MEMORANDUM

NATIONAL COUNCIL ON INDIAN OPPORTUNITY

WASHINGTON, D.C. 20506

June 8, 1970

TO: Mr. C. D. Ward

FROM: Robert Robertson

SUBJECT: A Bill to Establish an Office of Counsel to Enforce the Trust Responsibility of the U.S. Regarding Indian Land and Water and Fishing Rights

The following is the comparative study Woody Sneed was asked to do.

I.	The personnel should be or become experts on the legal rights of Indians so as to insure that the Indian rights are considered adequately during administrative process.	(It is difficult to reverse an Interior program once it has been finalized administratively)
II.	It should provide the mechanism to advocate the Indian interest at every step of the administrative process within Interior where Indians will be affected.	This could best be accomplished by being located within Interior. The office must have access to operations and records in all Interior bureaus and agencies.
III.	The office should have the attention and confidence of the Secretary of the Interior so as to exercise his discretion in Indian matters with every consideration for Indian interests.	The Secretary should be consulted or control the appointment of the Chief Counsel and he should be in the Office of the Secretary with no intermediaries between him and the Secretary.
IV.	The office should inventory Indian water needs and rights and provide advice to tribes how to plan so as to preserve those rights.	The office should be able to hire experts in planning and research in economic development and the best uses of water for particular tribes.
V.	The office should respond to tribal and individual requests for assistance within the purview of the responsibilities of the office.	It could do this without spelling it out in the legislation.

PRESERVATION COPY

Reproduced at the Richard Nixon Presidential Library and Museum

VI. The office should be able to see that a tribe or individual can be represented in court if the administrative process fails to protect an Indians legal right.

This could be done by providing a fund to pay private lawyers or by the office representing Indians itself.

VII. The office should exercise discretion in selection of cases so as to accomplish the most good most efficiently, e.g., it should set precedents with most general applicability.

The bill should not require mandatory representation of a Tribe or Indian if the office determines that the case is poor or if other demands on the office are of prior importance.

PRESERVATION COPY

Reproduced at the Richard Nixon Presidential Library and Museum

November 9, 1970

Dear Mr. Ruzow:

Thank you for your note of October 7; I apologize for the delay in responding.

The President in his Message to the Congress of July 8, 1970, proposed the creation, by statute, of an Indian Trust Counsel Authority to do for Indians for whom we bear a trust relationship what the Departments of Justice and Interior really have not been able to do because of inner conflicts within each of these. Enclosed is a copy of the statute the President has proposed.

Hearings were held in the Senate Interior Committee last month but I expect further hearings will be held in both the Senate and House Interior Committees in the 92nd Congress.

Sincerely yours,

Leonard Garment

Lawrence A. Ruzow, Esq.
500 Fifth Avenue
New York, New York 10036

Reproduced at the Richard Nixon Presidential Library and Museum

17

Ruzow & Ruzow
ATTORNEYS AT LAW

THEODORE M. RUZOW
LAWRENCE A. RUZOW

500 FIFTH AVENUE
NEW YORK, N. Y. 10036
947-8011

October 7, 1970

22

Executive Office of the President
Washington, D.C.

Gentlemen:

Some months ago President Nixon announced that an independent group of lawyers would be formed to assist Indian tribes in the assertion of their legal rights. If my memory serves me, this announcement was made at a meeting with some Indians from the Taos Pueblo. I wrote the Interior department to find out what had happened to this proposal, but they had no information. Could you please tell me the current status of this proposal?

Very truly yours,

Lawrence A. Ruzow

Reproduced at the Richard Nixon Presidential Library and Museum

Ruzow & Ruzow
500 FIFTH AVENUE
NEW YORK, N. Y. 10036

NEW YORK N.Y. OCT-7'70 U.S. POSTAGE = 0.06 P.B. METER 1049493

The Executive Office of the President
Washington, D.C.

OCT 10'70 AM

Reproduced at the Richard Nixon Presidential Library and Museum

National Congress of American Indians

RESOLUTION NO. 9

Indian Trust Council Authority

WHEREAS, there has been through the President's message and other pronouncements a recognition within the administration of what the Indian tribes have known all along, namely that there is a significant conflict of interest within the Justice Department, the Solicitor's office and in fact within the entire Department of the Interior, by which neither the Justice Department nor the Solicitor's office nor any other Federal attorney's have been able effectively to represent Indians in their tribal and reservation rights, AND

WHEREAS, there has been introduced Senate Bill 4165 and House Resolution 18727, to establish the Indian Trust Council Authority which would in effect set up a department employing attorneys to their special fields to represent Indian tribes and reservations in lawsuits and other litigation to protect their legal rights, particularly with regard to property, Hunting and Fishing Rights, Water Rights, ~~water rights~~, AND

WHEREAS, the present bills exist at the present time as a proposal and do not yet reflect the suggestions and possible amendments that will come as they are discussed by Indian organizations,

NOW THEREFORE BE IT RESOLVED, that National Congress of American Indians hereby approve and recommend the concept being proposed by Senate Bill 4165 and HR 18727 to establish an Indian Trust Council Autnority and request early hearings so that after appropriate amendments have been suggested and incorporated to reflect the suggestions and proposals of the Indians themselves, it be enacted and placed in effect as soon as possible.

Approved
10-23-70

Indian Tribes & Individuals

PRESERVATION COPY

Reproduced at the Richard Nixon Presidential Library and Museum

Calendar No. 285

91ST CONGRESS
1st Session

SENATE

REPORT
No. 91-294

PROTECTING THE RIGHTS OF THE AMERICAN INDIAN

July 8, 1969.—Ordered to be printed

Mr. ERVIN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2173]

The Committee on the Judiciary, to which was referred the bill (S. 2173) to amend an act entitled "An act to prescribe penalties for certain acts of violence or intimidation, and for other purposes," approved April 11, 1968, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to amend titles II and III of the act entitled "An act to prescribe penalties for certain acts of violence or intimidation, and for other purposes," approved April 11, 1968 (25 U.S.C. 1302). This amendment is intended to make it plain that the provisions of title II of the 1968 act (25 U.S.C. 1302) shall not be construed to affect any tribal property rights secured by law or treaty or to dilute the sovereignty of the tribal governments except to the extent of the prohibitions set forth in the present section 202 of the 1968 act. The bill would also extend from July 1, 1968, until July 1, 1973, the deadline before which the Secretary of the Interior is required to complete the Model Code of Indian Offenses provided for in title III of the 1968 act, and would provide that such Model Code would apply only to those Indian tribes that have adopted such code through the action of the body exercising the legislative powers of the tribe.

STATEMENT

In 1961, the subcommittee began its preliminary investigation of the legal status of the Indian in America and the problems Indians encounter when asserting constitutional rights in their relations with

Reproduced at the Richard Nixon Presidential Library and Museum

State, Federal, and tribal governments. This research, the first such study ever undertaken by Congress, demonstrated a clear need for further congressional inquiry and legislation.

S. 961 through S. 968 and Senate Joint Resolution 40 of the 89th Congress were introduced in response to the findings of the subcommittee based on these hearings and investigations.

After minor revisions in the original measures, on May 23, 1967, Senator Ervin and others cosponsored S. 1843 through S. 1847 and Senate Joint Resolution 87. Because extensive hearings were held on similar measures in the 89th Congress, no further hearings were necessary.

These six separate proposals were consolidated into one omnibus Indian rights measure (S. 1843) and it received unanimous approval of the Senate on December 7, 1967, after which it was sent to the House of Representatives where no action was taken.

Titles II through VI of the Civil Rights Act of 1968 (Public Law 90–284) contain the provisions of S. 1843, the Indian rights bill. These titles were added as an amendment to H.R. 2516, the administration's civil rights bill of 1968, which was signed into Public Law on April 11, 1968.

Briefly, these titles provide the following protections for Indians in their relationships with Indian tribes:

TITLE II

Title II constitutes a bill of rights for American Indians. It provides that Indian tribes exercising powers of self-government shall be subject to many of the same limitations and restraints that are imposed on Federal, State, and local government by the Constitution of the United States. It thus assures adequate protection of the basic rights of individual Indians who are members of tribes whose tribal constitutions now permit governmental action that would be unconstitutional if undertaken by Federal, State, or local government.

TITLE III

Title III directs the Secretary of the Interior to prepare and recommend to the Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations.

TITLE IV

Title IV repeals section 7 of Public Law 83–280 which confers civil and criminal jurisdiction over Indian country to certain States and gives consent to all other States to assume jurisdiction at any time. Title IV repeals this section and permits States to assert civil and criminal jurisdiction in Indian country only after acquiring the consent of the tribes in the State.

TITLE V

Title amends the Major Crimes Act of 1885 by adding the crime of "assault resulting in serious bodily injury," to the list of serious crimes (murder, manslaughter, rape, incest, assault with intent to

kill, assault with a dangerous weapon, arson, burglary, robbery, embezzlement and larceny) which, under that act, can be prosecuted in Federal courts although committed by an Indian in Indian country.

TITLE VI

Title VI remedies the problems Indian tribes have had in securing Interior Department approval of contracts for legal assistance by providing that if an application made by a tribe for approval of contracts for the employment of legal counsel is neither approved nor denied by the Secretary or by the Commissioner of Indian Affairs within 90 days of the date of filing, approval is deemed to have been granted.

TITLE VII

Title VII authorizes and directs the Secretary of the Interior to revise and publish on a current annual basis Senate Document No. 319, 58th Congress, containing treaties, laws, Executive orders and regulations relating to Indian affairs, to compile and maintain on an annual basis the official opinions of the Solicitor of the Department of the Interior relating to Indian affairs, and to prepare a revised edition of the treatise entitled "Federal Indian Law."

Need for Legislation: S. 2173

The present bill deals only with titles II and III of the Civil Rights Act of 1968. Since its enactment, misapprehensions have arisen among individual Indians and Indian tribes that the two titles go beyond the language in which they are couched and affect rights of property of Indian tribes in tribal lands and abridge the powers of self-government of Indian tribes in a manner inconsistent with the language of titles.

S. 2173 makes it plain that title II does not affect the property rights of any Indian tribe in its tribal lands or abridge any of the rights of self-government of any Indian tribe except to the extent of the prohibitions upon governmental action expressly set forth in title II.

Also, S. 2173 makes it clear that the model code enumerated in title III of the act will not become applicable to any tribe unless it is first adopted by the tribal council or other governing body of the tribe.

These amendments were introduced as a result of hearings conducted in Albuquerque, N. Mex., on April 11, 1969. At the request of Senators Anderson and Montoya of New Mexico, the subcommittee afforded the Pueblos of New Mexico an opportunity to voice their apprehensions over the provisions of titles II and III of the 1968 Civil Rights Act. The Pueblos and other Indians and Indian tribes testified that titles II and III affected purposes not intended by Congress and specifically that tribal sovereignty, property rights, and identity would be eroded by the implementation of the titles. These amendments are designed merely to obviate these misapprehensions of the Pueblos and other Indian tribes; as far as the committee is able to determine, there is no opposition to this measure.

Reproduced at the Richard Nixon Presidential Library and Museum

Changes in Existing Law

In compliance with paragraph 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Act of April 11, 1968 (25 U.S.C. 1302, 1311)

* * * * * * *

INDIAN RIGHTS

Sec. 202 (*a*). No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trail by jury of not less than six persons.

(*b*) *Subsection (a) shall not be construed—*

(1) to affect any rights in tribal lands secured to any Indian tribe by any law or treaty;

(2) to abridge the powers of self-government of any Indian tribe except to the extent specified in the prohibitions set out in subsection (a);

(3) to affect any tribal law or custom of any Indian tribe regulating the selection of the officers, bodies or tribunals by or through which the powers of self-government of the tribe are executed;

(4) to invalidate any tribal law or custom of any Indian tribe which is consistent with the prohibitions set out in subsection (a); or

(5) to deprive any Indian court of the power to impose in any case within its jurisdiction any penalty or punishment sanctioned by tribal law or custom which does not constitute cruel and unusual punishment within the purview of paragraph 7 of subsection (a) or exceed the limits of punishment as therein specified.

