had the best interests of the Indians at heart. Because the Bureau officials have matured in a system that is colonial and not adversary, they have difficulty in summoning forth the appropriate response. When an Internal Revenue Service agent calls, a lawyer can attempt to explain what lies at the base of the misunderstanding. There may be an argument between the two, but areas of disagreement will emerge and the scope of the contest will be virtually certain. Furthermore, there is a general awareness of when the process of informal tug and pull and appeal has ended and formal steps must be taken. And the lawyer has some idea of the formal steps within the government hierarchy before

to control their own destinies. Candidate Nixon, in a speech given October 9, 1968, for example, said "I will see to it that local programs and federal budgets are operated with minimum bureaucratic restraint and in full consultation with the Indian people who should achieve increasing authority and responsibility over programs affecting them."

7. *See, e.g.*, R. BRANDT, HOPI ETHICS: A THEORETICAL ANALYSIS 200-01 (1954); Van Valkenburgh, *Navajo Common Law*, III MUSEUM NOTES (Museum of N. Ariz.) 39 (1938).

8. *See* United States v. Clapox, 35 F. 575 (D. Ore. 1888).

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a court action will ensue.

In the Indian context, this structuring aspect of potential litigation is absent. There is rarely a concept of time, a concept of the limits of regulation, or a concept of meaningful response. The "Secretary's discretion" becomes the rallying point for any kind of action, no matter how unwarranted. And at the lower levels of the service, each agent tries to protect his decision or lack of decision by delay. Reservations, by and large, are scarred with unsolved legal matters. Title to land is littered with unanswered questions. The lawyer faces the maddening prospect of educating his adversary to the meaning of dealing with citizens who have attorneys. Bureau officials have trained their Indian wards to accept, almost without question, their statements. The "law" has been a distant force that sanctified their decisions rather than one that could place limits upon them.[9] Examples are legion. In land management, in education, in every field the problem is the same. The local agent has had unlimited power without meaningful challenge to his exercise of discretion. As a consequence, he has forgotten that there are boundaries placed by law on his conduct and his decisions. The relationship is colonial in that sense.

9. A California reservation that sought a license to sell beer on fiesta days asked secretarial approval of an ordinance that would limit the sale to specified parts of the reservation. The Bureau official claimed that only a wholesale lifting of prohibition would be approved, and as a consequence, he refused to pass the ordinance to the next highest office. In defense of his position, he invoked his superior knowledge of departmental regulations. A challenge by an attorney produced no better results; only by an appeal directly to the Secretary of Interior could the application be dislodged from the local official's desk.

The maddening slowness of the process is even present in criminal prosecutions. In a recent case on the Choctaw reservation, the body of a Choctaw woman was found near the house at an RCA Training Center. Soon thereafter, her husband, also a Choctaw, was arrested by Sheriff's deputies of Neshoba County, Mississippi, where the reservation is located. It is fairly clear that the state did not have jurisdiction to prosecute if the murder took place on the reservation, and it was clear to all that the murder did in fact take place near the reservation. Yet the federal government – in this case the United States Attorney – sought a survey of the land before he would accept jurisdiction, and the state took the position that they would not drop prosecution until the federal government moved in. For two months, the federal government moved the case back and forth between the Department of Interior and the Department of Justice while the defendant sat in the Neshoba County Jail. Finally, the OEO-funded lawyer filed an action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), to obtain his client's release.

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I. THE LAWYER AND THE TRIBE

The principal characteristic of the environment faced by the lawyer on the Indian reservation is the tenuously constructed, unsure tribal organization. For the smaller reservations, there may be virtually no organization at all; factionalism may be rampant, leading to an inability to build a constitutional structure.[10] On the larger reservations, the problems are more predictable. The governments are inadequately funded, and the leaders, with outstanding exceptions, suffer from lack of experience and education. They are, moreover, under great pressure. The revolution of rising expectations is just about to come to the reservation, and tribal governments have started to feel the momentum for change. The long tradition, partly cultural, partly encouraged by the Bureau, that it was not right for Indians to picket and demonstrate, to be uncivil like "other" minority groups, is beginning to be shattered.[11] Furthermore, the lands where the reservations are located – no matter how poor at the time of investiture – are now starting to fall in the suburbs of cities, along freeways, near airport sites, and are becoming potentially valuable in numerous other ways. Consequently, there are great questions about the direction to be taken in land use, and because land use and culture are so closely related, the new debate has intensified friction between traditionalists and less traditional groups on the reservation.

The tribal governments, then, find themselves beseiged by prob-

10. There are a number of sources for the difficulty in constitution-making, and not the least of them has been the conflicting directions for Indian development proffered by the United States. Division of the land into small individual holdings has created attitudes that conflict with attitudes of those who would rather see the preservation of the land as an entity. The policy of lumping distinct Indian groups on a single reservation – as on the Colorado River Reservation in Arizona and California and on the Rocky Boy Reservation in Montana – also contributes to the difficulty. Disputes about enrollment of members, as on the San Pasquale Reservation in Southern California, produce sharp and intense conflict that lasts over many decades. And the demand for a constitutional structure, which means the binding quality of a majority vote, often yields an embittered minority.

11. The National Congress of American Indians disassociated itself from the Poor People's March on Washington partly because of a commitment to change through the normal processes of appeal; on the other hand, groups such as the National Indian Youth Council and the fish-in protesters in the state of Washington have been more sympathetic toward demonstration methods.

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lems at a time when many still have feelings of inferiority and dependence, and the prospect they face is for more severe problems in the future. The potential for internal conflict is especially evident in three areas: (a) the division of resources; (b) the political process of the tribe; and (c) the administration of justice. In resource allocation, the Oglala Sioux of Pine Ridge, South Dakota, passed an ordinance several years ago that would have changed the system of allocating grazing permits to give a significant preference to members of the tribe with at least one-quarter blood quantum.[12] Other members who held substantial cattle interests complained bitterly and alleged that the council action was discriminatory. Their position, which implied constitutional limits to tribal action, was favorably viewed by the Secretary of the Interior, who disapproved the tribal ordinance.[13] More generally, where there is now a substantial off-reservation population (such as at the Yakima Reservation in Washington), there are frequent charges that the tribal leadership favors the on-reservation group in the disbursement of income or reserves for capital improvement.[14] An example of the potential for political conflict is the method for selecting tribal council members. Reservations are often fragmented into chapters or other political subdivisions from which represen-

12. Oglala Sioux Tribe of Pine Ridge Resolution 67-3. Grazing land is a major resource of the reservation, an expanse of land about 5,000 square miles in southwest South Dakota. The decision concerning the terms and conditions of leases of the land have been a consistent issue in elections for the tribal council that has the principal authority. *See* Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1827 (1968).

13. The Assistant Secretary of the Interior wrote the tribal attorney that "the relation a blood factor bears to the qualifications of members of the tribe is not apparent; and no showing has been made that blood degree classification relates to qualifications for a grazing allocation. . . ." The Department sloughed off the argument that the federal government establishes blood quantum tests for determining entitlement to federal benefits such as attendance at Bureau of Indian Affairs schools. The Assistant Secretary relied on Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), to support his argument. *See* M. PRICE, AMERICAN INDIAN LEGAL PROBLEMS: CASES AND MATERIALS ch. I, at 79-82 (tent. mimeo. ed. 1968).

14. It was pressure from off-reservation groups that persuaded the Secretary of Interior to include in the ill-fated Omnibus Bill of 1967 a section that would authorize tribes to vote to distribute shares of commonly-held assets to individuals who wished to withdraw their interest in the reservation. The section would have been divisive and destructive because of its incentive for increased fragmentation, but the bill did not prosper in Congress.

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tatives are selected. It may be that the system of apportionment, as in the Cheyenne River Reservation, is so unfair that by almost any standard the scheme raises serious constitutional questions.[15] In the administration of justice, conflict between individual and group arises where the tribe and the tribal judiciary seek to keep professional attorneys out of the litigative process.[16]

These conflicts between individual and tribe, often affecting the future course of political leadership and economic development, have presented the young OEO lawyers on the reservations with frequent dilemmas. They have been hired, ostensibly, to protect the interest of individual Indians who qualify for service; under a predominant view of their responsibility, they have little right to discriminate among appropriate applicants for their services. Yet in the reservation context, where the lawyer is a particularly important figure, where there may be few other non-Indians who are not connected with the Bureau of Indian Affairs or the Public Health Service, they can scarcely help having some important influence on the existing tribal structure. They must make subtle decisions concerning how much to attack and how much to support the present structure. They must decide how much to identify with the present leadership and strengthen it and how much time to devote to those who seek change. They must determine how much effort to devote to building the social organization and how much effort to devote to the servicing of the needs of individuals.

To suggest the difficulty of these problems in greater detail, I will discuss two fairly current matters. The first issue involves the recently passed Civil Rights Act of 1968, the "right to counsel" requirement, and its relationship to the tribe. The second is the crisis-

15. The tribal council may be selected with one representative from each particular culture group or historical band on the reservation, regardless of numerical representation. It would be interesting to see if the reservations are a haven from the ferocity of the one-man one-vote rule. The question, of course, has not yet arisen; but the passage of the Rights of Indians title to the Civil Rights Act of 1968, 25 U.S.C.A. §§ 1301-03 (1968), suggests that the equal protection standard of Reynolds v. Sims, 377 U.S. 533 (1964), could be made applicable.

16. The Navajo tribe is currently engaged in a serious dispute on this issue, primarily involving the impact of the Civil Rights Act of 1968 on a tribal rule that prohibited lawyers from practicing in tribal courts. *See* pp. 169-75, *infra*.

