92D CONGRESS
1ST SESSION

S. 2035

IN THE SENATE OF THE UNITED STATES

JUNE 9, 1971

Mr. BYRD of West Virginia (for Mr. JACKSON) (by request) introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

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 relationships 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.

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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 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

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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

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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 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

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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 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

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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 such suit against the United States, its officers and employees should 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 not include suits that could be brought under the provisions of section 1346 (a) (2) and 1491 of title 28, United States Code: *Provided, however*, that the Authority may assist any Indian tribe request-

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ings 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; and

(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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September 17, 1971

Bradley H. Patterson, Jr.
c/o The White House
190 Executive Office Building
Washington, D.C. 20500

Dear Brad:

I thought you would be interested in the attached speech made by Bob Barker on the Indian Trust Counsel Authority before the Federal Bar Association on September 10, 1971.

I would still like the opportunity to come over and talk with you when you get free.

Best regards.

Yours sincerely,

WILKINSON, CRAGUN & BARKER

Jerry

By: Jerry C. Straus

Enclosure

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THE UNITED STATES' INTEREST IN THE WELFARE AND ADVANCEMENT OF THE AMERICAN INDIAN COULD WELL BE EXPRESSED BY ADOPTION OF LEGISLATION CREATING A SUITABLE INDIAN TRUST COUNSEL AUTHORITY 1/

Few of us doubt that the United States, as a government and as a people, is interested in the welfare and advancement of the American Indian. The main problem, as in the case of much public administration, is failure to translate that feeling of interest and concern into effective action by the persons and the agencies who are responsible to act for the United States and its people. Sometimes, immediate pressures of conflicting interests within the government cause the failure of effective action. Some of these conflicts of interests exist in the very structure of the government agencies charged with protecting the interests of the Indians.

If a law firm or a bank or trust company sought to represent clients with such conflicting interests, there would be wide public criticism. Yet, our government agencies try to represent such conflicting interests in the field of Indian affairs on a regular and continuing basis. As a government, it seeks to advance the national interests and, at the same time, to serve as trustee and protector of the American Indians. Often, the interests of the Indians in the preservation and enhancement of their natural resources are in direct conflict with the programs, proposals and the objectives of the Bureau of Land Management, the National Park Service, the Bureau of Sport Fisheries and Wildlife, the Bureau of Reclamation and even the Forest Service. Most of these functions are under the supervision of the Secretary of the Interior who is also charged with the primary responsibility of being guardian and trustee for the Indians.

1/ Remarks of Robert W. Barker, Esquire, before Indian Law Committee, Federal Bar Association, September 10, 1971.

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Moreover, the lawyers for the government are primarily in the Department of Justice. These lawyers are charged with the responsibility of defending the United States in litigation. At the same time, they have responsibility to represent the United States in its duties as trustee for the Indians. This places the Department of Justice in an almost untenable position, at times.

Klamath-COPCO Case

About 20 years ago, as counsel for the Klamath Indian Tribe, our law firm tried repeatedly to get the United States, as trustee of the properties and interests of the Klamath Tribe, to file a suit against California-Oregon Power Company (COPCO). As trustee, the United States could have filed the suit free from the defense of the statute of limitations or laches, but the Tribe could not avoid such a defense if the suit were to be commenced by it in its own behalf. The United States, despite its responsibilities as trustee, never got around to filing the suit. We feel that the United States completely failed to perform its obligation as trustee to protect the interests of its Indian wards.

The Klamath Indians had long been accustomed to taking valuable salmon from the headwaters of an important river on their reservation. COPCO was granted the right to build a dam, with the requirement that fish ladders be provided to permit the salmon to make their way upstream past the dam to the headwaters of the river on the reservation. When COPCO failed to maintain the fish ladders, which fell into disrepair, and the salmon were unable to reach the headwaters on the reservation, the Klamaths were deprived of valuable property rights and benefits, the right to catch the salmon. By the time we were employed as general counsel for the Tribe and the situation was brought to our attention, it was too late for the Tribe to file a suit in its own name, so we asked for help from the Secretary of the Interior and the Department of Justice, in bringing the suit as trustee. We feel that we should have received such help. We didn't get it.

At the time, we believed that the studies we had made of (a) the basis for liability, and (b) the ability

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to prove substantial damages, made a compelling showing upon which the government should have acted. As a matter of fact, we ultimately got the support of the Solicitor and of the Department of the Interior and some of the attorneys in the Department of Justice. A suit was about to be filed but later, upon change of decision, was not.

We were fully aware at the time that the United States was in a difficult position. The Department of Justice was responsible for defending a number of suits then pending or about to be filed involving compensation for fishing rights allegedly destroyed by the erection of several high dams on large rivers. It was readily apparent that the Department of Justice would have had a hard time arguing in those cases against a principle of liability and the principles governing the measure of damages and, at the same time, in another case on behalf of the Klamath Tribe, sponsor a suit which was based upon the same principles of liability and damages. It is easy to see why the decisional-making authorities in the Department of Justice decided not to act for the Klamath Indians. But the question is posed, did the United States really perform its trusteeship.

Water Rights

Over the years, the Indians have felt it most urgent that their rights in the waters of western rivers be asserted and proved. In the arid west, there is no more valuable commodity than water. The Indians have felt that the United States, as their trustee and guardian, should have taken the lead in asserting and proving their water rights which were recognized by the Supreme Court of the United States in Winters v. United States (207 U.S. 564 (1908)). However, despite the strong urging of the various Indian tribes and the Indian community in general, little success has been achieved in getting the United States to take the lead in getting adjudication of these water rights. Many of us watched with amazement, for a number of years, as the United States was inactive, so far as protecting the interests of the Indians was concerned, in the early phase of the Colorado River litigation.

It has been realized by many competent observers that the Secretary of the Interior, as the Cabinet officer

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charged with administering Indian affairs, has a real tug-of-war in his own organization. The Bureau of Indian Affairs conscientiously tries to protect the interests of the Indians (including their water rights) and the Bureau of Reclamation has, as its mission, the development of feasible reclamation and irrigation projects, many of which require the Indian water to be economically feasible. How is the trustee to act fairly amid such conflicts?

The President Has Recognized The Need For A Change

President Nixon has become acutely conscious of the needs and interests of the American Indians. He not only has issued an important policy statement, clarifying his position, but he has proposed specific legislation which is now before the Congress. On July 8, 1970, in his message, he stated as follows:

> "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

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> 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.
>
> "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...."

The President has suggested legislation to remove the conflicts within the government between advancing both the national interest and protecting the Indian interests in land, water rights and other resources. The proposal would create a separate entity outside of the Department of the Interior which could promote the rights and claims and interests of the Indians in their natural resources, unfettered by the programs, aims and ambitions of the agencies, bureaus and programs within the Department of the Interior.

The bill on the Indian Trust Counsel suggested in July of 1970 was not perfect. Certainly, the concept of the legislation is significant, popular with the Indians and worthy of striving to accomplish. There were certain defects in the bill, however, which must be corrected before adoption. On April 28, 1971, the Secretary of the Interior recommended a revised bill to provide for the creation of the Indian Trust Counsel Authority. It has substantial improvements in it, but still has certain weaknesses which need to be worked upon.

Sketch of The Bill

As you know, the purpose of the bill 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 in order to reaffirm the trust and treaty relationships

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between the United States and The American Indians and Alaskan natives. The Indian Trust Counsel Authority would be established as an independent agency within the Executive Branch, but to be free from control by any executive department in the exercise of any and all of its functions. It would be an effort to set up the new machinery necessary to really protect the Indian rights and interests. The Authority would be governed by a three-man Board of Directors, 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 the members of the Board would be four years, except that the initial Board should be appointed with staggered terms. Compensation would be at the level of GS-18 for days actually engaged in service. The Board's function would be to set the policy and review the activities of the Authority and report to the President and the Congress annually on the activities of the Authority.

Within the Authority, there would exist an Indian Trust Counsel, Deputy Indian Trust Counsel and such other attorneys as the Board of Directors considers necessary after consultation with the Indian Trust Counsel. The Board of Directors would also have power to appoint and compensate special counsel and experts who may appear for or represent the Authority or one or all of the parties.

Within the organizational frame mentioned, the Authority would perform its major function - the protection of natural resource rights to lands, rights to the use of water, timber and minerals, the right to hunt and fish. With the consent of the aggrieved Indian, Indian tribe, band or identifiable group of Indians, the Authority is authorized to render legal services involving such rights, including the prosecution of such cases in all courts of the United States and of the states and to engage in any and all administrative proceedings. Time will not permit the detailed analysis of the twelve sections of the bill but it may be sufficient to say that under both Sections 8 and 9, the Authority may represent Indian natural resources rights in disputes against parties other than the United States. Under Section 9, claims may be brought in the name of the United States against any of the states, their subdivisions, departments and agencies or against persons and corporations, public and private. The Department of Justice would be relieved of the responsibility

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of representing the Indians or Indian tribes with regard to their rights or claims to natural resources, but the trust responsibility of the Department of the Interior would be continued. The bill would waive the sovereign immunity of the United States from suit in connection with litigation initiated by the Authority under Section 9 and any suit against the United States, its officers and employees, would be tried to the court without a jury.

Again, time will not permit a detailed analysis or suggestions. A few comments are in order, however:

1. Basically, the concept is good and should be encouraged. The impact of the legislation should be fully evaluated. In freeing the Indians from the ineffectiveness of the trusteeship, care should be taken to see that they are not left in a disadvantageous position in other respects.

2. The most important question mark, obviously, is the funding of the Authority. Some people feel that if the Trust Counsel were successful in really representing the Indians, so that it might hurt the United States or other interested parties, pressure would develop to cut out the funds of the organization. The integrity of the Authority and its ability to act must be guaranteed, otherwise, the Indians will be left in a less advantageous position. As one of the Indians said in the hearings on the bill, it might be better to have the Department of Justice on the side of the Indians part of the time than not have anybody there at all.

3. The role of the Department of Justice should be clarified. The initial draft would discharge the Department of Justice of any trust responsibility. This was met with complete disfavor on the part of the Indians. The most recent revision of the Bill suggested by the administration would merely relieve the Department of Justice of the responsibility of representing the Indians in certain matters. This is interpreted not to relieve the Department of Justice of considering the responsibility of the United States as trustee in all of its actions but further clarification of this point is needed. Also unanswered remains the important questions of (a) the availability of the services of the various United States

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attorneys, (b) the availability for detailing experienced attorneys from the Department of Justice to work with the Authority, and (c) the availability of the files, records and know-how of the Department of Justice to the Trust Authority.

4. The Board of Directors should be sufficient in size to be responsive to the Indian people and free from political pressure. It is felt that three individuals could be easily politically pressured. Perhaps a Board of seven or nine individuals would be less subject to such pressures. Further, the Indian viewpoint could be better expressed if the Board were larger and composed primarily of Indians. Steps must be taken to assure that the policy of this Board is in harmony with the wishes, desires and interests of the Indian community.

5. Better guidelines are needed to determine which litigation would be pressed and have priority. At the present time, the Authority would be authorized to render legal services and initiate suits "with the consent of the aggrieved Indian, Indian tribe, band or other identifiable group." This appears to give the Authority wide discretion in choosing its cases and activities. Some of the Indian tribes have made clear that the tribes should have self-determination and should be entitled to the right to have their matters handled through their own legal counsel, of their own choosing, if they desire and can afford it. Obviously, there may be circumstances, such as the COPCO case, where the tribe would be best served by having its own counsel take the lead in the litigation. In such a case, the Authority could be a sponsor of the case to protect against technical defenses, etc. Moreover, some litigation may be more important than others. That, having broad impact on the Indian community, should probably get first priority of attention and funds.

6. Dealing with conflicts between interested Indian parties requires clarification. It is possible that matters will develop where adjoining or neighboring tribes or individuals would have conflicting interests. In these circumstances, the Authority must be able to handle the matter, free from conflicts of interests. Probably, the best means of doing this would be to retain separate outside counsel to represent each of the groups.

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7. Uncertainty as to the extent of waiver of sovereign immunity needs to be clarified. Section 9 includes a waiver of sovereign immunity. Section 8, which authorizes the rendering of legal services (not the litigation), has no such waiver. It must be made clear that the United States waives its sovereign immunity in all appropriate situations.

8. It is important that the Authority have unrestricted access to documents within the files of the government. The bill would authorize the Authority to request from other agencies material, documents, services, etc. which it deems necessary to carry out its function. The agencies would be authorized to cooperate. Because documents, materials and information within the knowledge of the United States, as trustee, have often been channeled to the Department of Justice and the Department of the Interior, it should be made clear that the Trust Authority may demand and receive these documents and information as a mandatory matter and that the other agencies of the government do not have discretion as to turning them over.

Conclusion

The long-standing conflict of interests of the United States in representing various functions of government and serving the American Indians as trustee must be reconciled. The trust responsibility is of overriding importance in the relationship between the United States and the Indian people. The proposed Indian Trust Counsel Authority has a possibility of providing a means to better perform that function, however, adequate power, adequate funds and adequate safeguards are necessary as part of this program.

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STATEMENT OF AFFILIATED TRIBES OF NORTHWEST INDIANS
AND OF THE
SPOKANE TRIBE, COEUR D'ALENE TRIBE AND KALISPEL INDIAN COMMUNITY

IN CONDITIONAL SUPPORT OF S. 2035

During September 1970 the writer, together with tribal and regional delegates, testified in favor of S.4165 (presently introduced as S.2035). Prior to that time, on September 11, 1970, the Affiliated Tribes of Northwest Indians had adopted a resolution endorsing the bill without qualification. Individual tribes were "lining up" in their hearty endorsement of the bill.

The reason for the enthusiastic support was the fact that S.4165 existed as the first, genuine piece of legislation ever offered by the Administration, the purpose of which was to remedy the hopeless conflict of interest that impeded the Department of the Interior, the Solicitor's Office and the Department of Justice in effective representation of tribal and Indian causes and in the protection and preservation of their land and water resources.

This inherent conflict of interest has been so well documented that it needs no further proof. It was admitted by the President himself in his historic statement of July 8, 1970. It has been demonstrated again and again in patent failures to protect Indian interests in almost every instance where the Indian interests have been in conflict with those of the Bureau of Reclamation, the Corps of Engineers and even with private interests under State jurisdiction.

It is obvious that tribal and individual Indian resources and property rights have been allowed to dwindle and be lost because the various agencies of the United States Government have either failed to act to protect those rights or have acted positively and aggressively to speed up or assist in their loss. There have been innumerable instances when United States Attorneys, Justice Department lawyers or United States Solicitors have not acted or been allowed to act to protect the Indians' rights when to do so would appear to be in conflict with some other government program such as the acquisition of a reservoir site, the flooding of land or the preemption of water rights. The instances are rare when they acted in defense of the Indians.

S. 2035 establishing an Indian Trust Authority seeks to remedy this impasse. It sets up an Authority which will be authorized to employ attorneys to work exclusively as advocates, counsel and even trial lawyers, in the protection of Indian Rights. If it is enacted it will be a milestone. The trustee of Indian resources and property rights, the Federal Government, will actually be allowed to fulfill some of its responsibilities to the Indians.

The tribes the writer represents, the Spokane, the Coeur d'Alene and the Kalispel, can each tell a story of a loss of property and water rights because of the failure of the United States Government to act in any meaningful way to protect them.

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During the hearings of last year on S. 4165 the written statement filed in behalf of the Spokane, Kalispel and Coeur d'Alene Tribes and the Affiliated Tribes of Northwest Indians chronicled the sorry history of the failure of the Department of the Interior and the Justice Department adequately to protect their tribal resources.

The Committee's attention is directed to the earlier statement which will not be set out at length at this hearing. It outlined and recounted specific cases where the conflict of interest had been allowed to operate in jeopardy of tribal water rights. Some of those were as follows:

SPOKANE TRIBE:

1. The giving away in 1908 of Little Falls Dam site to the Washington Water Power Company which, with an initial payment of only $704.00 to the tribe, has ever since that time been operating this valuable hydro-electric resource belonging to the tribe free of charge and without regard to the damages the tribe suffered in the Power Company blocking forever the salmon runs.

2. The giving away to the Bureau of Reclamation for reservoir purposes of Roosevelt Lake behind Grand Coulee Dam of the Spokane and Columbia rivers' portions of the reservation and paying the tribe but $4700 for 35 miles of its river bed and the reservoir free-board area.

3. The failure to protect any of the tribal water resources against erosion and depletion through water permits granted non-Indians by the State of Washington, particularly on Chamokane Creek.

COEUR D'ALENE TRIBE:

1. As in the case of Little Falls, the giving away of Post Falls Dam site, eventually to the Washington Water Power Company, without any consideration whatever given to the tribal ownership of the site or provision for compensation to the tribe.

2. As in the case of the Spokane Tribe, the failure to inventory or identify the various water resources of the tribe so that the tribe and the Bureau of Indian Affairs would even know what they were.

3. The failure to take any steps whatever to protect the tribe against the granting by the State of Idaho of water diversion permits to non-Indians on tribal streams and ground water.

KALISPEL INDIAN COMMUNITY:

1. The failure to protect the immemorial tribal rights on the Pend Oreille River that flows through the reservation.

2. The failure to protect the tribal interests to the Pend Oreille River when its level was raised by the building by the local PUD of Box Canyon Dam.

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3. As in the case of the other tribes and in fact every tribe of the Northwest, the complete failure to this date to inventory and identify the various water resources of the tribe so that the tribe or the Bureau of Indian Affairs would have sufficient knowledge of their existence and nature to take any meaningful steps to protect and develop them for the benefit of the tribal members.

Similar examples could be given for every tribe in the Northwest: The loss of the pure Nooksak River waters to the Lummi Tribe. The ignominious agreement known as the Code Agreement involving the giving away of 75% of the waters of Ahtanum Creek on the Yakima Reservation to non-Indian farmers. The threatened raising of the dam on the Shoshone-Bannock Reservation which would result in the flooding and loss of thousands of acres of tribal land. The diversion and use of waters belonging exclusively to the Flathead Indians, but, in the name of an "Indian Irrigation District," used to irrigate 130,000 acres of non-Indian land. These are just some instances where tribes have lost valuable water rights because of the failure of the Department of the Interior to act in a meaningful way to protect those interests.

BASIS FOR SUPPORT OF THE INDIAN TRUST COUNSEL AUTHORITY S.2035:

Thus, with the sorry history summarized above, it was easy for the tribes of the Northwest to applaud the proposals of S.2035. They endorse it in principle.

After this initial enthusiastic endorsement, however, the tribes and their attorneys had time to review the bill more closely and generally found that, while the general principles of the Bill were constructive, the bill itself was unacceptable unless certain amendments and deletions were made.

CRITICISM OF PORTIONS OF S.2035:

Some of the things that are wrong with S. 2035 manifest perhaps a last effort by the Department of the Interior to put its stamp on the Bill so weakening some of its provisions that, if enacted, it may not result in correcting the deficiencies it seeks to correct.

The following are proposed admendments:

1. Section 2(c). This section provides that "At least two of the members of the board of directors shall be Indians." While such a provision to guarantee representation by Indians is applauded, the provision should be more flexible so that regional and national organizations such as the National Congress of American Indians could nominate a non-Indian to fill one of the two Indian positions if it is felt that the particular non-Indian can more effectively function in the protection of the Indians' interests.

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2. Section 8. Wherein this section provides that the Authority is authorized to render legal services "with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians . . ." the section should be amended to provide that if the matter relates to the resources, rights or claims of any tribe or reservation the request or consent must emanate from the governing body of the tribe. As drawn, the Authority could be utilized by any "rump" or dissident group to fight a tribe. Anyone dealing with Indian affairs knows that some of the worst enemies the tribes have are dissident or terminationist groups within the tribes themselves. Any group within the tribe, other than its own governing body, should receive clearance from the governing body or the tribe itself before being eligible to receive legal assistance from the Trust Counsel.

3. Section 8. As in the case of S.4165, S.2035 still retains in Section 8 the provision relieving the Department of Justice of its responsibility to Indians with regard to their rights or claims to natural resources, etc. This self-defeating clause should be deleted. No existing department of the Federal Government, least of all the Department of Justice or the Department of the Interior, should be relieved of any responsibility. They should continue to exist as a "resource" in legal cases, subject to assignment by the Trust Counsel to assist in particular matters. More important is the real Indian fear that if the Justice Department is relieved of responsibility the last semblance of it being an advocate and champion for Indian resources, property and water rights will disappear. It will be adverse to the Indians' interests in every important case.

FURTHER RECOMMENDATIONS:

The foregoing constitute some proposed amendments to correct what most Indian spokesmen believe are the major weaknesses of the Bill. At issue still is just how the Authority is going to operate in administering its responsibilities once it is under way.

It is the belief of most tribes that if it is simply a large government law office charged with representing Indian interests, it could still be so subject to control and influence from within the Administration that it really will not be in a position fully to correct the evils of the present situation of conflicts of interest within the Departments of Interior and of Justice. Additionally, it will be headquartered in Washington, D. C., so isolated from tribes that a small tribe, hundreds of miles away, may never come in contact with it.

How can a tribe get the Trust Counsel to act in its behalf in a particular water rights matter? It is easy to believe that, with the competition of tribes for services, it would be a "major case" itself to involve the Trust Counsel. As is now the case with the Justice Department, the Trust Counsel could require such proof and documentation of the tribe's needs and the facts and merits of the particular case that the tribe would decide not to utilize its services.

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One method of partially answering this problem of communication between the particular tribe and the Trust Counsel is to make provision in the Bill or at least administratively for direct financial grants to tribes for such things as water and resource inventories and for specific water rights cases. These grants utilized on a contract basis could be used by the tribe, for example, in a possible water rights case to employ local counsel and engineering assistance to carry on the case. As the case proceeded the Trust Counsel and the Justice Department could become further involved, probably as co-counsel with local counsel in the specific case. Unless an approach like this is worked out, it is difficult to see how the Trust Counsel can become aware enough of a particular situation on a specific reservation to take specific enough action to fill the needs of the tribe.

CONCLUSION:

That the Affiliated Tribes of Northwest Indians and the undersigned tribes endorse and support S.2035 if amendments and deletions are made to cover the foregoing criticism and suggestions.

Respectfully submitted,

Robt. Dellwo

ROBERT D. DELLWO

Attorney for Spokane Tribe, Coeur d'Alene Tribe, Kalispel Indian Community and Representative for the Affiliated Tribes of Northwest Indians

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91ST CONGRESS
2D SESSION

S. 4165

A BILL

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

By Mr. JACKSON, Mr. ALLOTT, and Mr. STEVENS

AUGUST 3, 1970

Read twice and referred to the Committee on Interior and Insular Affairs

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91ST CONGRESS
2D SESSION

S. 4165

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 1970

Mr. JACKSON (for himself, Mr. ALLOTT, and Mr. STEVENS) (by request) introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

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 relationships 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.

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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.

(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

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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.

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(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.

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 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, except 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 Indians with regard to their rights or claims to natural resources, including, but not limited to,

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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 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 and of the States, against the United States, its departments, agencies, officers, and employees, or 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 lands, 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

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sovereign immunity from suit in connection with litigation initiated by the Authority under this section.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 statute authorizing a suit to be brought against the United States.

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.

(5) Charge a fee based upon the Indians' ability to

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pay for services rendered pursuant to section 8 of this Act. The fees collected pursuant to this subsection shall be paid into miscellaneous receipts in the Treasury of the United States.

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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NATIONAL CONGRESS OF AMERICAN INDIANS

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September 28, 1971

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Blackfeet

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John Rainer
Taos Pueblo

TREASURER
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Cherokee

PHOENIX AREA
Ronnie Lupe
White Mountain Apache

PORTLAND AREA
Lucy Covington
Colville

SACRAMENTO AREA
Erin Forrest
Pitt River

Mr. Frank Bracken
Legislative Counsel
Office of the Secretary
Department of the Interior
Washington, D. C. 20240

Dear Mr. Bracken:

Enclosed is a copy of proposed amendments to the administration's Trust Counsel bill .

The proposed amendments are not meant to be complete, definitive, or final. Our rationale for each amendment is brief, but would be expanded in greater detail in any formal statement. In some cases, we have merely raised a question on certain provisions rather than proposing amendatory language.

While these proposed amendments cannot be taken as the formal position of NCAI on the Trust Counsel bill, it is representative of much of the current Indian thinking in this regard. We would appreciate your review of our proposed amendments and your comments thereon.

Sincerely,

Leo W. Vocu

Leo Vocu
Executive Director

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PROPOSED NCAI AMENDMENTS TO THE INDIAN TRUST COUNSEL AUTHORITY BILL

1. Section 2 (b). Strike the word "three" and insert in lieu thereof the word "five". After the word "members" insert the phrase ", no more than three of whom shall be of the same political party,".

A three member board is not sufficiently large to provide the diversity of interest and experience necessary to adequately represent the spectrum of Indian tribes and people. Perhaps even five is not a sufficient number to achieve this goal. The enlargement of the Board coupled with the limitation regarding political parties as proposed above would also reduce opportunities for political pressure being brought to bear on the Board.

2. Section 2 (c). Strike the word "two" and insert in lieu thereof the word "three". Strike the word "Indians" and insert in lieu thereof the phrase "enrolled members of a federally recognized Indian tribe".

The first part of this amendment is necessary to conform to Amendment No. 1. We feel that the second part of this amendment is necessary for two reasons. First, the provision for at least a majority of the Board to be Indians was included to insure that an understanding and awareness of Indian problems and thinking would be adequately represented in the decisions and deliberations of the Board. A President or his advisors could easily defeat the intent of this proviso by dredging up a political crony who might claim, legitimately or otherwise, an infintesimal degree of Indian blood [as over half the American population probably could] and who would have no knowledge of Indian law, history, administration, or culture.

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Second, the further limitation to membership in a federally recognized tribe is, obviously, in line with the purposes of the act. The act would provide better legal protection of the trust assets of Indian tribes to whom the United States owes a trustee obligation, giving rise to the federal relationship and recognition. If the Indian board members are to provide this kind of representation, they should have some knowledge of the trust relationship.

3. Section 2 (d). Strike the word "three" where it appears for the first time and insert in lieu the word "five". Strike the word "one" where it appears for the first and second time and insert in lieu thereof the word "two".