Sec. 301. The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before [July 1, 1968] *July 1, 1973*, a model code to govern the administration of justice by courts of Indian Offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian Offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian Offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the court of Indian Offenses, and (4) provide for the establishing of educational classes for the training of judges of courts of Indian Offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States. *Notwithstanding any provisions of this section, no model code recommended to the Congress by the Secretary of the Interior pursuant to this section shall be applicable with respect to any Indian tribe unless the body exercising the legislative powers of the tribe has first adopted such code.*

* * * * * *

O

Reproduced at the Richard Nixon Presidential Library and Museum

Prepared by Bill Veeder

Tadus v. US
E Dist Wash
403

IRREPARABLE DAMAGE TO AMERICAN INDIANS BY CONFLICTS OF INTEREST IN JUSTICE DEPARTMENT AND INTERIOR SOLICITOR'S OFFICE - INDIAN NEED FOR INDEPENDENT LEGAL REPRESENTATION

Conflicts of interest, deep-rooted and all-pervasive, preclude American Indians from receiving proper or adequate legal advice or representation by either the Justice Department or Interior Solicitor's Office. Conflicts of that nature include but are not limited to (a) legal representation in courts or other tribunals; (b) day-to-day administration of their lands and rights to the use of water; (c) legal advice and counseling; (d) matters pertaining to legislation and the interpretation of it. Those conflicts in Justice and Interior as they pertain to the American Indians, result in flagrant abuse of discretion, acts of commission or omission, conduct restricting Indian interests, procrastination, avoidance of needed action, dilatory practices. Examples will demonstrate those losses and the gravely distressing circumstances confronting the Indians and Indian Tribes by reason of the conflicts.

Abandonment or failure to assert Indian claims: (a) Sherrill v. McShan: Invaluable lands claimed by the Mohave Tribe of Indians were involved in the case of Sherrill v. McShan. The Justice Department was requested to represent the Indian interests in court. Evidencing the conflict of interest between the Indians and Interior's Bureau of Land Management, Justice without notice to the Indians, abandoned their claim in the course of trial and asserted title in the Federal Government. The United States lost the case in both the Arizona Federal District Court and in the Court of Appeals. 1/ At great cost the Indians now seek on their own behalf to recover the lands and initiated the case of Mohave v. LaFollette. A motion to dismiss their claim has been filed on the grounds, among others, that a judgment adverse to the United States is res judicata against them.

(b) Solicitor's conflict of interest regarding Mohave Indian land involving a California claim: With full knowledge of Mohave claims to 1,500 acres of land, likewise claimed by California, the Solicitor's Office conducted a hearing concerning which neither the Mohaves nor the Bureau of Indian Affairs was given notice or an opportunity to be heard. Two years of struggle and strenuous political pressure forced a rehearing of the matter. 2/ At the rehearing the Solicitor's Office assertedly bound by a Solicitor's opinion adverse to the Indians, represented Interior's Bureau of Land Management. The Mohaves have been and are now being forced at great cost they can ill afford, to protect themselves due to the conflict of interest in the Solicitor's Office. Proving the conflict of interest is this fact: When the Mohaves petitioned for legal assistance in the rehearing, they were advised that a lawyer for the Bureau of Indian Affairs was not available because it would conflict with the interests of the United States and was violative of 28 U.S.C. 205.

Pyramid Lake struggle epitomizes conflicts of interest in Justice and Interior: Destruction of Pyramid Lake by Reclamation projects built and abuilding is at hand. Through the years Solicitor's opinions and activities on behalf of Reclamation adverse to the Pyramid Lake Tribe of Indians,

Reproduced at the Richard Nixon Presidential Library and Museum

have contributed greatly to diversions of Truckee River water away from Pyramid Lake, its precipitous decline and presently assured destruction. 3/ When Justice attempted to abandon a long-standing decree in the Alpine Case, which abandonment would damage the Indians, they intervened in Alpine. Justice vigorously opposed the Indians in the lower court; opposes them on appeal. 4/ Impoverished Pyramid Lake Indians, at their own expense and with private assistance, will seek to defend themselves against further seizure of their Truckee River rights by Interior's Reclamation, the States of Nevada and California.

Mission Indians on San Luis Rey victims of conflicts: In 1894 Interior attempted by an agreement to deprive Mission Indians of invaluable rights in the San Luis Rey River. Repeated attempts by the Indians to void the 1894 agreement have failed. The Indians now seek to recover monetarily for their losses in the Indian Claims Commission. Justice defends on the grounds their rights are not adjudicated; when the Indians attempted to force Justice to have their rights determined, Justice refused to act. Both Justice and the Solicitor's Office, wholly without adequate information as to the law or the facts, meets with opponents of the Indians on May 26, 1970, in an attempt to force the Indians to accept another "settlement". 5/

Colorado River Indian Tribes gravely damaged by conflicts within Solicitor's Office: Boundary disputes dating back to 1879 with Interior's Bureau of Land Management plague Colorado River Tribes. Repeatedly the Solicitor's Office has ruled contrary to Indians; has effectively denied them their day in court. Vacillation, delays, avoidance of responsibilities, failure to advocate Indian position, cause them irreparable damage. 6/

Violation of decree threatens Yakimas: In 1945 a Federal Decree was entered protecting the Yakimas' rights in a river named after them. In total disregard of the decree, with the advice of the Solicitor's Office, Interior's Reclamation Bureau has undertaken the construction of the Kennewick Project and its extension, which commits Yakima Indian water, to their irreparable damage, to non-Indian uses. Representatives of the Solicitor vigorously opposed the Yakimas in their objection to Kennewick. 7/

Montana's Indians suffer from Solicitor's conduct: On advice from the Solicitor, Flathead Indians have been denied priorities and their rights invaded for non-Indian benefits; on advice from the Solicitor the waters of the Big Horn River are being sold and Indians' contractors required to pay Reclamation for water rightfully claimed by the Crow Indians. 8/

Pueblos' losses: Conflicts threaten destruction of Pueblo Indians on Rio Grande. 9/

Legislative opposition: In keeping with Indian policy, Justice opposes legislation which would restore land to Flatheads. 10/

Attached is proposed bill and documentation.

May 20, 1970

Reproduced at the Richard Nixon Presidential Library and Museum

IRREPARABLE DAMAGE TO AMERICAN INDIANS BY CONFLICTS OF INTEREST IN JUSTICE DEPARTMENT AND INTERIOR SOLICITOR'S OFFICE - INDIAN NEED FOR INDEPENDENT LEGAL REPRESENTATION

Documentation of footnotes for above captioned memorandum dated May 20, 1970

1. Sherrill v. McShan, U.S.D.C. Arizona, Civil No. 5431, decree August 17, 1964; Sherrill v. McShan, 356 F.2d 607 (CA9, 1966).

2. Bureau of Land Management hearing, Swampland Selection A 31022. See Congressman Pettis' attack on Solicitor's Office for its conduct, Congressional Record December 4, 1969.

3. Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, Joint Committee Pring, pages 497 et seq.

4. U. S. v. Alpine Land & Reservoir Company, Pyramid Lake Tribe of Indians, Interveners, U.S.D.C. Nevada; Court of Appeals for the Ninth Circuit, United States in opposition.

5. Rincon * * * La Jolla * * * v. The Escondido Mutual Water Co., Walter J. Hickel, United States Secretary of the Interior; John N. Mitchell, United States Attorney General, City of Escondido, Defendants, U.S.D.C. S.D. Cal.
Rincon * * * La Jolla * * * v. U.S., Ind. Cl. Comm. Docket 80-A.

6. U. S. V. C. D. Williams, U.S.D.C. S.D. Cal; U. S. Court of Appeals, 9th Circuit. Solicitor's opinion January 17, 1969.

7. Sunnyside * * * v. Kittitas * * *, U.S.D.C. E.D. Wash. Decree January 25, 1945; Kennewick Reclamation Project.

8. U. S. v. Alexander, 131 F.2d 359 (CA9, 1942); See memorandum dated August 12, 1969, to Assistant Secretary of Interior analyzing Crow Indian rights.

9. New Mexico, Plaintiff; United States, Intervener v. Aamodt, et al. No. 6639 U.S.D.C. N.M., and related cases.

10. Senate Bill 1517, "To set aside certain lands in Montana for the Indians of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana."
Deputy Attorney General Kleindienst and Under Secretary of the Interior Russell both formally oppose enactment of this legislation. Mr. Russell states, "We are, in keeping with the basic policy of this Department that Indian claims to land should be satisfied by money payments rather than by restoration of land, recommending against enactment of this bill.

Reproduced at the Richard Nixon Presidential Library and Museum

A B I L L

To create the Office of General Counsel for Indian Affairs and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

SEC. 1. There shall be the Office of General Counsel for Indian Affairs, hereafter referred to as the General Counsel, who shall be appointed by the President with the advice and consent of the Senate and will be responsible directly to the Executive Office of the President.

SEC. 2. The General Counsel and members of his staff shall render all legal services in regard to the lands and rights to the use of water of Indians or Indian Tribes, within the Nation's trust responsibility owing to the Indians and Indian Tribes, including but not limited to the investigation and inventorying of Indian lands and rights to the use of water, the preparation and trial and appeal of cases in all the courts, commissions and in all administrative proceedings. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 3. The General Counsel is authorized and empowered to:

(a) Cooperate with private, independent agencies and Indian organizations in furtherance of Indian claims and interests;

(b) Receive funds and assistance from those agencies and entities in furtherance of the objectives of this Act;

(c) Cooperate, investigate, appear by amicus or otherwise, or intervene in any litigation, civil or criminal, pending or initiated involving Indians or Indian Tribes in

Reproduced at the Richard Nixon Presidential Library and Museum

any Federal, State or local court;

(d) Exercise all other or necessary powers as he may deem essential for the protection and preservation of the personal rights, privileges or property rights or interests of Indians or Indian Tribes.in land or water.

SEC. 4. The General Counsel shall appoint assistants or deputy general counsels subject to the laws applicable to the employment of lawyers in the Federal Government, and all other personnel required, who shall be responsible to him in rendering legal services both in Washington, D. C. and elsewhere throughout the United States in the performance of the objectives of this legislation.

SEC. 5. The functions of the General Counsel and his staff shall be independent of and free from control, regulation or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice.

SEC. 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) General Counsel for Indian Affairs."

Reproduced at the Richard Nixon Presidential Library and Museum

Independent Counsel

THE WHITE HOUSE

WASHINGTON

1. VP letter to AG supporting Independent counsel

2. memo describing present conflicts of interest — prepared by Bill Veeder

Reproduced at the Richard Nixon Presidential Library and Museum

June 30, 1970

Dear John:

On July 7th the President is scheduled to send to Congress a message on Indian affairs. Among the various proposals that I have submitted to the President to be included in the message is the creation of an independent agency whose sole responsibility would be that of protecting the Indians' land and water rights.

Under the present situation, the Department of Justice and the Department of the Interior are charged with the protection of these rights; however, this has invariably time and time again resulted in a conflict of interests. This proposal has received very enthusiastic support from the ranking Republican members of the Senate and House Interior Committees.

Your Department has officially responded in the negative to this proposal; however, I understand Leonard Garment will be seeking your personal views on the matter. I strongly urge your support, as I feel this is a very necessary and desirable proposal.

Sincerely,

The Honorable John Mitchell
The Attorney General
Washington, D. C. 20530
STA/cdw/bd

PRESERVATION COPY

Reproduced at the Richard Nixon Presidential Library and Museum

July 13, 1970

Miss Bobbie Greene
Mr. C. D. Ward

Enclosed are two different approaches to ways to amend section 6 of the Indian Trust Counsel bill. I think that both will meet the points you have in mind that we discussed on Saturday. I will be happy to talk about them when ever you have time.

Robert C. Bruce

Robert C. Bruce

Reproduced at the Richard Nixon Presidential Library and Museum

SEC. 6. The functions of the Authority shall be independent of and free from the control, regulation, or interference of the Secretary of the Interior and of the Attorney General, and the Authority may participate in any action or proceeding authorized by this Act except that it must give thirty days' notice to the Secretary of the Interior and the Attorney General of its intention to take such action, such notice shall include a detailed statement of the basis upon which the Authority proposes to file. The Authority may request the Attorney General to undertake an action or proceeding authorized by this Act and if the Attorney General undertakes such action or proceeding, the Authority shall not participate in such action or undertaking except in an advisory capacity.

Reproduced at the Richard Nixon Presidential Library and Museum

A B I L L

To provide for the creation of an Authority to be known as the Indian Trust Counsel Authority which shall perform certain legal services for the American Indians, Indian Tribes, and Alaska Natives, and for other purposes.