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filled history of the largest Indian legal service program in the country, the Navajos' DNA.[17]

A. The Civil Rights Act and the Right to Counsel

Title II of the Civil Rights Act of 1968[18] sets forth a series of standards to govern the powers of the tribal councils and tribal courts. Heralded as a "Bill of Rights for Indians," it was the culmination of a long effort by Senator Sam Ervin of North Carolina. Senator Ervin's subcommittee on constitutional rights had determined that "one of the most serious inadequacies of tribal government arises from its failure to conform to traditional safeguards which apply to State and Federal Action."[19]

In addition to other important standards, the Act requires by section 202(6) that "No Indian tribe . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense." On the surface, this seems a simple and logical requirement and one that should be implemented immediately.[20] The meaning seems fairly clear, and an OEO-funded lawyer on a reservation, representing a client con-

17. The Navajo Tribe has approved a plan for hiring a professional attorney as a tribal prosecutor. DNA stands for Dinebeiina Nahiilna be Agaditahe, which means "Program for the Economic Revitalization of the People." The name was suggested by a Navajo member of the Board of Directors.

18. 25 U.S.C.A. §§ 1301-03 (1968).

19. Subcomm. on Constitutional Rights of Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Report 1 (1964).

20. Of course, there are serious questions as to the scope of the right to counsel generally, particularly in the area where a misdemeanor might involve a serious punishment. At the present time, the tribal courts do not take criminal jurisdiction over serious offenses, which are prosecuted by the federal government under the Major Crimes Act, 18 U.S.C. § 1153 (1964). But some feel that the criminal jurisdiction over serious crimes may be concurrent. *See* Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 Ariz. L. Rev. 62, 89 (1959), an excellent article. If the jurisdiction is concurrent, and if the Indian tribes were to exercise their power, then there would certainly be problems in that aspect of the Civil Rights Act of 1968 that promises an attorney only at the Indian defendant's "own expense." Assuming that the federal government has sole jurisdiction over serious offenses, the statute can be read as giving Indian defendants merely the opportunity to hire counsel in any criminal case including misdemeanors. Needless to say, the fundamental question, both before and after the passage of the Rights of Indians sections of the Civil Rights Act of 1968, is whether the *real* Bill of Rights applies to the acts of tribal governments either as instrumentalities of the federal government or through the fourteenth amendment. *See, e.g.*, Colliflower v. Garland, 342

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victed of a crime in tribal court, would seem to have no choice but to challenge any reservation rule that did not permit a lawyer to appear in a criminal prosecution. But let us assume the following circumstances: The reservation has a rule, passed by the tribal council, prohibiting professional attorneys from appearing in tribal courts. The tribal judges are not lawyers, and they do not have an extensive formal education, but they are wise and good judges who have developed techniques for seeking a just solution that may be sharply different from the techniques of the normal adversary process.[21] Moreover, there may be a cadre of tribal members — almost professional — who appear in the courts as advocates, who have some training and experience, but who are not lawyers. (Indeed, several of the OEO-funded programs are expanding and professionalizing such lay counsel for more effective representation in the tribal courts.) Furthermore, there probably is no prosecutor in the courts to purify through contest the contentions of defense counsel, nor is there money in the tribal coffers to expand the system by hiring a prosecuting attorney.

Those are the first level contextual problems that a tribe faces with section 202(6). But there are more subtle issues, too. The provision guarantees counsel (at defendant's expense) only in "criminal prosecutions." It is only clear that there are "criminal prosecutions" by the Indian Courts because of terms and practices that have been imposed from the outside. We may start with the easy assumption that there has to be some system of dispute settling, and some of the settlements must involve the imposition of certain sanctions. Yet the customary approach in many Indian settings was far richer in the range of sanctions, in the choice of alternatives, than was the non-Indian equivalent. Indeed,

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F.2d 369 (9th Cir. 1965); Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RES. J. 581 (1966); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

21. The best expositions of the judicial systems of the reservations are to be found in various cases that deal with the powers of the courts. *See, e.g.*, Colliflower v. Garland, *supra* note 20; Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15 (D.S.D. 1955); Application of Jimerson, 4 Misc. 2d 1028, 255 N.Y.S.2d 627 (Sup. Ct. 1963), *aff'd* 22 App. Div. 2d 417, 255 N.Y.S.2d 959 (1965). *See also* Lednicer, *The Peacemaker Court in New York State*, 14 N.Y.U. INTRA. L. REV. 189 (1959).

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even at present, as Mary Shepardson has documented, there are nonformal methods of dispute settling in the interior of the Navajo reservation in cases that we would call "criminal."[22] The dispute or the violation of mores was presented to some figure respected in the community – perhaps a medicine man – who announced some disposition. It may have involved certain degrees of shame, or banishment, or compensation to the injured party. Federal officials who viewed the reservation as a place to impart ideas of civilization found this barbarian practice of informal settlement of disputes intolerable. Indeed, the whole system of tribal courts developed as an educational device to teach the heathen about law and order, so that they would know about written rules, judges, and due process of law. Then, on that great day when all Indians would be civilized, when the reservation would vanish, an Indian would not be surprised when he had to obey the laws of Wisconsin, nor would he be shocked when he entered the marble halls of a municipal court judge. "Criminal trials" were imposed on reservations in this century, for the most part, and have only provided a partial method for the adjudication of disputes. It would not be unfair to say that if the reservations could regress in their method of adjudicating disputes, they would be replicating some of the experiments in alternate tracks and noncriminal dispositions that are now the vogue among commentators on American criminal law.[23] What I mean to suggest is that on the reservations there may be a loose and sometimes nonexistent line between "criminal" and noncriminal trials, particularly because those terms are so clearly non-Indian in both origin and significance. The want of a sharp line is beneficial, perhaps something that should be encouraged. Yet the Civil Rights Act, by requiring counsel in a "criminal proceeding," may force a hardening of the categories prematurely. It may be the role of the OEO-funded attorney, or any attorney with some institutional connection with the tribe, to urge ways in which the tribal council and tribal courts can mini-

22. Shepardson, *Problems of the Navajo Tribal Courts in Transition*, HUMAN ORGANIZATION 250 (1950).

23. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON THE COURTS 97 (1967).

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mize the scope of section 202(6) rather than to argue the circumstances in which counsel must appear.[24]

There is a third set of problems posed by section 202(6), which springs from the extraordinary nature of Indian tribes. Assuming that we can answer the question of what constitutes a "criminal proceeding," still the tribe, the defendant, and the lawyer for the defendant must decide what constitutes "counsel." Indeed, that is now a problem of great significance, for a number of tribes, including the Navajos, are presently making rules concerning who may practice in tribal courts. And here there is an important principle of sovereignty at stake. One of the nice powers of being a state, or being a state court, is deciding who can practice law within the state and who can appear in the state's courts. It is a power that should not be underestimated, because the decision determines the scope of the monopoly practitioners hold, the extent of their financial and political possibilities, the shape and course of the judicial system.[25] As part of the process of imposing counsel on the tribal courts, there is some indication that the federal government is also trying to say what the qualifications for counsel should be. To be sure, "counsel" in a criminal proceeding might mean nothing less than a regular lawyer, certified, for example, by the Arizona or New Mexico Bar. It seemed a simple matter. But since the passage of the Act, and partly to blunt its impact, serious thought has been given to the power of the reservation to determine who shall practice law in its courts. A number of restrictions have been suggested, all of them with some degree of reason.

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24. The Taos Pueblo may serve as an example. The Pueblo has resisted the imposition of the tribal court structure, and the Governor of the Pueblo settles cases as they are brought before him. It is doubtful that the Governor divides the cases into criminal or noncriminal for that distinction has only limited utility in a small, closely-knit society where all infractions have antisocial consequences — where, in fact, law and religion are closely intertwined. Similarly, the non-Indian judicial system is beginning to understand the disutility of classifying the problems of chronic alcoholics and the vagrant poor as "criminal" ones.

25. In Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), the court struck down extraordinarily restrictive rules announced by the federal judge in Mississippi that would have made it difficult for regular representation of civil rights litigants; the rules were designed principally, of course, to prevent disruption of patterns of culture, much the same purpose as reservation rules excluding professional attorneys. *Cf.* Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966).

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First, it might be useful for a tribe to require that counsel practicing in its courts pass an examination that demonstrates some familiarity with tribal law. Second, there might be some language requirement since many clients will speak only or predominantly the Indian dialect. Third, there might be some sort of residence requirement. These are not unusual requirements; they mirror the restrictions normally placed on the practice of law by the several states.[26] Yet there is some reluctance to allow the Indian tribes to impose them. The Office of the Solicitor for the Department has informally notified tribes that counsel means what one would normally consider it to mean, lawyers admitted to practice in the state in which the reservation is located. Language requirements are completely discouraged, and residence requirements are not even contemplated. Yet the issue is rife with important considerations of sovereignty. It is not only the theoretical power that is important, but the exercise of that power. If there is a substantial interest in developing strong and meaningful Indian courts that have an independent validity, that are more than pale carbons of inferior state tribunals, then the tribal development of standards governing who should practice before the courts is exceedingly important.

Because these rules are important to the reservation, they should be important to the OEO-funded lawyer who may be considering a complaint in a habeas corpus action that his client was not represented.[27] In this respect, the OEO lawyer is slightly different from the lawyer who is retained on a one-time basis by a particular tribal member. The OEO lawyer, because of his continuing relationship with the tribe, with his dual interest – both in his client and with all potential clients – sometimes must think twice about the posi-

26. Because they may be of assistance in the preparation of rules for other reservations, significant portions of the new Rules of Admission to the Practice of Law on the Navajo Reservation are reprinted in Appendix A. These rules are not now in effect.

27. The power to file an application for a writ of habeas corpus has been strengthened by section 203 of the Civil Rights Act of 1968, 25 U.S.C.A. § 1303 (1968): "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." For an indication of the scope of the writ prior to the Civil Rights Act, see Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

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tion he should espouse. If he, in his role as lawyer, as architect, has fixed views concerning the pace and form with which lawyers should be introduced into tribal courts, then he may not make all the arguments that he would otherwise make if his sole objective were to reverse a conviction or to obtain a new trial. As a lawyer, he has the opportunity to bring a variety of traditional reservation practices before the stern gaze of an often ununderstanding non-Indian judge in a non-Indian court.[28] Which issues he brings, and when, will have an enormous impact on the tribe. The lawyer can take a laissez-faire view and do what coldly seems necessary, but there seems to be a consensus among the OEO lawyers on the reservations that such a position is irresponsible. In each reservation, there are cases that should be brought sooner and cases that should never be brought, for one of the functions of the OEO lawyer on the reservation is to contribute to the growth and health of the tribe. He is part of a community action program that is very specifically designed to build an organization.