These amendments are necessary to conform to Amendments 1 and 2. Query: How does the last sentence in this subsection square with similar provisions in the enabling acts of other independent agencies in the Executive Branch, such as TVA.

4. Section 2 (e). Query: Is there any necessity to more explicitly spell out the duties and responsibilities of the Chairman.

5. Section 2 (f). After the word "day" insert the following phrase ", including any day or portion of a day in travel status,".

Travel time in the course of carrying out the business of the Authority will take a Board member away from his normal livelihood no less than the actual deliberations of the Board.

6. Section 3. In the second sentence, after the word "shall", insert the phrase "make a public".

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Unless the report or portions thereof fall within the exceptions to the Public Information Act, this information should be available to the scrutiny of the public as an added safeguard in the protection of Indian trust assets.

7. Section 4. While not prepared to offer language, NCAI feels that there should be at least some minimal statutory requirement set regarding the qualifications and abilities of candidates for the positions of the Indian Trust Counsel and the Deputy Indian Trust Counsel. These men will be responsible, directly, for the protection of billions of dollars in trust assets of Indian tribes and, in a very real sense, the actual continued existence of these tribes. While we hope that Indians could and would be placed in these positions, we feel that the critical responsibilities of these positions would transcend our desire in this regard.
The desired end might be accomplished by amending the bill to make specific qualifications a part of the act or by requiring the Board of Directors to set such minimum standards prior to selection of the chief counsel and his deputy and by making such standards subject to the approval of the President.

8. Section 5 (a). Strike the phrase "after consulting with the Indian Trust Counsel" and insert after the word "shall" the phrase ", upon the recommendation of and in consultation with the Indian Trust Counsel,".

If the Indian Trust Counsel is to be the chief executive officer of the Authority, he should have the right, subject to the approval of the

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Board and in conformance with any personnel procedures they may set, to select the cadre of attorneys he will need to carry out his duties.

9. Section 5 (b). After the word "shall" insert the phrase ",upon the recommendation of and in consultation with the Indian Trust Counsel,".

Same reasoning as for Amendment No. 8.

10. Section 5 (d). Strike the word "requesting" and insert in lieu thereof the phrase "lawfully entitled to". Strike the word "hire" and insert in lieu thereof the phrase "retain and reimburse". Strike the period at the end of the subsection and insert the phrase ", including reimbursement for the reasonable expenses of such assistance or representation."

The first part of the proposed amendment just makes us feel better. The rest of the amendment is to make it clear that the Authority may pick up the reasonable costs of insuring an adequate legal representation to an opposing party or parties in such conflict situation. In some states, the court will appoint an attorney for an indigent accused and then allow him $50 to pay the costs of such representation. This is clearly unjust and we wish to preclude this from occurring in the instant case.

11. Section 6. Reword Section 6 to read as follows:

"The Indian Trust Counsel shall, subject to the provisions of Title 5, United States Code and under the direction of the Board of Directors, appoint such employees, including an Administrative Officer, as he deems necessary in exercising the powers and duties of the Authority; Provided, however, that the provisions of 25 U.S.C. 44 and 45 shall be applicable to appointments made hereunder."

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The amendment would take the personnel selection power from the Board and place it in the Indian Trust Counsel, under direction of the Board. The reasoning here is the same as in Amendmend No. 8. The proposed amendment makes specific provision for an Administrative Officer. This is to insure that the chief counsel and his deputy are not burdened with administrative matters and can devote their time to legal duties. Finally, the proposed amendment would permit appointments under this subsection to be made under the "Indian preference" law.

12. Section 8. Insert the phrase "or ownership" after the word "use" where it appears for the first and second time. Strike the word "and" before the phrase "rights to hunt and fish," where that phrase appears for the first time and insert after such phrase the phrase "and any intangible rights appurtenant thereto,". Strike the word "and" before the phrase "rights to hunt and fish" where it appears for the second time and insert after such phrase the phrase ", and any intangible rights appurtenant thereto".

The right to use water, timber, and minerals may be a much different right than the right to ownership of these assets and, probably, a less valuable right. The first part of this amendment would insure protection of the ownership as well as the use of these resources. The second part of the proposed amendment would recognize that there may be intangible rights derived from and appurtenant to the listed rights which are as fully entitled to the protection of the trustee as the listed rights. The exemption from taxation of trust land and income derived therefrom might be an example of such an intangible right.

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Spokesmen for the Administration have stated that, in response to strenuous objection from the Indians, the absolution granted the Justice Department in the original version of the bill had been revised and limited in the 1971 draft. We can see no such substantive change although the language has been doctored. What services, other than legal protection of Indian trust assets and the tribal entity, does Justice provide Indian people? They do enforce and prosecute certain crimes on Indian reservations, but this is for the benefit of the United States rather than the tribes. It appears to us that the absolution granted Justice is as complete under the new version as it was under the old. We stand ready to be corrected if in error. If we are correct, the question of whether Indians would be better off accepting this complete absolution of Justice in return for the Trust Counsel bill or whether we would be better off remaining under the tender mercy of Justice is one which should be fully explained to the Indian people.

13. Section 9. Redesignate the section as Section 9 (a). Query: Is it wise to require the trustee, i.e. the Authority, to obtain the consent of the beneficiary before taking action to protect the corpus of the trust? It would appear the the United States would be accountable for failing to fulfill its trust obligation regardless of any instructions it might receive from the beneficiary.

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14. Add a new subsection 9(b) as follows:

> "The Authority may provide such assistance to any Indian, Indian tribe, band or other identifiable group of Indians as it deems appropriate in seeking administrative relief to insure the adequate protection of Indian trust assets by federal agencies charged with fulfilling such trust obligation."

History has shown, all too painfully, that Indian trust assets and rights are often administratively compromised, with irreversible legal effect, before a controversy ever reaches a formal administrative hearing or judicial review. All too often, the United States makes good its failure as a trustee with money rather than through a restoration of the Indian to his rights. This proposed amendment attempts to guarantee that the Authority can engage in 'preventive medicine'.

15. Add a new subsection 9(c) as follows:

> "The Attorney General of the United States shall cooperate to the fullest extent with the Authority in the transfer of authority and responsibility from the Department of Justice to the Authority, including the transfer of such documents, records, files and other supporting material and data as is necessary to permit the Authority to carry out its duties."

The proposed amendment is an awkward attempt to facilitate a smooth transfer of authority. Such a transfer might require the availability of certain Justice personnel and records to the Authority. In addition, perhaps some provision should be made for the continuation or other disposition of pending actions at the time of transfer being prosecuted by Justice.

16. Section 10. Strike the proviso at the end of the section and add the following:

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"Provided, however, That the Authority may provide legal assistance to any Indian tribe, band, or other identifiable group of Indians in any claim against the United States brought in the Court of Claims under authority of Section 89(a) of the Act of May 24, 1949 (63 Stat. 102; 28 U.S.C. 1505) if the Authority is satisfied that such tribe, band, or group is unable, for lack of funds or other valid reason, to retain counsel in such claim; Provided further, however, That the Authority may assist any Indian tribe requesting such assistance in its claim pending before the Indian Claims Commission."

Section 10 is very badly written. The language before the proviso would prevent Authority involvement in any claim brought under authority of the Indian Claims Commission Act, as amended. This includes claims which have been filed or could have been filed under such authority. It also prevents Authority involvement in claims brought under any special jurisdictional act for Indian claims. We assume this includes claims brought under authority of 28 U.S.C. 1505. The last clause before the proviso, reading " . . . but shall not include suits that could be brought under the provisions of section 1346(a)(2) and 1491 of title 28, United States Code: . . .", is extremely ambiguous. We can't determine whether it is meant to exclude Authority representation in cases arising under these sections or to permit such representation. It should be cleared up.

28 U.S.C. 1505 give the Court of Claims specific jurisdiction to consider claims by Indian tribes against the United States which claims arose after the deadline set by the Indian Claims Commission Act. Our amendment which adds a proviso would permit the Authority to undertake representation of such claims if it is satisfied that such claim is not frivolous and the tribe has been unable to secure counsel.

17. Add a new Section 17 as follows:

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"Nothing in this Act shall be construed or interpreted to diminish, reduce, impair, abrogate, cancel, or otherwise adversely affect the trust relatioship existing between the United States and any Indian or Indian tribe, band, or other identifiable group of Indians or the trust obligation and responsibility growing out of such relationship."

If no one intends that the Act should have such an effect, they should not object to inclusion of this explicit disclaimer.

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DRAFT:JCS:jm
11-9-71
Ducheneaux

MEMORANDUM FOR MR. DUCHENEAUX

Re: Proposed Amendments to Indian Trust Counsel Authority Bill

As requested we have reviewed your proposed amendments tothe administration's Indian Trust Counsel Bill. Our comments will be numbered according to the numbering you adopted in your proposed amendments.

1. We agree with your suggestion that the Board be increased to five members. We also think there is merit in your suggestion that no more than three members of the Board be of the same political party.

2. We think it is reasonable for NCAI to suggest that the Indian members of the Board be "enrolled members of a Federally recognized Indian tribe." You may wish to expand the definition slightly so that members of terminated tribes like the Menominees could qualify and that Alaskan natives could qualify. We suggest that you ~~should~~ consider the following substitute which is modeled on the definition of tribe contained in the present Constitution of NCAI:

> "Enrolled members of a tribe, band or other identifiable group of American Indians or Alaska natives (which term includes Eskimos and Aleuts) recognized by the Department of Interior, the Court of Claims or the Indian Claims Commission."

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3. We have no problem with the technical amendments you suggest in this section. We are not clear as to the question you raise concerning the last sentence of Section 2(d).

4. We don't believe it is necessary to spell out the duties of the Chairman more explicitly, particularly since the Chairman of the Board would not be working full time at the Authority but would only work at such time as the Board of Directors met or as needed at other times. As we envision it, the Indian Trust Counsel appointed by the Board will actually oversee the operations of the agency.

5. We doubt the need for the amendment you suggest. As we read that section, travel time would be covered since ~~the~~ members of the Board would be traveling on the business of the Authority. Perhaps this section should be clarified by making it clear that a Board member could be paid for part of a day so that after the word "day" the words "or part of a day" should be inserted.

6. We agree with your suggestion that the reports of the Authority should be public.

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7. We don't see how the minimal standards concerning qualifications and ability of candidates for the positions of Indian Trust Counsel and Deputy Indian Trust Counsel can be made part of the statute. To a large measure, the Indians will simply have to rely upon the good faith and good judgment of the members of the Board. We think there is mœ merit to your suggestion that the Board of Directors set their minimum standards and announce them publicly prior to any selection. However, as a practical matter, the Board is going to want to hire the best person they can get.

8. The amendment you propose does not accomplish your stated aim. If you would like the Indian Trust Counsel to have the right to select his staff subject to the Board's approval we suggest the following language to accomplish that result:

> "The Indian Trust Counsel shall appoint, fix the pay of and prescribe the duties of such attorneys as he may deem necessary, subject to the approval of the Board of Directors."

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9. Our comments are the same as under 8 and a similar amendment should be made to accomplish your desired end.

10. We question the needs for the amendment you propose. As presently drafted, the Authority has the discretion you desire to give it. Since there is nothing in the Section that limits the amount the Authority may expend in order to provide "special counsel or experts to assist or represent one or all of the parties" in a conflict complex situation. We question the effectiveness of substituting the phrase "lawfully entitled to" for the word "requesting" in the first part of this subsection. You don't really give any reason for the amendment. It seems to us that you could better make this point in an introductory statement rather than tying it to any particular provision, i.e., the point that the Indians are entitled as a matter of law to have their trust assets protected by the trustee. We think this would be much more effective a point in that context.

11. We see no objections to this proposed amendment.

12. We have no objection to the amendment you propose although it seems to us that the Authority under the language, as drafted, would be free to represent the Indians with respect to "intangible rights/are pertinent" to natural resource rights.

With respect to the absolution granted to the Department of Justice this is commented on in detail in our memorandum of July 8, which you have. While we think the present language is slightly improved over the earlier version we basically agree with your conclusion that the present version is unacceptable. You may wish to consider proposing the amendment we suggested in our July 8th memorandum to cure

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the defective language.

13. We think it is necessary for the Authority to have the consent of the Indian Tribe concerned. While it is true that the United States is trustee the nature of that trust relationship is changing to some extent and there appears to be fairly universal agreement that Indian tribes should play a larger role in shaping their own destiny and in decisions affecting their own property. We sincerely doubt that in a situation where a tribe does not wish to go to court over some natural resource right of the tribe that the United States would be liable for failing to act provided that the United States made reasonable efforts to acquaint the tribe of ~~any~~ a need for action. ~~xxxx~~ As a practical matter we doubt that there will be much problem in obtaining the consent of an aggrieved tribe where the Authority desires to act in a particular case.

14. With respect to your new proposed Subsection 9(b) we suggest that this be broadened to include state agencies as well as federal.

15. You may wish to consider the recommendations made in our memorandum of July 8th (p. 8).

16. We agree with your assertion that Section 10 is badly drafted. As ~~we~~ I interpret it, the Authority could not represent tribes in Indian claims matters either before the

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Indian Claims Commission or the Court of Claims. The proviso, as we see it, would allow the Authority to assist the tribe in a claim pending before the Indian Claims Commission but this would be where other counsel are prosecuting the claim.

As a practical matter, we doubt the wisdom of having the Authority heavily engaged in Indian claims matters. In those instances Indian tribes have been and are presently able to obtain counsel on a contingent fee basis where there is merit to the claim. The Indian Trust Council is simply not going to have enough staff or enough budget to handle all cases for Indian tribes. You recognize this in your assertion that the Authority could not take a case in the Court of Claims unless the tribe was unable to obtain counsel "or lack of funds or other valid reason."

We hope the above will assist you in preparing NCAI statement on the Indian Trust Council's Authority bill. As a matter of format, we suggest that you segregate the minor technical amendments from the major substantive ones and that these be included as an addendum to the main statement and will be touched upon briefly in the main statement.

Yours sincerely,
W, C&B
By: JCS

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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 its consideration and that it be enacted.

The purpose of this proposal, as provided 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 Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

Section 2 of the proposal establishes as an independent agency in the Executive Branch 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

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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. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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.

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 extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in a combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources, except that the Department of Justice in determining its litigation position with regard to any matter affecting the natural resource rights of Indians shall consider the obligation of the United States resulting from its trust responsibility to the Indians. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the 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 and State courts against the United States or any of its departments, agencies, officers or employees or 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.

Section 10 provides that the powers granted the Authority by this Act shall not extend to the filing or prosecution of any action, claim or other proceeding against the United States relating to any matter as

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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, and makes it clear that the prohibition does not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended.

Section 11 enumerates the authorities of the Authority.

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

As the President stated in his 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.
>
> "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, as provided in section 7, free from control of any Executive Department. This independence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

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The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal 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. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the 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 at the same time 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, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. 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 is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, 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

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its claim. The Authority is authorized to lend its assistance in the area of natural resource rights and interests to such Indian or Indian group. The section, however, makes it clear that the assistance rendered by the Authority in this section in protecting the rights of the Indians in their justiciable claims to natural resources, and the rights attached thereto, is in addition to the responsibilities that the Department of the Interior has to protect the Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and the American Indians. The section also provides that the Department of Justice will, after the enactment of the proposal, be relieved of its responsibility to the Indians in the area of natural resources but will continue to fulfill whatever responsibility it may have with regard to Indians generally. This relieving of Justice's responsibility is subject to the exception that Justice in pursuing a litigating position that affects the natural resource rights of the Indians shall give deference to the obligation of the United States arising from its tract responsibilities to the Indians.

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from 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. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they 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 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.

Section 10 of the proposal will bar the Authority from relitigating any claims that have been filed or should have been filed before the Indian Claims Commission. It will bar their reopening any claims settled by the Indian Claims Commission as well as any claims settled by the Court of Claims or any other competent court of the United States pursuant to special legislation authorizing an Indian tribe to bring suit against the United States for settlement of its claims.

Section 11 authorizes the Authority to make rules and regulations, to request assistance from any department, agency, or independent instrumentality of the Federal government to carry out its functions under this proposal and such assistance may be given to the Authority

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on a reimbursable or non-reimbursable basis. The Authority is authorized to receive and use funds authorized or donated to it by others. It is also authorized to make expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities.

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Finally, section 12 of this proposal authorizes the appropriation of funds necessary to carry out the provisions of the proposal.

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest 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

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

Enclosure

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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 relationships 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 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 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

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Trust Counsel, and who shall be paid at a rate equal to that provided for in level IV 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 sections 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.

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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, except 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 except further that in determining the litigating position to be taken by the Department of Justice on any matter affecting the natural resource rights of Indians or Indian tribes, the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe. 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.

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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 and of the States, against the United States, its departments, agencies, officers and employees, or 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 lands, 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.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended (24 Stat. 505).

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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.

(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.

→ Subsection 5 authorizing a fee has been deleted.

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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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 28 1971

Dear Mr. President:

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 its consideration and that it be enacted.

The purpose of this proposal, as provided 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 Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

Section 2 of the proposal establishes as an independent agency in the Executive Branch 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

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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. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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.

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 extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the 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 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

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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, and 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.

As the President stated in his 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.
>
> "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, as provided in section 7, free from control of any Executive Department. This indepencence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

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The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal 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. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the 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 at the same time given 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, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. 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 is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, 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

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its claim. The Authority is authorized to lend its assistance in the area of natural resource rights and interests to such Indian or Indian group. The section, however, makes it clear that the assistance rendered by the Authority in this section in protecting the rights of the Indians in their justiciable claims to natural resources, and the rights attached thereto, is in addition to the responsibilities that the Department of the Interior has to protect the Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and the American Indians. The section also provides that the Department of Justice will, after the enactment of the proposal, be relieved of its responsibility to the Indians in the area of natural resources but will continue to fulfill whatever responsibility it may have with regard to Indian generally. This relieving of Justice's responsibility is subject to Justice, in pursuing a litigating position that affects the natural resource rights of the Indians, recognizing the responsibility of the United States arising from its trust responsibilities to the Indians.

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from 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. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they 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 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..

Section 10 of the proposal will bar the Authority from relitigating any claims that have been filed or should have been filed before the Indian Claims Commission. It will bar their reopening any claims settled by the Indian Claims Commission as well as any claims settled by the Court of Claims or any other competent court of the United States pursuant to special legislation authorizing an Indian tribe to bring suit against the United States for settlement of its claims.

Section 11 authorizes the Authority to make rules and regulations, to request assistance from any department, agency, or independent instrumentality of the Federal government to carry out its functions under this proposal and such assistance may be given to the Authority

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on a reimbursable or non-reimbursable basis. The Authority is authorized to receive and use funds authorized or donated to it by others. It is also authorized to make expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities.

Finally, section 12 of this proposal authorizes the appropriation of funds necessary to carry out the provisions of the proposal.

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest 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,

Rogers C.B. Morton

Secretary of the Interior

Hon. Spiro T. Agnew
President of the Senate
Washington, D.C. 20510

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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 relationships 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 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 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

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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 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.

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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 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

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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 such suit against the United States, its officers and employees should 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 not include suits that could be brought under the provisions of section 1346(a)(2) and 1491 of title 28, United States Code: Provided, however, that the Authority may assist any Indian tribe

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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.

(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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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

~~April 25 1971~~

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 its consideration and that it be enacted.

The purpose of this proposal, as provided 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 Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

Section 2 of the proposal establishes as an independent agency in the Executive Branch 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

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OFFICE OF THE SECRETARY
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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

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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. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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.

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 extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in a combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources, except that the Department of Justice in determining its litigation position with regard to any matter affecting the natural resource rights of Indians shall consider the obligation of the United States resulting from its trust responsibility to the Indians. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the 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 and State courts against the United States or any of its departments, agencies, officers or employees or 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.

Section 10 provides that the powers granted the Authority by this Act shall not extend to the filing or prosecution of any action, claim or other proceeding against the United States relating to any matter as

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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, and makes it clear that the prohibition does not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended.

Section 11 enumerates the authorities of the Authority.

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

As the President stated in his 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.
>
> "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, as provided in section 7, free from control of any Executive Department. This independence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

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The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal 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. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the 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 at the same time 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, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. 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 is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, 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

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its claim. The Authority is authorized to lend its assistance in the area of natural resource rights and interests to such Indian or Indian group. The section, however, makes it clear that the assistance rendered by the Authority in this section in protecting the rights of the Indians in their justiciable claims to natural resources, and the rights attached thereto, is in addition to the responsibilities that the Department of the Interior has to protect the Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and the American Indians. The section also provides that the Department of Justice will, after the enactment of the proposal, be relieved of its responsibility to the Indians in the area of natural resources but will continue to fulfill whatever responsibility it may have with regard to Indians generally. This relieving of Justice's responsibility is subject to the exception that Justice in pursuing a litigating position that affects the natural resource rights of the Indians shall give deference to the obligation of the United States arising from its tract responsibilities to the Indians.

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from 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. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they 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 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.

Section 10 of the proposal will bar the Authority from relitigating any claims that have been filed or should have been filed before the Indian Claims Commission. It will bar their reopening any claims settled by the Indian Claims Commission as well as any claims settled by the Court of Claims or any other competent court of the United States pursuant to special legislation authorizing an Indian tribe to bring suit against the United States for settlement of its claims.

Section 11 authorizes the Authority to make rules and regulations, to request assistance from any department, agency, or independent instrumentality of the Federal government to carry out its functions under this proposal and such assistance may be given to the Authority

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on a reimbursable or non-reimbursable basis. The Authority is authorized to receive and use funds authorized or donated to it by others. It is also authorized to make expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities.

Finally, section 12 of this proposal authorizes the appropriation of funds necessary to carry out the provisions of the proposal.

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest 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

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

Enclosure

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S 2035 HR 2380

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 relationships 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 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 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

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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 sections 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.

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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, except 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 ~~except further~~ that in determining the litigating position to be taken by the Department of Justice on any matter affecting the natural resource rights of Indians or Indian tribes, the Department of Justice ~~shall consider and give due deference to the obligations of the United States~~ deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe. 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.

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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 and of the States, against the United States, its departments, agencies, officers and employees, or 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 lands, 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.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended (24 Stat. 505).

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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.

(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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October 12, 1971

Dear Leo:

Thank you for your letter with the comments on the Trust Counsel Bill.

These are what we were looking for last January and February, now that S 2035 has been introduced, the pertinent forum for considering them is of course the Senate Interior Committee, and I naturally assume you will make these suggestions in your testimony.

A few of them I don't quite understand and sometime between now and the Senate hearings it may be useful for us to sit down with a couple of Interior associates and compare notes.

You have naturally taken note of the Secretary's press conference of a week ago; I enclose a special copy of the Release in case you hadn't seen the full text. I think that there may be other actions pending and will keep you informed of them as soon as they are ready to hatch.

Cordially,

Bradley H. Patterson, Jr.
Executive Assistant to Mr. Garment

Mr. Leo Vocu
Executive Director
National Congress of American Indians
Suite 312
1346 Connecticut Avenue, N. W.
Washington, D.C. 20036

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Executive Director
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Washington, D. C. 20036

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PHOENIX AREA
Ronnie Lupe
White Mountain Apache

PORTLAND AREA
Lucy Covington
Colville

SACRAMENTO AREA
Erin Forrest
Pitt River

October 1, 1971

Mr. Bradley Patterson
Administrative Assistant
to Leonard Garment
188½ Executive Office Bldg.
The White House
Washington, D. C. 20500

Dear Brad:

Enclosed for your information is a copy of our proposed amendments to the Trust Counsel bill.

The proposed amendments are not meant to be complete, definitive, or final. The rationale for each amendment is very brief and would have to be expanded into greater detail for formal presentation. In some cases, we have merely raised a question without suggesting amendatory language.

It appears that there has been some slippage between your office and the Department of the Interior on the relative importance of the various pieces of the President's legislative package. I hope you can get this straightened out as I understand hearings may be in the offing on the Trust Counsel bill. If you have any comments or suggestions on our proposed amendments, we would appreciate hearing from you.

Sincerely,

Leo W Vocu

Leo Vocu
Executive Director

LWV:fdd
Enclosure

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 21 1971

Mr. Leo Vocu
Executive Director
National Congress of American Indians
1346 Connecticut Avenue, N.W.
Suite 312
Washington, D.C. 20036

Dear Mr. Vocu:

We have considered your letter of September 28, 1971, containing proposed amendments to the Administration's Trust Counsel bill.

Upon reflection, we believe that it would not be appropriate for us to comment on your proposals. A great deal of work and thought at all levels of the Administration have gone into the preparation of this bill. The bill is presently before the Congress as the recommendation of the Administration, and we do not believe that we should in any way qualify our support of the bill. Your proposed amendments are certainly entitled to consideration, but at this point we believe the proper forum is the Congress.

Sincerely yours,

(Sgd) Frank A. Bracken

Frank A. Bracken
Legislative Counsel

cc: Legislative Counsel
Asst. Legis. Counsel
Mr. Drabelle
Mr. Loesch
Mr. Brad Peterson - Vice President's Office

DDrabelle:iyj 10/21/71

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Ronnie Lupe
White Mountain Apache

PORTLAND AREA
Lucy Covington
Colville

SACRAMENTO AREA
Erin Forrest
Pitt River

September 28, 1971

Mr. Frank Bracken
Legislative Counsel
Office of the Secretary
Department of the Interior
Washington, D. C. 20240

Dear Mr. Bracken:

Enclosed is a copy of proposed amendments to the administration's Trust Counsel bill .

The proposed amendments are not meant to be complete, definitive, or final. Our rationale for each amendment is brief, but would be expanded in greater detail in any formal statement. In some cases, we have merely raised a question on certain provisions rather than proposing amendatory language.

While these proposed amendments cannot be taken as the formal position of NCAI on the Trust Counsel bill, it is representative of much of the current Indian thinking in this regard. We would appreciate your review of our proposed amendments and your comments thereon.

Sincerely

Leo W. Vocu

Leo Vocu
Executive Director

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October 15, 1971

Mr. Leo Vocu
Acting Executive Director
National Congress of American Indians
Room 1010
1346 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Leo:

Thank you for the wonderful time I had at your birthday party. I wish I could have stayed, but I had to get Percy Archambeau back to his hotel.