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

SEC. 2. There is established the Indian Trust Counsel Authority, hereinafter referred to as the Authority, which shall be governed by a Board of Directors composed of three members to be appointed by the President with the advice and consent of the Senate. At least two of the members of the Board of Directors shall be Indians. The term of office of members of the Board of Directors shall be four years or until their replacement has been appointed and confirmed, except that the first member appointed shall be appointed for a two year term, the second member appointed shall be appointed for a three year

Reproduced at the Richard Nixon Presidential Library and Museum

term, and the third member appointed shall be appointed for a full four year term. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the predecessor was appointed shall be appointed for the remainder of such term. One of the members shall be designated by the President to serve as the Chairman of the Board of Directors of the Authority. The members of the Board of Directors shall receive compensation of $125 per day for each day engaged in the business of the Authority and shall be allowed travel and transportation expenses authorized by law when engaged in the performance of services for the Authority.

SEC. 3. The Board of Directors of the Authority shall convene at the call of the Chairman but must convene at least once each quarter at which time they shall set policy for the Authority and review its activities. The Board of Directors shall report annually to the President on the activities of the Authority, such report to be issued on the first of January of each year.

SEC. 4. The Board of Directors shall, without regard to the civil service laws, appoint and prescribe the duties of a chief legal officer for the Authority, who shall bear the title of Indian Trust Counsel, and who shall receive compensation at a rate equal to that provided for in level V of the Executive Schedule and section

Reproduced at the Richard Nixon Presidential Library and Museum

5316 of title 5, United States Code. It shall, without regard to the civil service laws, appoint and prescribe the duties of an executive director, who shall receive compensation at a rate equal to that provided for grade GS-18 in section 5332 of title 5, United States Code.

SEC. 5. The Board of Directors shall, subject to the civil service laws applicable to the hiring of attorneys, appoint and prescribe the duties of such legal counsel as it deems necessary after consulting with the Indian Trust Counsel. Subject to the civil service laws, the Board of Directors shall appoint such other employees as it deems necessary in exercising its powers and duties. The compensation of all employees appointed under this section shall be fixed in accordance with chapter 53, title 5, United States Code.

102(c)
Title 2, NEPA

SEC. 6. The functions of the Authority and its staff shall be independent of and free from the control, regulation, or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General and the Solicitor General of the United States and the members of their staffs.

SEC. 7. The Authority and its staff, with the consent of any aggrieved Indians shall render legal services in regard to the natural resources and all rights therein of the Indians, including, but not limited to, the land, rights to the use of water, timber, minerals, and rights to hunt and fish, within the United States trust

Reproduced at the Richard Nixon Presidential Library and Museum

responsibility owing to the Indians, which services are now rendered by the Solicitor of the Department of the Interior or by the Attorney General of the United States, but nothing in this Act shall absolve the Solicitor of the Department of the Interior or the Attorney General of the United States of their treaty and trust responsibilities to the Indians. The legal services performed pursuant to this section shall include, but not be limited to, the investigation and inventorying of Indians' land and rights to the use of water, technical to the Indians in the preparation and trial and appeal of cases in all courts, Federal, State, and local, commissions, and in all administrative proceeding, and in those instances where the Indians can prove to the satisfaction of the Authority that they are not able to obtain adequate legal counsel, the Authority shall proceed with the preparation and trial and appeal of cases in all courts, Federal, State, and local, commissions, and in all administrative proceedings.

SEC. 8. The Authority is authorized, acting in the name of the United States as trustee for the Indians, to initiate and prosecute to judgment in all courts of the United States and of the States, against the United States, its departments or agencies, its officers and employees, and all of the States, their subdivisions, departments and agencies, as well as persons and corporations, public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication, or administration of all natural resources

Reproduced at the Richard Nixon Presidential Library and Museum

and interest therein of the Indians, including, but not limited to, rights to lands, rights to the use of water, timber, 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 United States or State or local administrative proceeding in order to protect the rights of the Indians. The United States waives its soverign immunity from suit in connection with litigation by the Authority as covered by this section.

SEC. 9. The Authority is authorized to:

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

(2) Request such personnel, services, and materials as it deems may be needed and such personnel, services, and materials shall be made available to the Authority by the Department or agency requested to furnish such personnel, services, and materials as the Department or agency head deems reasonable. Such personnel, services, and materials pursuant to this section may be furnished on a reimbursable or non-reimbursable basis;

(3) Receive and use funds or services donated by others, if such funds or services are donated without restrictions other than they be used in furtherance of the protection of the trust rights of the Indians; and

Reproduced at the Richard Nixon Presidential Library and Museum

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

SEC. 10. There is authorized to be appropriated such sums as may be necessary to carry out the functions and responsibilities of the Authority.

Reproduced at the Richard Nixon Presidential Library and Museum

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 14, 1970

MEMORANDUM FOR MR. GARMENT
MR. C.D. WARD
MISS GREENE

Subject: Justice's draft of an Indian Trust Counsel Authority bill

We have just received from Justice its revision of the subject bill based on our discussions Friday afternoon. The next step would appear to be to sit down with Justice people some time tomorrow to go over the draft and to get their reaction to the policy question of whether the Authority should have "first refusal" over litigated cases.

I will be in touch with you first thing in the morning about a suitable time tomorrow for holding the meeting.

Wilf Rommel

Wilf Rommel
Assistant Director for
Legislative Reference

Attachment

Reproduced at the Richard Nixon Presidential Library and Museum

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.

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

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

Reproduced at the Richard Nixon Presidential Library and Museum

(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, from time to time, designate one of the Directors to serve as Chairman.

(f) The members of the Board of Directors shall receive compensation at the rate provided for grade GS-18 in section 5332 of title 5, United States Code, for each day engaged in the business of the Authority, and shall be allowed travel expenses, including a per diem allowance as authorized by law when engaged in the performance of services for the Authority. / Note: check language withCSC./

Reproduced at the Richard Nixon Presidential Library and Museum

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 annually, in the first week of January, on the activities of the Authority. /Note: not at end of fiscal year? To Congress as well?/

SEC. 4. The Board of Directors shall, without regard to the civil service laws, appoint and prescribe the duties of a chief legal officer for the Authority, who shall bear the title of Indian Trust Counsel, and who shall receive compensation at a rate equal to that provided for in level V of the Executive Schedule. It shall, without regard to the civil service laws, appoint and prescribe the duties of an executive director, who shall receive compensation at a rate equal to that provided for grade GS-18 in section 5332 of title 5, United States Code. /Note: lawyer gets more than his appointer? More than executive director? Functions of executive director? Check CSC?/

SEC. 5. The Board of Directors shall /subject to the civil service laws applicable to the hiring of attorneys/ appoint and prescribe the duties of such attorneys as it

Reproduced at the Richard Nixon Presidential Library and Museum

deems necessary after consulting with the Indian Trust Counsel. Subject to the civil service laws, the Board of Directors shall appoint such other employees as it deems necessary in exercising its powers and duties. The compensation of all employees appointed under this section shall be fixed in accordance with chapter 53, title 5, United States Code. /Note: check CSC./

SEC.6. The functions of the Authority shall be independent of and free from the control, regulation, or interference of the Department of the Interior and of the Department of Justice, but the Authority shall not participate in an action or proceeding unless it (1) has given sixty days' notice to the Attorney General and the Secretary of the Interior of its intention to take such action, (2) has at the same time served on them a detailed statement of the facts and circumstances in support of such action, and (3) the Attorney General has not undertaken the action proposed.

SEC.7. Subject to the provisions of section 6, the Authority, which the consent of an aggrieved Indian, or an aggrieved tribe, band, or other identifiable group of Indians,

Reproduced at the Richard Nixon Presidential Library and Museum

shall 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 or the Department of Justice of their treaty and trust responsibilities to the Indians. 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 aid to the Indians in the preparation and trial and appeal of cases in all courts, before Federal, State, and local commissions, and in all administrative proceedings.

SEC. 8. Subject to the provisions of section 6, 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

Reproduced at the Richard Nixon Presidential Library and Museum

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. Also subject to the provisions of section 6, 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. 9. The powers granted to the Authority and its staff 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 was filed

Reproduced at the Richard Nixon Presidential Library and Museum

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 by any tribe, band, or other identifiable group of Indians.

SEC. 10. 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, if such funds or services are donated without restrictions other than that they be used in furtherance of the protection of the trust rights of the Indians; and

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

Reproduced at the Richard Nixon Presidential Library and Museum

SEC. 11. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Reproduced at the Richard Nixon Presidential Library and Museum

NEED FOR INDIAN TRUST SOLICITOR

Suggested Language

Indian tribes across the country, and particularly those in the West are involved in a continuing struggle for protection of their water rights. These tribes have identified a very grave shortcoming in the method present law provides for fulfilling the Federal government's trust responsibility to Indians in the protection of their natural resources.

In many of the disputes over water rights and land boundary and title matters, the Indians find that the adverse claimant is the trustee - the United States - whose duty it is to protect the interests of these tribes. When these matters come up for litigation, or even administrative actions, the legal staffs within the Government which are available to represent the Indians and the trustee are also duty bound to represent the broader national interest. This conflict of interest often precludes Indians from being adequately represented in these types of controversy.

I am proposing legislation which will create an office in the Department of the Interior with a staff of lawyers charged with the single and undivided responsibility for protecting Indian interests in land and water resources. The Office would be independent of the Solicitor's Office in the Department of the Interior and of the Attorney General in the Department of Justice. This Office would represent the Indian interest within the Department of the Interior with regard to administrative actions affecting Indian rights in land and water and would go into court on behalf of Indians when legal action is deemed necessary and when the tribe in question does not have sufficient funds to secure its own legal counsel. We must provide this legal service for Indians so that the Federal government will more adequately fulfill its trust responsibility toward its Indian citizens.

Reproduced at the Richard Nixon Presidential Library and Museum

E-1

A BILL

To create the Office of Indian Trust Solicitor in the Department of the Interior and for other purposes

Be it enacted by the Senate and House of Representatives of The United States of America in Congress assembled, That

(a) There shall be established in the Department of the Interior the Office of Indian Trust Solicitor.

(b) The Office of Indian Trust Solicitor, hereinafter referred to as the "Office", shall be directed by the Indian Trust Solicitor to be appointed by the President of the United States with the advice and consent of the United States Senate.

Sec. 2. In any controversy or suit dealing, either directly or indirectly, with the trust responsibility of the United States respecting Indian or Indian tribal land and the rights attached thereto, including rights to the use of water, the Office shall examine all the facts and information surrounding said controversy or suit and shall make a recommendation in writing to the Secretary of the Interior as to the position the United States should take regarding said controversy or suit. The Secretary of the Interior must act on said recommendation within thirty (30) days of its submission to him and must notify the Office of what action he has taken as soon as taken. Upon receipt of the Secretary of the Interior's action on said controversy or suit, the Office shall notify said Indian or Indian tribe of the action taken by the Secretary of the Interior. If the concerned Indian or Indian tribe, after receiving the report of the action of the Secretary of the Interior makes a decision, by resolution or other appropriate means in the case of a tribe, to take action to protect its rights, said Indian or Indian tribe is authorized notwithstanding any other provision of law, either through private counsel of its choice or by request to the Office to act in its behalf, to bring suit in the appropriate Federal Court if such action is needed to resolve said controversy or to intervene in a lawsuit in order to protect its right in and to land and interest attached thereto administered by the United States in its trust capacity. The Officer shall accept the request of any Indian or Indian tribe made pursuant to this section if he determines that said Indian or Indian tribe is not able to bear the cost of private counsel. The Office shall also assist, to the extent so requested, the private counsel retained by any Indian or Indian tribe pursuant to this section.

U.S.

Reproduced at the Richard Nixon Presidential Library and Museum

Sec. 3. If an Indian or Indian tribe believes that its rights in and to land and the interest attached thereto administered in trust for said Indian or Indian tribe by the United States, are being violated or infringed upon, it shall petition the Office concerning said violation or infringement. In the case of an individual Indian, the petition shall be in writing and in the case of an Indian tribe the petition shall be in the form of a tribal resolution or such other form as may be required by the tribal constitution or by-laws. The Office shall make a recommendation to the Secretary of the Interior concerning said petition within sixty (60) days of its report. The provisions of Section 2 of this Act shall also be applicable to petitions covered by this Section.

Sec. 4. The authority of the Indian Trust Solicitor under the provisions of this Act shall be independent of and free from control, regulation, or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice.

Sec. 5. The Indian Trust Solicitor shall have authority to appoint a deputy solicitor and such other assistant solicitors as are necessary, subject to the laws applicable to the employment of attorneys in the Federal government, who shall be responsible to him in rendering legal services both in Washington, D. C., and elsewhere throughout the United States in the performance of the responsibilities of the Office. The Indian Trust Solicitor shall have authority to appoint such other personnel, in accordance with the Civil Service Laws, as amended, as may be necessary in the performance of the duties of the Office.

Sec 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) Indian Trust Solicitor."