Thus, the OEO-funded lawyer confronted with section 202(6) of the Civil Rights Act has responded differently, depending on the reservation he serves. At Rosebud, South Dakota, the legal services attorney has pressed for the full representation of criminal defendants before the tribal court, offering to serve as counsel in those cases where the defendant cannot secure a retained attorney. The grounds for his position are largely the existing "legalization" of the tribal court at Rosebud. Indeed, that reservation is one of the few in the nation that has an attorney sitting as judge – a non-Indian from a nearby town who sits in an appeal capacity under appointment of the tribe. Furthermore, the criminal trials are *really* criminal trials, with incarceration in a most unpleasant jail the result of conviction. Finally, on the Rosebud reservation, there are no advocates experienced in the tribal courts who are

28. A famous example of a refusal to understand Indian justice is *Ex parte* Crow Dog, 109 U.S. 556 (1883), where a great rivalry between two leaders of the Brule Sioux resulted in the killing of Spotted Tail by Crow Dog. There was a customary form of retribution, including the surrender of horses and other property by the family of Crow Dog, but this was not sufficient punishment for the federal government. A federal murder indictment was brought.

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able to defend people accused of crimes for a small fee. The OEO lawyer is also seeking to aid the tribe in securing funds for a prosecutor so that there will be a full-blown adversary system to assist the judge, a far better system than defense counsel pitted directly against the bench.[29]

On the Navajo Reservation, the situation is quite different, and the position of the legal services program, DNA, is also quite different. In addition to the rules for professional attorneys adopted by the court[30] with assistance from the University of New Mexico School of Law and others, there is now a complement of lay counselors who have experience and skill in the tribal courts.[31] Furthermore, the tribal judges on the Navajo Reservation often view their role in a "criminal" prosecution as one of mediating between the defendant and the complainant and seeking a solution under which both parties walk out of the court happy. In this climate, DNA, not surprisingly, has taken the attitude that the sharp intervention of counsel, forcing a solution through the dictate of a federal district judge, is not wise at the moment.

B. The Navajo Legal Services Program

The second example of the effect of OEO attorneys on the tribe involves not a single issue, but an entire program. It involves the potential for conflict between reservation establishment, tribal members, and OEO lawyers, which arises almost by the very existence of a powerful legal services program.

In 1964, Theodore Mitchell, a graduate of the Harvard Law School and a tough Westerner, undertook the monumental task of building a 1,000,000 dollar a year program to provide adequate legal services to the 100,000 indigent Navajos stretched across a reservation as big as West Virginia. There were incredible ob-

29. Some reservations are planning to make application for funds for prosecutorial services under the Safe Streets and Crime Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. The Navajo Tribe has approved a plan for hiring a professional attorney as a tribal prosecutor.

30. See note 26, *supra*, and Appendix A.

31. Indeed, the OEO legal services program, from the outset, has considered itself a combination of professional Anglo attorneys and talented lay advocates recruited from the reservation. As part of the DNA program, these lay counsel are given additional training by the professional attorneys.

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stacles – recruiting a first-class staff to what was widely considered a desolate area, securing adequate housing on a reservation where there was hardly enough housing for tribal personnel, coping with the difficult problem of dealing with a client population many of whom spoke a different tongue, and setting up a parallel Navajo-manned legal service system for the tribal courts. With courage, bluster, and bravado, Mitchell moved toward what most people would have considered impossible. The rigor and romance of the program turned its remoteness from a liability into an asset; idealistic young lawyers began to flock to the program until Mitchell had a staff – including VISTA lawyers – of more than 20 professional attorneys. An excellent cadre of Navajo administrators was assembled, which developed substantial grass roots support for the program through the community education effort. It has become one of the biggest and most striking of the legal services programs in the country.

At the apex of the development, Mitchell, in August 1968, was banished from the reservation.[32] It was clear from the outset that

32. The Advisory Committee of the tribe, invoking the tribe's inherent power to exclude any non-Indian from the reservation, passed a rule forbidding Mitchell from coming on Navajo land. The very circumstances of the expulsion underscore the other-worldly quality of practice on the reservation. At a meeting in the Navajo Council Chamber shortly before his expulsion, Mrs. Annie Wauneka, an elderly and important member of the tribe's central Advisory Committee, was questioning certain Washington officials about the power of the tribe to exclude non-Indians. In the process of the conversation, Mitchell, who was sitting at the back of the room, laughed. He laughed, he said later, out of embarrassment; Mrs. Wauneka said it was "the silliest, dirtiest laugh I have ever heard." At any rate, after brooding about the matter, Mrs. Wauneka walked up to Mitchell at another session and began pounding him about the head. The next day, August 7, 1968, the Committee passed a resolution that Mitchell's

> ridicule of the Advisory Committee and other selected officers of the Navajo Tribe has increased tensions among the Navajo people to the point where there has even been a breach of the peace and violent disturbances during a meeting of the Advisory Committee. Such defiance, ridicule, tensions and violence seem destined to continue and grow worse, thus threatening the peace and well-being of the Navajo people and manifestly leading to grave danger to the life and health of members of the Navajo Tribe.

The resolution was a prelude to an order for "forcible removal" pursuant to section 1786 of the Tribal Code, which permits the Chairman, with the concurrence of the Bureau, "in extreme cases involving grave danger to the life, health, morals or property of the Tribe," to order exclusion from the reservation. The formal charge, then, leading to banishment was ridicule, a not infrequently used tool of lawyers. Mitchell moved his office

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at the heart of the controversy was a dispute over power. The OEO-funded program had become strong in such an important sense that it challenged the importance of the tribe. Whether the challenge took an overt form or not, it was implicit in the gleaming strength of the energetic attorneys, in their wide support throughout the reservation, in their thousands of dollars worth of equipment and books, in the acknowledged fact that the OEO lawyers could accomplish things that other people could not – that, in fact, often a person should come to DNA rather than to the tribe or the Bureau for help and assistance. In a society that is exceedingly sensitive to symbols, the emblems of strength displayed by the legal services program were too striking.

Again the historic context is important. The reservation governments have had a shaky existence, suffering the whims of Congress and the overarching impositions of impolite bureaucrats from the Bureau of Indian Affairs. The tribal chairman, in all this, has often been something of a cog, a powerless representative with the seeming responsibility of leadership. While strong leadership has in fact developed in some reservation contexts, the tendency has been for an uneasy wearing of the crown. While the Indian Reorganization Act of 1934[33] made some improvements in the relationship between federal government and tribal government, the goal of strong tribal governments has not been realized. Indeed, the Economic Opportunity Act, with its hope of providing more adequate financial assistance directly to the tribe and curtailing dependence on the Department of Interior, was the most important effort since 1934 toward strengthening the tribal structure.

The actions involving DNA should be viewed in this historical context. At least as far as the Indian Desk at OEO was concerned,[34]

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to a trailer outside the reservation, and OEO has hired a lawyer to defend him. In Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969), the federal court held that the tribe's action had violated the Civil Rights Act, and directed that Mitchell be readmitted to the reservation. The decision is now on appeal.

33. 25 U.S.C. §§ 461-79 (1964).

34. The Indian Desk was an early creation of Sargent Shriver, then Director of the Office of Economic Opportunity, designed to ensure that there was some coordinated philosophy behind OEO grants for the benefit of Indian

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the large amounts of money that were being funneled by OEO to the tribes were designed to improve the sense of sovereignty, to indicate, in a sense, that tribal governments as well as other governments were free to err, to make mistakes in spending public funds. The community action programs became, on many reservations, the funding vehicle for vast efforts that the tribe had wanted to undertake, but could never finance, such as housing programs and training programs; cultural programs were begun that could never have been approved through the staid and sterile chain of command at the Department of the Interior. In large part, this was true at the Navajo Reservation. The Community Action Program (CAP) soon became the second largest employer on the reservation. A vast home building and home repairing program was undertaken. An enormous pioneering educational effort was begun, first through Operation Headstart, then through the funding of a pioneer Rough Rock School, which introduced experimental techniques quite exciting in nature, and finally through the beginning of the first Indian junior college. Other large and striking programs were also undertaken. All these were under Navajo control; at the critical points in the development of the dispute, the Community Action Program was, in fact, closely aligned with the tribe.

In this setting, the legal services program presented a striking contrast. If all other programs were under close tribal control, then the legal services program can be said to have striven for independence. As was the normal reaction of all the lawyers placed in reservation settings, and in urban settings as well, the idea that an attorney who was to represent indigents would be controlled by the Community Action Program was anathema. Throughout the whole legal services system there was an effort to ensure that

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reservations. The Desk had its greatest influence on the design and funding of applications establishing community action agencies, such as the Office of Navajo Economic Opportunity. Headstart programs were also approved through the Indian Desk. Legal services programs were treated slightly differently. The predominant planning and funding function rested with the Legal Services Branch of OEO in Washington; the Indian Desk had the right to renew and complain, but not the power to veto. The director of the Indian Desk during the formative years was Dr. Jim Wilson, an Oglala Sioux.

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the CAP's priorities would not control the priorities of the legal services program, nor that CAP's strategy become its strategy. The effect of the independence, however, was that instead of supplementing the power of the tribe, the legal services program, in a crucial sense, detracted from it. It did so formally by disagreeing with certain decisions and suggesting that certain lawsuits be brought;[35] it did so politically by developing grass roots strength at the chapter level,[36] which could be interpreted as providing the base for political challenge to the incumbent chairman of the tribe; and it provided a challenge informally by becoming, through the accumulation of excellence, a sounder, more certain dispenser of results than the tribe. Finally, the legal services program had a payroll that rivaled that of the tribe.