We appreciate your sending to us the proposed amendments to the Trust Counsel Authority Bill. Obviously Franklin Ducheneaux has spent considerable time setting down your thoughts on it. I especially appreciate this since Franklin spent so much time with us on the road explaining the legislation last fall.

Leo, I think that it is fair to say that the bill which was sent to the Congress from the Administration was the best one we were able to come up with; any amendments to it will have to be gotten from the committees which will hear it.

Needless to say, the general support for this important piece of legislation is growing over what it was initially last fall (recognizing the concerns of people toward several aspects of the bill as it now stands). I would hope that the National Congress of American Indians would lead the way toward total Indian community support of the concept of the legislation, without such support the bill will never pass the Congress.

I will go over the material thoroughly and will circularize the Indian members of the Council as well as staff.

With best wishes and warm personal regards.

Sincerely,

Robert Robertson
Executive Director

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September 16, 1971

MEMORANDUM FOR SECRETARY MORTON

FROM: LEONARD GARMENT

SUBJECT: Senate Interior Committee Hearings on the Indian Trust Counsel Bill

Brad has received informal word from the Hill that the Senate Interior Committee leadership (Verkler) would be amenable to scheduling hearings on the Trust Counsel bill in October, but they would like a short note from you to Jackson reaffirming Administration interest.

As you know, this particular bill is high priority here, particularly in view of the mounting Indian criticism about the land and water rights issue. I am very pleased to see this sign of movement from the Interior Committee and recommend you sign a letter to Jackson. I attach a suggested draft for your consideration.

Time, we are told, is of the essence in order to tie down the October schedule period.

cc: Harrison Loesch
Nick Laird
Frank Bracken

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Dear Mr. Chairman:

Your concern about the issue of protecting Indian trust land and water rights has of course been brought to my attention.

I know that this concern is shared widely in the public, in the Indian community and in the Congress. The President in July of 1970 proposed what I sincerely believe is the only satisfactory long-run answer to this problem: the creation of an Indian Trust Counsel Authority.

S. 2035, now before you, reflects consultations held just this Spring with Indian leaders.

Your Committee held brief hearings a year ago on the Trust Counsel bill and it is my hope that these hearings can be resumed promptly so that this vital part of the President's comprehensive legislative package can start moving toward enactment.

With warm regards,

Rogers C. B. Morton

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STATEMENT FOR DEPARTMENT SECRETARIAL WITNESS TO BILL S. 4165
ESTABLISHING AN INDIAN TRUST COUNSEL AUTHORITY

Mr. Chairman and other members of the Committee:

It is indeed a great pleasure to be appearing before you this morning to testify for the swift enactment of Bill S. 4165 creating an Indian Trust Counsel Authority. I am in total agreement with the Presidential Message of July 8, 1970, which advocated the creation of this Authority. In that message, President Nixon indicated that the trust duties owed by the United States Government to the Indian people created often-times an inherent conflict of interest. This conflict arises from the fact that the Secretary of the Interior and the Attorney General must advance both the national interest in the use of land and water rights and the private interest of Indians in land which the Government holds as trustee. As many lawyers have often pointed out and many court decisions have held, a trustee owes the highest fiduciary duty to the beneficiaries of the trust. If any conflicts are present, the trustee must take positive action to eliminate them. This legislation provides

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the Federal Government the vehicle with which to resolve the inherent conflicts of interest. The President specifically noted that:

> "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 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."

That statement in the President's message cogently summarizes the inherent conflict which I previously discussed. The legislation presently under your consideration effectively eliminates this conflict. It provides for an independent Authority free to exercise its functions without any other duty but to advocate the strongest legal position for its one and only client; that is, an aggrieved Indian, Indian tribe, Band or other identifiable group of Indians. Specifically, the Authority renders legal services to these clients within the trust responsibility owing to the Indians.

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These services are related but not limited to the rights to land, to the use of water, timber, minerals, hunting and fishing, all of which emanate from the basic trust responsibility which the United States has assumed either through treaties or legislative enactments. The primary thrust of the proposed legislation is to preserve and to defend the natural resources of the American Indian. These natural resources form the economic basis upon which the American Indian can structure a viable community. If they are eroded or encroached as they have been in the past, this economic basis for survival of the American Indian culture will also be eroded and the American Indian will vanish.

At this juncture, I would like to cite particular examples where inherent conflicts have caused an apparent erosion of Indians' natural resources. The first example is the case of the Winnebago Tribe of Nebraska. Several months ago, the Winnebagos were informed by the Corps of Engineers that a portion of their reservation was to

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be condemned for the construction of a recreation project on the Missouri Basin. The Tribe sought assistance from the local U. S. Attorney who found himself in a direct conflict since the Corps of Engineers had also requested him to represent them in their condemnation proceedings. The U. S. Attorney resolved this conflict in favor of the Corps of Engineers and the Tribe had to seek legal assistance elsewhere. In that situation, the Trust Counsel could have acted on behalf of the Tribe and thus the inherent conflict of interest would be eliminated.

Another example is the legal complications which are presently faced by the San Luis Rey Bands of Mission Indians in the preservation of their natural resources. The Mission Bands are attempting to preserve their communities and establish their rights to a diminishing water supply. The United States is defending a claim in the Indian Claims Commission pertaining to the taking of water and it needs to assume an incongruous position in litigation arising on the San Luis Rey watershed filed in Federal District Court on behalf of the Mission Band Indians.

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In some instances, the Bureau of Indian Affairs in advocating the strongest position for Indian tribes is confronted with internal conflicts with other bureaus, stemming from the fact that different clients are being served. In particular, I am referring to the Bureau of Reclamation. Either directly or indirectly, the Bureau of Reclamation is often attacked by the Indian tribes for seeking to infringe and control Indian water. It is particularly noticeable that in the past 50 years whenever the Bureau of Reclamation has constructed a project wherein Indian water was involved, the Indians control over their water and the rights thereto have been diminished if not totally abrogated.

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In some instances, conflicts of interest arise between the Bureau of Indian Affairs and the Forest Service of the Department of Agriculture. A particular instance which causes concern is the 21,000 acres southwest of the present Yakima Reservation which were erroneously included in the boundary of the Gifford Pinchot National Forest. This area was part of the reservation reserved for the Tribe by the Treaty of June 9, 1859. The error resulted because the map which accompanied the treaty and delineated the boundaries was misplaced and not located until the 1930's and thus erroneous surveys were left uncorrected. Here the Trust Counsel Authority could intervene and represent the best interest of the Indian tribe.

Intradepartmental conflicts arise which can be evidenced by the Fort Mojave boundary matter for which a hearing was held recently by the Department of the Interior. In that particular case, the Fort Mojave Indians were not notified of the possible loss of

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approximately 1,500 acres by a determination of the Secretary of the Interior that the 1,500 acres were swamp and overflow land and title could therefore be issued to the State of California. I ordered the record to be reopened and allowed the Tribe to intervene and present evidence on their own behalf, but once again, the lack of economic wherewithal placed a great hardship upon the Tribe in presenting its case since it had to retain private counsel. In this type of situation, the Trust Counsel Authority could intervene on behalf of the tribe.

As you can readily ascertain, we could continue citing examples of a history replete with inherent conflicts within the Federal Government. It is these conflicts which the general policy of the bill will eliminate upon enactment. I am, therefore, in total support of the legislation as it fulfills a great need for the Indian tribes.

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I would also suggest, due to the importance of this legislation, that the Subcommittee consider the possibility of holding hearings in locations close to Indian reservations. This would allow a greater number of Indian views to be garnered for this extremely important legislation.

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WILKINSON, CRAGUN & BARKER

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CABLE ADDRESS
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ROSEL H. HYDE
DONALD C. GORMLEY
Counsel

January 11, 1971

Mr. Bradley H. Patterson, Jr.
c/o The White House
190 Executive Office Building
Washington, D.C. 20500

Hand-carried

Dear Brad:

Attached is a proposed amendment to the Trust Counsel Bill which we discussed some time ago.

Best regards.

Yours sincerely,

WILKINSON, CRAGUN & BARKER

Jerry

By: Jerry C. Straus

Enclosure

cc: C.D.Ward

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PROPOSED AMENDMENT TO
INDIAN TRUST COUNSEL BILL

Delete the language "except that the Department of Justice. . .fish" in Section 8 and insert the following in its place:

". . . except that in any case in which the Authority has instituted suit in any court pursuant to the authority provided in Sections 8 and 9 of this Act, the Department of Justice shall be relieved of its responsibility to provide legal representation for any Indians or Indian Tribes involved in said suit who are represented by the Authority; provided, that in determining the litigating position of the Department of Justice on any matter affecting the rights of Indians or Indian Tribes, the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian Tribe."

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Could award
attorney's fees
for ITC - IC
from the fund.

"(a) either with or without
specific return or fee,

Land Director should represent as
Indian tribe's right &
bring suits in their own name.

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The Deprtment of the Int erior and the Department of theArmy shall, with rwspect to any proposed a ction which may affect or impair the rights or claims of any Indian tribe, band, or other identifiable group of Indians to ntural resoucers, including, but not imited to, rights to land, rights to the use of water, timber and m nerals, and eights to hunt and fish within the United States,' trust rsponsibility owing to the Indians.

1) Give notice to th Authority and affected Indian teibes, bands and groups od the prposed action; and

2) Afford the Autho ity an affected Indians, yribes bands and groups a reasonable oppo tunity to sumit comments upon the proposed action and, where an oral hearing is rrquired by law, or where the agency deems it appropriatie to hold such a hearing, an opportunity to participate therein

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The fees collected pursuant to this section shall be deposited in the Treasury and ~~may be withdrawn by the Authority to pay directly the~~ shall be disbursed upon the order of the Secretary for the expenditures and shall be available without limitation of fiscal years necessary for the performance of functions authorized in this act

(3) To accept, hold, administer, and utilize gifts, and bequest of property, both real and personal, for the purpose of aiding or facilitating the work of the Department. Gifts & bequests of money and proceeds from sale of other property received as gifts or bequests shall be deposited in the Treasury & shall be disbursed upon the order of the Secretary. For the purpose of Federal income, estate, and gift taxes, property accepted under this section shall be considered as a gift or bequest to the United States.

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FOR RELEASE AT 12:00 NOON, EDT July 8, 1970

Office of the White House Press Secretary

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THE WHITE HOUSE

TO THE CONGRESS OF THE UNITED STATES:

The first Americans -- the Indians -- are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement -- employment, income, education, health -- the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country -- to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

Self-Determination Without Termination

The first and most basic question that must be answered with respect to Indian policy concerns the historic and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the one hand, it has -- at various times during previous Administrations -- be the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn

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obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of the Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW's Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy.

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1. Rejecting Termination

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. This resolution would explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska native governments, recognizing that cultural pluralism is a source of national strength. It would assure these groups that the United States Government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable. It would guarantee that whenever Indian groups decided to assume control or responsibility for government service programs, they could do so and still receive adequate Federal financial support. In short, such a resolution would reaffirm for the Legislative branch -- as I hereby affirm for the Executive branch -- that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians.

2. The Right to Control and Operate Federal Programs

Even as we reject the goal of forced termination, so must we reject the suffocating pattern of paternalism. But how can we best do this? In the past, we have often assumed that because the government is obliged to provide certain services for Indians, it therefore must administer those same services. And to get rid of Federal administration, by the same token, often meant getting rid of the whole Federal program. But there is no necessary reason for this assumption. Federal support programs for non-Indian communities -- hospitals and schools are two ready examples -- are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency. To this end, I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable community governing group voted to do so.

Under this legislation, it would not be necessary for the Federal agency administering the program to approve the transfer of responsibility. It is my hope and expectation that most such transfers of power would still take place consensually as a result of negotiations between the local community and the Federal government. But in those cases in which an impasse arises between the two parties, the final determination should rest with the Indian community.

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Under the proposed legislation, Indian control of Indian programs would always be a wholly voluntary matter. It would be possible for an Indian group to select that program or that specified portion of a program that it wants to run without assuming responsibility for other components. The "right of retrocession" would also be guaranteed; this means that if the local community elected to administer a program and then later decided to give it back to the Federal government, it would always be able to do so.

Appropriate technical assistance to help local organizations successfully operate these programs would be provided by the Federal government. No tribe would risk economic disadvantage from managing its own programs; under the proposed legislation, locally-administered programs would be funded on equal terms with similar services still administered by Federal authorities. The legislation I propose would include appropriate protections against any action which endangered the rights, the health, the safety or the welfare of individuals. It would also contain accountability procedures to guard against gross negligence or mismanagement of Federal funds.

This legislation would apply only to services which go directly from the Federal government to the Indian community; those services which are channeled through State or local governments could still be turned over to Indian control by mutual consent. To run the activities for which they have assumed control, the Indian groups could employ local people or outside experts. If they chose to hire Federal employees who had formerly administered these projects, those employees would still enjoy the privileges of Federal employee benefit programs -- under special legislation which will also be submitted to the Congress.

Legislation which guarantees the right of Indians to contract for the control or operation of Federal programs would directly channel more money into Indian communities, since Indians themselves would be administering programs and drawing salaries which now often go to non-Indian administrators. The potential for Indian control is significant, for we are talking about programs which annually spend over $400 million in Federal funds. A policy which encourages Indian administration of these programs will help build greater pride and resourcefulness within the Indian community. At the same time, programs which are managed and operated by Indians are likely to be more effective in meeting Indian needs.

I speak with added confidence about these anticipated results because of the favorable experience of programs which have already been turned over to Indian control. Under the auspices of the Office of Economic Opportunity, Indian communities now run more than 60 community action agencies which are located on Federal reservations. OEO is planning to spend some $57 million in Fiscal Year 1971 through Indian-controlled grantees. For over four years, many OEO-funded programs have operated under the control of local Indian organizations and the results have been most heartening.

Two Indian tribes -- the Salt River Tribe and the Zuni Tribe -- have recently extended this principle of local control to virtually all of the programs which the Bureau of Indian Affairs has traditionally administered for them. Many Federal officials, including the Agency Superintendent, have been replaced by elected tribal officers or tribal employees. The time has now come to build on these experiences and to extend local Indian control -- at a rate and to the degree that the Indians themselves establish.

3. Restoring the Sacred Lands Near Blue Lake.

No government policy toward Indians can be fully effective unless there is a relationship of trust and confidence between the Federal government

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and the Indian people. Such a relationship cannot be completed overnight; it is inevitably the product of a long series of words and actions. But we can contribute significantly to such a relationship by responding to just grievances which are especially important to the Indian people.

One such grievance concerns the sacred Indian lands at and near Blue Lake in New Mexico. From the fourteenth century, the Taos Pueblo Indians used these areas for religious and tribal purposes. In 1906, however, the United States Government appropriated these lands for the creation of a national forest. According to a recent determination of the Indian Claims Commission, the government "took said lands from petitioner without compensation."

For 64 years, the Taos Pueblo has been trying to regain possession of this sacred lake and watershed area in order to preserve it in its natural condition and limit its non-Indian use. The Taos Indians consider such action essential to the protection and expression of their religious faith.

The restoration of the Blue Lake lands to the Taos Pueblo Indians is an issue of unique and critical importance to Indians throughout the country. I therefore take this opportunity wholeheartedly to endorse legislation which would restore 48,000 acres of sacred land to the Taos Pueblo people, with the statutory promise that they would be able to use these lands for traditional purposes and that except for such uses the lands would remain forever wild.

With the addition of some perfecting amendments, legislation now pending in the Congress would properly achieve this goal. That legislation (H.R. 471) should promptly be amended and enacted. Such action would stand as an important symbol of this government's responsiveness to the just grievances of the American Indians.

4. Indian Education

One of the saddest aspects of Indian life in the United States is the low quality of Indian education. Drop-out rates for Indians are twice the national average and the average educational level for all Indians under Federal supervision is less than six school years. Again, at least a part of the problem stems from the fact that the Federal government is trying to do for Indians what many Indians could do better for themselves.

The Federal government now has responsibility for some 221,000 Indian children of school age. While over 50,000 of these children attend schools which are operated directly by the Bureau of Indian Affairs, only 750 Indian children are enrolled in schools where the responsibility for education has been contracted by the BIA to Indian school boards. Fortunately, this condition is beginning to change. The Ramah Navajo Community of New Mexico and the Rough Rock and Black Water Schools in Arizona are notable examples of schools which have recently been brought under local Indian control. Several other communities are now negotiating for similar arrangements.

Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools. This control would be exercised by school boards selected by Indians and functioning much like other school boards throughout the nation. To assure that this goal is achieved, I am asking the Vice President, acting in his role as Chairman of the National Council on Indian Opportunity, to establish a Special Education Subcommittee of that Council. The members of that Subcommittee should be Indian educators who are

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selected by the Council's Indian members. The Subcommittee will provide technical assistance to Indian communities wishing to establish school boards, will conduct a nationwide review of the educational status of all Indian school children in whatever schools they may be attending, and will evaluate and report annually on the status of Indian education, including the extent of local control. This Subcommittee will act as a transitional mechanism; its objective should not be self-perpetuation but the actual transfer of Indian education to Indian communities.

We must also take specific action to benefit Indian children in public schools. Some 141,000 Indian children presently attend general public schools near their homes. Fifty-two thousand of these are absorbed by local school districts without special Federal aid. But 89,000 Indian children attend public schools in such high concentrations that the State or local school districts involved are eligible for special Federal assistance under the Johnson-O'Malley Act. In Fiscal Year 1971, the Johnson-O'Malley program will be funded at a level of some $20 million.

This Johnson-O'Malley money is designed to help Indian students, but since funds go directly to the school districts, the Indians have little if any influence over the way in which the money is spent. I therefore propose that the Congress amend the Johnson-O'Malley Act so as to authorize the Secretary of the Interior to channel funds under this act directly to Indian tribes and communities. Such a provision would give Indians the ability to help shape the schools which their children attend and, in some instances, to set up new school systems of their own. At the same time, I am directing the Secretary of the Interior to make every effort to ensure that Johnson-O'Malley funds which are presently directed to public school districts are actually spent to improve the education of Indian children in these districts.

5. Economic Development Legislation

Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500. As I said in September of 1968, it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure. To that end, I am proposing the "Indian Financing Act of 1970."

This act would do two things:

1. It would broaden the existing Revolving Loan Fund, which loans money for Indian economic development projects. I am asking that the authorization for this fund be increased from approximately $25 million to $75 million.

2. It would provide additional incentives in the form of loan guarantees, loan insurance and interest subsidies to encourage private lenders to loan more money for Indian economic projects. An aggregate amount of $200 million would be authorized for loan guarantee and loan insurance purposes.

I also urge that legislation be enacted which would permit any tribe which chooses to do so to enter into leases of its land for up to 99 years. Indian people now own over 50 million acres of land that is held in trust by the Federal government. In order to compete in attracting investment capital for commercial, industrial and recreational development of these lands, it is essential that the tribes be able to offer long-term leases. Long-term leasing is preferable to selling such property since it enables tribes to preserve the trust ownership of their reservation homelands. But existing

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law limits the length of time for which many tribes can enter into such leases. Moreover, when long-term leasing is allowed, it has been granted by Congress on a case-by-case basis, a policy which again reflects a deep-rooted pattern of paternalism. The twenty reservations which have already been given authority for long-term leasing have realized important benefits from that privilege and this opportunity should now be extended to all Indian tribes.

Economic planning is another area where our efforts can be significantly improved. The comprehensive economic development plans that have been created by both the Pima-Maricopa and the Zuni Tribes provide outstanding examples of interagency cooperation in fostering Indian economic growth. The Zuni Plan, for example, extends for at least five years and involves a total of $55 million from the Departments of Interior, Housing and Urban Development, and Health, Education and Welfare and from the Office of Economic Opportunity and the Economic Development Administration. I am directing the Secretary of the Interior to play an active role in coordinating additional projects of this kind.

6. More Money for Indian Health

Despite significant improvements in the past decade and a half, the health of Indian people still lags 20 to 25 years behind that of the general population. The average age at death among Indians is 44 years, about one-third less than the national average. Infant mortality is nearly 50% higher for Indians and Alaska natives than for the population at large; the tuberculosis rate is eight times as high and the suicide rate is twice that of the general population. Many infectious diseases such as trachoma and dysentary that have all but disappeared among other Americans continue to afflict the Indian people.

This Administration is determined that the health status of the first Americans will be improved. In order to initiate expanded efforts in this area, I will request the allocation of an additional $10 million for Indian health programs for the current fiscal year. This strengthened Federal effort will enable us to address ourselves more effectively to those health problems which are particularly important to the Indian community. We understand, for example, that areas of greatest concern to Indians include the prevention and control of alcoholism, the promotion of mental health and the control of middle-ear disease. We hope that the ravages of middle-ear disease -- a particularly acute disease among Indians -- can be brought under control within five years.

These and other Indian health programs will be most effective if more Indians are involved in running them. Yet -- almost unbelievably -- we are presently able to identify in this country only 30 physicians and fewer than 400 nurses of Indian descent. To meet this situation, we will expand our efforts to train Indians for health careers.

7. Helping Urban Indians

Our new census will probably show that a larger proportion of America's Indians are living off the reservation than ever before in our history. Some authorities even estimate that more Indians are living in cities and towns than are remaining on the reservation. Of those American Indians who are now dwelling in urban areas, approximately three-fourths are living in poverty.

The Bureau of Indian Affairs is organized to serve the 462,000 reservation Indians. The BIA's responsibility does not extend to Indians who

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have left the reservation, but this point is not always clearly understood. As a result of this misconception, Indians living in urban areas have often lost out on the opportunity to participate in other programs designed for disadvantaged groups. As a first step toward helping the urban Indians, I am instructing appropriate officials to do all they can to ensure that this misunderstanding is corrected.

But misunderstandings are not the most important problem confronting urban Indians. The biggest barrier faced by those Federal, State and local programs which are trying to serve urban Indians is the difficulty of locating and identifying them. Lost in the anonymity of the city, often cut off from family and friends, many urban Indians are slow to establish new community ties. Many drift from neighborhood to neighborhood; many shuttle back and forth between reservations and urban areas. Language and cultural differences compound these problems. As a result, Federal, State and local programs which are designed to help such persons often miss this most deprived and least understood segment of the urban poverty population.

This Administration is already taking steps which will help remedy this situation. In a joint effort, the Office of Economic Opportunity and the Department of Health, Education and Welfare will expand support to a total of seven urban Indian centers in major cities which will act as links between existing Federal, State and local service programs and the urban Indians. The Departments of Labor, Housing and Urban Development and Commerce have pledged to cooperate with such experimental urban centers and the Bureau of Indian Affairs has expressed its willingness to contract with these centers for the performance of relocation services which assist reservation Indians in their transition to urban employment.

These efforts represent an important beginning in recognizing and alleviating the severe problems faced by urban Indians. We hope to learn a great deal from these projects and to expand our efforts as rapidly as possible. I am directing the Office of Economic Opportunity to lead these efforts.

8. Indian Trust Counsel Authority

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 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 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.

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 Authority would be governed by a three-man board of directors, appointed by the

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President with the advice and consent of the Senate. At least two of the board members would be Indian. The chief legal officer of the Authority would be designated as the Indian Trust Counsel.

The Indian Trust Counsel Authority would be independent of the Departments of the Interior and Justice and would be expressly empowered to bring suit in the name of the United States in its trustee capacity. The United States would waive its sovereign immunity from suit in connection with litigation involving the Authority.

9. Assistant Secretary for Indian and Territorial Affairs

To help guide the implementation of a new national policy concerning American Indians, I am recommending to the Congress the establishment of a new position in the Department of the Interior -- Assistant Secretary for Indian and Territorial Affairs. At present, the Commissioner of Indian Affairs reports to the Secretary of the Interior through the Assistant Secretary for Public Land Management -- an officer who has many responsibilities in the natural resources area which compete with his concern for Indians. A new Assistant Secretary for Indian and Territorial Affairs would have only one concern -- the Indian and territorial peoples, their land, and their progress and well-being. Secretary Hickel and I both believe this new position represents an elevation of Indian affairs to their proper role within the Department of the Interior and we urge Congress to act favorably on this proposal.

Continuing Programs

Many of the new programs which are outlined in this message have grown out of this Administration's experience with other Indian projects that have been initiated or expanded during the last 17 months.

The Office of Economic Opportunity has been particularly active in the development of new and experimental efforts. OEO's Fiscal Year 1971 budget request for Indian-related activities is up 18 percent from 1969 spending. In the last year alone -- to mention just two examples -- OEO doubled its funds for Indian economic development and tripled its expenditures for alcoholism and recovery programs. In areas such as housing and home improvement, health care, emergency food, legal services and education, OEO programs have been significantly expanded. As I said in my recent speech on the economy, I hope that the Congress will support this valuable work by appropriating the full amount requested for the Economic Opportunity Act.

The Bureau of Indian Affairs has already begun to implement our policy of contracting with local Indians for the operation of government programs. As I have noted, the Salt River Tribe and the Zuni Tribe have taken over the bulk of Federal services; other projects ranging from job training centers to high school counseling programs have been contracted out to Indian groups on an individual basis in many areas of the country.

Economic development has also been stepped up. Of 195 commercial and industrial enterprises which have been established in Indian areas with BIA assistance, 71 have come into operation within the last two years. These enterprises provide jobs for more than 6,000 Indians and are expected to employ substantially more when full capacity is reached. A number of these businesses are now owned by Indians and many others are managed by them. To further increase individual Indian ownership, the BIA has this month initiated the Indian Business Development Fund which provides equity capital to Indians who go into business in reservation areas.

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Since late 1967, the Economic Development Administration has approved approximately $80 million in projects on Indian reservations, including nearly $60 million in public works projects. The impact of such activities can be tremendous; on the Gila River Reservation in Arizona, for example, economic development projects over the last three years have helped to lower the unemployment rate from 56 to 18 percent, increase the median family income by 150 percent and cut the welfare rate by 50 percent.