Reproduced at the Richard Nixon Presidential Library and Museum

A B I L L

To create the Office of General Counsel for Indian Affairs and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

SEC. 1. There is hereby established in the Office of the Indian Trust Counsel, hereafter referred to as the Counsel, who shall be appointed by the President with the advice and consent of the Senate and will be a part of the Executive Office of the President.

SEC. 2. The Indian Trust Counsel and members of his staff shall render legal services in regard to the natural resources, including but not limited to, the lands, rights to the use of water and hunting and fishing rights of the American Indians, Indian tribes and Alaska Natives coming within the Nation's trust responsibility. Such legal services shall include, but not be limited to the investigation and inventorying of Indian lands and rights to the use of water, the preparation and trial and appeal of cases in all the courts, commissions and in all administrative proceedings. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 3. The Indian Trust Counsel is authorized and empowered in regard to the natural resources and interests therein referred to above to:

(a) Cooperate with private, independent agencies and Indian organizations in furtherance of Indian claims and interests;

(b) Receive funds and assistance from those agencies and entities in furtherance of the objectives of this Act;

(c) Cooperate, investigate, appear by amicus or otherwise, or intervene in any litigation, civil or criminal, pending or initiated involving Indians or Indian Tribes in

Reproduced at the Richard Nixon Presidential Library and Museum

any Federal, State or local court;

(d) Exercise all other or necessary powers as he may deem essential for the protection and preservation of the personal rights, privileges or property rights or interests of Indians or Indian Tribes. ~~in land or water.~~

SEC. 4. The ~~General~~ Counsel shall appoint assistants or deputy ~~general~~ counsels subject to the laws applicable to the employment of lawyers in the Federal Government, and all other personnel required, who shall be responsible to him in rendering legal services both in Washington, D. C. and elsewhere throughout the United States in the performance of the objectives of this ~~legislation.~~ act.

SEC. 5. The functions of the ~~General~~ Counsel and his staff shall be independent of and free from control, regulation or interference from or by the ~~Solicitor~~ Secretary of the Department of the Interior, the Solicitor of the Department of the Interior or members of ~~his~~ their staffs, and from or by the Attorney General of the United States and members of his staff. ~~in the Department of Justice.~~

SEC. 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) General Counsel for Indian Affairs."

SEC. 6.

(a) In furtherance of the objectives and intent of this Act, the ~~Indian Trust~~ Counsel shall have the same right of access to ~~all of~~ the files, records and other data of ~~all~~ agencies of the United States and the same right of subpoena of witnesses and documents as the Attorney General of the United States, ~~and the Solicitor of the Department of the Interior.~~

Reproduced at the Richard Nixon Presidential Library and Museum

II. It is recommended that there be created within the Department of Interior the Office of Indian Trust Solicitor which would be authorized to act on behalf of Indian and Indian tribes within the scope of the Nation's trust responsibility for land and water rights. (Tab D)

ASH COMMISSION - RE RECOMMENDATION FOR ASSISTANT SECRETARY AND THE OFFICE OF INDIAN TRUST SOLICITOR

The Ash Commission expects to submit its recommendation on May 2 regarding the Department of Interior. Included in the report will be a number of recommendations relating to the Bureau of Indian Affairs.

Two recommendations of the Commission regarding a Councilor for American Trust and Treaty People and an Office of Solicitor-Advocate correspond to our recommendations to create an Assistant Secretary for Indian and Territorial Affairs and the Office of Indian Trust Solicitor. The Ash Commission is also considering using the title Administrator rather than Assistant Secretary in the new department.

Reproduced at the Richard Nixon Presidential Library and Museum

BACKGROUND

Chief Justice John Marshall speaking for the Supreme Court in the case of The Cherokee Nation vs. The State of Georgia declared that the relationship of American Indians to the United States "resembles that of a ward to his guardian." Court decisions following have affirmed that a trust relationship with all of the express and implied obligations stemming from it exists between this Nation and its Indian citizens.

Great stress must be applied to the nature of the Indian trust property, including Indian rights to the use of water. It is private property, legal title to which is held by the United States in trust for the American Indians as beneficial holders of equitable title. Indian property is not public property as is the other property of the Nation. Plenary power and responsibility under the Commerce Clause of the Constitution reside with the Congress to effectuate the trust relationship between the United States and the American Indians.

Congress is likewise invested by the Constitution with plenary power over the "public lands," all other lands, all rights to the use of water, title to which resides in the Nation. These lands and rights to the use of water are to be administered for the Nation as a whole. It is imperative that the nature of the right, title, interests and obligations of the Nation in regard to these properties held in trust for the Nation as a whole be sharply

Reproduced at the Richard Nixon Presidential Library and Museum

distinguished from the lands and rights to the use of water of the American Indians.

Congress in the exercise of its plenary power over the Nation's lands and rights to the use of water has invested the Department of the Interior with broad authority to administer, develop, sell, dispose of, and otherwise to take all required action respecting those lands and rights to the use of water. Agencies within the Department of the Interior carrying out the will of Congress in regard to those properties held for the public as a whole include but are not limited to: The Bureau of Reclamation, Bureau of Land Management, National Park Service, Bureau of Outdoor Recreation and the agencies generally responsible for the propagation and protection of fish and wildlife.

Administrators, engineers, scientists, within the Department of the Interior, all acting within the scope of the authority vested in the Secretary of the Interior, are:

(1) Charged with the responsibility of fulfilling the Nation's trust status in regard to the Indian lands and rights to the use of water, which, as stated, are private in character, to be administered solely for the benefit of the Indians;

(2) Charged with the responsibility of administering lands and rights to the use of water claimed in connection with reclamation projects, administration of grazing districts, and other

Reproduced at the Richard Nixon Presidential Library and Museum

land uses requiring the exercise of rights to the use of water; fish and wildlife projects, recreational areas and other activities, all of which require rights in the streams.

Lawyers in the Department of the Interior directly responsible to the Solicitor, in whom resides the obligation of performing the "legal" work for that Department; all of the agencies of it, including the Bureau of Indian Affairs, Indians and Indian Tribes, are constantly confronted with the sharp conflicts of interests between the Indian land and rights to the use of water, and the numerous other agencies referred to that likewise make claims to those waters and contest the rights and claims of the Indians to them. Lawyers in the Department of Justice directly responsible to the Attorney General, the Nation's chief law officer, have the responsibility:

(1) To defend, protect, preserve and have adjudicated, title to the lands of the Indians and their rights to the use of water, and otherwise to act as lawyers for the trustee obligated to perform with the fullest degree of loyalty to the Indians;

(2) To proceed as an adversary against the Indian claims for the seizure of their lands and rights to the use of water, seeking to limit or otherwise defeat the claims of the Indians predicated upon the laws which other attorneys of the Justice Department are required effectively to espouse and advocate on behalf of the Indians;

Reproduced at the Richard Nixon Presidential Library and Museum

(3) To perform legal services in regard to lands and rights to the use of water in streams and other water sources where the Indian rights are in conflict with claims of other agencies of the United States.

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, particularly in the complex and contentious field of Indian rights to the use of water in the arid and semiarid regions of western United States. Failure by those Departments, agencies and personnel to fulfill the Nation's obligation to protect and preserve Indian rights in land and water includes, but most assuredly is not limited to: (a) Lack of knowledge of the existence, or the nature, measure and extent of those rights to the use of both surface and ground waters--refusal to recognize Indian rights are private rights to be administered separate, apart and independent of the "public rights" of the Nation as a whole in identically the same manner as other private rights are protected and preserved; (b) Lack of timely action to preserve, protect, conserve and administer those rights; (c) Inability or reluctance at the decisional level to insist upon recognition and preservation of

Reproduced at the Richard Nixon Presidential Library and Museum

Indian rights to the use of water when to do so would prevent the construction--and/or administration in the manner desired--of a reclamation or other project conflicting with the Indians for water, the supply of which is insufficient; (d) Attempted subordination, relinquishment, or conveyance of Indian rights to the use of water which are in conflict with other claims, Federal, State or local; (e) Failure to assert rights, interests and priorities of the Indians on a stream or project when to do so would limit the interests of non-Indians; (f) Opening Reservations to non-Indian occupancy with the seizure of Indian land and rights to the use of water, with or without the payment of just compensation; (g) The imposition of servitudes, easements, and illegal occupancy or use of Indian lands and rights to the use of water.

Irreparable damage to the American Indians in western United States has ensued by reason of the consequences flowing from the conflicts described above. The Indians have suffered from extreme poverty, with the attendant ills of malnutrition, high infant mortality rate, reduced life expectancy, disease, and the shattering loss of human dignity which stems from poverty and deprivation of the necessities of life.

CONCLUSION

Economic development of the American Indian Reservations in western United States will continue to be prevented or severely

Reproduced at the Richard Nixon Presidential Library and Museum

curtailed in the absence of drastic changes in the laws and policies which would eliminate conflicting rights, responsibilities and obligations which presently exist among the several agencies of the National Government, and the accompanying bill is designed to correct this situation.

This bill proposes creation of an Office of Indian Trust Solicitor to be independent of Solicitor's Office in Interior and of the Department of Justice. The Indian Trust Solicitor can initiate investigations and the preparation of cases protecting Indian rights in land and water and can represent such Indian interests in response to petitions by Indians or Indian tribes. The Indian or Indian tribe may opt to retain private counsel at its own expense and will be required to do so when the Secretary of Interior determines that it is financially able to do so.

The Indian Trust Solicitor as an advocate of Indian interests will prepare briefs for the Secretary of the Interior when an administrative decision affects Indian rights in land and water. The Indian Trust Solicitor will be authorized to bring suit in the appropriate federal court when a lawsuit is necessary to resolve an Indian right to trust property.

Reproduced at the Richard Nixon Presidential Library and Museum

SEC. 7. Nothing in this Act shall diminish the responsibility of the Secretary of the Interior or of any other officer of the United States faithfully to carry out the trust responsibility of the United States owing to the American Indians, on Reservations, Indian tribes and Alaska natives.

to the ~~Bureau of Indian Affairs~~ officers of the United States, to Indians and Indian tribes, and Alaska natives

Reproduced at the Richard Nixon Presidential Library and Museum

SEC. 7. The functions of the Indian Trust Counsel and his staff shall be independent of and free from control, regulation or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 8. The Indian Trust Counsel shall select its officials, agents and employees in keeping with Civil Service standards and practices and said employees shall be included in the federal roster to share in all legal benefits of federal government employment and to be subject to such requirements as to ability and conduct as are thereby prescribed.

SEC. 9. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) Indian Trust Counsel."

Reproduced at the Richard Nixon Presidential Library and Museum

THE WHITE HOUSE

WASHINGTON

Date: 6/4/70

TO: Len Garment

FROM: JOHN C. WHITAKER

Reproduced at the Richard Nixon Presidential Library and Museum

X cert to
Len Garment &
Murray Comarow

Marshall Kaplan, Gans, and Kahn

Partners

Marshall Kaplan
Sheldon P. Gans
Howard M. Kahn
James T. Yamamoto

Associates

Douglas M. Costle
Edward G. Roach
Kurt Wehbring
Joseph Vileno, Jr.

May 27, 1970

Mr. John Whitaker
Deputy Assistant to the President
The White House
Washington, D.C.

Dear John:

Just a quick note.

I have been concerned that one of the several opportunities for real organizational reform will be lost with regard to Indians and territorial peoples. I think that the concept of the Council recommendations has an integrity in its submitted form.

In essence, the concept is to de-administer Indian and territorial Federal assistance policy. The proposed Office of the Solicitor-Advocate would serve the broad goal of de-emphasizing the Indian in terms of his land, and emphasizing him in terms of his humanity and civil rights. The role of the Solicitor-Advocate was to have been to protect the humanity and civil rights of territorial peoples as well.

It seems to me that to do less will merely exacerbate the hysteria which surrounds the larger Indian issue and his land as the raison d'etre of Federal responsibility. Accordingly, I hope that the Administration can consider the role of the proposed Solicitor-Advocate in terms which go beyond mere Indian land trust protection to encompass both American trust and treaty peoples in the broadest sense.

John, I hope we can be in touch.

Sincerely,

Howard M. Kahn
HMK:mjd

Principal Office: 426 Pacific Avenue San Francisco, California 94133 Telephone (415) 433-4814

Reproduced at the Richard Nixon Presidential Library and Museum

Marshall Kaplan, Gans, and Kahn

Partners

Marshall Kaplan
Sheldon P. Gans
Howard M. Kahn
James T. Yamamoto

Associates

Douglas M. Costle
Edward G. Roach
Kurt Wehbring
Joseph Vileno, Jr.