The conflict between the Navajo Tribe and DNA seems, at one level, to be exactly the sort of confrontation where caution by the lawyers was counseled in the previous discussion of the Civil Rights Act. Yet the confrontation between DNA and the tribe should be seen as involving not a withering of the strength of the tribe, but a strengthening of the normal political process within the reservation. The paradox of the OEO-funded lawyer on the reservation is such that despite these seemingly symbolic attacks on the sovereignty of the tribe, the DNA program was in far more important ways a buttress to sovereignty, a reinforcer of the tribal structure. This was particularly true as DNA, under severe attack, demonstrated the enormous amount of community support that it had developed in its short span. Indeed, the supportive aspect of DNA's politicalization helps to explain how legal services programs, acting at their best, are effective parts of Community Action Programs.

35. Various areas of friction developed; among them was the pace of recognition of the Native American Church and its use of peyote; DNA seemed to encourage greater haste toward legalization than did the tribe's general counsel.

36. The Navajo tribe is divided into 98 chapters with roughly 1,000 members each. DNA sought to reach the people with an effective community legal education program through the chapters. Furthermore the chapters elected Navajo members to the Board of Directors of DNA. Because of the service, the close contact, and the appointment of effective young Navajos to leadership positions in DNA, the bonds to the people were strong.

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One of the peculiar questions, conceptually, from the beginning of the Community Action Program was the relationship between the goals of the CAP Board of Directors and legal services, or stated differently, how legal services could fit into an overall strategy to use CAP funds to organize and channel the political energies of the community. It was always hard to understand how legal services programs could serve as integral portions of the CAP efforts; normally they perceived their role as totally unrelated.[37] The standard legal aid effort was the worst offender. Hiding behind the slogan that its mission was to provide for poor people the same kind of legal services that people who had money could afford – that it should provide the best legal service possible for the people who walked through the door – the legal aid agencies asserted independence from the CAP as a way of keeping social reformers out of their hair. The legal aid lawyer religiously avoided working with the CAP personnel; indeed, there was usually conversation between them only at refunding time.[38]

DNA took another course, a course that made it effective, but also brought it into conflict with the tribe. In essence, the Director of DNA, its staff, and its Board viewed the legal services program as itself a community action program. It was to be concerned in a broad way with education, economic development, cultural growth, and political strengthening. The lawyers were not to rely solely on the flow of cases into the offices. They were to ask the architectural question that was at the base of OEO: how can we, guided by the Board of Directors, and given close to a million dollars in federal funds, deploy our forces and our money in a way that will contribute to the elimination of poverty on the

37. Thus, the Legal Services Bureau in Washington made it a fairly strict rule that the OEO-funded lawyers were not to provide legal advice to CAP officials. Furthermore, the CAP normally had, at the most, only token representation on the legal services board. Ethical problems, such as the interposition of a nonlawyer decision-maker between the lawyer and his client, were thereby blunted. But the Washington office made it clear that there was supposed to be some relationship with the CAP. In metaphorical terms, the legal services program was one weapon in the war on poverty; if the CAP director was the General, then surely he must have some influence on what his divisions do.

38. It is true, however, that the CAP executives rarely knew how to use a legal services program in an integrated way with other programs even if the lawyers would have been willing.

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reservation? The asking of that question meant that the legal services program, rather than merely serving as lawyer to indigents, would become a political force, with a viewpoint that would likely differ from that of the tribe itself. DNA became an effective program, not because it provided good legal services to people who came to the door, but because it provided the political function that the CAP was designed to produce: the creation of a political effort toward change, toward redistribution of resources, toward less reliance on the federal government, toward the training of new political leaders. The presence of conflict forced the program to become intensely political. An enormous proportion of time was spent in self-preservation to gain the support of the people. And through the process of gaining that support, DNA created attitudes and forces that will have a long-range impact on the future of the Navajo reservation.[39]

II. THE OEO LAWYER AND ECONOMIC DEVELOPMENT

As difficult as are the attitudinal issues confronting an OEO lawyer who participates in legal conflicts within the reservation, the ambivalences surrounding the lawyer's role in economic devel-

39. The theme of this section has been to develop examples that indicate the differences between OEO experience on Indian reservations and in other legal services contexts. A final contrast relating to conflict may be useful. A major question for OEO has been the acceptability of a condition in grants to legal services programs prohibiting suits against state officials. This issue was epitomized in the struggle between Governor Ronald Reagan and California Rural Legal Assistance. At the heart of the fight, at least in its last incarnation, was the demand by the Governor that the CRLA lawyers promise that they would not sue government agencies. At one level, the Governor was protesting the use of government funds to finance attacks on government programs, but the basis of the attack was some sentiment about the right of the state to develop, for example, the Medicaid program free of substantial interference from another official agency. It was easy at the time for those fighting poverty to point out the folly of the Governor's position – since transactions between the government and the poor were often the root of a felt injustice or oppression, to exclude that area of litigation from the activities of lawyers for the poor would be to gut the effort and to substitute a patina of assistance for the real thing. Advocates of CRLA summoned forth numerous examples of state subvention of legal attacks, primarily in the area of criminal defense. Since the 1920's there has not been much fashion in the position that the government is entitled to some special protection or some preferred position in the defense of law suits. The CRLA struggle was not an occasion where reasonable men could differ; if anything, the CRLA experience, the challenges to the state and to the federal Department of Labor, emphasized the need for an adequately financed group of lawyers

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opment are even greater. These problems are particularly striking because an important characteristic of providing legal services on Indian reservations (distinguishing it from OEO's urban role) is the quite different potential for economic development. Unlike the urban poor, the reservation poor normally possess a considerable common asset, usually land.[40] It would be natural if the presence of this resource encouraged a different strategy for the legal services attorney.

The problem in economic development of the proper role of the OEO lawyer is so complex that OEO lawyers on the reservations have been more or less stymied. Impediment after impediment has prevented or discouraged applying legal skills in a way that will have an appreciable impact on income levels. For example, the restriction against taking fee-bearing cases is sometimes, although falsely, perceived as a barrier to significant involvement in the economic development task by OEO lawyers. A substan-

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whose prime function was to attack the government.

Yet there is a haunting difference between CRLA's experience with Governor Reagan and suits against the tribal government on Indian reservations. For example, the Office of Economic Opportunity, through promotional and training programs established at Arizona State University, approached eight pueblos in northern New Mexico to determine whether they would be interested in a legal services program as a delegate agency of the community action effort. The pueblos, including the Taos Pueblo, contain strong traditional leadership that has measured carefully the introduction of each modern development. The pueblos listened carefully to the OEO proposals and then indicated acceptance with a limitation that sounded strangely Reaganesque: the OEO-funded lawyers in the pueblos must agree not to bring any action against the tribal organizations. The pueblos argued that they could not trust lawyers from an alien culture, taking internal issues into foreign courts, upsetting delicate balances, providing the image that the tribal government is not only fallible, but can easily be brought to task before non-Indian decision-makers. What at first seems like a similiar condition – that the federally- funded lawyer forbear from challenging a governmental decision – may thus turn out to have different roots and to be defensible here.

40. The land is held, as will be indicated below, under serious disability. All in all, there are about 50 million acres of Indian land (outside Alaska) that fall under trust status with the Bureau of Indian Affairs. COMMISSION ON THE RIGHTS, LIBERTIES, & RESPONSIBILITIES OF THE AMERICAN INDIAN, REPORT: THE INDIAN: AMERICA'S UNFINISHED BUSINESS 72 (W. Brophy & S. Aberle eds. 1966). Some of the land is owned in common by the reservation; some is allotted into units and owned, subject to the federal trust relationship, by individual Indians; some land is assigned to Indian families, formally or informally, but with the impact that assigned land is not open to reassignment at the tribe's whim. See Gilbert & Taylor, *Indian Land Questions,* 8 ARIZ. L. REV. 102 (1966).

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tial impediment has also resulted from the historic tendency of the federal government to leave development goals undefined, or perversely to shift from one definition to another without the substantial and considered participation of the Indian group involved.[41] Indeed, it is possible to say that the concept of economic development itself has fluctuated from period to period, reflecting central prejudices concerning the style of life on Indian reservations. Although "economic development" as a matter of fashion now summons forth rather unanimous concord, the term masks important differences about such questions as the relationship between work and income, the conflict between cultural growth and economic growth, and political prerequisites for reservation development. Because those questions have rarely been sharply faced, the function of the lawyer is treacherous.

In this section, an attempt is made to define certain aspects of the economic development role that reservation lawyers must confront. First, as has been indicated, there is the basic problem, rooted

41. "Development" is a magic word that rarely receives interpretation. It is incanted to persuade electronic assembly plants to remove to reservations where nimble fingers can be placed at the disposal of transistor radios. "Development" as a concept is swallowed uncritically, not rubbed and examined to determine what kind of development is good for what kind of reasons. Indeed, there is the possibility that economic development – as widely understood – is itself chimerical, as remote, romantic, and false a goal as "civilization" was in the nineteenth century. It wraps up inapplicable values in a dignified cloak, obscuring the basic crudity of our understanding. In the nineteenth century, private property was the *summum bonum*, the doorway to civilization and progress, the prerequisite to education, thrift and enterprise. Since private property in land was so elevated, it was forced upon the Indians, primarily through the Dawes Act, 24 Stat. 388 (1887), with disastrous consequences. Today, it is thought, sophistication is rampant, and our planners would not repeat the simplistic mistakes of the past. Yet the Bureau planners now have the solution wrapped up in development with the formation of "corporations" being the successful technique. The attitude toward development fluctuated with the predominant feeling about the good life in the United States. In its 1904 regulations, for example, the Department of Interior claimed that the act passed in 1887 was designed to "give the Indian a tract of land that he could call his own; in which he would feel a personal interest and from the cultivation of which, by the labor of his own hands, he might gain a subsistence and at the same time acquire the arts of civilization." U. S. Dep't of the Interior, Regulations of the Indian Office § 599 (1904). The regulations continued: "To permit the indiscriminate leasing of these allotments would defeat the purpose for which they were made." This virtual prohibition on leasing is far different from the 99-year leases now being indulged on various reservations designed to encourage economic development, 1960's style.