There has been additional progress on many other fronts since January of 1969. New "Indian Desks" have been created in each of the human resource departments of the Federal government to help coordinate and accelerate Indian programs. We have supported an increase in funding of $4 million for the Navajo Irrigation Project. Housing efforts have picked up substantially; a new Indian Police Academy has been set up; Indian education efforts have been expanded -- including an increase of $848,000 in scholarships for Indian college students and the establishment of the Navajo Community College, the first college in America planned, developed and operated by and for Indians. Altogether, obligational authority for Indian programs run by the Federal Government has increased from a little over $598 million in Fiscal Year 1970 to almost $626 million in Fiscal Year 1971.

Finally, I would mention the impact on the Indian population of the series of welfare reform proposals I have sent to the Congress. Because of the high rate of unemployment and underemployment among Indians, there is probably no other group in the country that would be helped as directly and as substantially by programs such as the new Family Assistance Plan and the proposed Family Health Insurance Plan. It is estimated, for example, that more than half of all Indian families would be eligible for Family Assistance benefits and the enactment of this legislation is therefore of critical importance to the American Indian.

This Administration has broken a good deal of new ground with respect to Indian problems in the last 17 months. We have learned many things and as a result we have been able to formulate a new approach to Indian affairs. Throughout this entire process, we have regularly consulted the opinions of the Indian people and their views have played a major role in the formulation of Federal policy.

As we move ahead in this important work, it is essential that the Indian people continue to lead the way by participating in policy development to the greatest possible degree. In order to facilitate such participation, I am asking the Indian members of the National Council on Indian Opportunity to sponsor field hearings throughout the nation in order to establish continuing dialogue between the Executive branch of government and the Indian population of our country. I have asked the Vice President to see that the first round of field hearings are completed before October.

* * *

The recommendations of this Administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wiser spending. In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of <u>whether</u> the Federal government has a responsibility to Indians to the question of <u>how</u> that responsibility can best be fulfilled. We have concluded that the Indians

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will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

The Indians of America need Federal assistance -- this much has long been clear. What has not always been clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

RICHARD NIXON

THE WHITE HOUSE,

July 8, 1970.

# # # #

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506

April 9, 1971

MEMORANDUM

TO : Members of the Committee on Claims Adjudications

FROM : Roger C. Cramton, Chairman

SUBJECT : Report and Recommendation on Indian Trust Counsel Authority

Remaining problems with respect to the development of a recommendation on the establishment of an Indian Trust Counsel Authority have now been clarified as a result of conversations that Professor Chambers has had with representatives of the Department of Interior, the White House, and Indian groups. Neil Hosenball has asked me to circulate to the Committee the proposed recommendation and report which is attached. The recommendation is supported by a brief supporting memorandum, which incorporates by reference as the basic research document the prior study of Professor Chambers. A copy of the draft legislation, now under consideration by the Office of Management and Budget and presumably to be submitted to the Congress in the near future, is also attached.

Neil Hosenball plans to talk with members of the Committee by telephone in order to determine whether the recommendation and report is acceptable to the Committee. If it is, Neil will report any suggested changes or improvements when he meets with the Council on April 19.

Roger C. Cramton

Roger C. Cramton

Enclosures

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506

INDIAN TRUST COUNSEL AUTHORITY

Recommendation and Report
of the
Committee on Claims Adjudications

April 1971

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506

RECOMMENDATION NO. : Indian Trust Counsel Authority

The United States acts as the trustee for the land and water rights of American Indians. Many legal disputes involving these rights, however, are between Indians and agencies of the United States which are charged with responsibility to protect Indian interests. Conflict-of-interest problems arising out of this dual involvement on the part of Federal agencies are troublesome and serious. The need exists to provide American Indians with independent legal counsel to assure adequate protection of their claims to natural resources.

Recommendation

1. Legislation should be enacted to establish an Indian Trust Counsel Authority as a permanent, independent agency of Government. Its functions should be, with the consent of an aggrieved Indian, Indian tribe, band, or other identifiable groups of Indians, to provide legal services necessary to protect their rights or claims to natural resources.

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The Indian Trust Counsel Authority should be empowered to:

(a) Represent, either through prosecution or by defense, the rights or claims of Indians in any formal or informal administrative or judicial proceeding before any agency or court of a State or of the United States.

(b) Receive and use as a tax-exempt organization funds or services donated from any source in addition to such appropriations as Congress may authorize; and

(c) Appoint and fix the compensation of employees, regular or special counsel, consultants and experts; define their duties and responsibilities; and direct and supervise their activities.

2. The United States should waive sovereign immunity with respect to claims asserted by the Authority or special counsel on behalf of Indians involving natural resources, including but not limited to rights in land, water, timber, minerals, hunting and fishing.

3. The Department of the Interior and the Corps of Engineers of the Department of the Army should give advance notice and information to the Authority pertaining to any proposed proceeding which may affect the rights of Indians.

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4. The existence of the Authority should not bar aggrieved Indians, Indian tribes, bands, or other identifiable groups of Indians, from appearing pro se or by their own counsel in any administrative or judicial proceeding.

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WASHINGTON, D.C. 20506

COMMITTEE ON CLAIMS ADJUDICATIONS

MEMORANDUM IN SUPPORT OF RECOMMENDATION TO ESTABLISH AN INDIAN TRUST COUNSEL AUTHORITY

I. Statement of the Problem

The United States stands in a fiduciary relationship to Indians and Indian tribes. This relationship has been characterized as that of "trustee" or "guardian". In Seminole v. United States, 316 U.S. 286, 296-97 (1942), the Supreme Court held that the United States "has charged itself with moral obligations of the highest responsibility and trust." This guardianship was referred to as in part "a humane and self-imposed policy."

While the reach of the trust responsibility is broader, it most often involves the claims of Indians to land or water rights. In this area, the trust responsibility of the Government is similar to that of a private trustee; it is to protect the private property rights of Indians against all claims from whatever source -- Federal, state or local. The United States has a duty of undivided loyalty to preserve and protect the trust property of the Indian beneficiaries. This responsibility is vested primarily in the Department of Interior and

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in its Bureau of Indian Affairs; the Department of Justice is also involved in prosecuting and defending Indian claims.

The same agencies, however, are responsible for the development, implementation, and legal defense of Federal land and natural resource policies that are sometimes adverse to Indian interests. These include such matters as: lease for irrigation purposes of lands claimed by Indians; reclamation projects that divert waters claimed by Indian tribes; issuance of rights-of-way across Indian lands; lease of timber or mineral rights on Indian reservations; and cession to States of property which Indians claim under treaties.

In many of these proceedings, effective representation of the rights of Indians has been lacking, and in others the Government has sometimes refused to press Indian claims or has worked out a compromise not always acceptable to the tribe. Detailed consideration of these situations is provided in Professor Chambers' study, a copy of which is attached as Appendix A.

II. Current Proposals for Solution

The problems posed by this inherent conflict-of-interest have not gone unnoticed.

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The Departments involved have long been most concerned. For example, in a 1969 paper prepared by an Interior Department attorney entitled "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development,"* it was stated:

> "Conflicting responsibilities, obligations, interests, claims, legal theories--indeed philosophies--oftentimes prevent the Interior and Justice Department administrators, planners, engineers and lawyers from fulfilling the trust obligation (which the Nation owes) to the American Indians in regard to natural resources***."

The President also indicated concern in his Indian Message of July 8, 1970, in which he said in part:

> "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."

Shortly thereafter, the Administration forwarded legislative proposal to Congress to establish an Indian Trust Counsel Authority to provide independent representation for Indians and native

---

* William H. Veeder, in Towards Economic Development for Native American Communities, Joint Economic Committee, 91st Cong. 1st. Sess. p. 460

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Alaskans. Initial hearings on S. 4165, containing the Administration's proposal, were held before the Senate Judiciary Subcommittee on Administrative Practice and Procedure in September 1970.*

The Administration is currently making revisions to this legislative proposal before seeking its introduction in the 92nd Congress. A draft of a bill, prepared by the Department of the Interior, but which has not yet been cleared by the Office of Management and Budget, is attached as Appendix B.

III. Committee Recommendation

The Committee on Claims Adjudications has considered this problem on the basis of the prior work of Professor Reid Peyton Chambers of the University of California (Los Angeles) Law School. Although his study was not prepared for the Conference, Professor Chambers has made it available and has agreed to work with the Committee in the development of a recommendation on this subject. The Committee believes that Professor Chambers' study, a copy of which is attached as Appendix A, provides detailed support for its view that a conflict-of-interest problem exists and that legislation creating an independent authority to represent the interests of Indians in disputes with Federal agencies and the United States is needed.

---

* Text is printed as Appendix A to Professor Reid Peyton Chambers' report, attached.

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The Committee on Claims Adjudications has concluded that the Conference should not attempt to endorse any specific piece of legislation in view of the many technical and purely administrative provisions. The Committee has concluded, however, that the Conference should go on record as supporting the principal substantive provisions which any such legislation should contain.

The legislation should provide for the establishment of an Indian Trust Counsel Authority to represent the legitimate rights and interests of Indians. It should be independent of any existing agency. It should be empowered to provide representation at all levels of formal or informal proceedings, either Federal or state, which affect the interest of Indians.

To make the legislation effective, the bill should provide that the Government will give the Authority advance notice of proposed actions affecting the rights of Indians, and the United States should also waive sovereign immunity with respect to suits brought against it by the Authority or by special counsel retained by the Authority.

The Committee strongly recommends adoption of this recommendation at this time so that the views of the Conference will be available to the Congress in the consideration of legislation which will shortly be submitted. The Committee contemplates that the Chairman of the Conference would testify

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in support of legislation embodying these general principles and should also speak to any technical or administrative aspects of the bill which he feels would improve the legislation.

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APPENDIX A

DISCHARGE OF THE FEDERAL TRUST RESPONSIBILITY TO ENFORCE LEGAL CLAIMS OF INDIAN TRIBES: CASE STUDIES OF BUREAUCRATIC CONFLICT OF INTEREST

by

Reid Peyton Chambers
Professor of Law
University of California
Los Angeles

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APPENDIX B

DRAFT OF

DEPARTMENT OF INTERIOR BILL

This legislative proposal has not yet been cleared by the Office of Management and Budget for submission to Congress.

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ALL INDIAN PUEBLO COUNCIL, Inc.
Representing the Nineteen New Mexico Pueblos

907 INDIAN SCHOOL RD., N.W.
ALBUQUERQUE, NEW MEXICO 87107
Telephone 505-242-1891

December 28, 1970

The Presidents

The following statement was duly adopted at a meeting of the All Indian Pueblo Council held on December 28, 1970 at Santo Domingo Pueblo.

WHEREAS, "President Nixon's Legislative Program" is a group of Bills introduced in the Congress which deal with Indian affairs and,

WHEREAS, these bills cover a wide range of activities pertaining to Indian tribes and their relations with the Federal Government, and all have the stated intent of increasing the opportunities for Indian self-determination in programs affecting them,

NOW, THEREFORE, the All Indian Pueblo Council makes the following statements about the bills in the Legislative Program:

1. Indian Finance Act (HR. 18571, S.4116). This bill is very complicated, but we favor increases in the Bureau of Indian Affairs revolving loan fund and making other sources of credit available to Indians, and this bill seems to do that. Accordingly, we favor it.

2. Assistant Secretary Bill (HR. 18570, S.4115). The bill should spell out that the new Assistant Secretary of the Interior is exclusively for Indian Affairs and the Territories.

3. Trespass and Traders Bill (HR. 18572, S.4114). The sections pertaining to livestock and removing prohibitions on government employees dealing with Indians are acceptable. The section dealing with traders must be deleted since it would remove the legal grounds on which the Warren Trading Post decision rests, and the section is unnecessary anyway since tribes already have a say in this matter.

accepted

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4. Johnson O'Malley amendments (HR. 18729, S.4166). Allowing Indian tribes as well as states to contract Johnson O'Malley funds is a good idea, as it increases the options open to us. We feel some administrative priority should be given to Indian tribes who are competent to administer the program.

5. & 6. Employee Benefits Bill (HR. 18735, S.4163). Indian Takeover Bill (HR. 18728, S.4164). These bills seem acceptable since they serve to increase the options open to tribes.

7. Trust Counsel Authority (HR. 18727, S.4165). We have several amendments which we feel are needed in order to make the bill cover possible unfavorable contingencies that might arise with the proposed language.

   a. The bill should spell out that Indian tribes should be consulted by the President before any appointments to the Board of Directors are made.

   b. The Trust Counsel Authority must deal only with a recognized Tribal authority and not represent any "aggrieved Indian" within a tribe. Internal matters between the Tribes and its members should not be of concern to the Trust Counsel Authority.

   c. The bill should spell out the duty of the Trust Counsel Authority to provide representation to any tribe requiring assistance regardless of prior Trust Counsel Authority commitments. If the Trust Counsel Authority finds itself in a potential conflict of interest situation, it should be required by law to provide funding, by contract, to a private attorney chosen by the tribe to act in its behalf. The Trust Counsel Authority should provide money for technical and investigative work as well as legal expenses connected with any actions undertaken by the contracted attorney.

   d. Section 11 (5) should be deleted. No fees should be charged for Trust Counsel Authority services. Under the present Department of Justice system we do not have to pay; and there is no reason to start now.

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e. Delete that part of Section 8 which absolves the Department of Interior and Department of Justice of their responsibilities to the Indians. Any tribe should have its choice in the matter of representation, otherwise, there would be no improvement from the current system.

f. Section (10) should not contain the phrase "or any other statute authorizing a suit to be brought against the United States." since it could limit actions under such laws as the Tort Claims Act, the Tucker Act and other present legislation permitting suits against the United States as well as perhaps bind Indians to unknown future actions of Congress which might limit the scope of the Trust Counsel Authority.

These amendments are needed if the proposed bills are to be in the best interest of the Pueblos.

CERTIFICATION

The foregoing Statement was duly adopted by the All Indian Pueblo Council at a meeting held on December 28, 1970, with 15 members voting for, 0 voting against and 4 members absent.

Domingo Montoya, Chairman

ATTEST:

Joe Sando, Secretary

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91ST CONGRESS
2D SESSION

S. 4165

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 1970

Mr. JACKSON (for himself, Mr. ALLOTT, and Mr. STEVENS) (by request) introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

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 relationships 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.

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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~~ a minimum of five members and a maximum of nine members to be appointed by the President by and with the advice and consent of the Senate.

(c) At least ~~two~~ two thirds of the members of the Board of Directors shall be Indians. reservation Indians involved in governmental activities of their Tribe, Pueblo or other organization.

(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 terms, and ~~one shall be appointed for a~~ four-year terms. 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.

(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

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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.

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(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.

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 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, ~~except 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 Indians with regard to their rights or claims to natural resources, including, but not limited to,~~

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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 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.

rights to land, rights to the use of water, timber, minerals, and rights to hunt and fish

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 and of the States, against the United States, its departments, agencies, officers, and employees, or 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 lands, 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. After proper review by the Board, the Board should be authorized to permit Indians and Indian Tribes to avail themselves of the waiver of soverign immunity and initiate litigation in their own names, or in the name of the United States as Trustee for the Indians.

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~~sovereign immunity from suit in connection with litigation initiated by the Authority under this section.~~

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 statute authorizing a suit to be brought against the United States.

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.

~~(5) Charge a fee based upon the Indians' ability to~~

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~~pay for services rendered pursuant to section 8 of this Act. The fees collected pursuant to this subsection shall be paid into miscellaneous receipts in the Treasury of the United States.~~

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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2/5 cc to Bob Bruce

AN ANALYSIS BY

CALIFORNIA INDIAN LEGAL SERVICES

and

NATIVE AMERICAN RIGHTS FUND

of

PRESIDENT NIXON'S PROPOSED LEGISLATION AFFECTING INDIANS

California Indian Legal Services
2527 Dwight Way, Suite 7
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September, 1970

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Comments On A Bill To Create An
Indian Trust Counsel Authority

Already depleted Indian natural resources are still dwindling. The Federal trust obligation to protect Indian land, water, minerals, and hunting rights is going unfulfilled. Inertia and irreconcilable conflicts of interest within the Interior and Justice Departments are crushing Indians' hopes for economic self-sufficiency. (See the report of Reid Chambers entitled Discharge of the Federal Trust Responsibility To Enforce Legal Claims of Indian Tribes: Case Studies of Bureaucratic Conflicts of Interest.)

The Administration's bill clearly recognizes this intolerable situation. Congress should definitely create an Indian Trust Counsel with the powers enumerated in the Administration's proposed bill.

Several aspects of the bill are not wholly satisfactory, however.

First, a corporate Indian Trust Counsel would be preferable to an independent authority in the Executive Branch. No matter how much independence is guaranteed by section 7 of the bill, an executive agency with directors appointed by the President will seem subject to executive domination and conflicts of interest. The President recognized this problem in his Indian message of July 8, 1970 (which is quoted on page 3 of Secretary Hickel's letter transmitting the Trust Counsel proposal) when he stated: "[T]he credibility of the Federal Government is damaged whenever it appears that such a conflict of interests exists." [Emphasis added.] Establishing the Indian Trust Counsel as a federally chartered non-profit corporation would help prevent any misunderstanding.

Enlarging the board of directors and lengthening the director's terms to six years would also strengthen the Trust Counsel and make it more responsive to Indians. The President could not easily dominate an eleven man board with staggered six year terms once the initial appointments had been made. The same is not true for the proposed bill's three man board with four years terms. A President who considered the Trust Counsel too aggressive could, under the bill's present organization, find and appoint two new, submissive directors all too quickly. In addition, the board, rather than the President, should select the board's chairman.

We believe the provisions of the bill concerning employment and civil service are not acceptable. They (sections 4, 5(a) and 6) provide that all personnel except the chief legal officer shall be subject to the civil service law. These provisions are unacceptable because they are inconsistent with the spirit of 25 U.S.C. §§44-47 and 472, which (a) give Indians a preference in employment (including promotion and reductions in force) for jobs that serve Indians and (b) require a separate civil service system for Indian employees who serve Indians. The employment provision are also objectionable because they

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could lock mediocre people into jobs that require drive and imagination. The Trust Counsel should be able to function like a private law firm on an OEO legal services program--with the power to hire and fire personnel in any manner consistent with due process of law.

A fourth desirable change would be the deletion from section 8 of the phrase "within the United States' trust responsibility owing to Indians, which services are now rendered by the Department of the Interior or by the Department of Justice..." That phrase is undesirable for two reasons. First, it would arguably prevent the Trust Counsel from representing eastern tribes, such as those in Maine and New York, as to which the federal government has denied any trust responsibility. Those Indians are as much, or more, in need of legal assistance in protecting their natural resources and historically just as deserving of help. Second, the phrase says that the Interior and Justice Departments are now rendering legal services, but in fact they are not doing so or are unable to do so because of the very conflicts of interest, legal and political, which have given rise to this proposal.

By the same token, the Justice Department should be absolved of the government's trust obligations only to the extent that those obligations are assumed by the Trust Counsel. The first sentence of section 8 should therefore read:

> "The Authority [or Corporation if one is created] 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 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; but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to Indians, except 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 Indians with regard to rights or claims to natural resources, including but not limited to those specified above, as to which the Authority [corporation] is rendering legal services."

Section 10 should be deleted from the bill entirely. Its avowed purposes, as set out at page 5 of Secretary Hickel's letter of transmittal, do not make sense. The doctrine of res judicata would bar the Trust Counsel from relitigating final decisions rendered by the Indian Claims Commission, the Court of Claims or any other court, regardless of whether litigation was initiated pursuant to a special jurisdictional act. Nor could the Trust Counsel now file claims before the Indian Claims Commission. (25 U.S.C. §70k.)

The real effect of section 10 would be to prevent the Trust Counsel from bringing any, or perhaps almost any, suit against the United States for money. This result flows from the combination of

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section 10's prohibition against "any action...against the United States relating to any matter as to which a claim...could have been filed... under any...statute authorizing a suit to be brought against the United States" and 28 U.S.C. §§1346, 1491 and 1505, which together seem to authorize every imaginable type of suit for money damages against the United States.

Moreover, section 10 is open to the construction that no suit for declatory or injunctive relief could be brought against the United States or its officers if (1) that suit would be considered against the United States but for section 9 and (2) a damage action could be brought (without the Trust Counsel's help) against the United States. So construed, any such law would eliminate one of the main reasons for the Trust Counsel, i.e. to protect Indians against improper federal actions.*

Finally, section 11(5), which allows the Treasury to collect fees for Trust Counsel services, should be removed from the bill. Even a fee based on ability to pay is inconsistent with a Trust Counsel created to fulfill already existing, but unsatisfied, trust obligations. Government collection of fees would be utterly unconscionable where the Trust Counsel could enforce statutory and fiduciary duties to Indians only by suing federal officials.

Comments On A Bill To Establish An Assistant Secretary Of The Interior For Indian And Territorial Affairs

The Bureau of Indian Affairs is presently under the Assistant Secretary of the Interior for Public Land Management. This arrangement is unsatisfactory for four reasons. First, non-Indians in positions above the Bureau of Indian Affairs make important policy decisions affecting only Indians. Second, the BIA is not primarily a land and natural resources agency. Most BIA expenditures are for education and welfare. Third, other interests in Public Land Management, such as those of the Bureau of Land Management, conflict with Indian interests.

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* An acceptable alternative to the proposed section 10, and one without the destructive effects described in the text, would read:

> "The powers granted to the Authority [or Corporation if one is created] by this Act shall not extend to the filing or prosecution of any action, claim, or other proceeding against the United States if such action, claim or proceeding is barred by section 70k of Title 25 or by a similar provision in any special jurisdictional act authorizing a particular tribe or other identifiable group of Indians to bring an action or present a claim against the United States."

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Finally, the BIA's present location in Interior makes it difficult, if not impossible, for Indians to have an effective voice in Interior Department decisions.

The proposed law would help to alleviate all of these problems. Fewer non-Indians would be above the BIA; the BIA would not be seen as just a lands and natural resources agency; Indians would not have to compete with other Bureaus under Public Land Management; and the Indian voice in Interior would be strengthened.

The question will remain, however, of whether the Interior Department is the best place for the BIA. Some Indians and non-Indians have suggested moving the Bureau to the Department of Health, Education and Welfare, and others have advocated establishing it as an independent executive agency. We urge this committee to state expressly that those possibilities will not be affected by upgrading the BIA within the Interior Department. We also urge the committee to hold hearings at which Indians from across the nation will have a full opportunity to advise Congress on the status they prefer for the BIA.

Comments On A Bill To Provide For Indian Control Of Certain Programs Now Managed By The Federal Government

The proposed bill is an excellent mixture of continued federal responsibility for Indians and Indian control of Indian programs. Only a few technical changes seem desirable.

The definition of "Indian tribe" in section 1(a) should include Pueblo, and section 1(b) should be modified so that "Indian tribal organization" will include Pueblo Councils, which are not presently elected bodies.

The period at the end of section 2(c) should be deleted and the following language added: "and inspection by members of the tribal organization." Indians should not be kept in the dark about their governments' activities.

Section 2(e) should either spell out in detail a tribe's rights at a hearing to terminate tribal control or should incorporate applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§551 and 554-558. Section 2(e) should also (1) provide that the Secretary must hold a hearing upon the demand of 20% of a tribal organization's members and (2) spell out the member's rights at such a hearing. Past experience suggests that the Secretary may sometimes fail to protect a tribal organization's members against excesses by the people in control of the tribal organization.

Finally, section 3 must be rewritten to delete all reference to the civil service. Indian employees of the BIA and Indian Health Service are supposed to be hired, promoted, and discharged under special employment systems, not under the civil service system. (See 25 U.S.C. §472 and the comments, infra, on the Bill To Retain Civil Service Coverage For Government Employees Who Become Tribal Employees.)

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Comments On A Bill To Retain Civil Service Coverage For Government Employees Who Became Tribal Employees

Congress should not enact the proposed Federal Employees Indian Tribal Organization Transfer Act in its present form. The Act as presently drafted would perpetuate the present inclusion under civil service of all BIA and Indian Health Service (IHS) employees, an arrangement which is inconsistent with 25 U.S.C. §472.

BACKGROUND

From 1834 to 1910 Congress passed laws (25 U.S.C. §§44-47) that promised Indians preference for government service to Indians. The Bureau of Indian Affairs virtually ignored those laws. Reservations filled up with white people who lived off the Indians. (Remarks of Senator Noreck in Hearings on S.2755 before the Senate Committee on Indian Affairs, 73d Cong. 2d Sess., 1934, at 259.)

In 1934 Congress tried to rectify matters by passing 25 U.S.C. §472. Both John Collier, then Commissioner of the BIA, and Representative Howard, the House sponsor of the law, expressly stated that section 472 required the creation of "a special Indian civil service." (Remarks of John Collier in Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong, 2d Sess, 1934, at 39; Remarks of Representative Howard at 78 Cong. Record 11727 (1934).) When the head of the federal employees union complained that the effect of section 472 was "to withdraw from the classified service of the Federal Government the entire personnel of the Indian Service," Senator Wheeler, co-sponsor of the Act and Chairman of the Indian Affairs Committee, replied:

> "That is the purpose of it. That is what should be done, in my judgment. You are discriminating at the present time. We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned, because of the fact that it has discriminated against Indians." Hearings on S.2755 before the Sen. Comm. on Indian Affairs, 73d Cong. 2d Sess. at 256 (1934).

The clear mandate of section 472 has not been carried out, although the BIA has at least twice acknowledged its duty under that statute to create a special civil service. (Remarks of Commissioner Collier in VII Indians at Work No. 5 at 1-2 (Jan., 1940); U.S. Dept. of the Interior, Federal Indian Law 533, 536 (1958).) Instead both the BIA and the Indian Health Service remain under the general civil service

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system; and Indians are preferred only for initial employment, not for training or promotion or during reductions in force.

A not atypical result of this system is the Denver (formerly Littleton) Colorado Office of the BIA. It has 118 employees; the 17 lowest paid are all Indians; and of the other 101, only one is an Indian.

THE PROPOSED ACT

Congress would perpetuate this situation and sub silento repeal 25 U.S.C. §472 if it passed the proposed act with its references to how all BIA and IHS employees are covered by civil service. (See e.g., the last sentence of section 2(a)(5), section 4(a), and section 5.) That must not happen.

We should not be misunderstood as seeking to wipe out the health, injury, life insurance, and retirement benefits of BIA and IHS employees. Those benefits must of course be preserved; but that preservation must come within a framework that recognizes a separate civil service system for Indian employees of the BIA and IHS.