May 27, 1970

Mr. Leonard Garment
The White House
Washington, D.C.

Dear Len:

Just a quick note.

I have been somewhat out of touch with planned Federal Indian reform. Nonetheless, I am concerned that a proposal to appoint a new solicitor whose responsibilities are limited to the protection of the Indian land trust will exacerbate the hysteria surrounding Indians and their land.

I think that so long as Indians have a sense that Federal responsibility is based on the existence of land, rather than on their existence as people, Federal policy will necessarily be heavily administered. The concomitant to such heavy administration is a continuation of the self-destructive dependency under which Indians all too frequently labor.

I hope these comments can prove relevant.

Sincerely,

Howard M. Kahn

HMK:js

c.c. Bradley Patterson

Principal Office: 426 Pacific Avenue San Francisco, California 94133 Telephone (415) 433-4814

Area Offices: Washington, D.C. Boston, Massachusetts Chicago, Illinois Honolulu, Hawaii

Reproduced at the Richard Nixon Presidential Library and Museum

Marshall Kaplan, Gans, and Kahn

Partners

Marshall Kaplan
Sheldon P. Gans
Howard M. Kahn
James T. Yamamoto

Associates

Douglas M. Costle
Edward G. Roach
Kurt Wehbring
Joseph Vileno, Jr.

May 27, 1970

Mr. Leonard Garment
The White House
Washington, D.C.

Dear Len:

Just a quick note.

I have been somewhat out of touch with planned Federal Indian reform. Nonetheless, I am concerned that a proposal to appoint a new solicitor whose responsibilities are limited to the protection of the Indian land trust will exacerbate the hysteria surrounding Indians and their land.

I think that so long as Indians have a sense that Federal responsibility is based on the existence of land, rather than on their existence as people, Federal policy will necessarily be heavily administered. The concomitant to such heavy administration is a continuation of the self-destructive dependency under which Indians all too frequently labor.

I hope these comments can prove relevant.

Sincerely,

Howard M. Kahn

HMK:js

c.c. Bradley Patterson

Principal Office: 426 Pacific Avenue San Francisco, California 94133 Telephone (415) 433-4814

Area Offices: Washington, D.C. Boston, Massachusetts Chicago, Illinois Honolulu, Hawaii

Reproduced at the Richard Nixon Presidential Library and Museum

6/2 INT

Trustees should have
legal counsel. (Kahl)

All Centers should
have right of intervention
& US means something.
when there is just cause.
Right to initiate actions.
Counsel outside of
Govt.

Fund.
Care by Care, mandi
of law suit (by Congress)

DOJ
"no position"

Reproduced at the Richard Nixon Presidential Library and Museum

Ah!

Army FTS is in good; G should be outside detector.

Command must reduce delegation by advising ~~should~~ should of true about the legality of a situation.

Must be ~~with~~ with good USG team the trust responsibility.

Reproduced at the Richard Nixon Presidential Library and Museum

CDW – should be
recall letters –
~~letters made~~
get info ahead
of time –
Work out ~~w/ Lang~~
~~delegation~~ Secy makes
decision – & w/ Lang
delegation is necessary.

Letters mean: Remarks
Indian tribes – not
individual Indians – –

Reproduced at the Richard Nixon Presidential Library and Museum

except dead allottee lands — trust corporation

US Enrolled allottees

perhaps.

---

25 USS 175

3/3/1893

US Attorneys shall represent [illegible]

of.

Reproduced at the Richard Nixon Presidential Library and Museum

Trust Sol 6/1

Suit must be
brought in the name
of the US - as plaintiff
& as Trustee

Who can settle for
the Tribe - (without its
consent? - as AG & Sec
Interior now can!)

How does the ITSol
get out - only from
Tribes? Can mutually
always - - investigative staff

Don't release full
of exp.

Call for felix
Investigation / Research
Assn.

And enjoin a
Congressional
embargo.

~~Co~~ Indian land 25
~~Not~~ subject to eminent
domain - by Congress

Reproduced at the Richard Nixon Presidential Library and Museum

Trust rep:
revolt from
eminent domain?

Building the case re
water rights -- field
work.

Protecting land -
legal tool when
compens acts

Loan of money: Grace
Trust rep: revenue
return from land.

Reproduced at the Richard Nixon Presidential Library and Museum

Trust rep:
revolt from
eminent domain?

Building the case re
water rights -- field
work.

Protecting land -
both bird refuge
& campus arts

Loan of money: Grace
Trust rep: revenue
return from land.

Reproduced at the Richard Nixon Presidential Library and Museum

File for sound—
Julie have options
to take matter into
its own hands.

Reproduced at the Richard Nixon Presidential Library and Museum

Alaska natives?

A B I L L

To create the Office of General Counsel for Indian Affairs and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

SEC. 1. There shall be the Office of General Counsel for Indian Affairs, hereafter referred to as the General Counsel, who shall be appointed by the President with the advice and consent of the Senate, responsible ~~either~~ directly to the Executive Office of the President ~~, or to the Vice President to be determined at the discretion of the President under existing authority~~.

SEC. 2. The General Counsel and members of his staff shall render all legal services ~~relating to~~ in regard to the lands, rights to the use of water, hunting and fishing rights and all interests therein, all natural resources including and inventorying of them, of Indian Affairs, the Indians and Indian Tribes within the Nation's trust responsibility owing to the Indians and Indian Tribes, including but not limited to the investigation and preparation and trial and appeal of cases in all the courts, the commissions and in all administrative proceedings. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 3. The General Counsel is authorized and empowered to: in regard to the natural Resources and interest in them referred to above

(a) Cooperate with private, independent agencies and Indian organizations in furtherance of Indian claims and interests;

(b) Receive funds and assistance from those agencies and entities in furtherance of the objectives of this Act;

(c) Cooperate, investigate, appear by amicus or otherwise, or intervene in any litigation, civil or criminal, pending or initiated involving Indians or Indian Tribes in

Reproduced at the Richard Nixon Presidential Library and Museum

any Federal, State or local court;

(d) Exercise all other or necessary powers as he may deem essential for the protection and preservation of the personal rights, privileges or property rights or interests of Indians or Indian Tribes.

SEC. 4. The General Counsel shall appoint assistants or deputy general counsels subject to the laws applicable to the employment of lawyers in the Federal Government, and all other personnel required, who shall be responsible to him in rendering legal services both in Washington, D. C. and elsewhere throughout the United States in the performance of the objectives of this legislation.

SEC. 5. The functions of the General Counsel and his staff shall be independent of and free from control, regulation or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice.

SEC. 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) General Counsel for Indian Affairs."

Reproduced at the Richard Nixon Presidential Library and Museum

C. Presidential Recommendations

In addition to the Cabinet Officers and the NCIO carrying out their mandates, the President may wish to indicate several critically needed actions which he would want to initiate personally.

1. Legal Advocacy for Indians

Our first citizens lag behind all other groups politically, economically, and educationally in our society. The unique Federal relationship and

Reproduced at the Richard Nixon Presidential Library and Museum

responsibility between the American Indians and Federal Government requires that a more positive and active role be pursued by the Federal Government in protecting Indian land, resources, and individual rights.

Each of the Federal departments will be asked to actively seek ways to assure, through joint planning, that American Indians are getting their full share of all our arsenal of Federal and State programs.

In addition, I am asking the Department of the Interior to create a separate legal entity to actively protect Indian land and resources from encroachment by Federal, State, and individual interests. This office will serve as a legal advocate and counsel for reservation Indians on issues of difference between their tribes, the Federal Government and others.

Reproduced at the Richard Nixon Presidential Library and Museum

B. Indian Trust Solicitor.

This proposal arises from the realization that there is an inherent conflict of interest in having the Secretary of Interior serve in a position where he must at the same time advance the national interest in the use of public land and water rights and also advance the private interests of Indians in their land which he holds as trustee.

OEO

Legally a trustee is obligated to be free of conflicts and exercise the highest degree of diligence, competence and skill in advancing the interests of the beneficiaries of a trust. In a water rights situation, whose interest will the Secretary advance -- the nation's interests as owner of the river bed of a navigatable waterway or the Indians' interest as riparian owners? The Office of the Solicitor of the Department of Interior, where the conflict falls as a practical matter, has in the past been insensitive to the obligations of a Trustee, to understate.

The proposal to create a separate Office of Indian Trust Solicitor, still under the Secretary of Interior, does not resolve the conflict. In the last analysis, it is the Secretary of Interior who is the Trustee and not one Solicitor or another. This new Solicitor may serve to make the Secretary more aware of the conflict in his two roles and thereby strike a better balance between considerations of public land use and the private interest of Indians in their own land, but it still is improper. The role of the advocate cannot be squared with the role of the judge.

In order to have the Trustee's obligation met with integrity, it would seem that it must be performed outside of the Department of Interior. Purists would suggest the creation of an independent counsel.

A middle ground would be for the Administration to request legislation authorizing the Legal Services Program to undertake this responsibility. It is important to note that while more

Reproduced at the Richard Nixon Presidential Library and Museum

than 80% of the on-reservation Indian population have incomes below the poverty line, the right to legal counsel in this case, does not arise out of their inability to finance adequate counsel, but out of their trust agreement with the government. Such a move would make a basic change in the foundation of the Legal Services Program.

Reproduced at the Richard Nixon Presidential Library and Museum

Bureau of Indian Affairs

I. We believe the title for the new Assistant Secretary position should be "Assistant Secretary for Indian and Territorial Affairs.

II. We are in complete agreement with the proposal to establish within the Department of the Interior an Office of Indian Trust Solicitor as proposed in the draft. The purpose of such an Office would be to represent, in administrative and judicial proceedings, the trust responsibilities and obligation of the United States for Indian tribes and Indian tribal property. The role of the Office would be largely an oversight capacity in insuring the vigorous protection of the trust interests of Indian tribes and individuals.

It is completely understood that the Office would in no way replace the right and responsibility of Indian tribes and individuals to retain private counsel to protect both their trust and non-trust rights. However, where the Indians are prevented, by operation of law, lack of financial resources, or by the weight of circumstances, from adequately protecting such interests, the Office would be empowered to take appropriate action.

Reproduced at the Richard Nixon Presidential Library and Museum

It must be perfectly clear that the Office is not to represent Indian tribes or individuals, but to represent and vigorously discharge the trust obligation of the United States owing to that Indian tribe or individual. It is to prevent the abandonment or subordination of the trust obligations by officers of the United States to the United States own governmental or proprietary interests. The action of the Office will, in brief, keep the United States honest in the discharge of its trust obligation.

If the Office is not to supplant the Departmental Solicitor's Office in providing legal advice to the Commissioner and to other Departmental officials, then it should be empowered to challenge any opinion of the Solicitor which infringes or endagers the trust interest of an Indian tribe or an individual.

With this understanding of the concept, we realize that there should be some further study of the draft and perhaps some technical changes. But we must remember this: when the United States defaults on its trust obligation and Indian rights and Indian property is lost, that lostt is irretrivable in many cases even though it may be compensable in monetary damages. The establishment of such an office is urgent.

We would suggest that the staff of the office be given the same protection as is provided for the Hearing Examiners by the Civil Service Commission so that the possibility of intimidation by Departmental officials is minimized.

Reproduced at the Richard Nixon Presidential Library and Museum

C

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

May 18, 1970

Memorandum

To: Franklin D. Ducheneaux, Acting Chief, Legislative and Tribal Relations

From: William H. Veeder, Water Conservation and Utilization Specialist

Subject: Conflict of interest in Justice Department respecting Indians and Indian Tribes

As requested by you, an analysis has been made of the copy of the letter from Shiro Kasiwa, Assistant Attorney General, Department of Justice, to Mr. Kenneth R. Cole, Jr., Deputy Assistant to the President for Domestic Affairs. Assistant Attorney General Kashiwa's letter was attached to a memorandum dated May 12, 1970, from Bobbie Greene to C. D. Ward, transmitting to Mr. Ward the Justice letter.

> Conclusion: Conflicts of interest in the Justice Department relative to Indians and Indian properties are both expressly and tacitly admitted by Assistant Attorney General Shiro Kashiwa of the Department of Justice.

In making those admissions the Justice Department was responding to a request for its recommendations respecting the Vice President's "proposal for an Office of Solicitor Advocate (Indian Trust Solicitor).