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in deeply-held attitudes, of assisting in the definition of the economic development goals; second, there is the function, close to the lawyer's heart, of expanding the resources available for development and the closely-related function of unraveling the legal complexities that make the use of the resources almost impossible. Third, there is the necessity of encouraging the growth of adequate managerial expertise. The lawyer must understand all these aspects of his role if he is to be able to advise his clients on establishing the legal forms appropriate to their desires and needs.

A. DEFINITIONAL PROBLEMS

The current approach of most officials of the Bureau of Indian Affairs, as well as of those in other government agencies, is to emphasize development of a sort that maximizes the opportunity for work rather than the opportunity for income.[42] As a consequence, development plans often have little or no relation to the cultural and political goals of the reservation.[43] This approach is a matter of substantial consequence to the legal services attorney since federal goals are a significant limit on the strategies he must pursue. In the absence of the prejudice in favor of work-related development, the existence of natural resources could mean that his function would be to help make a poor man rich, rather than just a little less poor. But such a view raises cultural hackles. On the procedural level, there is the nagging problem of representing poor people where there is a chance of a payoff in the future out of which a nice fee could have been drawn.[44] Naturally, there was

42. The current style in economic development is for the location of industries that will provide jobs on the reservation. In important ways, this is not a departure from the nineteenth century approach outlined in the prior footnote. Instead of a farmer, the Indian becomes a worker; either way, he finds his way to civilization.

43. The location of various industries in the area near Shiprock on the Navajo reservation has meant important changes in population distribution and, often, an increase in the number of single women who are employed in a quasi-urban area. While there is certainly nothing "wrong" with the trend towards urbanization on the Navajo reservation, and towards the creation of a new supply of jobs for women, the tribe does not ask a great deal about the social implications before it encourages General Dynamics or Fairchild to establish a plant.

44. It is possible that all that is implied is that the development chore is for private rather than OEO-financed attorneys. But it has been clear on almost all reservations (except for those that have ever-present private

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continuous concern in the beginning of the legal services programs generally that these programs were driving marginal lawyers out of business. Their concern was extended to the reservations, and at one time there was a general rule proscribing legal services programs from representing tribes rather than individuals. Culturally, income-directed development was upsetting because of a deep-seated feeling, in Americans in general and in lawyers as products of America, that the road up for poor people is (and should be) long and hard, and that work, not income, is the direction that must be taken. Because the mental set is for OEO lawyers to alleviate conditions of poverty by eliminating discrimination that may prevent a client from getting an entry level job that pays slightly above subsistence salary, or providing a little greater security so that the client will not be arbitrarily ejected from his dwelling, or providing modest opportunities for self-employment and management, or assisting by offering welfare benefits, there is little thought given to using legal techniques to change the allocation of resources radically and provide a comfortable source of funds for the formerly poor. In the urban context, it is almost impossible for the legal services lawyer to find any means whereby the latter strategy of rapid income change would succeed. In the reservation context, that did not have to be the case, yet the influence of strongly-held attitudes often produced roughly similar approaches.

It is important for a legal services attorney to understand the development goals of the reservation he serves; otherwise he will be unable to advise his clients on matters that are resource oriented, such as how assignments and allocations of land should be made, what challenges or suggestions to offer concerning an internal tax system or even concerning the nature of the educational system. In California, particularly in the southern reservations, California Indian Legal Services has begun encouraging the sharper definition of development goals. When CILS began, the OEO-

attorneys) that the OEO lawyer can do a great deal to establish the basis for development, draft some of the early papers, and introduce some important choices for organization among other things, leaving to the private lawyer the remaining functions when the enterprise begins to be profitable.

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funded lawyers expected the package of legal problems that normally accompany poverty. California Indians were reported to be at the bottom of the economic barrel with annual income, life expectancy, educational level – all the normal indicators of mainstream participation – suggesting abysmal poverty and despair. But there were immediately sharp distinguishing characteristics. At least the leadership of the California Indians shared in the dream that a way out would still be found; that under more or less free enterprise, they would be able to develop their resources in a way that would make them independent of government interference. They began to conceive of a lawyer in an entirely different way.

For the urban poor, the function of the lawyer is to force the establishment to invent quasi-entitlements to resources that the middle class now controls. The pool of jobs has to be shared; the universities built for the middle class must be made accessible to the poor; and there are those who argue bravely that, beyond all else, there must be a sharing of income, regardless of the distribution of work. It is exceedingly difficult to construct the necessary legal, as opposed to political, argument to compel such sharing. The lawyer for the Indian poor may often find these themes of "sharing" inapposite. The California Indians, living on reservations, for example, have resources and are often entitled to additional resources under traditional legal doctrines. For them, the problem is somewhat different. To be sure, the Indians of California are plagued with problems concerning education, welfare payments, landlord-tenant, and so forth. But in an interesting process of interaction between lawyer and client, the attention of the lawyers have been directed to far more developmental issues. For example, the leaders of the Morongo reservation, between Palm Springs and Riverside, became concerned over the fact that the slippage of land out of trust status and into non-Indian ownership gives the reservation a pock-marked quality that impeded optimal use and the most satisfactory planning of resources; more important, the land slippage was eroding the base of young members of the band who, deprived of land, moved to nearby cities. The preparation of a more sensible tenure pattern might permit the preservation of zones

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free of the indirect fallout from development. Tribal leaders sought advice on the possibility of devising some sophisticated scheme that would help in preserving the integrity of the remaining Indian land.[45]

It is hard for lawyers for the poor to take on such an assignment for several reasons. First, as has already been indicated, the fierceness of the Protestant ethic influences greatly the strategies that are usually considered. The Bureau of Indian Affairs, the Congress, the Economic Development Administration, the prevailing mood, all seek progress in terms of jobs. The Bureau will not show California reservation lands to prospective industrial users as part of its promotional task largely because there is not an ample Indian labor supply for development. Even though the lands are often in excellent industrial-potential zones, and even though the chief industrial development office of the Bureau is in Los Angeles, the Bureau encourages Fairchild, General Dynamics, and others to locate in the southwest, the Dakotas, and other areas, such as the Navajo Reservation, where Indian unemployment is found in large numbers. Since the Los Angeles office is largely ineffective, the point is not exceedingly important, but the underlying philosophy is indicative. There is no public interest in making the California reservations financially comfortable without work. It is viewed as peculiar and bizarre that the Palm Springs Indians should now be "rich" without having worked their way up some well-accepted ladder.

Debate concerning economic development, then, is plagued by ambivalence – ambivalence about the relationship between work and income that pervades discussion in other contexts of welfare payments and the preferability of a job. This ambivalence toward substantial wealth for poor reservation Indians is reflected in the process of adjudicating Indian claims against the federal govern-

45. At Soboba to the southeast, the problem was just as encompassing. Reservation population had decreased and income per capita had fallen precipitously since the early twentieth century when a water-carrying tunnel destined for Los Angeles, driven through the mountains above Soboba, dried up the springs that fed the land immediately below it. From a plush orchard, the land became dry and rocky. Now, 50 years later, negotiations are still in process to restore an adequate water supply and to obtain compensation.

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ment. Because this problem is basic to development, it is worth dwelling a moment on the claims process. California Indians, for example, have claimed considerable land within the state for the last century; to the factory worker in Downey, the claim — that the Indians are entitled to large chunks of metropolitan and rural California — appears extravagant.[46] In the twentieth century, afflicted with some sense of guilt, the nation provided for limited opportunities for the assertion of these Indian claims.[47] If there had been full compensation, the Indians would have gathered enormous wealth, either in land or money. Economic development — in the sense of providing immediate financial security of the highest sort — would have been assured. The solution, embodying a compromise in the form of limited compensation, reflects the reluctance to see development in such grand nonlabor terms. On the one hand, the response allowed continuation of the idea that we are a fair and square country that believes in law and certainly in property rights — for that reason alone, some recognition had to be given to the Indian claims. On the other hand, it was preposterous to recognize fully such extraordinary claims of a handful of poor people, even to the extent that these were based on legitimate entitlement.[48]

Pervading the entire process is the particular kind of phoniness and condescension that pervades many economic development efforts. There was the knowledge from the beginning that the

46. In fact, the California claims have an unusual and fairly clear historical validity. Shortly after the Treaty of Guadalupe Hidalgo, in an effort to quiet title, the federal government dispatched a group of treaty commissioners to California to persuade the Indians to surrender their claims to immense areas for the guarantee of peace and tranquility in more modest zones. By and large, the Indians agreed, questions of the adequancy of consideration aside, in 18 treaties. But in the spirit of the Gold Rush, there was opposition to assuring Indian hegemony even over the limited parcels guaranteed in the treaties; as a consequence the treaties were never ratified by the Senate. Because the treaties were rejected, the former rights of the Indians were theoretically preserved.

47. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946), *as amended*, 25 U.S.C. §§ 70-70v (1964).

48. The California claims cases are typical of the compromise inherent in the response. In the first suit, under a special jurisdictional act, a portion of the California Indians obtained a judgment of $17 million against the United States, based on a valuation of land at the time of taking of $1.25 per acre; the figure of $1.25 was justified by peculiarly legalistic notions such as the price that could have been commanded if all the land had

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claims, even if they went through trial, could not produce what they would have been worth if they had been the claims of non-Indian property owners claiming, in the twentieth century, a taking without compensation in violation of the fourteenth amendment. Even the pooling of claimants and the per capita distribution process have a certain cynical and simplifying aspect. It would have been too tedious and burdensome to process each claim separately – there must have been over 100 separate California claimants; yet pooling and per capital distributions ignore handsome differences among the groups and individuals in terms of what happened and what their rights are. And for some litigants, lower claims were made simply because of the incredible size of the claims if normal rules were applied.