Congress should therefore adopt a new law which would clearly express the intent of section 472 by explicitly creating a separate BIA-IHS Indian civil service system. That system, as contemplated by section 472, would establish standards of health, age, character, experience, knowledge, and ability for the initial employment, training, promotion and retention of Indians. The system would also expressly provide that a non-Indian, regardless of his civil service status, could not be hired, trained, promoted, retained, or transferred to the BIA-IHS if any competent Indian wished to fill a position. Health, injury, life insurance, and retirement benefits would remain part of the general civil service system for non-Indians and would accrue to Indians under the Indian civil service system. Indians would acquire rights under the general as well as Indian civil service after three years of acceptable service with the BIA or IHS, so that Indians could transfer to other agencies if they wished to do so.

This proposale would assure greater Indian management and control of Indian affairs. That was the purpose of section 472 and is a major goal enunciated in the President's July 8, 1970, message to Congress.

A few technical details of the bill also need correction. First, section 2(a) gives a tribe the option of continuing benefits for employees who transfer from the government. Section 2(b), on the other hand, says a tribe must make contributions toward those benefits. Clearly, section 2(a) is the correct approach, and section 2(b) is not.

Second, the definitions in sections 2(b) and 2(c) should be conformed to these in sections 1(a) and 1(b) of the Indian Control bill (with the modification suggested in our discussion of the Control Bill). The two laws would be part of one scheme and should be parallel.

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Finally, section 6 should be changed so that the Benefits Bill takes effect at the same time as the Control Bill, rather than 60 days after the Benefits Bill's enactment.

Comments On A Bill To Amend The Johnson-O'Malley Act and Laws Relating to Indians and the Public Health Service.

Sections 1 and 2 of this bill are a mistake. Both sections are superfluous in view of the much more carefully drafted Bill For Indian Control of Certain Programs Now Managed By The Federal Government. Section 1 is also undesirable because it fails to give Indians control of Johnson-O'Malley funds used in off-reservation situations.

JOHNSON-O'MALLEY ACT

The Johnson O'Malley Act (25 U.S.C. §§452-454) was enacted in 1934. Its purpose was to provide education, medical attention, agricultural assistance, and social welfare to Indians who were "to a considerable extent mixed with the general population." (H. Rept. No. 864 (73d Cong, 2d Sess., 1934); S.Rept. No. 511 (73d Cong, 2d Sess., 1934).) The benefits were to come to the Indians from funds supplied to states and private organizations under contracts with the Federal Government.

The discrepancy between this objective and what actually happened is documented in Indian Education: A National Tragedy--A National Challenge, Senate Rpt. No. 91-501 (91st Cong. 1st Sess, 1969). Bureau policy is to provide Johnson-O'Malley money only for children whose parents live on or near reservations. (Id. at 39.) Public school districts often add Johnson-O'Malley funds to their general operating budgets instead of expending the money for the benefit of Indians. (Id. at 39.) And Indians are given little or no voice in how the funds are spent. (Id. at 132-133.)

The special Subcommittee on Indian Education therefore unanimously recommended certain charges in the Johnson O'Malley program. These included: (1) Indian involvement in the planning, execution and evaluation of Johnson-O'Malley expenditures, (2) Johnson-O'Malley contracts that would insure that Indians, and only Indians, would benefit, and (3) an end to BIA regulations (25 C.F.R. 33.4(b); 62 I.A.M. 3.25) tying Johnson-O'Malley funds to residence on tax-exempt land. (Id. at 132-133.)

Section 1 of the proposed bill would not carry out the last two of these recommendations at all; and Indians would be involved by the bill in controlling Johnson O'Malley funds only if they constituted tribes, bands, groups, or communities under contract with the BIA. Where the BIA contracted with a state because Indians were "to a considerable extent mixed with the general population," those Indians--who were supposed to be Johnson-O'Malley's principal beneficiaries--would

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still have no voice.

Section 1 would carry out the Indian Education Subcommittee recommendation that tribes and Indian communities be added to the list of agencies with which the BIA can negotiate Johnson-O'Malley contracts. However, that recommendation was premised on the current law for Indian control of Indian programs (25 U.S.C. §48). The President's proposed bill granting Indian tribes and communities the absolute right to take over programs that benefit them makes section 1 (and the Sub-committee recommendation) unnecessary and inappropriate.

The Johnson-O'Malley Act should be amended, but the amendments should assure that Johnson-O'Malley funds benefit only Indians and that contracts with states and other organizations are subject to Indian control. We would also support Secretary Hickel's recommendation to delete references to territories in the Johnson-O'Malley Act.

PUBLIC HEALTH SERVICE LAWS

Section 2(a and b) would authorize contracts between Indian tribes and the Secretary of Health, Education and Welfare under which the former would provide Indians with personal health care and water and sanitation facilities that the latter now supplies under 42 U.S.C. §§2001-2004a.

Those provisions, like section 1, would be totally unnecessary and inappropriate if Congress enacts the President's proposed bill for Indian Control of Programs Now Managed by the Federal Government.

Section 2(c) would also be unnecessary in view of section 3 of the Indian Control bill.

Section 3, which would continue the draft deferment of Public Health Service officers assigned to Indian tribes should be slightly modified and made a part of the Indian Control bill. A modification is needed so that the draft exemption of men would continue not only if they were assigned to a tribe by the PHS but also if they were employed by a tribe that had assumed the tasks formerly performed by HEW under 42 U.S.C. §§2001-2004a.

Comments On A Bill To Amend
Certain Laws Relating To Indians

TRESPASSING LIVESTOCK

Sections 1 and 3(1) of this bill would effect desirable changes in the law of livestock trespass on Indian land.

Two technical changes should be made, however. First livestock should be defined as including, but not being limited, to cattle, sheep, goats, pigs, horse, and mules. Second, the law should clearly state whether the charge of five dollars per animal is per day of trespass or per day of storage after impounding.

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TRADERS

Non-Indian traders still take advantage of reservation Indians. Lacking cars and dependent on pawn to finance their purchases, Indians are forced to deal with the traders. The traders respond with usurious interest, illegal detention of pawn, and illegal detention of welfare checks when the trader is also the post office. Excessive prices are common.

While Secretary Hickel is apparently unaware of these facts (see page 2 of his letter of transmittal), the legislation proposed in section 2 of the bill is, with one major exception, generally satisfactory.

The glaring deficiency in section 2 is its failure to take account of the tax consequences which may flow from it. The Supreme Court in Warren Trading Post v. Arizona, 380 U.S. 685 (1965), held that state sales tax laws are inapplicable on Indian reservations because 25 U.S.C. §§261-264 completely occupy the field of trader regulation even though they do not prescribe or proscribe taxation. A court might hold that no such federal occupation exists where a tribe has elected to remove itself from the protections of those laws.

Consequently, the following proviso must be added to section 2:

> "provided that no business, transaction, property, or use of property shall be subject to taxation by virtue of this section or any tribe's laws or ordinances making sections 261 through 264 of this Title inapplicable on their reservation.

The second sentence of section 2 should also be changed to reflect the fact that 25 U.S.C. §261 will necessarily be inapplicable on a reservation that adopts its own trader laws. (Section 261 gives the Commissioner of Indian Affairs sole power over traders.) An appropriate revision would read:

> "When a tribe has enacted such laws or ordinances, section 261 of this Title shall not be applicable to its reservation and sections 262 through 264 of this Title shall not be applicable to that reservation, if the tribe's laws or ordinances so provide."

PRIVATE BUSINESS TRANSACTIONS BETWEEN GOVERNMENT EMPLOYEES AND INDIANS

Section 3 of this bill would repeal 25 U.S.C. §§68, 68a, and 87a and 18 U.S.C. §437. Those statutes prohibit all private sales to Indians by government employees and all resales of Indian goods or services purchased by government employees. Such laws are salutory and should not be repealed. If anything they should be strengthened. (See United States ex Rel. Burnette v. Valandra, 300 F.Supp. 312 (S.D. 1969).)

Comments on the proposed Indian Financing Act of 1970 will be forwarded in the near future.

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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 relationships 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~~ 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 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 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

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Trust Counsel, and who shall be paid at a rate equal to that provided for in level IV 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 sections 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.

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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, except 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 except further that in determining the litigating position to be taken by the Department of Justice on any matter affecting the natural resource rights of Indians or Indian tribes, the Department of Justice shall consider and give due difference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe. 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.

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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 and of the States, against the United States, its departments, agencies, officers and employees, or 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 lands, 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.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended (24 Stat. 505).

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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.

(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. Subsection 5 authorizing a fee has been deleted.

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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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Mr. Speaker:

Enclosed is a proposal "To amend Acts entitled 'An Act authorizing the Secretary of the Interior to arrange with States or Territories for theeducation, medical attention, relief of distress, and social welfare of Indians, and for other purposes', and 'To transfer the maintenance and operation of hospital and health facilities for Indians to the Public Health Service, and for other purposes' and for other purposes."

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

Section 1 of the proposal amends the Act of April 16, 1934 (48 Stat. 596), as amended by the Act of June 4, 1936 (49 Stat. 1458), known as the Johnson-O'Malley Act by inserting in the Act the phrase "or with any Indian tribe, band, group, or community recognized by the Secretary,". It also strikes the word "Territory" wherever it appears in the first section of the Act because of the fact that it is no longer applicable to the Act.

Section 2 of the proposal amends the Act of August 5, 1954 (Public Law 568, 68 Stat. 674), by adding two new sections to the Act and re-numbering the other sections so that they conform to the Act with the new sections. The first new section added is a new section 4 that authorizes the Secretary of Health, Education, and Welfare to contract with "any Indian tribe, band, group, or community" to carry out his health responsibility to the Indians. The second new section added by the proposal is a new section 9 that gives the Secretary of Health, Education, and Welfare the authority to detail Public Health Service personnel for the purpose of assisting an Indian tribe, band, group, or community in carrying out Indian health functions.

Section 3 of the proposal amends Paragraph (2) of section 6(a) of the Military Selective Service Act of 1967 by adding words that will allow the commissioned officers of the Public Health Service who are serving under a service agreement with the Public Health Service that credits their Public Health Service service against their military obligation under the provisions of the Selective Service Act to continue to have such credit apply against their military obligation under the provisions of the Selective Service Act while on detail to work with Indian tribes, bands, groups, or communities.

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In the President's Indian message of July 8, 1970, he discusses the need to make certain that Johnson-O'Malley funds, which were designed to help Indian students, should come under the influence of the Indians as to the way that the money is spent. He therefore proposed that the Congress amend the Johnson-O'Malley Act to authorize this Department to channel funds appropriated under the Johnson-O'Malley Act directly to Indian tribes and communities. The amendment proposed in section 1 of our proposal will carry out this Presidential request. This amendment will give the Secretary of the Interior authority to contract directly with not only State and local institutions but with Indian tribes, bands, groups, or communities who run their own educational institutions. The Secretary will then be able to contract directly with these Indian tribes, bands, groups, or communities to carry out his responsibility in Indian education, agricultural assistance, and social welfare to the Indians. This will be in connection with the direction the Department has been given by the President to make every effort to ensure that Johnson-O'Malley funds which are presently directed to public school districts are actually spent to improve education of Indian children in those districts.

The amendments made by section 2 of the proposal will give the Secretary of Health, Education, and Welfare the same authority to deal with Indian tribes, bands, groups, or communities in carrying out the health functions that were transferred to the Secretary of Health, Education, and Welfare by Public Law 568 of the 83d Congress that the amendment made by section 1 of the proposal gives to the Secretary of the Interior in the areas of education, agricultural assistance, and social welfare.

Basically the amendments give the Secretary of Health, Education, and Welfare the authority to make contracts with Indian tribes, bands, groups, or communities to carry out the Indian health function that has been placed in the Secretary of Health, Education, and Welfare. In connection with this contracting authority, the Secretary is given the authority to detail personnel of the Public Health Service to work with Indian tribes, bands, groups, or communities in relation with the contracts made by them to carry out the health function.

Section 3 of the proposal is a provision that is needed as a companion to the new section 9 added to Public Law 568, 83d Congress by section 2 of this proposal. The language in section 3 continues the draft-deferred status of those commissioned officers of the Public Health Service who are detailed by the Secretary of Health, Education, and Welfare to work with Indian tribes, bands, groups, or communities in connection with transfers made by the Secretary to carry out the Indian health function. Without this amendment to the Selective Service Act, the commissioned officers of the service who are detailed to work with Indian tribes, bands, groups, or communities would lose their draft-deferred status, making the detailing of the junior officers to this work virtually imposcible.

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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

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

Enclosure

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A B I L L

"To amend Acts entitled 'An Act authorizing the Secretary of the Interior to arrange with States or Territories for the education, medical attention, relief of distress, and social welfare of Indians, and for other purposes', and 'To transfer the maintenance and operation of hospital and health facilities for Indians to the Public Health Service, and for other purposes' and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act of April 16, 1934 (48 Stat. 596), as amended by the Act of June 4, 1936 (49 Stat. 1458), be amended to read as follows:

"That the Secretary of the Interior be, and hereby is, authorized, in his discretion, to enter into a contract or contracts with any State or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, or with any Indian tribe, band, group, or community, recognized by the Secretary, for education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians, through the agencies of the State, tribe, band, group, or community, or of the corporations and organizations hereinbefore named, and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State."

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SEC. 2. The Act of August 5, 1954 (68 Stat. 674), as amended by the Act of July 31, 1959 (73 Stat. 267) is amended:

(a) by redesignating sections 4, 5, 6, and 7 as sections 5, 6, 7, and 8, respectively.

(b) by adding after section 3 the following:

"SEC. 4. That the Secretary of Health, Education, and Welfare is authorized to contract with any Indian tribe, band, group, or community to carry out all functions, authorities, and responsibilities conferred upon him by this Act, in accordance with the Act of June 4, 1936 (49 Stat. 1458)."

(c) by adding a new section 9 at the end of the Act of August 5, 1954 (68 Stat. 674), as amended, as follows:

"SEC. 9. In accordance with section 214(d) of the Public Health Service Act, 42 U.S.C. 215(d), upon the request of any Indian tribe, band, group, or community, personnel of the service may be detailed by the Secretary for the purpose of assisting such Indian tribe, band, group, or community, in work related to the functions of the service."

SEC. 3. Paragraph (2) of section 6(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. 456(a)(2)) is amended by inserting the words "or who are assigned to functions of the service in assisting Indian communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended by the Act of July 31, 1959 (73 Stat. 267)," after the words "Environmental Science Services Administration."

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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 its consideration and that it be enacted.

The purpose of this proposal, as provided 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 Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

Section 2 of the proposal establishes as an independent agency in the Executive Branch 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

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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. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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.

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 extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in a combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources, except that the Department of Justice in determining its litigation position with regard to any matter affecting the natural resource rights of Indians shall consider the obligation of the United States resulting from its trust responsibility to the Indians. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the 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 and State courts against the United States or any of its departments, agencies, officers or employees or 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.

Section 10 provides that the powers granted the Authority by this Act shall not extend to the filing or prosecution of any action, claim or other proceeding against the United States relating to any matter as

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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, and makes it clear that the prohibition does not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended.

Section 11 enumerates the authorities of the Authority.

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

As the President stated in his 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.
>
> "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, as provided in section 7, free from control of any Executive Department. This independence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

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The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal 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. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the 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 at the same time 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, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. 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 is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, 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

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its claim. The Authority is authorized to lend its assistance in the area of natural resource rights and interests to such Indian or Indian group. The section, however, makes it clear that the assistance rendered by the Authority in this section in protecting the rights of the Indians in their justiciable claims to natural resources, and the rights attached thereto, is in addition to the responsibilities that the Department of the Interior has to protect the Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and the American Indians. The section also provides that the Department of Justice will, after the enactment of the proposal, be relieved of its responsibility to the Indians in the area of natural resources but will continue to fulfill whatever responsibility it may have with regard to Indians generally. This relieving of Justice's responsibility is subject to the exception that Justice in pursuing a litigating position that affects the natural resource rights of the Indians shall give deference to the obligation of the United States arising from its tract responsibilities to the Indians.

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from 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. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they 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 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.

Section 10 of the proposal will bar the Authority from relitigating any claims that have been filed or should have been filed before the Indian Claims Commission. It will bar their reopening any claims settled by the Indian Claims Commission as well as any claims settled by the Court of Claims or any other competent court of the United States pursuant to special legislation authorizing an Indian tribe to bring suit against the United States for settlement of its claims.

Section 11 authorizes the Authority to make rules and regulations, to request assistance from any department, agency, or independent instrumentality of the Federal government to carry out its functions under this proposal and such assistance may be given to the Authority

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on a reimbursable or non-reimbursable basis. The Authority is authorized to receive and use funds authorized or donated to it by others. It is also authorized to make expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities.

Finally, section 12 of this proposal authorizes the appropriation of funds necessary to carry out the provisions of the proposal.

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest 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

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

Enclosure

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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 relationships 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 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 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

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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 sections 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.

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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, except 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 except further that in determining the litigating position to be taken by the Department of Justice on any matter affecting the natural resource rights of Indians or Indian tribes, the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe. 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.

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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 and of the States, against the United States, its departments, agencies, officers and employees, or 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 lands, 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.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended (24 Stat. 505).

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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.

(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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1884

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 Ralph Burr DATE 3-5-71

REMARKS

Brad:

Here are the 7 bills--I assume they are as you and Bobbie agreed upon with Interior. I am not requesting views of NCIO--assume your sign-off will take care of that.

Ralph

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DISCHARGE OF THE FEDERAL TRUST RESPONSIBILITY TO ENFORCE LEGAL CLAIMS OF INDIAN TRIBES: CASE STUDIES OF BUREAUCRATIC CONFLICT OF INTEREST

By Reid Peyton Chambers*

"No servant can serve two masters; for either he will hate the one and love the other; or else he will hold to the one, and despise the other"

Luke 16:13

*Acting Professor of Law, University of California at Los Angeles. This paper was financed by California Indian Legal Services (CILS). The author is grateful to CILS, and to all individuals who have generously contributed ideas and information. I am particularly indebted to Richmond F. Allan, Esq., David H. Getches, Esq., Robert S. Pelcyger, Esq., Browning Pipestem, Esq., Professor Monroe E. Price, Daniel M. Rosenfelt, Esq., Thomas Susman, Esq., Henry B. Taliaferro, Esq., William H. Veeder, Esq., and I.S. Weissbrodt, Esq.

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The United States stands in a fiduciary relationship to Indians and Indian tribes. It has been held by the Supreme Court that "these Indian tribes are the wards of the nation".[1] The duty is a "self-imposed" one which derives from the status of Indians as "dependent and sometimes exploited people," Seminole v. United States, 316 U.S. 286, 296-97 (1942). In Seminole Nation, the Supreme Court held that the United States "has charged itself with moral obligations of the highest responsibility and trust." Ibid.

The existence of this trust relationship was recently reaffirmed by President Nixon. In a message to Congress on July 8, 1970, he emphasized that:

> "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."

The president noted that many legal disputes concerning the extent of the Indians' land and water rights are between them and agencies of the federal government, their trustee. Such instances involve conflicts of interest, as it is impossible for the government vigorously to provide legal representation to the Indians and, at the same time, effectively pursue its own designs and policies with respect to land and water also claimed by the Indians.

In order to remove the conflict of interest, the President proposed creation of a new entity, independent of the executive branch, to provide legal representation to Indians. Legislation to establish this entity - the Indian Trust Counsel Authority - was sent to Congress on July 31, 1970. A copy of the proposed bill as sent to Congress is attached as Appendix A. As proposed, the Trust Counsel Authority would be controlled by a three member Board of Directors, appointed by the President with the advice and consent of the Senate.[2] The Board of Directors, in turn would appoint the Indian Trust Counsel, as the chief legal officer.[3]

---

1. United States v. Kagama, 118 U.S. 381 (1886). In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), Chief Justice Marshall stated that the relationship between Indians and the United States "resembles that of a ward to his guardian." United States v. Payne, 264 U.S. 446, 448 (1924); Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886). See also Creek Nation v. United States, 295 U.S. 103, 109-10 (1935).

2. Proposed bill, sec. 2 (b).

3. Proposed bill, sec. 4.

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While the Indian Trust Counsel Authority would be authorized "to render legal services in regard to rights or claims of Indians to natural resources"[4] in opposition to States and private claimants,[5] the most significant portion of the bill - Section 9 - authorizes the Authority to commence suit "acting in the name of the United States as trustee for the Indians . . . against the United States, its departments, agencies, officers, and employees."[6] Moreover, this section specifically waives sovereign immunity as a defense to such litigation.

The purpose of this paper is to evaluate the proposal to create an Indian Trust Counsel Authority by discussing several situations where a conflict has arisen between Indian trust rights and conflicting federal claims. The situations described herein have all arisen within the past three years, although in some cases, the conflict of interest has deeper historical antecedents. Since the trust responsibility to the Indians is primarily reposed in the Department of the Interior, the conflict of interest is most direct when the agency with an interest adverse to the Indians is a bureau located in the Interior Department. Therefore, conflicts between either the Bureau of Land Management or Bureau of Reclamation - both Interior agencies - and Indian rights have been selected for most of the cases analyzed.

In analyzing the conflict of interest between government agencies and the Indians, it is imperative to perceive - as President Nixon did in his message[7] - that the federal government as trustee is charged with the protection of what are essentially private property rights. As trustee for private rights, the government does not act in its usual political capacity, but is charged[8] with the same general obligations as are imposed on private trustees.

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4. Proposed bill, sec. 8

5. Proposed bill, sec. 9

6. Proposed bill, sec. 9

7. The President stated: "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." (Emphasis in original.)

8. In Menominee Tribe of Indians v. United States, 101 Ct. Cls. 10, 18-19 (1944) it was held that a special jurisdictional act providing that "the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary, add[s] little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." In Menominee Tribe, the government was barred from borrowing funds from the Indians without paying a normal rate of interest, and from making expenditures with high-interest funds before exhausting low interest accounts. In Sioux Tribe v. United States, 105 Ct. Cls. 725 (1946) the Court held that the government has a standard fiduciary duty to make a proper accounting to its beneficiary.

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Indeed, the Court of Claims recently held that the United States should be held to "the most exacting fiduciary standards" with respect to Indians, whatever its other goals and preferences.[9] The same principle was announced by the Supreme Court in Seminole Nation v. United States, 316 U.S. 286, 297 (1942). Just as a private trustee, the United States has a duty of undivided loyalty, which has been called the "most fundamental" duty owed to the beneficiary by his trustee or a ward by his guardian.[10] Another important duty is the obligation to preserve and protect the trust property, which includes taking all reasonable steps to enforce the beneficiary's legal claims relating to the property.[11] And just as a conflict between the private trustee's fiduciary duty of loyalty and his own personal interests would be intolerable if it interfered with performance of his trust responsibility, a conflict between the rights of Indian beneficiaries and the public purposes embodied in federal programs with adverse interests MUST NOT IMPEDE the effective discharge of the United States' fiduciary obligation to protect private Indian property rights.

This "conflict " then, is not one which properly can be resolved through the political process of balancing conflicting interests. Such a balancing procedure within the executive department is desirable where competing public policies are being balanced; this, of course, is the method by which public policy is formulated. But private rights, which the United States is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes. The government's relationship to the Indians is, in this respect, unique in character.

On the one extreme, the prohibition against the United States , as trustee, having an interest adverse to his beneficiary could conceivably be resolved by holding that wherever a public purpose conflicts with Indian trust rights, the latter shall always prevail. Such an absolute frustration of competing public policies would clearly be intolerable for several reasons. Most importantly, the formulation of public policy must retain more flexibility than would be permitted by such an iron-clad rule. As will be seen, Indian property rights are sometimes difficult to define and raise complex legal and factual questions. Moreover, a private trustee faced with a conflict between a fiduciary duty and a critical personal interest could resign, whereas the federal trust obligations cannot be ended without an Act of Congress. What can be demanded at a minimum is that Indians' claims be asserted by an advocate with undivided loyalty.

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9. Navajo Tribe of Indians v. United States, 364, F. 2d 320, 322 (Ct. Cls. 1966), Compare Menominee Tribe of Indians v. United States, 102 Ct. Cls. 555 (1945).

10. Scott, Trusts, p. 1297 and § 170-17.

11. Id., §§176-177.

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The opposite extreme would be a rule requiring the Indian interest to yield to conflicting public purposes. In the past this extreme - while by no means a fast rule of administrative practice - aptly describes the result of most, although not all,[12] cases where a conflict of interest has arisen in the discharge of the federal trust responsibility. In part, this consequence may derive from entrusting primary responsibility for administering the trust obligations to Indians to the Secretary of the Interior and, within the Interior Department, to the Bureau of Indian Affairs.[13] The Department of the Interior's major responsibility is the management and conservation of public property and resources;[14] its bias, therefore, would be against conflicting private property rights.

The Indian Trust Counsel proposal represents a departure from either of these extremes. Without pledging that private Indian interests should prevail whenever they conflict with public purposes, the proposal represents an institutional rearrangement in which private rights can be advanced with undivided loyalty. Since the proposed bill waives the sovereign immunity of the United States in connection with actions commenced by the Trust Counsel, it favors resolution of conflict situations by the judicial branch rather than by executive fiat.

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12. While the case studies are ones where the Indian interests appear to have been compromised, this is, of course, not always the situation in which conflict arises. For example, in January, 1969, the Solicitor determined that the south boundary of the Salt River Indian Reservation in Arizona had been erroneously determined by the Bureau of Land Management to be the North, rather than the South, channel of the Salt River. Memorandum, Solicitor Edward Weinberg to Secretary of the Interior, M-36770, January 17, 1969. Similarly, the Solicitor determined in 1966 that the boundaries of the Yakima Indian Reservation had been erroneously surveyed and portions of the land that should have been included in the reservation administered by the BLM, should be returned to the Tribe. Memorandum, Associate Solicitor for Indian Affairs to Assistant Secretary for Public Land Management, June 21, 1967. "Restoration to Yakima Tribe of Lands Omitted from Survey."

13. 5 U.S.C. §§22, 481, 485; 25 U.S.C. §§1, 1A, 2.