(a) Failure of Justice Department to recognize or comment upon the fact that Indian properties are private properties is the greatest deficiency in the Justice statement

This analysis must of necessity be related to the bill containing the Vice President's proposal and the "Background" paper which Justice considered in making its recommendations. In that regard this fact is of transcendent importance:

> In the Background paper it is stated: "Great stress must be applied to the nature of the Indian trust property. * * * It is private property * * *. Indian property is not public property as is the other property of the Nation." (Background, page 1, par. 2)

Reproduced at the Richard Nixon Presidential Library and Museum

Failure of Justice to take cognizance of that quoted, basic, undeniable fact delineates with clarity its conflict of interest; its great dilemma; its damage to the Indians and their interests. Yet if Justice were to admit the private nature of the Indian trust property, it would embarrass defenses it now is interposing where Indian claims are involved. For example, before the Indian Claims Commission it asserts that the seizure by the National Government of lands in an Executive Order Indian Reservation does not constitute a compensable "taking" under the Constitution. A morally and legally irresponsible assertion gravely damaging to the Indians.

Throughout the Justice letter an attempt is made to equate the "public interests" and the "private Indian interests" as the "government interest." That conflict is rejected out of hand as being contrary to basic principles of law pertaining to privately owned land, publicly owned land, land held in trust.

(b) Admissions of conflict of interest and the asserted power in Justice to deny the Indians their day in court or their own representation

This quoted statement from page 1, paragraph 2 of the Justice letter admits that the Justice lawyers represent the Indians and defend against Indian claims - simultaneously at times - a legal and moral impossibility:

> "Litigation for [a] the purpose of enforcing or protecting rights possessed by Indians because of their being under the protective arm of the United States, and [b] the defense of claims brought against the United States and its officers by Indians and Indian tribes, are handled by the Land and Natural Resources Division of the Department of Justice."

Failure to comprehend its irreconcilable conflict of interests - its perplexing dilemma - Justice in the same paragraph speaks of allowing Indians to employ their own lawyers to represent themselves except where Interior and Justice in their discretion believe that "some overriding federal interest requires that the interests of the United States and the Indians be represented by this Department." That policy has two crucial aspects: (a) it asserts a right in effect to deny the Indians their day in court in its entirety, or as pertinent issues which might be raised or (b) it denies the Indians the right to be represented by counsel of their own choosing. Both (a) and (b) are immoral assertions of the right to carry out a policy which may be most damaging to the Indians. Again let it be emphasized: Private Indian lives and property similar to the lives and property of other private citizens are frequently contrary to

Reproduced at the Richard Nixon Presidential Library and Museum

the policy of agencies, Federal, State and local, in which the private citizens must be afforded their own legal representation to effectuate the principles of due process under the law.

This excerpt is in part from page 4 of the "Background" to which Justice refers on page 4 of its letter:

> "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 * * *."

Admitting that conflict, Justice has this to say: "It would be idle to dispute that the Attorney General is oftentimes called upon in litigation to represent different interests of the United States, or that these interests are sometimes at odds with each other." (Emphasis supplied) As stated, the Justice letter is permeated with the concept that "interests of the United States" as a sovereign, as a property owner, is the same as the Indian "interest". Frequently the Indian interest, like any other private interest, is irreconcilably contrary to "public interest" - hence the exercise of the National power of eminent domain against the Indian interest and other private property interests. To declare, as Justice does, that it represents "different interests" which sometimes are "at odds with each other" is an understatement. Daily litigation is in progress or threatening in Western United States in which Reclamation, Fish and Wildlife, other Federal agencies are in clear conflict with Indian interests - they are just at "odds" with each other. Daily, Justice attempts without success to reconcile the irreconcilable, frequently to the irreparable damage of the Indians.

Having admitted its conflict of interest, Justice undertakes rationalization of that conflict. It does so by urging that when it purports to represent Indian and conflicting interests "at odds with each other" this action is warranted because it permits "centralization" of litigation and "promotes reconciliation and accommodation of divergent government interest * * *." Again there is presented the fallacy that the private Indian interests come within the purview of "government interests." Proper perspective must again be created: The Attorney General purports to represent a private and public interest and purports to effect a "reconciliation and accommodation" of those interests. No private lawyer representing a beneficiary under a trust would undertake to represent the trustee when their interests are "divergent" or "at odds with each other." immediate and drastic action against a lawyer making an attempt to represent conflicting interests of a trust beneficiary and the trustee would be taken by the Ethics Committee of the Bar.

Reproduced at the Richard Nixon Presidential Library and Museum

Cryptic meanings are ascribed in the letter to the seemingly innocuous words "reconciliation" and "accommodation" of "divergent government interests." Experience over many years reveals that "reconciliation" or "accommodation" means that Indian rights will be bargained away when politically expedient; that the scope of litigation will be drastically limited to the irreparable damage of the Indians; that forced settlements of cases being tried or pending will be attempted; or decrees which have been entered will be revised.

Implausible nature of the Justice attempt to justify its conflict of interest is well demonstrated in regard to "accommodations" between the private interests of the Indians and what Justice considers to be the public interest. When that occurs it is stated to be the "general practice" to advocate that the Indian interest be given "first consideration." (Bottom of page 4, top of page 5) That statement cannot stand scrutiny. For example, on the Rio Grande today a glaring conflict of interest demonstrates a subordination of Indian interests to State and Federal conflicting claims.

Continuing, arguendo, regarding its conflict of interest, Justice states that Indian advocacy is abandoned when in the view of Justice there is a "higher federal interest." Succinctly stated, Justice will jettison the private interests of the Indians in their properties when, constituting itself judge and jury, it decides there is a conflicting "higher federal interest." For the Indian lawyer - the Justice Department - to seize that power to determine whether it will or will not act to the fullest extent possible to protect the Indian interests is the strongest argument that its conflict of interest is unconscionable and must not be tolerated.

Private properties, including rights to the use of water, of the individual Indian or Indian Tribes may be abandoned, ignored, abridged or lost based upon these criteria as enunciated by Justice on page 5 of its letter. To explain what is described as the "reasons for centralizing litigation responsibility under the Attorney General," the criteria adhered to are set forth: "(1) the need for selectivity in the filing and presentation of cases." Failure to discern Indian interests by Justice is again demonstrated. An Indian or Indian Tribe wants and must have their property protected whenever and however their interests are involved - a normal reaction. Justice reserves the right, however, to abandon, abridge or lose, as stated, an Indian right unless and until a case of its choosing arises. An ordinary trustee would be discharged and held liable if it attempted eclectivity when confronted with the loss of the rights to which the beneficiary is entitled.

Reproduced at the Richard Nixon Presidential Library and Museum

Another factor in the criteria for abandoning Indian rights, as stated by Justice: "(2) the need for presenting to the courts uniform government positions." Fallacies are reiterated by confusing "government positions" with Indian positions, which, as stated, can be and frequently are diametrically opposed. Strained construction of the Commerce Clause in presenting the "government positions" is a prime example of the effect of the conflict of interest so prevalent in the activities of Justice when Indian interests are involved.

Final phase of the guidelines of the Attorney General for "centralizing litigation responsibility" including the Indian interests, is said to be "(3) the need for greater objectivity than an affected agency can have." Had "objectivity" been adhered to by Justice in writing the letter the blatant purported omniscience would have been to some degree muted. Gravest charge against Justice is its failure, due to conflicting interests, strongly to advocate the Indian position. Objectivity is now and obviously throughout many years, has been the facade behind which Justice recedes when confronted with the harsh but manifestly unavoidable choice of demanding full protection and preservation of Indian rights and interests, and representing the interests "at odds."

Rambling nature of the Justice letter has the unavoidable consequence that in some manner the Vice President's inquiry trenched upon the private domain of the Justice Department, which in a defensive attitude has adopted a righteous posture, which is unwarranted. It states on page 2:

> "The proposal of the Vice President includes the transfer to organizations composed largely, if not entirely, of Indians * * *."

In the event of failure, says Justice, the burden "must be borne by them [the Indians] and not by the taxpayers." This threat, it must be observed, is not supported by law or indeed, logic. The dire straits in which the Indians find themselves - unable for the most part to afford private adequate representation in costly litigation - is most assuredly not their action. Continuing, Justice advises the Vice President that if it is not allowed by reason of conflict of interest, to continue to purport to represent the Indians, "The United States should not remain responsible for activities which are beyond its control." Responding to that rather bizarre statement is this fact: The Justice Department is but a part of the United States. Quite clearly another, better equipped agency without conflicting interests which harrass Justice, could more properly represent the Indians.

There must, of course, be challenges made to many features and aspects of the Justice letter. The Indians cannot afford adequate representation themselves. Hence, the United States has the obligation and

Reproduced at the Richard Nixon Presidential Library and Museum

should fulfill it by representation not involved in conflicts of interest.

No request was made that an analysis be offered of the bill submitted to Justice. It is a matter, however, that is under consideration both as to scope and intendment.

If you would care to discuss this matter further, I shall, of course, be available at your call.

William H. Veeder
Water Conservation and
Utilization Specialist

Reproduced at the Richard Nixon Presidential Library and Museum

ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES
DIVISION

Department of Justice
Washington

Mr. Kenneth R. Cole, Jr.
Deputy Assistant to the President
for Domestic Affairs
The White House
Washington, D.C.

Dear Mr. Cole:

This is in response to the request for the recommendations of this Department on the Vice President's proposal for an Office of Solicitor Advocate (Indian Trust Solicitor). The request is accompanied by a memorandum for the President on "Indian Affairs", a statement entitled "Background", a proposed bill to create the office of Indian Trust Solicitor in the Department of the Interior and for other purposes, and a one-page statement entitled "Need for the Indian Trust Solicitor".

At the present time there is an Indian Division in the Office of the Solicitor, Department of the Interior, which serves as advisor to the Secretary of the Interior and the Bureau of Indian Affairs on legal matters. Litigation for the purpose of enforcing or protecting rights possessed by Indians because of their being under the protective arm of the United States, and the defense of claims brought against the United States and its officers by Indians and Indian tribes, are handled by the Land and Natural Resources Division of the Department of Justice. Tribal claims against the United States are prosecuted by counsel employed by the tribes and individual Indians or tribes are free to employ their own counsel to handle their litigation. In the event they desire to do so, it has been the policy of this Department and the Department of the Interior to permit them to do so, except in the unusual case where some overriding federal interest requires that the interests of the United States and the

Reproduced at the Richard Nixon Presidential Library and Museum

Indians be represented by this Department. One example of such exception is when the United States has undertaken to represent, and is representing, the Indian interest, and the Indians then seek to participate in the litigation separately through independent counsel. In recent years, the Indians have been much more active in employing their own counsel and few cases have fallen within the exception stated.

The proposal of the Vice President includes the transfer to organizations composed largely, if not entirely, of Indians (presumably entirely outside of the Department of the Interior) of important federal programs authorized for the benefit of the Indians. While the proposal to transfer the functions appears clear, the proposal is silent as to where the responsibilities will lie. If such transfers are to be made, it should be clear that all responsibilities for a function are also being transferred to the Indians and that any resultant failures must be borne by them and not by the taxpayers. The United States should not remain responsible for activities which are beyond its control.

In connection with the transfer of additional activities to the Indians, or possibly independent thereof, the proposal includes a recommendation for the creation of the office of Indian Trust Solicitor and a draft bill to accomplish this purpose has been prepared. We find the draft bill quite ambiguous. It would apparently take some, if not all, of the duties now performed by the Indian Division of the Office of the Solicitor, Department of the Interior, out of that office and place them in the office of the Indian Trust Solicitor, who would be responsible directly to the Secretary. It would also authorize the Trust Solicitor to conduct litigation with respect to matters so assigned to him.

Reproduced at the Richard Nixon Presidential Library and Museum

One of the principal ambiguities is whether the office of the Indian Solicitor would represent only the interests of individual Indians and tribes in litigation or whether he would also act in behalf of the United States, thus supplanting the duties of the Attorney General insofar as Indian litigation is concerned. The proposal appears broad enough to authorize the Indian Trust Solicitor to take over the defense (as well as the prosecution) of Indian claims against the United States and its officers.

Whether attorneys in the Department of the Interior working on Indian matters remain within the Office of the Solicitor or whether they are responsible directly to the Secretary is a matter primarily of concern to that Department. We note, however, that such a change would not eliminate the supposed conflicts which are asserted as the reason for the proposal. Whereas the Solicitor is now the Interior Department legal officer in position to make decisions related to litigation where the interests of various bureaus in the Department are different, under the proposal it would be the Secretary himself, or his delegate (who would presumably have to be other than the Solicitor in order to accomplish the purpose of the proposal), who would have to decide when one of the interests involves the trust responsibility of the United States respecting Indian lands "and rights attached thereto". But the decisions would still have to be made and it is highly doubtful that legislating that they must be made by the Secretary rather than the Solicitor would be in the interest of good administration.