Just as the claims process was manipulated to provide some compromise between the obligation of conscience and the extraordinary change in living conditions that might occur if full compensation were made, economic development efforts represent a compromise as well. There must be enough industry, enough effort directed to encouraging industry to move to reservations, that our consciences will be collectively healed, but only that sort of industry should be encouraged that permits the proper kind of heal-

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been sold at one time and the sorts of buyers that were available in 1851. There was never any question of receiving land back, of course, nor was there interest on the judgment. And to add legalistic insult to injury, the Congress "set off" against the judgment $12 million for items such as education, blankets, and support for BIA bureaucrats. The result was a "victory" for the litigating California Indians of $5 million. Through such contortions was the American legal conscience satisfied, while preventing a particular group of poor people from asserting fully and adequately an entitlement against the government.

A "compromise" is now coming to fruition in the remaining California claims cases. Under a law establishing an Indian Claims Commission in 1946, ch. 959, 60 Stat. 1049, all claims not included in the 1944 judgment could be filed for recovery. The claims were pooled, and lengthy research proceedings began. By 1963, the lawyers for the California Indians (there were over 70 lawyers involved in one capacity or another) agreed with the Department of Justice that a settlement offer of $0.47 per acre should be presented to the Indians. While some estimates of the entitlement ran to half a billion dollars, the settlement offer was finally accepted although a plebiscite among the plaintiffs revealed a significant dissent. In the fall of 1968, Congress passed the necessary legislation ordering that a roll of California Indians be brought up to date and that the $29 million be distributed on a per capita basis. It is expected that there will be about $800 distributed per person by 1970 and that that will be the end of the land settlement.

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ing. And that has meant, traditionally, the sort of development that provides the slow entrance into the "mainstream" of American society through work and saving. Indeed, the impetus towards mainstream is so great that encouragement of industry has an added complexity. Development must be sufficient to make life on the reservation adequate, but not so adequate that persons will be discouraged from leaving the reservation and assimilating into American society. As conceived and as pushed by the federal government, and as has been impressed upon the tribes, economic development means traditionally this kind of shifty compromise. The legal services attorney should not be satisfied with such a compromise, at least to the extent that it is Bureau-imposed. It presents the greatest likelihood of disintegrating and emasculating the reservation even further, for the trade of work for income diminishes rather than expands the opportunity for the cultural growth of the reservation.[49]

B. EXPANDING RESOURCES

It is quite natural for a lawyer to expand the resouces available for development once the primary goal is clarified. This function includes more than conquest as a means of adding to the tribal domain; it means, also, extricating existing resources from legal and political snarls that render them virtually useless. The claims of the Alaskan Natives provide one example. In the act giving statehood to Alaska,[50] the Congress authorized the state to select about 100 million acres of federally-owned land. It was generally agreed that the state selection process was crucial to Alaska's economic development. When the government in Juneau began the long process of picking and choosing from the massive federal reserves, it almost immediately was faced with objections from Natives to every selection. It was the Natives' contention that when the United States bought Alaska from Russia in 1867, the United States assured continuing rights of use and occupancy in the Na-

49. At the Choctaw Reservation near Philadelphia, Mississippi, development takes the form of taking six new families each month into a year-long skill development program with an eye to eventual jobs in New Orleans and Cleveland. There are only 300 Choctaw families left. Six families each month is a steady sort of cultural attrition.

50. The Alaska Statehood Act, 72 Stat. 339 (1958).

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tives.[51] The purchase agreement has never been fully and adequately interpreted. But the claims that the Natives are now making are far from unreasonable; moreover, they have been packaged in a manner that makes them extremely appealing.[52] As a consequence, the Secretary of Interior has frozen all state selections until there is a settlement of the claims.[53] The function of the Alaskan claims is to provide a permanent base of financial security and a guarantee that the Eskimos and Indians will have a continuing stake in the economic future use of the state. The security provides the opportunity to fashion the cultural future of the group in a way that makes it less dependent on migration to urban areas and marginal employment for subsistence.

There are probably similar, well-based claims in numerous states. In South Dakota, the Oglala Sioux of Pine Ridge Reservation are pressing for the return of valuable Black Hills land "temporarily" borrowed by the United States for an artillery range during World War II. In Maine, a venturesome lawyer, on behalf of the few remnants of the Passamaquoddy, has sued the state for 150 million dollars for improper trusteeship of timberland held for the benefit of the tribe. Several years ago in Utah, a group of Navajos successfully attacked the decisions of a state Indian commission that was using trust funds to benefit individuals other than the true

51. The Alaska Organization Act of 1884, 23 Stat. 24, 26, declared that "the Indians . . . shall not be disturbed in the possession of lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. . . ." The Statehood Act, in addition to providing that the state could select about 100 million acres from the public domain, provided that the State must disclaim right and title to lands or other property if the right or title is held by Natives or by the United States in trust for them. Since it was unclear which land was public and which was Native-owned, there was a stalemate.

52. The Alaska Federation of Natives, together with the then Governor Walter J. Hickel, now the Secretary of the Interior, established a Land Claims Task Force to develop a legislative proposal in cooperation with the state. The report of the Task Force was far-reaching and imaginative. It would provide land security by withdrawing lands in extensive measure surrounding Eskimo and Indian villages. In addition, there would be the receipt of a percentage of revenues from the exploitation of offshore oil wells with the money administered through a development corporation run by the Native people. Finally, there would be some per capita cash distribution.

53. *See generally* Henninger, *Alaska: Share the Oil*, THE NEW REPUBLIC, June 28, 1969, at 15.

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beneficiaries.[54] As a categorical matter, residual rights under treaties that still have force have never been adequately explored. Certain areas, including Montana, Oklahoma, and the checkerboard area of the Navajo reservation, are pregnant with uncertainties that flow from the overlapping settlements, and where there is uncertainty, the chances are good that non-Indians have acted affirmatively, leaving it to the Indians to raise later objections. Throughout the West, the rights of Indians to precious water should almost certainly be the subject of more extensive litigation.

Closely tied to these areas for legal ingenuity are the problems linked to the fallowness of present resources held in Indian hands. In Southern California, a drive from Indio to El Centro along the Salton Sea is dramatic demonstration of the special problems of Indian land. Alternate sections are Indian-held; those sections owned by non-Indians flourish with date palms, other agricultural uses, and some industrial and residential improvements, while the Indian-held land languishes in the grip of restrictive leasing policy, the ensnarlment of distrust, the heavy hand of cautious bureaucracy, and the crippling uncertainty of informal and formally conflicting claims. A small piece of land is subject not only to statutory restrictions on long-term leasing,[55] but its ownership may be fragmented among numerous heirs who cannot be brought together for the purpose of reaching a common business decision. In other places, there may be historic assignments of land, so that on an informal or customary basis, the tribe may not be able to control land that is nominally "tribal." The prospect of working with large chunks of land — a first impression — is quickly corrected by experience. Here there is an important and difficult task for lawyers. Some way must be found to improve the power to make decisions that can rationalize land assignments and land use on the reservation. Some technique must be devised to allow at least the possibility of reassignment of existing rights within the reservation so that the people feel a sense of participation in the planning, a knowledge that their interests are protected, and some

54. Sakezzie v. Utah State Indian Affairs Comm'n, 215 F. Supp. 12 (D. Utah 1963).

55. *See* 25 U.S.C. § 415 (1964).

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sense that through cooperation and rearrangement of entitlement there is some likelihood that not only the group but the individuals within the group will prosper. On most reservations, such a task will require a complete examination of tenure patterns and a wholesale reassessment of the way land is held.

C. Lawyers and Managerial Guidance

In addition to clarification of development goals and improvement of resources, there is a third important function OEO lawyers should fulfill: the providing of managerial guidance. One failure of federal policy, only partly remedied in the onrush of programs in the 1960's, has been the failure to provide adequate technical assistance so that resources, once exploited and realized, would have a good chance at sensible management. The counsel for Indians must help to close the gap. Two examples will provide background: the Palm Springs Indians and the claims award process.

In Palm Springs, it has been clear since the late 1940's that at some time in the future there would be a partition of tribal assets (mainly land) that had soared in value, and that members of the Agua Caliente Band would face new and intense responsibilities.[56] Indeed, by the time the partition actually took place, the per capita share was in excess of $300,000. The United States, in the exercise of its trust capacity, was quite careful in making sure – under direction from Congress – that the distribution of land was meticulous and fair; men were employed fulltime for several years to supervise the real estate affairs of the Agua Caliente Band. Yet no attention was given to providing the Indians with any skill, education, or training concerning the management of the resources once the trust status was severed. At the time of the distribution, no member of the Band was a college graduate; juvenile delinquency was beginning to be a serious matter. The void in management skills was quickly filled by a group of lawyers under the supervision of a state judge.[57] The group, or at least most of

56. *See* Arenas v. United States, 322 U. S. 419 (1944).

57. The process of turning the Indian estates from federal trust status to local guardianships and conservatorships under the control of the Palm Springs bench and bar was outlined in a series of Pulitzer Prize winning stories by George Ringwald of the Riverside Enterprise. *See also* N.Y. Times, May 20, 1967, at 16, col. 4.

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its members, was later charged by the federal government with bilking the Indians by extracting from them exorbitant fees for management and legal services.[58] The dependency relationship had been transferred from one group (the federal Bureau) to another (the local lawyers and bankers). The major consequence of the federal investigation in 1967 and 1968 into the practice of the Palm Springs bar was castigation and a resumption of the federal trust relationship. There has yet to be an important effort to prepare the Agua Caliente Band for its new responsibilities. There has been no effort to provide experience or exposure to various investment opportunities or development strategies.

The same thing is true under the practice of the Indian Claims Commission. By and large, its processes consist of long discussions among Washington lawyers for the Indians, Washington lawyers for the Justice Department, anthropologists, and Commission members. At the end of the discussions – which may take over 20 years – checks are sent out to the Indians. On the occasion of the distribution, it is the practice of journalists for some clever press service bureau to go out to the Indian community to see how quickly the paltry sum is spent; it always makes an amusing story. What no one has reported is the shameful fact that the Indian Claims Commission has now distributed 251 million dollars,[59] and neither it nor the Congress has given any consideration to the consequences of distribution.