14. Its duties include administration of public lands, mines, territories and possessions, fish and wildlife, national parks and petroleum conservation.

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The Nature of Legal Conflicts of Interest

In legal representation, there are three basic conflict-of-interest situations. The first is where the attorney himself has a personal interest in property claimed by his client. It is obvious that an attorney will not zealously advocate his client's interests if he must sue himself, a corporation in which he has a substantial financial stake, or his employer. Such representation has repeatedly been declared to be unethical.[15]

Similarly, an attorney cannot effectively represent a client whose claimed rights onflict with those of another client.[16] An attorney "should resolve all doubts against the propriety of" representing multiple clients.[17] The multiple client problem, where a federal agency has a claim to property adverse to Indian claimants, is the most common conflict in federal representation of Indians.[18]

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15. E.g. American Bar Association, Committee on Ethics, Informal Opinion NO. 967 (1966). In United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963), the Court stated:

> "Attorneys must not allow their private interests to conflict with those of their clients . . . . They owe their entire devotion to the interests of their clients."

Disciplinary Rule 5-101, (American Bar Association) Code of Professional Responsibility provides "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

16. For example, an attorney for an insurance company was engaged in representing X, a motorist insured by the company, in a suit against Y following an automobile accident involving X and Y. In this litigation, the attorney was contending before the court that Y had been negligent and X had not been negligent. Due to the length of the court proceeding, and the size of his out-of-pocket expenses in connection with his injuries, X requested an arbitration proceeding under the terms of the policy where, if successful, X could require prepayment of certain benefits. To resist prepayment, the company must show that X was negligent in the accident. It was held that the same attorney could not represent both X in court, and his company in the arbitration proceeding, even if both X and the company consented. Informal Opinion No. 977 (1967).

17. Ethical Consideration 5-15, American Bar Association, Code of Professional Responsibility.

18. The federal conflict-of-interest laws protect the Government against any such conflicting interest held by its employees. These laws, butressed by criminal sanctions against violators, prohibit any federal employee from representing a private party before a court or agency in a matter where the United States has an interest. 18 U.S.C. §§203, 205. This prohibition survives for a period of time after a person leaves government employment with respect to matters in which he actively participated while with the government and matters under his official supervision. 18 U.S.C.§207 (a),(b).

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A third conflict of interest is that political influence may intercede between the lawyer and his clients. A conflict may thereby be created between the attorney's duty to his client and his dependence on third persons-here, chiefly higher officials in the Departments of Justice and Interior and members of Congress. Canon 35 of the American Bar Association, Canons of Professional Ethics would seem to be violated by the present structure by which federal legal representation is provided to the Indians. It reads (in part):

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual . . . . A lawyer's relation to his client should be personal, and the responsibility should be direct to the client."

The American Bar Association Code of Professional Responsibility similarly bars political influence exerted upon an attorney-client relationship.[19] Ethical Consideration 5-23 declares that:

> "Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."

While political influence may properly focus upon government attorneys who are charged with implementing public policies, it is unjustified in the case of attorneys employed in the discharge of a federal trust responsibility to protect private rights.

The case studies which follow demonstrate that all of the three types of prohibited conflicts of interest exist in the federal representation of the Indians. Additionally, they indicate that - where a conflict of interest of the "multiple client" type exists, and a federal agency is claiming trust property in which the Indians claim an interest - no government attorney is at present charged with single-mindedly advancing the Indians' claim. The Solicitor's

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19. Ethical Consideration 5-21 reads in part:

> "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic political or social pressures upon the lawyer."

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office, in evident violation of professional ethical standards, generally "represents" both the Indians and the agency involved. Moreover, the controversy is usually resolved in that office itself: the Solicitor issues an "opinion" which, far from resembling an opinion letter from a private attorney to his client, constitutes an adjudication of the dispute for all practical purposes. No government attorney will "appeal" the opinion to a court or higher administrative authority; it is accepted as a statement of the law.[20]

Opinions are, moreoever, frequently based upon facts supplied to the Solicitors by agencies with interests adverse to the Indians, for example, hydrological studies by the Bureau of Reclamation and land surveys conducted by the Bureau of Land Management. These "facts" are seldom subjected to scrutiny comparable to that of cross-examination by a zealous attorney or the critical evaluation of a hearing examiner, commission or judge. The Indians generally have no comparable "expert" to which they can turn for technical expertise.

Finally, no systematic procedure exists for notifying Indian tribes or their protectors of actions which might infringe Indian trust interests. In some instances surveyed, the Indians have learned of the contemplated action too late to muster effective opposition.

I. Case Studies of Conflicts of Interest

A. The "Multiple Client" Problem.

1. Lease of Colorado Riverfront Property, Claimed by Quechan Tribe, by the Bureau of Land Management.

The Bureau of Land Management (BLM) administers the public lands of the United States. Not infrequently the BLM sells or leases lands claimed by the Indians or Indian tribes.

The Colorado River serves as a boundary for a number of Indian reservations along its banks. Riverfront property in many areas is especially valuable for recreational purposes. In April, 1967, Interior's Program Support Staff recommended that Secretary Udall approve a lease of lands to Yuma County for an airport and park

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20. Mediation of disputed interests of two clients by an attorney is permissible only if (1) both clients affirmatively request it and (2) the attorney desists from further representation of either client on the matter involved. American Bar Association, Code of Professional Responsibility, Ethical Consideration 5-20; H. Drinker, Legal Ethics, p. 112.

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facilities.[21] These lands, which border the Colorado River, were claimed by the Quechan Tribe to be part of their Ft. Yuma Reservation.

The conflicting claims of the tribe and the BLM were presented to the Department of Interior's Solicitor for his "opinion." The Solicitor reasoned that the Quechans possess a beneficial interest only in the irrigable lands within the reservation, but that Indian title to nonirrigable reservation lands had been ceded by an agreement of December 3, 1893, ratified by an act of Congress in 1894.[22] The Solicitor then determined that the proposed lease was legally unobjectionable so long as one irrigable parcel of land was excluded from it.[23]

In rendering this "opinion", the Solicitor was in reality arbitrating a dispute among various of his "clients." The Indian tribe and the BIA, on the one hand, resisted the lease; other Bureaus within the Department supported it. Clearly, the Solicitor could not provide complete legal representation to the competing interests. Rather than acting as an advocate, he functioned as an umpire and fashioned a "compromise" solution. Moreover, the critical technical determination as to which lands were irrigable and which were nonirrigable was made by the Bureau of Reclamation, one of the Bureaus which favored the lease.[24]

In sustaining the legality of the lease, the Solicitor held the 1893 Agreement, on which the 1894 statute was based, to be valid. This determination rejects certain claims of the Quechan Indians that the Agreement was an utter nullity because it was obtained by fraud, duress and even forgery, arguments the Indians could expect an uncompromised advocate to advance in a judicial or administrative proceeding.

In 1893, Congress granted a right-of-way to an irrigation company to construct a canal over lands on the Yuma Indian Reservation.[25] Three commissioners were appointed to negotiate with the Indians and obtain their consent to the right-of-way. The tribal members could not read, write, or understand English, and an Indian interpreter

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21. Memorandum, "Lease of Lands to Yuma County," Acting Director Program Support Staff to Secretary of the Interior, April 20, 1967.

22. Act of August 15, 1894, 28 Stat. 332 (1894).

23. Opinion of June 12, 1968, Status of Land in T.16 S.R.22 and 23 E., SBM Proposal for Lease to Yuma County, Arizona.

24. Id. at p. 2.

25. Act of February 15, 1893, 27 Stat. 456 (1893).

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who was not a member of the tribe was engaged by the commissioners. An "agreement" was concluded, by which the Quechans granted not only the canal right-of-way, but also forfeited all reservation lands in return for allotments once the canal was constructed. Evidence introduced before the Indian Claims Commission[26] indicates that the interpreter and commissioners forced some Indians to sign the document, forged other signatures, and failed to explain that the agreement would have the effect of ceding the entirety of the reservation.[27] Moreover, eight tribal members opposed to the agreement were imprisoned in Los Angeles at the time it was signed; some of these dissidents were whipped and one died in prison.[28]

The agreement was ratified by an Act of Congress in 1894, but significant portions of the act were never carried out. The Act specifically provided that unless the company began construction of the canal "within three years from the date of the passage of this Act, . . . the rights granted by the Act aforesaid shall be forfeited."[29] The canal was not constructed within that time period. Instead, an irrigation project over reservation lands was finally constructed over a decade later pursuant to the Reclamation Act of 1902 then in effect and an appropriation bill enacted in 1904.[30] This legislation was far less advantageous to the Quechans than the 1893 agreement, for the entire cost of the irrigation project was to be borne by them, and the land was to be sold at its value prior to reclamation, rather than by auction at market value as provided in the 1894 act. Allotments were not made until 1912, nearly twenty years after the 1893 agreement.[31]

Clearly, an argument can be made - and would be advanced by an uncompromised advocate of the Quechans - that the 1893 agreement

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26. Prior to the leasing dispute discussed above, the Quechans filed a claim against the United States asserting the liability of the government for the loss of use of a considerable amount of their land. The Quechan Tribe of the St. Yuma Reservation v. United States, Ind. Cl. Com. Docket No. 320.

27. Indeed, the agreement and congressional enactment following it have never been interpreted as extinguis hing the Quechan's beneficial interest in irrigable lands which have not been disposed of under the reclamation laws of the United States.

28. Memorandum, William H. Veeder to W. Wade Head, Area Director, Phoenix, Arizona, April 15, 1970, "Title of the Quechan Tribe in the Yuma Indian Reservation."

29. 28 Stat. 286, 336 et seq.

30. 33 Stat. 189 at 224 (1904).

31. Veeder memorandum, supra, note 23, at pp. 23-24.

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was void ab initio, and that even if the agreement were valid, the cession of Quechan lands contained in it and in the 1894 Act was revoked by the company's failure to commence construction of the canal within three years. The area continued to be administered as an Indian reservation after the 1894 Act,[32] and the 1904 Act recognized that the Indians maintained a beneficial interest in irrigable lands (the only lands the 1904 Act covered) not sold to settlers. If the 1893 Agreement and 1894 Act had really ceded all reservation land, no such beneficial interest could have continued. The issue, of course, is not whether these arguments would ultimately be sustained - the crucial point is that they were never articulated by the Solicitor.

2. The Use of Big Horn River water by the Bureau of Reclamation.

The Bureau of Reclamation is the other agency within the Interior Department which most often has claims which conflict with Indian trust property rights. The federal reclamation program, originally limited to the construction of irrigation works for both public and private users, has expanded over the past seventy years to provide water for power, municipal, commercial and industrial users.[33] Reclamation projects may store and sell surplus waters, and may advance such objectives as navigation flood control.[34]

Frequently, these projects seek to use water to which Indians and Indian tribes have a claim under the "Winters Doctrine." First set forth in Winters v. United States, 207 U.S. 564 (1908), this doctrine is that when the Indians ceded lands to the federal government, they impliedly retained rights to sufficient water to serve the needs present and future,[35] of those lands which they retained.

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32. This was recognized in an earlier opinion by the Solicitor, January 8, 1936, M-28198, pp. 10-11.

33. Irrigation is the paramount use for reclamation waters. 43 U.S.C.§§485h, 521-522. It was not until 1920 that Congress generally authorized the disposition of project water for uses other than irrigation. Act of February 25, 1920, ch. 86, 41 Stat. 451, 43 U.S.C.§521. But as early as 1906 the Secretary was authorized to supply water and power to "towns or cities on or in the immediate vicinity of irrigation projects." Act of April 16, 1906, ch:1631, 34 Stat. 116-17 43 U.S.C. §§522, 567.

34. J. Sax, "Federal Reclamation Law," Water and Water Rights, p. 121.

35. United States v. Ahtanum Irrigation District, 236 F. 2d 321, 326 (9th Cir. 1956); Conrad Investment Company v. United States, 161 Fed. 829 (9th Cir. 1908).

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There are a number of unresolved general issues concerning Winters doctrine rights. While it seems that the Indians can use their water for any purpose for which their reservation was created,[36] it is not clear how far they may depart from the initial agricultural use served by irrigation.[37] Moreover, the measure of the Winters doctrine right may be exceedingly complex, involving a present estimate of future beneficial needs. It seems obvious that they require an advocate who will press those claims to the fullest extent possible. In a number of instances, the Interior and Justice Departments have desisted from doing so, in large measure because of the conflicting policy of the Bureau of Reclamation to appropriate as much water as possible for the reclamation projects. Reclamation projects, in fact, cannot be authorized under present procedures unless found feasible from a financial standpoint. A finding of feasibility requires that the estimated cost of proposed construction which can properly be allocated to irrigation, power, municipal and miscellaneous purposes be repaid to the United States from the sale of water and power to private users.[38]

Another point of contention between the reclamation projects and Indian Winters rights claims is that - while the Winters doctrine extends to water needed for present and future use, the Bureau of Reclamation seems to plan projects where water sufficient to sustain the project is not currently being appropriated, irrespective of whether an Indian claim of future beneficial need might be asserted. This problem appears in the Rio Grande and Kennewick Dam case studies.

The Bureau of Reclamation constructed Yellowtail Dam on the Big Horn River in the late 1950's, on the Crow Indian Reservation in Montana. Lands belonging to the Crow Tribe and the right to use water

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36. "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest, Arizona v. California, 373 U.S. 546, 601 (1963).

37. In United States v. Walker River Irrigation District 104 F. 2d 334, 340 (1939), the Court of Appeals for the Ninth Circuit held that a Winters doctrine right could be used for irrigation, power and domestic and stock-watering purposes.

38. Compare Act of August 4, 1939, ch. 418, §9(a), 53 Stat. 1.93, 43 U.S.C. 485h (a).

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owned by the tribe for power generation were condemned for this purpose.[39] Without legal opposition from within the government, the Bureau of Reclamation is currently selling waters from the Big Horn River to industrial users. These sales may be in violation of the Tribe's Winters rights,[40] which have never been inventoried or established.

In November, 1967, the Field Solicitor's Office in Billings, Montana, issued a memorandum sustaining the legality of the Reclamation diversions.[41] The Field Solicitor proposed a restrictive interpretation of the Winters case, which would limit the rights conferred by the doctrine to uses in agricultural production. Since the Crow Tribe is primarily desirous of developing coal deposits on the reservation - estimated at up to one billion tons - the Field Solicitor's opinion would deny them the right to use Big Horn water in preference to Reclamation for this purpose. The Field Solicitor adopted this position while admitting that "it has not been decided whether the use of Winter's [sic] Decree water may be changed from irrigation to industrial use.[42] Moreover, the Field Solicitor argued that since the Bureau had condemned the power site for Yellowtail Dam, it could urge that it had condemned the entire Winters doctrine rights of the tribe to the river, since the value of the power site would be diminished by tribal diversions. No opinion could be more damaging to the interests of the Solicitor's Indian clients. Surely, any committed advocate would be expected to urge on their behalf that, since the condemnation case explicitly compensated the tribe for the use of water for power generation, all other water rights remained intact and the power site value was merely paid for the taking of land. In this instance, the Field Solicitor chose solely to serve one of his "clients," to the inevitable detriment of the interests of the Indians.

The problem is a continuing one. In January, 1968, the Commissioners of the BIA and Bureau of Reclamation met, and it was agreed that the Crow Tribe would receive 110,000 acre feet annually of Big Horn water. This agreement was based on assurance contained

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39. United States v. 5677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1958).

40. United States v. Powers, 93 F. 2d 783, 785 (9th Cir. 1939) aff'd 305 U.S. 527 (1939).

41. Memorandum from Field Solicitor to Regional Director, Reclamation, "Diversion of water of Bighorn River under terms of Yellowstone River Compact," November 16, 1967.

42. The Field Solicitor likewise took the position that Winters doctrine rights were non-transferable unless the Indian land were also sold, while admitting that this question has never been resolved by a court.

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in a study that this was all the water which could be made available to the Indians.[43] A year later, at the 1969 Reclamation Conference, the Commissioner of the Bureau of Reclamation and the Billings Regional Director reportedly indicated that about 750,000 acre feet of water would be available from Yellowtail Reservoir for industrial purposes - two-and-one-half times the amount projected in the study preceding the 1968 agreement. It was stated that much of this water had been contracted for, and that the sale of industrial water alone would repay the cost of constructing Yellowtail Reservoir earlier than planned. A persuasive argument can be made that the tribe is entitled to sufficient water to meet all of its beneficial needs, including industrial uses, or that it is entitled to compensation for the loss of water rights not covered by the condemnation of the Yellowtail power site. But since this would obviously involve a payment by the government, this claim has not been pressed by the Indians' trustee.

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43. Memorandum, March 22, 1968, Commissioners of Bureau of Reclamation and BIA to Assistant Secretaries Public Land Management and Water and Power Development, "Sale of M & I water from Yellowtail Unit, Missouri River Basin Project, Montana-Wyoming."

44. Conflicts between the Bureau of Reclamation and Interior's Indian wards in the Missouri River Basin are by no means limited to the Big Horn River. In a memorandum of March 14, 1967, to the BIA's Aberdeen Area Director, the Director of the BIA's Missouri River Basin Investigation claimed that upstream developments of the Agnostura Rapid City and (projected) Belle Fourche projects by the Bureau of Reclamation had depleted the flow of the Cheyenne River, leaving a barren several thousand acres of potentially irrigable bottom land and higher benches on the Cheyenne Indian Reservation. The Director quoted the Bureau of Reclamation's own Cheyenne Diversion Report to substantiate his charge:

> "A reconnaissance-grade reappraisal of the Cheyenne Pumping Units was made in 1958, with the conclusion that further consideration was unwarranted mainly because of the doubtful water supply . . . . No appreciable further development of either land or water resources may be expected in the Cheyenne River Basin. Five Bureau of Reclamation reservoirs, taking advantage of all the more attractive sites, effectively control most of the runoff."

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3. Pyramid Lake

Pyramid Lake has often been cited as the prime example of a long-continuing conflict-of-interest between an Indian tribe and the Bureau of Reclamation.[45] The Pyramid Lake reservation was established in 1859; it essentially forms a circle around the lake, which is the terminus of the Truckee River in Nevada. Historically, the Paiute tribe, for whom the reservation was established, have been a fishing people, and the lake's fishery was the chief source of sustenance for the reservation.[46]

Reclamation's incursions into the water used to supply the lake began shortly after the passage of the Reclamation Act of 1902. In 1906, the Newlands Irrigation Project was established on the nearby Carson River, which constructed a dam and canal to divert water from the Truckee.[47] The canal steadily depleted the water supply of Pyramid Lake, reducing its level and ultimately destroying its natural fishery.

After the canal was constructed, the United States initiated quiet title actions to adjudicate the rights of water users along the Carson and Truckee Rivers. A temporary decree was entered in 1950 in United States v. Alpine Land and Reservoir Co., Equity No. D-183 (D. Nev.), adjudicating the respective rights of the Newlands project and private users to Carson River water. A final decree along the Truckee, the Orr Water Ditch decree, was entered in 1944.[48] Although the Winters doctrine was established when the case was brought, the Indians' federal fiduciary did not assert their Winters doctrine rights for water to stock Pyramid Lake and protect the dying fishery.[49]

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45. The major study of the federal conflict of interest, William H. Veeder "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in "Toward Economic Development for Native American Communities," Subcommittee on Enonomy in Government of the Joint Economic Committee, Congress, 91st Congress, 1st Sess. (Comm.Print 1969) (hereafter cited as "Veeder Committee Print") devotes major attention to Pyramid Lake.

46. United States v. Sturgeon, 27 Fed. Cas. 1357 (No. 16, 413) (D.Nev. 1879), aff'd, 27 Fed. Cas. 1358; Veeder Committee Print, p. 498-99.

47. Veeder Committee Print, p. 499-500. The Carson River runs south of, and generally parallel to, the Truckee.

48. United States v. Orr Water Ditch Co., Equity No. A-3 (D.Nev.).

49. After the case was begun, but long before a final decree was entered in it, the Supreme Court conclusively established the right of an executive-order reservation to protect and conserve its fishing rights. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

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(The United States did, however, assert and secure a water right for the Newlands project to divert Truckee water.)[50] Between 1917 and 1967 the average annual diversion of Truckee River water for the Newlands project has been 250,000 acre feet - half the average annual flow of the Truckee River.

In recent years, the government has been derelict in representation of the Pyramid Lake Indians in the following respects:

(a) The Orr Water Ditch decree did rule that the Indians were entitled to 30,000 acre feet per annum for irrigation purposes. When they sought instead to use this water to raise the lake's level, thereby improving the fishery resource, the Solicitor of the Interior Department in 1955 issued an opinion that this was unlawful[51] - hardly an act of zealous advocacy on behalf of the Indians. The tribe then sought to have the government modify the decree to permit such a use. In 1964, the Interior Department requested Justice to petition the court to amend the decree, but no action was ever taken.

(b) In 1957, Congress authorized construction of the Washoe Project by the Bureau of Reclamation.[52] This project has two principal componenets: (1) Stampede Dam on the upper Truckee River, and (2) Watasheamu Dam and Reservoir on the Carson River, upstream from the canal and Newlands project. The major threat posed by this project to Pyramid Lake is the construction and authorization of Watasheamu Dam and Reservoir. If operated for the benefit of upstream Carson users, it would have the certain affect of depriving the downstream Newlands project of Carson River water and increasing its demand upon Truckee River water.

The possibility that Watasheamu Dam and Reservoir might be constructed impelled upstream Carson water users to press for a settlement in the Alpine case (Carson River) more favorable to them than the 1950 temporary decree. Their hope was, in part, that enough water could be reserved for upstream users to make the construction of Watasheamu Dam feasible. Negotiations by Justice Department

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50. A 1968 report by Clyde-Criddle-Woodward Inc. of Salt Lake City, "Report of Lower Truckee-Carson River Hydrology Studies" concludes that there is substantial waste in this water use and that only half the diverted amount is beneficially used by the project. Such waste is a violation of the reclamation laws which limit water to beneficial uses.

51. Memorandum, Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs, May 5, 1955, M36282.

52. Act of August 1, 1957, ch. 809, §2 (a) 70 Stat. 775, 43 U.S.C. §614a (a).

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attorneys looking toward a more lenient settlement than the temporary decree aroused suspicions by the Indians that the Bureau of Reclamation was influencing the Justice Department negotiations. In addition, enforcement of the temporary decree by a court-appointed water master has in many respects permitted use by private parties not sanctioned by the decree. The Indians, therefore, sought to intervene in the Alpine case to require strict enforcement of the decree and to participate in any settlement so as to protect their existing use of Truckee water, which could otherwise be diverted to serve the Newlands project if the project's rights to use of Carson water were curtailed. The tribe charged that the Department of Justice had not adequately represented their interests.[53] The motion to intervene was opposed by Justice, and denied by the District Court and the Court of Appeals for the Ninth Circuit.[54]

(c) In April, 1969, the Interior Department recommended that the Department of Justice institute a quiet title action on the Truckee River on behalf of the tribe, limited to waters not already adjudicated in the Orr Water Ditch case. No such action has been commenced in the sixteen months since that request was made. Unable to receive a response from the government, the tribe finally filed suit in the Washington, D. C. Federal District Court against the Secretary of the Interior and Attorney General.[55] The relief sought includes an injunction compelling the Secretary to recognize the prior and paramount right of the Tribe to Truckee River water to maintain the lake's fishery. The tribe also requested a court order that the defendants enforce both the Orr Water Ditch and Alpine decrees, and an order requiring the Attorney General to seek a judicial determination of the tribe's water rights.

4. Water Right Litigation Concerning Tributaries to the Rio Grande River.

While the American Bar Association's Code of Professional Responsibility permits representation of potentially conflicting clients where litigation is not involved, it clearly enjoins an attorney from any representation of clients with differing interests in litigation.[56]

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53. Veeder Committee Print, pp. 507-508.

54. United States v. Alpine Land and Reservoir Co., No. 24, 156 (9th Cir. Aug. 24, 1970).

55. Pyramid Lake Paiute Tribe v. Hickel, Civil No. 2506-70, (D. D.C. filed August 21, 1970).

56. Ethical Consideration 5-15.

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The wisdom of this absolute prohibition is demonstrated by the difficulties in which the Department of Justice has become enmeshed while conducting water rights litigation on behalf of Indian pueblos in New Mexico. In a real, albeit indirect, sense, the government may be said to be representing "both the plaintiff and defendants in an adversary action."[57]

The State of New Mexico has commenced five suits seeking to administer water to be diverted into the Rio Grande from the Colorado River system by the San Juan-Chama Reclamation Project.[58] The State Engineer of New Mexico is authorized to administer the Bureau of Reclamation's project in certain respects. Accordingly, the State Engineer has instituted these suits to determine all water rights to certain tributaries of the Rio Grande so as to aid in this administration.

One of the five pending cases[59] names as among the defendants four Indian pueblos - Nambe, Pojoaque, Tesuque and San Ildefonso. This case seeks to adjudicate water rights to the Nambe and Pojoaque Creeks. San Ildefonso Pueblo, and a number of other pueblos not named defendants, border on the Rio Grande and claim water in the Rio Grande by virtue of the Winters doctrine. Representatives of the Solicitor's Office in Albuquerque have even expressed the view that assertion of the Indians' full claim to Rio Grande water would exhaust the present flow.[60] Thus, the federal attorney for the pueblos is aware of an Indian property claim which, if asserted, might destroy the feasibility of a reclamation project which seeks to supply principally municipal and industrial users in Albuquerque that already use some Rio Grande water.

The Department of Justice intervened to defend the litigation on behalf of the pueblos and filed a complaint claiming "quantities of water sufficient to satisy the maximum needs and purposes of said Pueblos. . . ."[61] But, although one pueblo, San Ildefonso, has claims to water on the Rio Grande as well as Pojoaque Creek, the United States elected to accept the limitations on the case framed by the State and

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57. Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 966 (1958).

58. The San Juan Chama Project was authorized in 1962 76 Stat. 96.

59. New Mexico v. Aamodt, No. 6639, U.S.District Court, D. New Mexico.

60. Meeting, October 8, 1969, discussed in Daniel M.Rosenfelt, "Report on the Protection of Pueblo Indian Rights to the Use of Water in the Rio Grande Basin: A discussion Pending Litigation" (hereafter cited as "Rosenfelt Report") p. 2.