To the extent the proposal would authorize the Indian Trust Solicitor to conduct litigation in behalf of the United States or its officers, we are opposed to it. Our opposition applies even though the proposal be modified to make clear that the Trust Solicitor would participate in litigation only in support of claims of rights held by or for Indians.

Reproduced at the Richard Nixon Presidential Library and Museum

First, it has long been established that the Attorney General, as the chief law officer of the United States, should be responsible for litigation to which the United States or its officers are party. The very limited number of exceptions to this rule which presently exist are not justification for additional exceptions. As a matter of fact, by memorandum of April 29, 1970, Mr. Krogh advised the Attorney General that arrangements had been made whereby the Office of Legislative Reference of the Bureau of the Budget will require the inclusion in all drafts for legislation of language placing in the Attorney General the control and direction of any litigation involving the United States, its offices, and agencies.

Second, the paper entitled "Background" submitted with your request indicates that the justification for the proposal is an asserted conflict in representation by the Attorney General, as well as in the office of the Solicitor of the Department of the Interior, of diverse interests of the United States. At page 4 of the "Background" paper, the statement is made that "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 * * *". It would be idle to dispute that the Attorney General is oftentimes called on in litigation to represent different interests of the United States, or that these interests are sometimes at odds with each other. But the centralization of legal representation of the Government in this Department does not prevent fulfilling the fiduciary obligation of the United States to the Indians; on the contrary, such centralization promotes reconciliation and accommodation of divergent government interests which may be involved in litigation. Where such reconciliation or accommodation

Reproduced at the Richard Nixon Presidential Library and Museum

cannot be effected to the advantage of the Indian interest, it has been the general practice in this Department to advocate that such interest be given first consideration unless there be a higher federal interest, such as an international obligation or a constitutional power, to which it must be subordinate. This does not mean that the Attorney General will always adopt for litigative purposes legal theories and decisions which he is requested to advocate in behalf of Indians. Sometimes it is necessary, in the exercise of sound legal judgment, to reject some requests because they are deemed legally unsound or tactically imprudent and it is deemed that their advancement would not be to the advantage of the Indian interest. But such differences of opinion are inherent in the handling of any legal matter, and it is beyond dispute that such cannot be and would not be eliminated by the designation of an independent law officer to handle litigation involving the United States and its officers with respect to Indian land matters. The principal reasons for centralizing litigation responsibility under the Attorney General, as discussed in the next preceding paragraph, are: (1) the need for selectivity in the filing and presentation of cases; (2) the need for presenting to the courts uniform government positions; and (3) the need for greater objectivity than an affected agency can have. Representation of the United States in litigation in connection with its fiduciary obligations to Indians is not so different from representation of the United States in connection with other interests, administrative responsibility for which is vested in separate agencies as to make any of these reasons inapplicable. On the contrary, in our judgment the application of these principles to the administration of litigation involving Indian interests results in more effective representation of those interests than would be possible were the proposal under discussion to be adopted.

Reproduced at the Richard Nixon Presidential Library and Museum

If it is the purpose of the proposal only to authorize the Indian Trust Solicitor to represent the interests of Indians and Indian tribes in their own name and not in the name of the United States, and the proposal were modified to make this clear, the question would simply be: is such either necessary or desirable? As already indicated, there is nothing to preclude Indians and Indian tribes at the present time from choosing to advance their interests through private counsel. In addition, a considerable number of Indian groups presently obtain legal representation under the legal service program of the Office of Economic Opportunity. When the Indians concerned, and the Department of the Interior, so request, this Department also provides representation unless in the exercise of its best judgment the matter should not be litigated, a decision which is seldom made. The existence of these different opportunities for representation has given rise to some difficulties, and it is suggested that provision for an additional opportunity for representation of Indians and Indian tribes in their own names through an office of Indian Trust Solicitor could be expected to cause additional confusion.

Sincerely,

Shiro Kashiwa
Assistant Attorney General

Reproduced at the Richard Nixon Presidential Library and Museum

EXECUTIVE OFFICE OF THE PRESIDENT
PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
WASHINGTON, D. C. 20506

May 12, 1970

MEMORANDUM FOR KEN COLE

SUBJECT: Vice President's Proposal for an Indian Message (White House Log No.: 3851)

The organizational proposals contained in the Vice President's memorandum for the President on Indian affairs are consistent with proposals of PACEO, but do not go as far. In particular, the Solicitor Advocate proposed by PACEO (corresponding to the position of "Indian Trust Solicitor" in the Vice President's memorandum) should, in our view, represent both Indian and territorial peoples and should undertake actions to protect both personal and property rights. As we understand the position of "Indian Trust Solicitor" he will be limited to protecting property rights only. Further, he will represent only the rights of Indians in such matters and not those of territorial peoples.

We also feel that Indian social welfare and educational programs should be administered separately from a resource development and trust function, although this separation could be accomplished with both functions reporting to the same Assistant Secretary.

We support the recommendation to upgrade the handling of Indian affairs within the Department of the Interior, and have no objections to the choice of "Assistant Secretary for Indian Territorial Affairs" as the new title.

PACEO recommendations concerning Indian affairs and the Office of Territories are contained in Tab C of the Council's memorandum to the President on natural resources which was transmitted to John Whitaker this date.

Andrew M. Rouse
Acting Executive Director

Reproduced at the Richard Nixon Presidential Library and Museum

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 18, 1970

MEMORANDUM FOR

THE HONORABLE RICHARD G. KLEINDIENST

SUBJECT Office of Indian Trust Solicitor

Attached is the response from the Department of Justice relating to the creation of an Office of Indian Trust Solicitor within the Department of the Interior. The response opposes the creation of such a position. I would request that you personally review this situation, especially in view of the attitude of Congressional leaders on this proposal.

During the past several days, various members of the White House and the Vice President's staffs have visited Congressional offices to discuss the various proposals that are currently under consideration to be included in a Presidential statement or message on Indian affairs. Of these various proposals, none has received as enthusiastic a response as the one relating to the Office of Indian Trust Solicitor.

This was particularly the case with respect to Congressman Saylor, the ranking minority member of the House Interior and Insular Affairs Committee, and Senator Allott, the ranking minority member of the Senate Interior and Insular Affairs Committee.

C. D. Ward
Assistant to the
Vice President

Reproduced at the Richard Nixon Presidential Library and Museum

BR 5/28

Bureau of Indian Affairs

The major point of contention in the responses to this section concerns the proposed creation of an Office of Indian Trust Solicitor.

Mr. Garment suggests that the responsibilities of such a solicitor should be expanded beyond questions of water and land as proposed. The Ash Commission suggests that the brief of any such office should include personal and property rights. The OEO proposes vesting all such responsibilities in its own Legal Services program rather than a new office in the Department of Interior. These proposals seem to miss the point that the objective in the creation of the new Office of Indian Solicitor is to safeguard the integrity of the trustee obligations and that this obligation is in the area of land and water. Where questions of personal, civil rights, and so forth arise, individual Indians can of course have recourse to the OEO Legal Services Program; OEO can be complimented and encouraged to extend even further its activities in the area of legal services.

The Justice Department raises very strong objections to the proposal. I believe that negotiations are under way between yourself and Mr. Kleindienst on this subject. The Vedder bill (attached) should receive full consideration.

On a separate suggestion, we can support the OEO suggestion that the President ask the Attorney General to examine the problem of legal jurisdictions affecting Indians.

We also support the suggestion of Mr. Garment that a note be made to the speech writer to "refer to the new mostly-Indian team which is just coming on duty in BIA, express pleasure at their advent and confidence in their competence and explicitly defer any ideas concerning further BIA reorganization until the new team has had time to get its feet on the ground and make recommendations to the Secretary and to the President and also time to consult on such matters with the Indians."

Reproduced at the Richard Nixon Presidential Library and Museum

A B I L L

To create the Office of General Counsel for Indian Affairs and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

SEC. 1. There shall be the Office of General Counsel for Indian Affairs, hereafter referred to as the General Counsel, who shall be appointed by the President with the advice and consent of the Senate and will be responsible directly to the Executive Office of the President.

SEC. 2. The General Counsel and members of his staff shall render all legal services in regard to the lands and rights to the use of water of Indians or Indian Tribes, within the Nation's trust responsibility owing to the Indians and Indian Tribes, including but not limited to the investigation and inventorying of Indian lands and rights to the use of water, the preparation and trial and appeal of cases in all the courts, commissions and in all administrative proceedings. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 3. The General Counsel is authorized and empowered to:

(a) Cooperate with private, independent agencies and Indian organizations in furtherance of Indian claims and interests;

(b) Receive funds and assistance from those agencies and entities in furtherance of the objectives of this Act;

(c) Cooperate, investigate, appear by amicus or otherwise, or intervene in any litigation, civil or criminal, pending or initiated involving Indians or Indian Tribes in

Reproduced at the Richard Nixon Presidential Library and Museum

any Federal, State or local court;

(d) Exercise all other or necessary powers as he may deem essential for the protection and preservation of the personal rights, privileges or property rights or interests of Indians or Indian Tribes.in land or water.

SEC. 4. The General Counsel shall appoint assistants or deputy general counsels subject to the laws applicable to the employment of lawyers in the Federal Government, and all other personnel required, who shall be responsible to him in rendering legal services both in Washington, D. C. and elsewhere throughout the United States in the performance of the objectives of this legislation.

SEC. 5. The functions of the General Counsel and his staff shall be independent of and free from control, regulation or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice.

SEC. 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) General Counsel for Indian Affairs."

Reproduced at the Richard Nixon Presidential Library and Museum

Vader
5/19
Brad

A B I L L

To create the Office of General Counsel for Indian Affairs and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

SEC. 1. There shall be the Office of General Counsel for Indian Affairs, hereafter referred to as the General Counsel, who shall be appointed by the President with the advice and consent of the Senate, responsible either directly to the Office of the President or to the Vice President to be determined at the discretion of the President under existing authority.

SEC. 2. The General Counsel and members of his staff shall render all legal services relating to Indian Affairs, the Indians and Indian Tribes within the Nation's trust responsibility owing to the Indians and Indian Tribes, including but not limited to the investigation and preparation and trial and appeal of cases in all the courts, commissions and in all administrative proceedings. The United States waives its sovereign immunity from suit in all proceedings within the purview of this Act.

SEC. 3. The General Counsel is authorized and empowered to:

(a) Cooperate with private, independent agencies and Indian organizations in furtherance of Indian claims and interests;

(b) Receive funds and assistance from those agencies and entities in furtherance of the objectives of this Act;

(c) Cooperate, investigate, appear by amicus or otherwise, or intervene in any litigation, civil or criminal, pending or initiated involving Indians or Indian Tribes in

Reproduced at the Richard Nixon Presidential Library and Museum

any Federal, State or Local Court;

(d) Exercise all other or necessary powers as he may deem essential for the protection and preservation of the personal rights, privileges or property rights or interests of Indians or Indian Tribes.

SEC. 4. The General Counsel shall appoint assistants or deputy general counsels subject to the laws applicable to the employment of lawyers in the Federal Government, and all other personnel required, who shall be responsible to him in rendering legal services both in Washington, D. C. and elsewhere throughout the United States in the performance of the objectives of this legislation.

SEC. 5. The functions of the General Counsel and his staff shall be independent of and free from control, regulation or interference from or by the Solicitor of the Department of the Interior or members of his staff, and of the Attorney General of the United States and members of his staff in the Department of Justice.

SEC. 6. The Federal Executive Salary Act of 1964 (5 U.S.C. 2211) is amended by adding to Section 303(d) thereof the following clause: "(70) General Counsel for Indian Affairs."

Reproduced at the Richard Nixon Presidential Library and Museum

BUREAU OF INDIAN AFFAIRS

I. Assistant Secretary for Indian and Territorial Affairs

Comments. We support this proposal.

II. Interior Office of Indian Trust Solicitor

BoB 5/7

Comments. The reasoning behind this proposal is that the Federal Government cannot, as it now operates, fulfill all of its trust obligations to tribes, that there is a built-in conflict within the Interior and Justice Departments regarding the protection and development of Indian land and water rights, and that a new independent office is needed to address Indian land and water rights problems. We recognize that there are conflicting demands on the Interior and Justice Departments in these areas and support the recommendation.

Note that the proposals for an Assistant Secretary and for an Office of Indian Trust Solicitor overlap to some extent ideas being considered by the Ash Council and should be reconciled with the Ash Council's recommendations.