Although Congress does review the plan for distribution before appropriating money, it has generally treated the claims process as if it were an ordinary judgment; and ordinarily neither the judge nor the defendant cares what the plaintiff does with the money he has secured. Yet, in a sense, the Indian Claims Commission Act can be looked upon as a precursor of the Economic Opportunity

58. *See* Report to the Solicitor of the United States Department of the Interior, from the Special Palm Springs Task Force, September 26, 1967. The Task Force reviewed the following complaints about the conservatorship and guardianship program: (1) high fees assessed against the estates; (2) lack of knowledge by the wards about their estate affairs; (3) confusion and misunderstanding of Indian rights under the program; (4) failure of the program to train and educate Indians to handle their own affairs; (5) frustration at not being able to foresee an end to the program.

59. 1968 INDIAN CLAIMS COMM'N ANN. REP.

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Act. Problems of obligation aside, there was a perceived need to use a greater amount of federal funds to correct the vast discrepancy between the living standards of Indians and the living standards of other Americans.[60] Perhaps it is wise to look at the Indian Claims Commission Act as a technique for justifying needed expenditures based on entitlements rather than on charity; the "claims" justification, in this sense, aided only in obtaining passage for the Act. If the Commission was a prototype OEO, then it and Congress have failed miserably. The most important goal of such a mission would be to see that the money expended contributed to independence, self-sufficiency, and development. Yet that aspect of the job was totally and completely neglected until the development of the poverty program. The Congress assumed that the awards would mean that there was little need for continued federal help through the Bureau of Indian Affairs; indeed, the Indian Claims Commission was often a threshold for termination of the federal trust status.[61] But the assumption was wholly erroneous. The award of a large sum of money, by itself, almost nowhere provided the ability to survive independently of federal trusteeship. As a consequence, the money awarded by the Claims Commission was virtually thrown to the winds. It was a salve to our collective conscience, but little else. It did not do what it could have done – provide the basis, the start for meaningful development.

What should be done about this lack of training in development? It is virtually impossible for the Bureau of Indian Affairs, as presently constituted, to correct this problem. Its local agents, by and large, are capable of distributing only misinformation, particularly on issues of economic development. They have no experience and certainly no outstanding expertise in matters like banking, land finance, and land planning. At times the Bureau attempts to progress through changes in nomenclature. At one agency on the Navajo

60. There was also an effort to improve the world public view of the United States. Karl Mundt, then a Congressman and now a Senator, urged that "if any Indian tribe can prove it has been unfairly and dishonorably dealt with by the United States, it is entitled to recover. This ought to be an example for all the world to follow in its treatment of minorities." 92 CONG. REC. A492 (1946).

61. *See* Pawnee Indian Tribe v. United States, 109 F. Supp. 860 (Ct. Cl. 1953).

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texts, it is fair to ask whether the reservation counsel, OEO-financed or not, is capable of fulfilling this role. What skills, in other words, are necessary for the task?

First, the architectural skills of the lawyer are much in demand. He should constantly consider the sorts of innovative legal constructs that will provide for exploitation of resources in a way that is compatible with the cultural needs of his clients. Here, as in other respects, the lawyer for the Indian poor must be as resourceful as the lawyer for the wealthy. Lawyers for the rich have devised schemes to allow a culture to continue: the spendthrift trust, the personal holding company, the foundation, the Philadelphia nun, the generation-skipping trust – all designed to allow a group of people to live in the style to which it has grown accustomed, hindered as little as possible by the incursions of change in the society at large. Moreover, the rich have often taken the perspective that their way of life should be available not only for them, but for generations to come as well. They ask not only that their assets be preserved, but that they grow, and they ask as well that those assets produce a sufficiently ample income to give the owners freedom to pursue activities of their own choice.

The Indians ask no less of their lawyers. They seek economic development that is consistent with their style of life, but only seldom is it provided. The Palm Springs Agua Caliente Band may serve, again, as an example. The land of the Band and of its members is rapidly being "developed." Lavish new houses, new hotels, new golf courses have appeared where not long ago barren vacant lands existed. But none of the houses are inhabited by Indians, and the comfortable country clubs have no Indian members. There is money, but it is obtained at the expense of the continuing existence of the Band as a political and cultural entity. Similar difficulties are encountered in the pell-mell effort to induce industry – any industry – to locate on reservations. The fact that the jobs created may be rendered obsolete in five or ten years is often overlooked, even though technological change may leave in its wake the same kind of brutalization and haphazard urbanization that has occurred in many instances in small towns and cities throughout the country. And some reservations, without wise coun-

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sel, expose themselves to the sort of raping of their natural resources that has saddened the lives and future of Appalachia.[62]

There are more hopeful examples. In Alaska, the legal services program was asked to provide a legal entity that would develop Nelson Island, located in the western part of the state. The Indians of the village sought a vehicle for development that would not defeat traditional concepts of property and life. The legal services program devised a new kind of entity tailored to the traditional forms of organization and political decision making in the area. Most important, all property except personal property will eventually be held in trust on behalf of all the members of the Nelson Island corporation.[63] The corporate form provides the atmosphere for development while honoring customary ways in which the members of the village consider the property of the commune. Together with Z. Simpson Cox, a Phoenix attorney, the Gila River Reservation has formed a complex five-year plan for development, including careful decisions concerning what reservation land should be used for homesites, where industrial development would be most desirable, and how transportation, water, and income changes relate to education, tribal organization, and housing. Largely as a consequence of the basic planning, Gila River was selected for inclusion in the federal model cities program.

In California, there are special circumstances for economic development that limit the capacity of the Indians of the state

62. On the Muckleshoot reservation in Washington, beautiful land with historical significance is being cleared for trailer parks. Another example is the Big River project of the Colorado River Reservation, straddling the Arizona and California border. The most valuable sector of the reservation, along a scenic bend in the river, has been turned over to developers for the building of yet another suburban-type leisure city, with some opportunity, some time in the future, for the Indians to be paid. In the meantime, the developers have given the tribe a new gymnasium, the 1969 equivalent of glass beads. There was not even the attempt, indulged frequently by underdeveloped countries elsewhere in the world, to require that the developer employ and train the indigenous population at all levels of his enterprise.

63. Summary of Achievements, Alaska Legal Services Program (undated memorandum). Similar problems arose in American Samoa. The Samoan Constitution, approved by the United States Secretary of Interior, proclaims that no law shall be passed that is inconsistent with Samoan customs and land ownership. Specifically, Samoan land cannot be owned by anyone with less than 50% Samoan blood. The constitutionality of this provision under the United States Constitution has not been tested.

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to employ the substantial funds that have been gained through the claims process. The prime limitation has been the understandable desire of the Indians with an interest in the fund to obtain a per capita distribution. Deprived for 100 years of both land and money, they now have little tolerance for an intangible right to a fund. On the other hand, it is clear that the potential for development is almost wholly dissipated when the 29 million dollars is spread at the rate of about 800 dollars per claimant. Still, some leaders, particularly in the southern part of the state, are interested in seeking ways to achieve both goals. The OEO-funded program in California, California Indian Legal Services, is presently exploring the possibility of creating a special savings bank, in the nature of a California Indian Development Fund, that would allow withdrawals by individual Indians, but would also permit accumulations for investment purposes.

III. CONCLUSION

The process of shifting from a service orientation to a development orientation is not easy for the lawyer. First of all, there are service needs that, because they result from immediate pains, often must be met. Furthermore, the lawyers themselves may not be trained to take a developmental view of their skills. A corporate lawyer, in the company of titans, may plot with his client the conquest of certain worlds, but the lawyer for the poor normally views his role more humbly. To argue, on behalf of a group of poor people, that they, rather than a major city, are entitled to the flow from a major river is a luxury that is local to those representing Indians. Yet in some California valleys where substantial diversions have taken place, such an argument undoubtedly has great merit.

It would be excellent if the charge to lawyers could rest with the mandate to maximize resource use consistent with the cultural needs of the reservation client. Unfortunately, there are complications. Quite clearly, many reservations, smitten by the same ambivalencies that have diseased the non-Indian administrators, may not be able to present the profile of a life-style that they wish to nourish and preserve. In some cases, such as the Colville Reser-

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vation in Washington, the membership is riven. A large sector has already accomplished the acculturation process and is loathe to stand by while a significant proportion of tribal assets is dedicated to the development of the reservation, but there are others, usually those still on the reservation, who see the need to use common resources in ways that assist the tribal members who are living, as treaties used to say, "in the Indian manner." Again, the use of land becomes central. If the land is not to be sold, the wholly assimilated members of the band may wish to have it exploited in a way that maximizes income, whether the land use is consistent with traditional needs or not. Before long-term action can be taken, before the lawyer-as-architect has any idea of the direction he should take, there must be some approximate resolution among the vying forces concerning the uses of reservation resources.

The resolution is not necessarily in terms of a blue-print and full plan for development; that will rarely occur. It may occur through the political process with the leadership selected largely because of its capacity to mediate between the two sides. But there is almost certainly a prior role for the lawyer to play in some settings assisting in the articulation process. For example, the dissention in some reservation contexts may be attributable to the fact that no one is aware of all the alternatives; presented with a meager set of choices, the opportunity for polarization is increased. Furthermore, the continuing uncertainty about federal policy contributes to a false sense of urgency when it appears that policy may change quite drastically. If the lawyer seeks to be guided by the reservation concerning the use of his architectural skills, he must increase the richness of the choices available to the tribe. He has to encourage the tribe to look at issues from a development perspective, he must enhance the ability to criticize the proposals of the government, of consultants, of lawyers, of private developers.