61. Complaint, paragraph VI (a).

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not assert any claims to the Rio Grande itself. Consequently, San Ildefonso must "compete" with the three other pueblos for water in the Pojoaque and Nambe creeks which, in fact, are almost dry.[62] Some of the Indian pueblos are concerned that the government's decision to limit the water rights adjudication to tributaries of the Rio Grande, and not to assert cliams to the main river itself, is influenced by a desire not to delay the completion and operation of the federal San Juan Chama Reclamation Project.[63] The first clear conflict of interest in New Mexico then, is that the United States Department of Justice and the Solicitor's office of the Department of Interior (the regular attorneys for the Bureau of Reclamation) are representing Indian interests which may not be compatible with the multi-million dollar project of another important government "client."

A second conflict of interest appears on the face of the pleadings. The same attorneys are representing interests of the Indians and the Santa Fe National Forest. Both the Indians and the National Forest must compete for the same limited supply of water.

These conflicts are not theoretical; they appear to have resulted in a serious failure to protect Indian rights.

The government has failed to contest a "settlement" arrived at between the State and non-Indian users following administrative procedures under New Mexico State law, notwithstanding the federal nature of Indian water rights. When it filed its complaint, the State prepared an elaborate hydrolographic survey showing its determination of all lands which have been irrigated within the Nabe-Pojoaque watershed. The State then made "offers of judgment" to the non-Indian defendants based on the survey. If accepted, these offers were signed as court orders. The federal attorneys in an unbelievable instance of non-adversary representation of the Indians, failed to require any non-Indian landowner to prove the source and character of his title, or the measure of rights to the use of water, or history of water use.[65] Indeed, these non-Indian defendants are not even required by the United States to answer its complaint and to plead - let alone prove - title to their land or use of water.[66]

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62. Rosenfelt Report, p. 28.

63. See also Memorandum, William H. Veeder to Commissioner, "Memorandum respecting rights to the use of water of the Pueblo Indians of New Mexico in the Rio Grande and its tributaries," October 31,1969.

64. Affidavit of Daniel M. Rosenfelt, April 23, 1970, Case #6639 District of New Mexico.

65. Rosenfelt Report, p. 39.

66. Id. at p. 43.

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5. Private Trespass Over Tlingit and Haida Lands.

The Pueblo water rights claims to the Rio Grande (just as the Indians' claims to water for Pyramid Lake) involve the prospect of adjudicating all, or a substantial number of, the claims to use of water in a huge river system. The government's handling of more limited types of litigation, however, appears no more effective when blemished by the occurrence of a conflict of interest. An example of this deficiency can be seen from an analysis of the trespass committed by a private road builder over Tlingit and Haida lands near the native village of Klukwan, Alaska.

The construction firm initially sought a permit to construct the road from the Bureau of Land Management in Alaska. Since the road would pass over, and use timber situated on, land determined by the Court of Claims[67] to be held in aboriginal "Indian title"[68] by the Tlingit and Haida Indians, the BLM told the firm to secure the Indians' consent. The BLM specifically stated that "no cutting of right-of-way timber or road construction is to take place until the right-of-way and timber permits are issued."[69] Nonetheless, when consent was refused by the Tribal Council, the firm constructed the road without the permission of either the Indians or the BLM.[70]

In January, 1969, the Tlingits and Haidas requested the Solicitor for the Interior Department to take action against the builder for its trespass.[71] In April, 1969, a decision was reached to institute suit seeking money damages and injunctive relief. After suit was filed, the BLM was asked to "investigate" the facts of the situation. This

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67. Tlingit and Haida Indian v. United States, 147 Ct. Cl. 130 (1968).

68. Indian title is a right to exclusive possession of land, based upon occupancy since "time immemorial." Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Choteau v. Molony, 57 U.S. (16 How.) 203 (1853); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872); Buttz v. Northern Pacific R., 119 U.S. 55 (1886); Cramer v. United States, 261 U.S. 219 (1923); United States v. Shoshone Tribe, 304 U.S. 111 (1938).

69. Letter, James W. Scott, Manager, Anchorage District Office, BLM, to Moore & Poeser, Inc. May 21, 1968.

70. Letter, I.S. Weissbrodt to Edward Weinberg, Solicitor, Department of the Interior.

71. Ibid.

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investigation revealed that the road had indeed been constructed in August, 1968, and a report described in some detail the factual results of the investigation.[72] No action was taken to prosecute the claim. In the view of the Indians' Washington counsel this was because the theory of recovery was resisted by the Public Lands Division of the Solicitor's Office.[73] Ultimately, the action was dismissed by the United States.

The Solicitor's Office, evidently, did not wish to claim that aboriginal "Indian title" gives the Indians enforceable rights to the land - despite the fact that the Tlingit and Haidas title had been recognized by the Court of Claims, and Indian title has been held by the Supreme Court to furnish a basis for the recover of money damages.[74] This is not surprising in view of Interior's history of dealing with Indian title in Alaska.

Between the time of Alaskan Statehood Act of 1958 and promulgation of the land freeze in January, 1968,[75] the BLM patented six million acres in Alaska - mostly to the State. Half of this land was claimed by Alaskan native by virtue of aboriginal possession.[76]

To some degree, the Solicitor's reluctance to assert the enforceability of Indian title as a property right may have been due to the fact that the Interior Department was, in the latter part of 1969, considering the issuance of right-of-way permits for construction of a trans-Alaskan pipeline, which would pass over lands claimed by Alaska natives by virtue of Indian title.[77]

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72. Report from Natural Resources Specialist, Juneau, to District Manager, BLM, Anchorage, "Moore and Roeser, Inc. Timber and Road," May 19, 1969.

73. Letter, I.S. Weissbrodt to Mitchell Melich, Solicitor, Department of the Interior, November 5, 1969.

74. United States v. Santa Fe Pacific R. Co., 314, U.S. 339 (1941).

75. PLO 4582, 34 Fed. Reg. 1025 (1967).

76. Federal Field Committee for Development Planning in Alaska, Alaskan Natives and the Land; (1968), p. 453.

77. In April, 1970, a preliminary injunction was issued barring issuance of right-of-way permits to traverse some lands claimed by Alaskan native villages. Native Village of Allakaket v. Hickel, Civil No. 706-70 (A.D.C. filed March 9, 1970).

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B. Other Conflicting Responsibilities of the United States: Defense of Indian Claims Commission Proceedings.

The Department of Justice's statutory duty[78] to defend proceedings commenced by Indian tribes or bands in the Indian Claims Commission results in a conflict which has, on occasion, prevented it from fulfilling its trust responsibility to protect and conserve Indian property rights.

In October, 1968, the Rincon and La Jolla Bands of Mission Indians requested the government to commence an action on their behalf against the Escondido Mutual Water Company for an injunction and damages for unlawful appropriation of San Luis Rey River water claimed by the Indians.[79] Despite repeated requests, and a growing urgency as negotiations progressed concerning the terms under which the water company would sell all its assets to the City of Escondido and liquidate, the government refused to make any decision.[80] Finally three days before the water company's shareholders were scheduled to meet to vote formally on the city's offer to purchase the company's assets and on the liquidation plan, the Rincon and La Jolla Bands filed suit in the federal district court in San Diego against the

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78. 25 U.S.C.§70n.

79. Letter, Robert S. Pelcyger, California Indian Legal Services, to Mr. William E. Finale, Bureau of Indian Affairs, October 31, 1968.

80. During the course of discussions between the Indians, and their attorneys with California Indian Legal Services, on the one hand, and the Department of Justice and the Interior, on the other hand, a report together with recommendations was submitted to the Department of the Interior by the Sacramento Regional Solicitor's Office. Although the Indians' attorney requested an opportunity to review this report and discuss it with the individual preparing it, the Regional Solicitor's Office refused to make the report available. After its submission, it was classified as "confidential." The withholding of this report from the Indian wards seems in violation of the trustee's duty to disclose opinions of counsel dealing with his own management of the trust property. Scott, Trusts, p. 1407. This disclosure must be made even if it reveals the trustee's own negligence. American Bar Association, Informal Opinion No. 1010. The governemnt's defense of its action - that the document constituted an attorney's "work product" - constitutes an admission that the Department's of Justice and the Interior have interests adverse to those of their Indian beneficiaries.

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Escondido Mutual Water Company, and the City of Escondido. The Secretary of the Interior and the Attorney General of the United States were named as defendants because of their failure to represent the Indians.[81]

The government's reluctance to commence litigation proceeded in part from a desire not to embark upon general riverwide water rights adjudications.[82] Another reason given by the Department of Justice for its failure to represent the Mission Indians was the fact that the Department was currently defending an Indian Claims Commission proceeding in which the Indian Bands claimed that the government had been derelict in its preservation of their water rights in the river.[83] This institutional conflict-of-interest is particularly troubling since, when the government filed its proposed findings of fact and brief in the San Luis Rey case it had urged that the Indians' best course was to seek redress from the water company rather than the government, and even that receiving damages from the government could preclude the Indians and the government from later asserting their water rights.[84] If such an adjudication is a desirable means to protect the trust property, the government as trustee should have brought it. Similarly, if the statutory requirement that the Department of Justice defend Indian Claims Commission actions makes that agency less vigorous in protecting Indian trust property, new institutional arrangements should be created to fulfill that vital function.

Indeed, the Department of Justice has acknowledged that the pendency of the claims proceeding and concern that the United States could be liable for its sanctioning of the water company's diversion

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81. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal. filed July 25, 1969).

82. In a letter to Representatives James B. Utt, August 15, 1969, Assistant Attorney General Kashiwa pointed out that such adjudications require several years and entail great expense both for the United States and all water users in the area. It is far from clear that a general stream adjudication would have been required in the San Luis Rey case, since only the water company's appropriation was complained of - not that of other water users.

83. Rincon Band of Mission Indians v. Escondido Mutual Water Co.,, No. 69-217-S (S.D. Cal. filed July 25, 1969). Response of Attorney General and Secretary of the Interior to Court Order dated November 26, 1969.

84. Memorandum, Robert S. Pelcyger, to Thomas S. Susman, Staff, Committee on the Judiciary, U.S. Senate, November 14, 1969, "San Luis Rey Water Case," p. 14.

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(the Secretary of the Interior had entered into a 1914 contract with the water company without the Indians' consent, limiting their use of the river's water) influenced the Department's attitude toward representation of the Mission Indians. Assistant Attorney General Kashiwa, justifying the Justice Department's ten month delay in deciding whether to assist the Indians, stated that:

> "The La Jolla, Rincon, Pauma and Pala Bands of Mission Indians are not only wards of the United States but must be considered as potential adversaries in litigation against the United States."[85]

The Department of Justice's defense of Indian Claims Commission cases on behalf of the government adversly affects its representation of Indians in those situations within the Interior Department where the Solicitor or another official "arbitrates" an Indian claim. For example, the Quechans also had a claim pending before the Indian Claims Commission at the time the Yuma County lease was signed.[86] The government's determination that the riverfront lands were non-irrigable may have been motivated by a desire to minimize their value before the Claims Commission.[87]

C. Conflict of Interest Between the Attorney's Duty to Represent Indian Trust Property Rights and Political Influences from the Executive Department and Congress.

In addition to his representation of conflicting Interior Department bureaus, the Solicitor's zeal in representing Indian trust beneficiaries is further strained by his position as the legal advisor to the Secretary of the Interior. The Solicitor is thus clearly responsive to the Secretary's desires. There is evidence in the Quechan lease case that Secretary Udall was influenced to favor the lease by political pressures from his home state of Arizona. Prior to the Solicitor's opinion, a meeting was held in March, 1968, between the Yuma County River Parks Advisory Committee and representatives of the Solicitor and the Secretary. In a letter to "Dear Stu," the Chairman of this Yuma County Committee reported on this meeting and expressed disappointment with the sympathy shown by Deputy Solicitor Weinberg for the Indians' claim.[88] Secretary Udall responded to

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85. Letter to Representative James Utt, August 15, 1969, p.4.

86. The Quechan Tribe of the Ft. Yuma Reservation, California v. United States, Ind. Cl. Com. Docket No. 320.

87. See Letter, Roy R. Young, to Honorable Stewart L. Udall, March 13, 1968.

88. Letter, Roy R. Young, to Honorable Steward L. Udall, March 13, 1968.

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"Dear Roy" on March 22, and expressed the hope that the lawyers could promptly overcome the obstacles involved. The same day, the Secretary urged the Commissioner of the Bureau of Reclamation to make his determination as to the irrigability of the lands "as rapidly as possible," and indicated that "I consider this matter of great priority."[89]

Congressional pressures may also obstruct effective legal representation of Indian trust rights. The opinion in United States v. Ahtanum Irrigation District, 236 F. 2d 321 (9th Cir. 1956) - a case commenced by the government to protect the rights of the Yakima Tribe in the waters of Ahtanum Creek - describes how letters from prominent congressmen and resolutions contributed to postponing the bringing of the litigation for thirty years.[90]

D. Technical Determination by Interior Agencies With an Interest Adverse to the Indians: the Kennewick Dam Extension.

One problem illuminated in the Quechan lease case was the unquestioning reliance which Interior Department decision-makers placed upon the technical determinations made by the Bureau of Reclamation as to the irrigability of the land in controversy. Similarly, the Tlingit and Haidas were required to rely on a BLM investigation of the trespass to their lands.

A more extreme example of the Interior Department's undiscerning reliance upon the technical determinations of a Bureau with interests adverse to the Indians is the Department's continued support of the Kennewick Dam Extension to the Yakima Reclamation Project. Legislation authorizing the extension had passed the Senate and was nearing House passage when the Yakima Indian Tribe - which had not been notified of the pending legislation - urged that consideration of the bill be postponed as the extension would use waters to which the tribe was entitled. Specifically, the tribe was concerned that if the extension were constructed it would preclude the Yakimas' own plans, which were concrete in their formulation and had been submitted to Interior, to construct three irrigation projects.

On July 16, 1969, a meeting was convened by the Assistant Secretary for Public Land Management, attended by representatives from the tribe, the National Congress of American Indians, the Bureau of Reclamation, Interior's Legislative Counsel, and members of the Solicitor's Office representing both Indian Affairs and Reclamation. All present agreed that a 1945 court decree constituted a full and complete adjudication of water rights in the Yakima River above the

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89. Memorandum, Secretary of the Interior, to Commissioner, Bureau of Reclamation, March 22, 1968.

90. 236 F. 2d 330-31 fn. 12.

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contemplated project and of all waters in tributaries to the Yakima River flowing through the Yakimas' land - particularly Toppenish and Satus Creeks, where two Indian irrigation projects were planned by the tribe. At this meeting, Reclamation officials stated that they would make no use of tributary water, and the Assistant Secretary accepted their technical determination that the hydrology of the river did not require their use of these waters.[91] This assurance however, was directly contradictory to a prior House Report, wherein Reclamation had stated that, in order to establish project feasibility, it did rely on the inflows from these tributaries during certain times of the year.[92]

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91. Letter, Mr. Robert Jim, Chairman, Yakima Tribal Council, to Honorable Henry M. Jackson, July 22, 1969 (hereafter referred to as "Jim letter").

92. H. Rep. No. 296, 88th Cong. 2d Sess., states in part:

"Available Water"

"The flow of the Yakima River at Prosser Dam consists of spills over Sunnyside Dam, the next diversion above Prosser Dam, and inflow between Sunnyside and Prosser Dams is made up of tributary inflow and return flow from irrigated lands. The spills over Sunnyside Dam constitute the greatest volume of the total annual runoff, but are a fluctuating, unreliable irrigation supply. By comparison the return flows below Sunnyside Dam comprise a smaller portion of the total runoff, but because they are dependable flows, they provide a large portion of the irrigation supply for the Kennewick Division.

"Inflow, Sunnyside to Prosser Dam"

"The inflow to the Yakima River below Sunnyside Dam is made up of runoff from tributaries (Toppenish and Satus Creeks) and return flows from irrigated lands. Tributary runoff is of little importance in the months of July-October, when it amounts to about 2 percent of the total inflow. Return flows drain to the river from the Wapato project, south and west of the river, and from the Sunnyside and Roza divisions of the Yakima project on the north and east. A high total inflow is sustained during the irrigation season because the maximum tributary runoff and the maximum return flow occur at different times. Tributary runoff reaches a maximum during the spring and early summer, when return flows are relatively small. After May or June, tributary runoff decreases abruptly, and return flows increase sizably, reaching a maximum during the late summer. In the fall and winter, inflow is small and does not increase appreciably until augmented by melting snow and spring rains." (Emphasis supplied.)

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The Bureau of Reclamation's July disclaimer[93] is also inconsistent with a memorandum less than one month earlier, which stated that the extension would utilize only "return flow from upstream irrigation and uncontrolled spills past the point of diversion."[94]

Despite these plain inconsistencies in Reclamation's reports, the Assistant Secretary stated that his study confirmed Reclamation's disclaimer,[95] and on August 12, Secretary Hickel reaffirmed his support for the Kennewick Dam Extension.[96]

E. Prior Notification to Indian Tribes of Projects Which May Affect Their Interests: the "Return" of Lands Claimed by Fort Mojave Indians to the State of California.

As is apparent from the discussion of Kennewick Dam Extension, affected Indians are sometimes not notified when a federal agency contemplates actions adverse to their trust property rights. Consequently, the Indians may be stripped of the land and other natural resources on which they rely for their livelihood, and left with only a claim for money compensation.

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93. Jim Letter, p. 3.

94. Memorandum, Commissioner of Reclamation to Legislative Counsel, Office of the Under Secretary, "Water Supply and Water Rights for the Kennewick Dam Extension, Washington," June 17, 1969, p. 5. The proposal to use uncontrolled spills is inconsistent with a portion of the 1945 decree, which allocated spills over Sunnyside Dam, (the project directly upriver from the Kennewick Division) relied upon by Reclamation, to existing users (as of 1945) "in accordance with its practice prior to the entry of this judgment." William H. Veeder, Memorandum, "Yakima Indian Nation's Rights to the Use of Water Imperiled by Bills: To Provide for the Construction, Operation, and Maintenance of the Kennewick Division Extension, Yakima Project, Washington," July 7, 1969, p. 15.

95. Jim Letter, p. 3.

96. Letter to Senator Jackson, August 12, 1969.

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On March 15, 1967, a BLM hearing examiner issued a proposed decision to award to the State of California a substantial portion of the lands claimed by the Mohave Indians to be included within their reservation. The basis for this decision was a determination that the land in question was public land on September 28, 1850, the date the Swamp and Overflow Land Act[97] was passed, and was hence "returnable" to the State by the United States. At no time did the Mohave Tribe have notice of the proceeding. By accident, in June, 1967, the BIA learned of the decision. Shortly thereafter, both the BIA and the Mohave Tribal Council petitioned to intervene.[98] The grounds for the petitions were that the Indian Claims Commission had determined the lands in question to be held by the Mohaves by "Indian title" in 1850.[99]

These petitions were referred to the Office of the Solicitor - the Indians' trust attorney. Earlier in 1967, the Solicitor had rejected the BIA's request to resurvey the Ft. Mohave reservation boundaries, and a member of the Solicitor's staff who had written that decision also participated in the decision concerning the petitions to intervene. At first the Solicitor denied the BIA's petition (on the ground that since a government attorney had participated in the hearing, the BIA had been adequately represented) and granted the Mohaves a limited right to intervene which was conditional upon the Solicitor and the Secretary making certain determinations. Then, in October, 1969, the Solicitor broadened his decision and granted the tribe a de novo hearing, with the right to cross-examine witnesses who had testified earlier.[100] Although the tribe requested that a government attorney represent them in this costly proceeding, the Department of Justice refused to provide one and the Mohaves were ultimately required to secure private counsel.

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97. 43 U.S.C. §§981 et seq.

98. Speech, Representative Pettis of California, December 4, 1969 (H 11816, Cong. Rec.) (hereafter referred to as Pettis speech).

99. 7 Ind. Cl. Com. 219. The Supreme Court has declared the Swamp and Overflow Land Act to be inapplicable to lands which the Indians held in 1850. United States v. O'Donnell, 303 U.S. 501, 509 (1937); United States v. Minnesota, 270 U.S. 181, 206 (1925). Also, the act applies only lands made unfit for cultivation, see Keeran v. Allen, 33 Cal. 542 (Cal. Sup. Ct), and the Mohaves rely on the Colorado River to irrigate and fertilize their fields. 7 Ind. Cl. Com'n 219, 252 (App.).

100. Pettis speech, supra note 98.

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F. Conflicting Interests Among Indian Clients: Intervention into Rio Grande Litigation by Puebloes of Santo Domingo and San Felipe.

As discussed earlier[101] certain Indian pueblos believed that their interests to water on the Rio Grande should be asserted in the New Mexico litigation which was limited by the state and the United States to tributaries of the river. On April 23, 1970, the pueblos of Santo Domingo and San Felipe moved to intervene in all five cases commenced by the state, and to assert their claims to the Rio Grande. This motion was resisted by the Departments of Justice and Interior, on the ground that the interests of the intervening pueblos were adequately represented by government counsel.

The Commissioner of the Bureau of Indian Affairs sought to assign a highly experienced water rights lawyer in the Bureau's employ, Mr. William H. Veeder, to represent these pueblos. The Justice Department resisted Mr. Veeder's being assigned as a co-counsel to them, so the Commissioner assigned him to the pueblos themselves,[102] and the pueblos directed that he appear in court. After Mr. Veeder had made one court appearance, a dispute arose as to whether Mr. Veeder's assignment was to act as counsel or as an expert witness. The Commissioner took the position that Mr. Veeder was only to be an expert witness. Accordingly, Mr. Veeder's assignment was retracted on the grounds that government attorneys could not oppose other government attorneys, and that the Department of Justice adequately represented the pueblos. Mr. Veeder was even threatened with prosecution for violating the federal conflict of interest laws,[103] if he continued to represent the pueblos against the government.[104]

The New Mexico litigation, and the intervention by the pueblos, dramatizes another problem: that Indian tribes or groups may have conflicting interests among themselves which require resolution. Either different Indians may have conflicting claims to particular property, as the four pueblo defendants obviously had competing claims to the waters in the Nambe-Pojoaque system; or they may differ on tactical questions, such as whether to assert their rights to the Rio Grande itself. Notably San Ildefonso, and the other pueblos with Rio Grande claims, did not join Santo Domingo and Dan Felipe in requesting that

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101. Pp. 17-19, supra.

102. The Commissioner relied on 25 U.S.C. §48 which provides:

"Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

103. 18 U.S.C.§§201 et seq.

104. Washington Post, August 22, 1970, pp. A1, A6.

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the litigation be broadened to include the Rio Grande.[105]

II. Evaluation of the Proposed Indian Trust Counsel Authority.

This paper has discussed at some length at least eight separate instances where a conflicting interest on the part of an Interior Department Bureau has obstructed legal enforcement of an Indian claim to land or natural resources. Each situation is current - arising in 1967 or later - and some are continuing controversies.

The responsibilities of the Interior Department's Solicitor to other departmental bureaus and the duty of the Department of Justice to other agencies and to defend Indian Claims Commission proceedings in practice greatly diminish their zeal and effectiveness in providing legal representation to the Indians. The Solicitor is particularly compromised as an advocate for Indian rights by the fact that he must render opinions settling many inta-departmental disputes, including such procedural matters as whether the Mohaves can intervene in a pending BLM proceeding. He is thus charged with serving both as lawyer and as judge. The Department of Justice seems sluggish in responding to Indian requests that litigation be brought; moreover, the defense of Indian Claims Commission proceedings forces upon the Department the role and also the mentality of being an adversary to many Indian claims to natural resources. Similarly, the Interior Department's duty to conserve and protect public resources engenders a hostility on its part in some instances to claims by Indians of private property rights. Even the existence of a suspected conflict of interest - as in Justice's negotiations to settle the Carson River Alpine case or its decision to confine the scope of New Mexico water rights litigation - raises just doubts in the minds of the Indian clients as to the fidelity of their attorney. Attitudes as well as the existence of a number of indisputable conflicts of interest damaging to the advocacy of Indian property rights, necessitate the establishment of a separate institutional arrangement, under which uncompromised attorneys can directly represent and advance Indian trust rights unhampered by the fact that they also represent an executive department. The Indian Trust Counsel Authority thus represents a salutary concept and would, if adopted, substantially reduce the instances in which a conflict of interest has forestalled effective implementation of the trustee's duty to enforce Indian trust property rights.

A. Suits in the Name of the United States.

The most striking substantive feature of the bill, apart from the establishment of the Authority, is empowering it to commence suit in the name of the United States and, correspondingly, the waiver

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105. Even if San Ildefonso had asserted its rights solely to the Rio Grande, three pueblos would have been left to rely exclusively on the tributaries.

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of sovereign immunity. A suit by the Authority in the name of the United States as trustee against the United States would be a justiciable controversy, for there are two separate interests involved.[106] The Authority would be suing to vindicate private property rights for which the government is the trustee, and the Department of Justice would be defending the United States in its general governmental capacity.[107] Thus, the policy of the rule that the same person cannot be both plaintiff and defendant - the barring of collusive lawsuits - would be inapplicable here.[108] Government counsel has occasionally appeared on both sides of a controversy, where agencies are in disagreement,[109] or where one side - as here - represents the government's interests in a non-governmental capacity.[110]

B. Sovereign Immunity

Section 10 as presently drafted bars the filing of any claim which "has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other statute authorizing a suit to be brought against the United States" (emphasis supplied). This section could be read to preclude any suit for money damages, for the Tucker and Federal Tort Claims Acts [111] are surely

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106. Of course, much litigation commenced by the Authority challenging federal action will seek injunctive relief and be filed against an officer of the government rather than the United States.

107. In United States v. I.C.C., 337 U.S. 426 (1949) the United States as a shipper was permitted to challenge an I.C.C., order sustaining railroad charges against it. The case was held to be justiciable despite the fact that Justice Department attorneys represented both sides. 337 U.S. at 431.

108. See generally, Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 Harv. L. Rev. 1050, 1055-56 (1949).

109. For example, the Secretary of Agriculture is authorized by statute to appear in Interstate Commerce Commission proceedings concerned with the rates for farm products, 7 U.S.C.§1291, and appeal determinations to the courts. Secretary of Agriculture v. United States, 350 U.S. 162 (1956). The Office of Price Administration intervened in suits against the I.C.C. North Caroline v. United States, 56 F. Supp. 606 (E.D. N.C. 1944), rev'd 325 U.S. 507 (1945).

110. United States v. I.C.C., 337 U.S. 426 (1949). In Western Airlines v. CAB., 347 U.S. 67 (1954), the Solicitor General appeared for the Postmaster General seeking review of a Civil Aeronautics Board order fixing the mail pay subsidy for an air carrier.

111. 28 U.S.C.§§1346, 1491, and 1505.

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"statutes" within the ambit of that section. Indeed, to the extent that a court might hold that a suit against a particular officer seeking equitable relief were, in reality, a suit against the United States under a statute, such a suit could also be barred. Section 10 therefore, could effectively eliminate the waiver of sovereign immunity contained in section 9.

To remove any possible misunderstandings concerning the section's meaning it should be removed; it adds nothing to the bill but confusion. If there is serious concern about the act's being so broad as to reopen Indian claims which are now barred substitute language could accomplish such a purpose. A possible revision of Section 10 designed to cover the only possible legitimate objectives of the present section without emasculating it would read:

> "The powers granted to the Authority by this Act shall not extend to the filing or prosecution of any action, claim, or other proceeding against the United States if such action, claim or proceeding is barred by section 70k of Title 25 or by a similar provision in any special jurisdictional act authorizing a particular tribe or other identifiable group of Indians to bring an action or present a claim against the United States."

C. Administrative Actions With Continuing Conflicts of Interest.

While the substantive tenor of the bill contemplates litigation, the case studies indicate that conflicts between Indian property rights and Interior agencies will continue to be resolved within the Interior Department. Four of the eight case studies - the Quechan lease, the Kennewick Dam Extension, the return of the Mohave land, and the use of water in the Big Horn River - never progressed to litigation. A fifth, Pyramid Lake, has involved years of administrative determinations and judgments concerning water allocation, and administrative decisions, such as permitting Reclamation to rely on unappropriated waters to which there may be an Indain claim.

In order effectively to represent Indian clients at an early stage of proceedings which may infringe upon their rights, the Authority must intervene in such matters within the Interior Department before a decision is reached. For example, the Authority should submit "briefs" to the Solicitor's Office in cases such as the Quechan lease, and pursue administratively matters such as the Crow and Yakima claims to the Big Horn and Yakima Rivers before plans for a reclamation project are finalized. Advocacy within the Interior Department with the possiblity of subsequent litigation or legislative presentations may prove to be the most important function of the Trust Counsel.

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In two of the four above situations -- the Kennewick Dam and the Mohave land - the tribes were not apprised of the prospective threat to their property rights. To be effective administratively, the Authority and its Indian clients must be notified of contemplated actions which may affect Indian trust property rights. The bill should contain a provision requiring federal agencies contemplating actions which may infringe upon Indian rights to land, water and other natural resources, to notify the Authority and its potential clients - the Indians or tribes which may be affected. Prior notification to other agencies is commonly required in reclamation enactments. Under the Flood Control Act, the Secretary of the Interior is required to give affected states and the Secretary of the Army information about contemplated reclamation projects and an opportunity to submit adverse comments to Congress along with the Secretary's Report.[112] The Secretary must also consider water quality control officials in each state, including all state agency reports in his submission to Congress.[113] State fish and wildlife officials must similarly be consulted and their views considered and submitted. The Secretary is under a statutory duty to include in his reclamation project plans "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits."[114]

D. Technical Determinations

A problem which recurs throughout the case studies is the reliance by the Interior Department, particularly the Solicitor's Office, upon technical determinations made by Interior bureaus with interests conflicting with those of the Indians in the particular controversy involved. Not only do the present federal attorneys representing Indians fail to question these determinations, but they lack the resources to make independent technical evaluations. This shortcoming in discharge of the federal trust responsiblity to Indians is rectified by the bill, which both permits the Authority to "request... information" from other governmental departments and agencies to assist in carrying out its functions[115] and allows it to hire "such...[independent] experts as it deems necessary."[116]

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112. 33 U.S.C.§701-1(c). Similarly, in proposing navigation and flood control projects, the Army Corps of Engineers is required to consult with affected states and with the Secretary of the Interior, and transmit their views to Congress. Sax, Federal Reclamation Law, supra, note , p. 156.

113. 33 U.S.C.§466a(b) (1).

114. 16 U.S.C.§662(b).

115. Proposed bill, Sec. 11 (2).

116. Proposed bill, Sec. 5 (b).

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E. Imposition of Fees.

The Administration bill authorizes the Authority to charge a fee "based upon the Indians' ability to pay for services rendered pursuant to Section 8."[117] Since Section 8 includes both the "render[ing of] legal services" with respect to Indian claims to natural resources and "the preparation and trial and appeal of cases in all courts, before Federal, State, and local commissions, and in all administrative proceedings," this provision may authorize a fee to be charged for all litigation conducted by the Authority. On the other hand, Section 9 of the bill overlaps to a considerable extent with Section 8, for it authorizes the Authority to sue "the United States, its departments, agencies, officers and employees," any "States or their subdivision, departments and agencies," and "persons" and "corporations." Thus, the way the bill is presently drafted, it is impossible to tell whether a particular piece of litigation is commenced under Section 8 or Section 9. It does seem, however, that all other legal services are covered only by Section 8, and that a fee may be charged for them.

Although a private trustee may ordinarily charge the trust property for legal services, it is undesirable for the Authority to receive fees from its Indian clients for several reasons. First, in those cases which must be brought because of the existence of a conflict of interest, clearly no fee should be charged. Where there is a conflict between an Indian claim and the interest of a federal agency, the controversy arises because of an act by the trustee. It would be unconscionable for the trustee to charge his beneficiary a legal fee to defend the trust property against the trustee's own infringement.[118] Secondly, the Authority may be tempted to favor performing services for fee-paying clients, and neglect those cases where the tribe or Indian is too poor to remunerate it. Richer tribes, which can to some extent protect themselves against conflicts of interest by securing private counsel, would then receive the maximum benefit from the Authority. The possibility of recovering contingent fees from poorer tribes will not be great in cases where the Indians seek only to secure their title or enjoin interference with a valuable natural resource rather than recover money damages.

The section authorizing imposition of fees provides that funds collected shall be paid into the miscellaneous receipts in the Treasury. A better mechanism, if fees are to be charged, would be to direct that they be credited to the Indian Trust Counsel Authority.

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117. Proposed bill, Sec. 11 (5).

118. It may be that the intent of limiting the fee-charging provision to Section 8 is to exclude such cases, since Section 9 expressly authorizes commencement of actions against the United States by the Indian Trust Counsel Authority.

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The greatest practical difficulty facing the Authority will most probably be securing appropriations, since, to the extent it is successful in establishing Indian claims to natural resources, the Authority may offend powerful political groups which favor a contrary use of those resources. Specifically, adverse claimants in the case studies discussed included Yuma County, Arizona (the Quechan River-front lease), water users in Escondido, California and Albuquerque, New Mexico, industries in the Missouri River basin, and ranchers and farmers in the Rio Grande Valley, along the Yakima River in Washington and in California and Nevada near the Carson and Truckee Rivers. These groups are likely to find significant support for their interests in Congress, and the ultimate success of the Authority will depend upon the extent to which it is able to achieve indepen-dence from close congressional control.

The appropriation issue may be critical in another respect. The language of 25 U.S.C.§175 indicates that the Department of Justice has a mandatory duty to represent owners of Indian trust property. Section 175 provides:

> "In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."

In Siniscal v. United States,[119] the Court of Appeals for the Ninth Circuit held that the U.S. Attorney need not represent Indian defendants where the Department of Justice is prosecuting the very claim that is the subject matter of the suit. In the San Luis Rey case discussed above, the district court judge ordered the Attorney General to take action within 45 days either to represent the plaintiff Indians or to file a separate suit on their behalf, and if he should decide to do neither, to explain to the court why it would not be in the best interests of the Indians to do one or the other. An attorney from the Justice Department reported back to the court that the Attorney General elected to do nothing because in his discretion, he found that it would not be in the best interests of the Indians for the Department of Justice to represent them. Without finding that a conflict of interest existed, as in the Siniscal case, the court found that, since the duty to represent Indians is not mandatory (citing Siniscal), the Attorney General had exercised his discretion, and it is not within the power of the court to dictate the manner in which that discretion may be exercised. The ruling is being appealled.

The interpretation of §175 as mandatory finds support in the most prominent text on Indians, itself a product of the Department of the Interior, in which it is stated that §175 insures that "federal legal services...are available to the Indians in cases involving the protection of property...[held] in trust for the Indians" by the United States.[120]

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119. 208 F. 2d 406 (9th Cir. 1953), cert denied 348 U.S. 818 (1954).

120. Department of the Interior, Federal Indian Law, 252 (1958).

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The bill as proposed would relieve the Department of Justice of all responsibility for representation of Indian rights to natural resources, whether or not it has a conflict of interest.[121] A discretionary authority of the Trust Counsel to represent Indians is substituted for what may be a mandatory duty on the part of the Justice Department to provide services where no conflict of interest is involved. If Trust Counsel appropriations are insufficient to permit it effectively to represent Indian claimants, the property rights of Indian tribes may be even less adequately protected than at present.[122]

If the Trust Counsel's resources are too limited to permit it to represent all reasonable claims of Indian trust rights, it is important that the beneficiaries be involved as directly as possible in the determination of what cases will be brought. A larger Board of Directors, largely composed of Indians, might serve the purpose of representing as diverse a range of Indian interests as possible. Further, extension to the Authority of Indians' statutory preferences to employment in government agencies primarily serving Indians[123] would help ensure that qualified Indian attorneys employed by the Authority would participate in these decisions.

F. Conflicts Among Indian Claimants.

The possibility of conflicting interests between Indian claimants, illustrated by the New Mexico litigation and by the intervention of the Pueblos, will almost certainly arise in some Trust Counsel matters. The bill could be strengthened in this regard by authorizing the Trust Counsel to contract with private attorneys to represent one or more, or conceivably all, conflicting parties, and by providing that the waiver of sovereign immunity shall attach to any litigation so contracted for.[124]

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121. Proposed bill, Sec. 8.

122. Since the waiver of sovereign immunity attaches only to suits commenced by the Trust Counsel, but not by his clients, inadequate appropriations could throttle this substantive innovation.

123. 25 U.S.C.§§44, 46, 47 and 472.

124. Section 5(b) of the proposed bill, authorizing the Authority to "appoint...special counsel" would seem to solve the problem of conflicting claimants; however, Congress's intent in this regard should be more precisely fixed.

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Conclusion

It is recommended that the Indian Trust Counsel Authority be established, with the following alterations:

(1) deletion of Section 10 as an undesirable limitation on the waiver of sovereign immunity;

(2) deletion of section 11 (5) which authorizes imposition of fees or, as an alternative, inclusion of a provision that fees shall be credited to the Authority;

(3) insertion of a requirement that federal departments, bureaus and agencies which propose actions that may affect Indian claims to land, water and natural resources (a) give prior notice of the action to the Authority and to the affected tribe or Indians; (b) solicit any comments they may have; (c) give those comments due consideration in light of the government's trust responsibility to protect and conserve Indian rights, and (d) transmit the comments of the Authority and tribes to Congress with any report or proposed legislation;

(4) enlargement of the Board of Directors and extension of the Indian preference statutes for employment to the Authority; and

(5) provision for the Authority to contract with private attorneys to provide legal services to Indian claimants, allowing the claimants to assert the statutory waiver of sovereign immunity.

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APPENDIX A.

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 relationships 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

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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.

(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

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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.

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 Indians to natural resources, including, but not limited to,

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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, except 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 Indians 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 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 and of the States, against the United States, its departments, agencies, officers and employees, or against any of the States, their subdivisions, departments and agencies, or against persons and corpora-

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tions, 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 lands, 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.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of 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 statute authorizing a suit to be brought against the United States.

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

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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.

(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.

(5) Charge a fee based upon the Indians' ability to pay for services rendered pursuant to section 8 of this Act. The fees collected pursuant to this subsection shall be paid into miscellaneous receipts in the Treasury of the United States.

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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THE WHITE HOUSE

WASHINGTON

February 27

LG:

I have written the attached response to Senator Allott.

It has been cleared with Harrison Loesch.

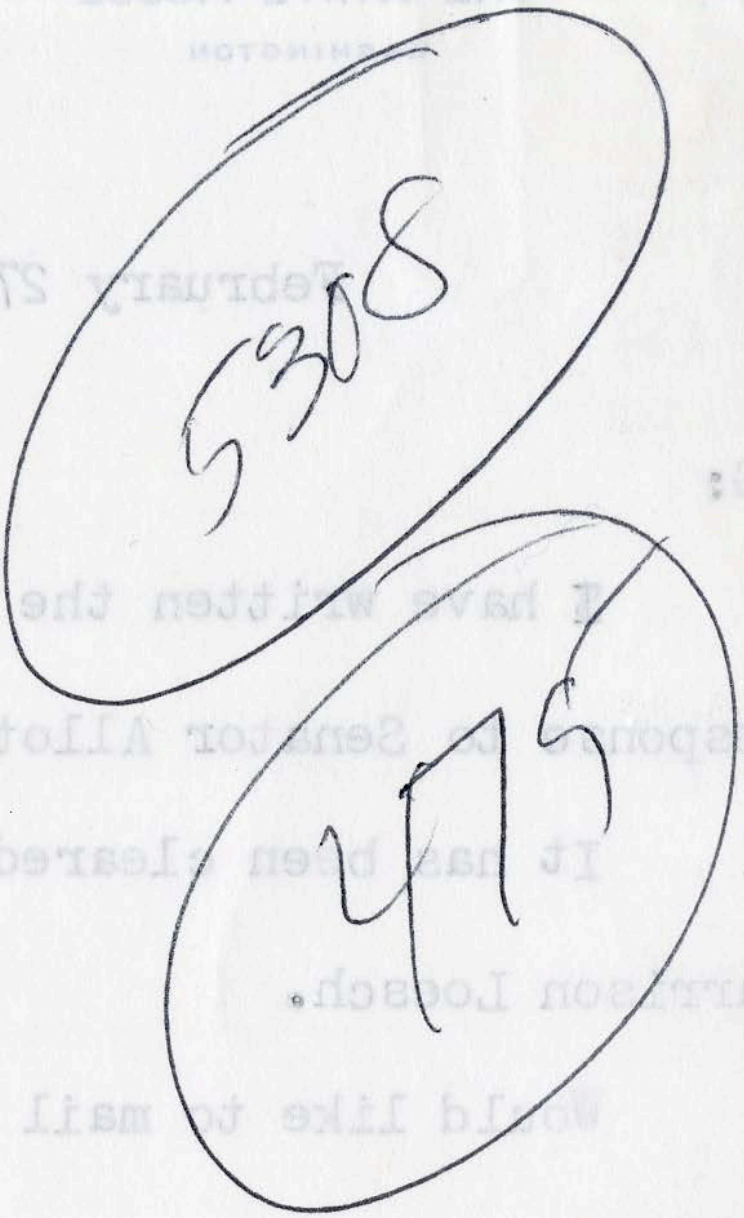
Would like to mail it after your OK.

Will send a copy to Timmons.

OK

Brad

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JERRY T. VERKLER, STAFF DIRECTOR

United States Senate
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
WASHINGTON, D.C. 20510

February 23, 1971

Mr. Brad Patterson
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Mr. Patterson:

Enclosed is a letter I have received from the Western States Water Council in opposition to the Indian Trust Counsel Authority legislation which was submitted by the administration last year.

I would appreciate having your comments on this letter so that I may send them on to the Council.

Best regards.

Sincerely yours,

Gordon Allott.

Gordon Allott
United States Senator

GA:dw
Enclosure

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FEB 1 1971

WESTERN STATES WATER COUNCIL

January 27, 1971

Honorable Gordon L. Allott
United States Senate
Senate Office Building
Washington, D. C. 20510

Dear Senator Allott:

The Western States Water Council was formed in 1965, pursuant to a resolution of the Western Governors' Conference, to foster effective cooperation among Western States in planning for programs leading to integrated development by state, federal and other agencies, of their water resources. The Council has three representatives, appointed by the Governor, from each of the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Each state has one vote but no recommendations may be issued or external positions taken, except by unanimous vote of all member states.

In the last Congress, legislation was introduced which would have created an Indian Trust Counsel Authority (HR 18727 and S 4165). That Authority was to be completely free from control by any Executive Department and would supplant the Departments of Justice and Interior as legal representatives of Indians in any matter concerning their rights or claims to natural resources.

At the twenty-first meeting of the Western States Water Council, representatives of the Governors' of the eleven Western States were convinced that this legislation is contrary to the interests of both Indians and non-Indians and unanimously agreed that the creation of the proposed Indian Trust Counsel Authority should be opposed. Those same Governors' representatives agree that Indians should have ready access to the competent legal representation necessary for the protection of their rights to natural resources, and should be encouraged and assisted in the pursuit and protection of those rights.

Legislation similar to HR 18727 and S 4165 will undoubtedly be introduced in this session of Congress. If it is, it is hoped that, prior to taking a position,

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1725 University Club Building / Salt Lake City, Utah 84111 / Telephone (801) 521-2800

you will consider this unanimous action taken by representatives of the Governors of the States of Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming.

Thank you for your consideration.

Sincerely,

Thomas E Cahill

Thomas E. Cahill
Executive Secretary

TEC/rf

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THE WHITE HOUSE

WASHINGTON

February 25, 1971

Dear Senator Allott:

Thank you for your letter of February 23 and for bringing to our attention the views of the Western States Water Council conerning the proposed Indian Trust Counsel Authority. I very much appreciate the opportunity, through your distinguished good offices, to alleviate the apprehensions of the representatives of the Western Governors.

From a close examination of Mr. Cahill's letter, several points seem to be troubling the Council members:

1. That the authority would be completely free from control by any Executive Department.

This is true with respect to the operational decisions of the Trust Counsel in the same sense that it is true of a judge on the bench: he must be insulated from day to day pressures in order that his independence and integrity are never called into question on a given case. But the draft statute provides that the Board of Directors of the Indian Trust Counsel Authority would be nominated by the President and confirmed by the Senate. So, as with federal judges, such officers would have to meet just about the highest test of capability and probity that our constitutional system provides. In fact, however, the Board of the Indian Trust Counsel Authority would be more "tied" to the executive and legislative centers of power than are federal judges; these Directors would serve for limited terms (four years).

My analogy at the opening of this paragraph is inappropos in that the Trust Counsel and his staff will of course not be judges; they will only be pleaders. The judgments and decisions on natural rights resources matters will continue to be made by the judicial and regulatory bodies of our federal system; nothing about the Indian Trust Counsel changes that.

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2. The Departments of the Interior and Justice are assumed by the Water Council to be competent as the Indians' legal representatives.

Frankly, this is not so, and it is in candid recognition of this fact that the President has proposed the Indian Trust Counsel Authority.

It is of course the Department of Justice which actually takes cases to court, but the Department of the Interior makes recommendations to the Department of Justice as to which cases and as to the substance of suits to be brought.

But as a matter of fact, both Departments are internally split into necessarily differing centers of interest which make it really impossible for them to act as trustees for Indian natural resource rights --which is, indisputably, the federal government's responsibility. Interior has Bureaus of Land Management, Reclamation, Parks, Recreation, Mines, Fisheries and other public and economic interests which often are in competition for the natural resources which Indian tribes may allege are legally theirs. In presenting a recommendation to the Department of Justice for a suit, the Secretary of the Interior is forced to be a compromiser among these competitors rather than, as a trustee must do, function with single-mindedness to protect the interest of those for whom he is the trustee. What any trustor or ward would expect of his trustee has been expected of the Secretary: to be the uncompromising representative of the ward's best interest and that of the res of the trust itself. But, from that description of the Department of the Interior, it is not even fair to expect the Secretary to be "uncompromising."

Precisely the same is true of the Attorney General and of the U.S. Attorneys -- an unfair expectation that they will be single-minded trustees when they, too, really have to be compromisers among many legitimate but necessarily competing interests.

Forcing these two Departments to be "lawyers" for the Indian trust when they actually have to be compromisers among many interests, forces the men in them, in turn, to make judgments about Indian resources rights which only actual Judges should make.

Here, for instance, is an example of this conflict of interest:

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Several months ago, the Winnebago Tribe of Nebraska was informed by the Corps of Engineers that a portion of their reservation was to be condemned for the construction of a recreation project on the Missouri Basin. The Tribe sought assistance from the local U.S. Attorney who found himself in a direct conflict since the Corps of Engineers had also requested him to represent them in their condemnation proceedings. The U. S. Attorney resolved this conflict in favor of the Corps of Engineers and the Tribe had to seek legal assistance elsewhere.

It is to remedy this quintessential unfairness -- to the Secretary of the Interior, to the Attorney General, to the U. S. Attorneys and to the Indians -- that the President has proposed the Indian Trust Counsel Authority. That group, being governmental, can discharge the federal government's trust responsibility and can be free of competing pressures in so doing. Then the actual decisions and judgments on these very complicated cases can rest 100% where of course we all agree they belong: in the hands of Courts themselves.

3. Indians "should have ready access to the competent legal representation necessary..."

If by this phrase the Council means the legal resources of the Departments of the Interior and Justice, I have tried in the foregoing section to explain why these resources are inherently uncertain for reliance by Indians.

Perhaps the Council refers here to private legal representation. Some tribes do not have the resources for hiring private legal help, especially when, as in water rights cases, extensive geological and other technical and scientific data have to be gathered from many experts. But in a way that is beside the point: the federal government is trustee for reservation Indians and has an obligation to supply legal and similar resources. This is why the Indian Trust Counsel was proposed as a federal entity, rather than relying primarily on any private firm or institution. Of course the Indian Trust Council bill does not preclude the Indians from relying on private legal help -- instead of or in addition to the resources of the Counsel -- so this option remains open to them.

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I apologize for the length of these responses, but wanted to answer the Council's inquiries straightforwardly.

The President and, I am sure, the distinguished members of the Senate Interior Committee of both parties, want to make our governmental and legal system work more effectively for all our people. Hypothetically I might say that if the Indian Trust Counsel never won a case, surely the Water Council and the Governors would agree that the natural resources rights issues, in any Court or regulatory body anywhere, should be well and openly presented by both sides. Only then does our "system" meet the test of fairness.

I would be pleased to try to answer any further questions the Council might have and would enjoy the opportunity of meeting with them if a Washington occasion might be possible.

Very respectfully,

Bradley H. Patterson, Jr.

Honorable Gordon Allott
U. S. Senate
Washington, D. C. 20510

cleared by Harrison Loesch

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THE WHITE HOUSE

WASHINGTON

February 25, 1971

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But as a matter of fact, both Departments are internally split into necessarily differing centers of interest which make it really impossible for them to act as trustees for Indian natural resource rights --which is, indisputably, the federal government's responsibility. Interior has Bureaus of Land Management, Reclamation, Parks, Recreation, Mines, Fisheries and other public and economic interests which often are in competition for the natural resources which Indian tribes may allege are legally theirs. In presenting a recommendation to the Department of Justice for a suit, the Secretary of the Interior is forced to be a compromiser among these competitors rather than, as a trustee must do, function with single-mindedness to protect the interest of those for whom he is the trustee. What any trustor or ward would expect of his trustee has been expected of the Secretary: to be the uncompromising representative of the ward's best interest and that of the res of the trust itself. But, from that description of the Department of the Interior, it is not even fair to expect the Secretary to be "uncompromising."

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Forcing these two Departments to be "lawyers" for the Indian trust when they actually have to be compromisers among many interests, forces the men in them, in turn, to make judgments about Indian resources rights which only actual Judges should make.

Here, for instance, is an example of this conflict of interest:

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Several months ago, the Winnebago Tribe of Nebraska was informed by the Corps of Engineers that a portion of their reservation was to be condemned for the construction of a recreation project on the Missouri Basin. The Tribe sought assistance from the local U.S. Attorney who found himself in a direct conflict since the Corps of Engineers had also requested him to represent them in their condemnation proceedings. The U. S. Attorney resolved this conflict in favor of the Corps of Engineers and the Tribe had to seek legal assistance elsewhere.

It is to remedy this quintessential unfairness -- to the Secretary of the Interior, to the Attorney General, to the U. S. Attorneys and to the Indians -- that the President has proposed the Indian Trust Counsel Authority. That group, being governmental, can discharge the federal government's trust responsibility and can be free of competing pressures in so doing. Then the actual decisions and judgments on these very complicated cases can rest 100% where of course we all agree they belong: in the hands of Courts themselves.

3. Indians "should have ready access to the competent legal representation necessary..."

If by this phrase the Council means the legal resources of the Departments of the Interior and Justice, I have tried in the foregoing section to explain why these resources are inherently uncertain for reliance by Indians.

Perhaps the Council refers here to private legal representation. Some tribes do not have the resources for hiring private legal help, especially when, as in water rights cases, extensive geological and other technical and scientific data have to be gathered from many experts. But in a way that is beside the point: the federal government is trustee for reservation Indians and has an obligation to supply legal and similar resources. This is why the Indian Trust Counsel was proposed as a federal entity, rather than relying primarily on any private firm or institution. Of course the Indian Trust Council bill does not preclude the Indians from relying on private legal help -- instead of or in addition to the resources of the Counsel -- so this option remains open to them.

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I apologize for the length of these responses, but wanted to answer the Council's inquiries straightforwardly.

The President and, I am sure, the distinguished members of the Senate Interior Committee of both parties, want to make our governmental and legal system work more effectively for all our people. Hypothetically I might say that if the Indian Trust Counsel never won a case, surely the Water Council and the Governors would agree that the natural resources rights issues, in any Court or regulatory body anywhere, should be well and openly presented by both sides. Only then does our "system" meet the test of fairness.

I would be pleased to try to answer any further questions the Council might have and would enjoy the opportunity of meeting with them if a Washington occasion might be possible.

Very respectfully,

Bradley H. Patterson, Jr.

Honorable Gordon Allott
U. S. Senate
Washington, D. C. 20510

cleared by Harrison Loesch

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