Partly, this is a problem of Indian perception of the Bureau of Indian Affairs. In the past, the Bureau was the exclusive provendor of federal government largess. The Superintendent of the Agency was the man from whom all money had to be coaxed and who

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approved all decisions. The political consequences of this colonial relationship were disastrous. In the recent past, there has been an effort to fragment the notion of dependence by encouraging Indian tribes to go elsewhere with proposals for a change. The Economic Development Administration, the Department of Labor, the Department of Health, Education and Welfare, as well as the Office of Economic Opportunity, have become principal sources for tribal funding. As a consequence, the economic importance of the Bureau personnel on the reservation has diminished. But the legacy of subservience and overobedience still remains. It will be impossible for economic development to occur, and it will be impossible for the lawyer to obtain a useful picture of tribal goals, so long as the singleness of the relationship exists.[64] As part of his function of demonstrating the richness of alternatives, the lawyer must indicate the richness of institutional choices that the reservation can make – that it is not necessary to be so dependent on the Bureau of Indian Affairs.[65]

This task, breaking the psychological stranglehold of the Bureau, the legacy of dependence even after the fact of dependence has disappeared, will be most difficult. To a large extent, it will be the function of the lawyer to demonstrate that the Bureau is vulnerable not invincible, and that its decisions concerning development are often faulty and overly conservative. Such a strategy can be implemented in several ways. First, the lawyer can encourage the establishment of model projects that proceed wholly indepen-

64. Indeed, the idea that in 1968 a government functionary can bear the title "superintendent" of a reservation (as if it were a huge prison farm) approximates the absurd.

65. For example, a reservation in the Northwest has a substantial timber business with a potential income of $10 million per year. The management of the resources is now conducted by the Bureau of Indian Affairs; for the past 25 years, the tribe has eschewed obtaining expert private management assistance because it thought it was obtaining aid from the Bureau free of charge. Recently the tribe learned that the Bureau is deducting 10% of income to cover administrative expenses. Furthermore, the Bureau, in providing management assistance, often has unusual ideas about the limits on development strategies; it has, for example, discouraged vertical integration of the tribe's lumber business because of the possibility of distressing the white community near the reservation. It is possible and likely that the Bureau will change its views, but the monopoly aspect of the situation stifles the atmosphere in which the highest, most creative thought concerning development can take place.

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dent of Bureau involvement, hoping to demonstrate the effect of the Bureau's dead hand. Second, there is the exposition of the truth, making known to the tribal leadership aspects of the Bureau-tribal relationship that have probably never come to light.[66] There are few developmental aspects of the Bureau's stewardship that would not bear serious scrutiny.[67]

The task, however, is not only changing the reservations' view of the Bureau, but also the Bureau's attitude toward the reservations. An Indian reservation, Judge Deady said in *United States v. Clapox*,[68] is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations that distinguish the civilized from the uncivilized man. That has been the view of the Bureau, virtually since its inception. It has looked at the reservation as a campus – to be terminated when the graduates all attain sufficient degree of civilization. In terms of economic development, however, there are special perils because of the Bureau's definition of civilization. It must be a definition that flows from the collective ideas and attitudes of the personnel. It is a view of civilization and development that is humble and modest, an attitude toward the pupils that one might expect from a third-grade teacher toward her class. It is an attitude based on Horatio Alger and hard work, professional ambitions for the few, but virtually no ambition for

66. Often this will center about the administration of trust land or trust money by the Bureau. California Indian Legal Services, for example, has filed suit against the government for paying only 4% interest on Indian funds on deposit in the United States Treasury while no other creditor is paid at so low a rate.

67. The lawyer might encourage more critical appraisals of Bureau proposals. In California, the Bureau found $15,000 remaining at the end of the fiscal year that would have to be returned to the Treasury if it were not used or obligated. Rather than turn back the funds, the Bureau spent the money to hire a retired land planner to do an economic development profile of five reservations in the Pauma Valley. It was a hopeless task from the outset– the contract was signed before the Indians were consulted; there was not enough money to do a decent study; the contract plan was pregnant with the possibility that the planner would devise land uses incompatible with Indian wishes. With little at risk, it would have been possible to recommend to the over-studied California band that they reject the contract, that they state why it was inadequate and inefficient, and that they ask for an accounting from the General Accounting Office, of the procedures under which the contract was let.

68. 35 F. 575 (D. Ore. 1888).

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the many. Development of the land, like development of the political institutions, is desirable only to the extent that it increases the freedom of the reservation clients – freedom from hunger and privation, but also freedom to pursue a culture or style of life considered worthwhile. It is no feat to fill the reservation with another suburb, or to line the reservations with industrial buildings assembling electronic components, just as it is no feat to superimpose American-style courts and educational institutions upon the political structure of the tribe. What is needed, rather, is a subtle understanding, on behalf of the reservation, its lawyers, and the government agencies, of the capacity to manipulate progress so as to provide a greater degree of meaningful self-determination.

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APPENDIX

RULES OF ADMISSION TO THE PRACTICE OF LAW ON THE NAVAJO RESERVATION

I. DEFINITIONS

A. "Attorney" shall mean any person who has been licensed to practice law by any State.

B. "Advocate" shall mean any person who is not a licensed attorney in at least one of the states of the United States, who appears for another and practices law upon lands subject to the jurisdiction of the Navajo Tribe by arguing causes, presenting motions or otherwise appearing before the Navajo Tribal Courts, whether such arguments, motions or other appearances is made orally or by written documents.

C. "Practice of Law" shall mean giving legal advice or counsel; or appearing in a representative capacity in proceedings before any court; board, body or commission; or acting professionally in legal formalities, negotiations or proceedings for a client; or preparing or drafting legal instruments or contracts by which legal rights are secured; or taking any action for another in matters connected with the law.

II. SELF REPRESENTATION

Any person may appear before the courts of the Navajo Tribe without the assistance of a regularly licensed attorney or advocate and present or defend any action wherein he is plaintiff or defendant. One who acts only for himself in legal matters is not practicing law contrary to these rules. An owner representing a business entity other than a sole proprietorship, or a person prosecuting a claim procured by assignment or a claim not originally his own is engaged in the practice of law, and must be licensed according to these provisions.

III. LICENSE TO PRACTICE

A. Only persons licensed to practice by the Board of Legal Examiners shall practice law upon lands subject to the jurisdiction of the Navajo Tribe. The practice of law is a privilege bestowed upon qualified persons for the benefit of the Navajo Tribe in accordance with its duty to assure that a high standard of justice and order is maintained.

B. An attorney shall be licensed to practice upon lands subject to the jurisdiction of the Navajo Tribe who furnishes satisfactory proof to the Board of Legal Examiners that:

1. He has a professional knowledge of the laws, court rules and procedures of the Navajo Tribe, and is a licensed member in good standing of at least one state bar, or, he is a licensed member in good standing of at least one state bar and has engaged in the practice of law for 5 years continuously prior to his applications;
2. He is of good moral character, and
3. (a) He has maintained his continuous domicil upon the Navajo

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Reservation for a period of four months immediately prior to his application, or

(b) He has been permanently and continuously employed on the Navajo Reservation on a full time basis under the supervision of an attorney who is duly licensed to practice pursuant to these rules for a period of four months immediately prior to his application.

C. An advocate shall be licensed to practice upon lands subject to the jurisdiction of the Navajo Tribe who furnishes satisfactory proof that:

1. He has a professional knowledge of the laws, customs, and court rules and procedures of the Navajo Tribe, and
2. He has a fluent command of the Navajo and English languages, and
3. He has maintained his continuous domicil upon the Navajo Reservation for a period of six months immediately prior to his application, and
4. He is of good moral character.

D. Advocates and attorneys currently practicing law upon the lands subject to the jurisdiction of the Navajo Tribe may be licensed notwithstanding any other licensing requirements set forth in these rules upon:

1. Payment of the application filing fee, and
2. Furnishing satisfactory proof that:
   (a) If the application is for license as an advocate, the applicant has been regularly practicing before the courts of the Navajo Tribe since (insert date 6 months prior to effective date of these rules), or
   (b) If the application is for license as an attorney, the applicant has been regularly practicing law on the Navajo reservation, other than by appearing in tribal courts, on a full-time basis since (insert date 3 months prior to effective date of these rules).

E. Upon motion to the court hearing the case a duly licensed member of a state bar who is sponsored by an attorney or an advocate who is licensed to practice on lands subject to the jurisdiction of the Navajo Tribe may be permitted to appear as an associate to a duly licensed advocate.

The motion to appear must be accompanied by a statement showing that the applying attorney is sponsored by an attorney or advocate duly licensed pursuant to these rules to practice upon lands subject to the jurisdiction of the Navajo Tribe. The statement of sponsorship shall state that the sponsoring attorney vouches for the good character and professional good standing of the applicant, and that the sponsoring attorney will be personally responsible for the professional conduct of the applicant.

The motion must specify the advocate with whom the applicant is associating, and the applicant may not associate with a different advocate except upon motion to the court. The association shall be only for the purpose of the trial or hearing of the cause then before the court, and the attorney who has been granted permission to associate shall at all times be under the direct personal supervision of the advocate with whom he is associated, pursuant to the provisions of Section IV of these rules. Time spent on the lands subject to the jurisdiction of the Navajo Tribe while associated shall not be included

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in computing time requirements for domicil or practice periods under Section III B of these rules. Nor shall permission to associate confirm any rights to practice law on the lands subject to the jurisdiction of the Navajo Tribe other than those given to participate as an associate in the cause in which permission to associate has been given. Any person upon lands subject to the jurisdiction of the Navajo Tribe pursuant to a permission to associate shall be subject to the provisions of Section X of these rules.

IV. MOTIONS AND ARGUMENTS

All motions and arguments before courts of the Navajo Tribe, whether oral or written, shall be presented only by the following persons:

A. In criminal or juvenile cases by an advocate, or by an attorney under the direct personal supervision of the advocate.

B. In civil cases by an advocate, or pursuant to a motion if the court specifically grants permission for the purposes of the case before it, by an attorney under the direct personal supervision of an advocate.

C. This section shall not be construed as limiting the scope of Section I.

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