Reproduced at the Richard Nixon Presidential Library and Museum

IRREPARABLE DAMAGE TO AMERICAN INDIANS BY CONFLICTS OF INTEREST IN JUSTICE DEPARTMENT AND INTERIOR SOLICITOR'S OFFICE - INDIAN NEED FOR INDEPENDENT LEGAL REPRESENTATION

Conflicts of interest, deep-rooted and all-pervasive, preclude American Indians from receiving proper or adequate legal advice or representation by either the Justice Department or Interior Solicitor's Office. Conflicts of that nature include but are not limited to (a) legal representation in courts or other tribunals; (b) day-to-day administration of their lands and rights to the use of water; (c) legal advice and counseling; (d) matters pertaining to legislation and the interpretation of it. Those conflicts in Justice and Interior as they pertain to the American Indians, result in flagrant abuse of discretion, acts of commission or omission, conduct restricting Indian interests, procrastination, avoidance of needed action, dilatory practices. Examples will demonstrate those losses and the gravely distressing circumstances confronting the Indians and Indian Tribes by reason of the conflicts.

Abandonment or failure to assert Indian claims: (a) Sherrill v. McShan: Invaluable lands claimed by the Mohave Tribe of Indians were involved in the case of Sherrill v. McShan. The Justice Department was requested to represent the Indian interests in court. Evidencing the conflict of interest between the Indians and Interior's Bureau of Land Management, Justice without notice to the Indians, abandoned their claim in the course of trial and asserted title in the Federal Government. The United States lost the case in both the Arizona Federal District Court and in the Court of Appeals. 1/ At great cost the Indians now seek on their own behalf to recover the lands and initiated the case of Mohave v. LaFollette. A motion to dismiss their claim has been filed on the grounds, among others, that a judgment adverse to the United States is res judicata against them.

(b) Solicitor's conflict of interest regarding Mohave Indian land involving a California claim: With full knowledge of Mohave claims to 1,500 acres of land, likewise claimed by California, the Solicitor's Office conducted a hearing concerning which neither the Mohaves nor the Bureau of Indian Affairs was given notice or an opportunity to be heard. Two years of struggle and strenuous political pressure forced a rehearing of the matter. 2/ At the rehearing the Solicitor's Office assertedly bound by a Solicitor's opinion adverse to the Indians, represented Interior's Bureau of Land Management. The Mohaves have been and are now being forced at great cost they can ill afford, to protect themselves due to the conflict of interest in the Solicitor's Office. Proving the conflict of interest is this fact: When the Mohaves petitioned for legal assistance in the rehearing, they were advised that a lawyer for the Bureau of Indian Affairs was not available because it would conflict with the interests of the United States and was violative of 28 U.S.C. 205.

Pyramid Lake struggle epitomizes conflicts of interest in Justice and Interior: Destruction of Pyramid Lake by Reclamation projects built and abuilding is at hand. Through the years Solicitor's opinions and activities on behalf of Reclamation adverse to the Pyramid Lake Tribe of Indians,

Reproduced at the Richard Nixon Presidential Library and Museum

have contributed greatly to diversions of Truckee River water away from Pyramid Lake, its precipitous decline and presently assured destruction. 3/ When Justice attempted to abandon a long-standing decree in the Alpine Case, which abandonment would damage the Indians, they intervened in Alpine. Justice vigorously opposed the Indians in the lower court; opposes them on appeal. 4/ Impoverished Pyramid Lake Indians, at their own expense and with private assistance, will seek to defend themselves against further seizure of their Truckee River rights by Interior's Reclamation, the States of Nevada and California.

Mission Indians on San Luis Rey victims of conflicts: In 1894 Interior attempted by an agreement to deprive Mission Indians of invaluable rights in the San Luis Rey River. Repeated attempts by the Indians to void the 1894 agreement have failed. The Indians now seek to recover monetarily for their losses in the Indian Claims Commission. Justice defends on the grounds their rights are not adjudicated; when the Indians attempted to force Justice to have their rights determined, Justice refused to act. Both Justice and the Solicitor's Office, wholly without adequate information as to the law or the facts, meets with opponents of the Indians on May 26, 1970, in an attempt to force the Indians to accept another "settlement". 5/

Colorado River Indian Tribes gravely damaged by conflicts within Solicitor's Office: Boundary disputes dating back to 1879 with Interior's Bureau of Land Management plague Colorado River Tribes. Repeatedly the Solicitor's Office has ruled contrary to Indians; has effectively denied them their day in court. Vacillation, delays, avoidance of responsibilities, failure to advocate Indian position, cause them irreparable damage. 6/

Violation of decree threatens Yakimas: In 1945 a Federal Decree was entered protecting the Yakimas' rights in a river named after them. In total disregard of the decree, with the advice of the Solicitor's Office, Interior's Reclamation Bureau has undertaken the construction of the Kennewick Project and its extension, which commits Yakima Indian water, to their irreparable damage, to non-Indian uses. Representatives of the Solicitor vigorously opposed the Yakimas in their objection to Kennewick. 7/

Montana's Indians suffer from Solicitor's conduct: On advice from the Solicitor, Flathead Indians have been denied priorities and their rights invaded for non-Indian benefits; on advice from the Solicitor the waters of the Big Horn River are being sold and Indians' contractors required to pay Reclamation for water rightfully claimed by the Crow Indians. 8/

Pueblos' losses: Conflicts threaten destruction of Pueblo Indians on Rio Grande. 9/

Legislative opposition: In keeping with Indian policy, Justice opposes legislation which would restore land to Flatheads. 10/

Attached is proposed bill and documentation.

May 20, 1970

William H. Veeder

Reproduced at the Richard Nixon Presidential Library and Museum

IRREPARABLE DAMAGE TO AMERICAN INDIANS BY CONFLICTS OF INTEREST IN JUSTICE DEPARTMENT AND INTERIOR SOLICITOR'S OFFICE - INDIAN NEED FOR INDEPENDENT LEGAL REPRESENTATION

Documentation of footnotes for above captioned memorandum dated May 20, 1970

1. Sherrill v. McShan, U.S.D.C. Arizona, Civil No. 5431, decree August 17, 1964; Sherrill v. McShan, 356 F.2d 607 (CA9, 1966).

2. Bureau of Land Management hearing, Swampland Selection A 31022. See Congressman Pettis' attack on Solicitor's Office for its conduct, Congressional Record December 4, 1969.

3. Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, Joint Committee Pring, pages 497 et seq.

4. U. S. v. Alpine Land & Reservoir Company, Pyramid Lake Tribe of Indians, Interveners, U.S.D.C. Nevada; Court of Appeals for the Ninth Circuit, United States in opposition.

5. Rincon * * * La Jolla * * * v. The Escondido Mutual Water Co., Walter J. Hickel, United States Secretary of the Interior; John N. Mitchell, United States Attorney General, City of Escondido, Defendants, U.S.D.C. S.D. Cal.
Rincon * * * La Jolla * * * v. U.S., Ind. Cl. Comm. Docket 80-A.

6. U. S. V. C. D. Williams, U.S.D.C. S.D. Cal; U. S. Court of Appeals, 9th Circuit. Solicitor's opinion January 17, 1969.

7. Sunnyside * * * v. Kittitas * * *, U.S.D.C. E.D. Wash. Decree January 25, 1945; Kennewick Reclamation Project.

8. U. S. v. Alexander, 131 F.2d 359 (CA9, 1942); See memorandum dated August 12, 1969, to Assistant Secretary of Interior analyzing Crow Indian rights.

9. New Mexico, Plaintiff; United States, Intervener v. Aamodt, et al. No. 6639 U.S.D.C. N.M., and related cases.

10. Senate Bill 1517, "To set aside certain lands in Montana for the Indians of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana."
Deputy Attorney General Kleindienst and Under Secretary of the Interior Russell both formally oppose enactment of this legislation. Mr. Russell states, "We are, in keeping with the basic policy of this Department that Indian claims to land should be satisfied by money payments rather than by restoration of land, recommending against enactment of this bill.

Reproduced at the Richard Nixon Presidential Library and Museum

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET
WASHINGTON, D.C. 20503

JUN 3 1970

MEMORANDUM FOR MR. KEN COLE

Subject: Proposed Office of General Counsel for Indian Affairs

This is in reply to your memorandum of May 25 requesting our comments on a draft bill to establish an Office of General Counsel for Indian Affairs in the Executive Office of the President.

At the outset we should indicate that we are sympathetic to efforts to protect and defend the Indians' legal rights and lawful claims. We note that such protection is the subject of a number of studies and proposals including, in addition to the present proposal, a draft bill to establish an Indian trust solicitor in the Department of the Interior and organizational proposals which, we understand, the Ash Council is studying. We are not clear how much these three proposals have in common, but it would be important to clarify their relationship in the process of reaching a decision on any one of them.

The current bill raises a number of significant policy, legal, and organizational issues which need fuller exploration than we are in a position to give at this point. In particular, we would like to see the views of Justice and Interior, whom you have also asked to comment, before we comment definitively on this draft bill.

At this time we would like to raise the following questions:

(1) Assuming an Office of Legal Counsel for the Indians is established, should it be located in the Executive Office of the President? We do not see this as an appropriate location. The need for Indian representation at the Executive Office level is already met, we believe, by the National Council on Indian Opportunity chaired by the Vice President. An Indian legal office would be heavily engaged not in policy formulation, but in day-to-day litigating activities, much of which would not be of

Reproduced at the Richard Nixon Presidential Library and Museum

major import. Its activities could also be expected to be controversial and it would frequently be in opposition to other established law offices of the executive branch. For these reasons we think any Indian legal office should be located either as an independent entity in the Department of the Interior or elsewhere in the executive branch.

(2) Should an Indian legal office concern itself with all Indian legal rights and interests, both tribal and individual, as section 3(c) of the draft bill apparently contemplates, or should it be limited to Indian land and water rights stemming from U.S. trust responsibility? We think a more circumscribed role would have much to commend it. The Office of Trust Solicitor in Interior, as described in an earlier draft bill which you sent over as part of a larger Indian legislative package, would adopt such a limited role.

(3) Has any thinking been done about having some organization created outside the Federal Government which would act as an advocate and defender of Indian legal rights? It might be funded by the Indians themselves, by foundation grants, and conceivably by grant or subsidy from the Federal Government. An outside organization would avoid some of the conflicts which must inevitably arise when the Federal Government acts in the multiple roles of trustee for the Indians, protector and defender of Federal legal rights in land and water, and interpreter of the public interest generally.

Finally, we would note that the current draft bill is deficient in various technical respects; we assume that Justice and Interior will comment on these matters.

Your memorandum poses two specific questions which we would answer as follows:

First, with respect to the provisions of section 3(d) of the bill, we think that they are limited to land and water rights and interests. On the other hand, section 3(c), as noted earlier, seems to contemplate that the Office of General Counsel for Indian Affairs would concern itself with all Indian legal problems and claims.

Reproduced at the Richard Nixon Presidential Library and Museum

Second, we would defer to Justice and Interior as to whether it would be necessary to have the General Counsel bring suit in the name of the United States as trustee in certain cases.

James R. Schlesinger

James R. Schlesinger
Acting Deputy Director

Reproduced at the Richard Nixon Presidential Library and Museum

U.S. Had Warning Of Indian Wrath On Fishing Rights

By William Greider
Washington Post Staff Writer

The memorandum was addressed to Washington headquarters from the Department of the Interior's regional office in Portland, Ore., and expressed an urgency not always found in governmental correspondence.

"I'm writing this confidential memorandum," said assistant regional solicitor George D. Dysart, "because I am afraid the department is going to have an Indian problem blow up its face. And neither this department nor the Department of Justice can avoid responsibility for the explosion."

That warning was sounded Jan. 15 of this year, when the steelhead trout were running on the rivers of western Washington. Dysart pleaded for the government to get moving on lawsuits to protect the fishing rights of several Indian tribes in their running feud with fish and game agencies in the state of Washington.

Two weeks ago, his prophecy of trouble was fulfilled. An armed camp of militant Puyallip Indians, fishing on the Puyallip River at Tacoma in violation of state regulations, clashed with police attempting to seize their salmon nets and gear.

Shots were fired at the law enforcement officers. Two firebombs were tossed at a railroad bridge. Police fired tear gas and arrested about 60 Indians and their supporters on felony riot charges. No one was injured.

Last Friday, nine days after the skirmish at the river, the federal government filed its fishing-rights suit in behalf of the Puyallip and six other tribes against the state of Washington.

This sequence of events either adds up to an "unfortunate coincidence," as Dysart described it in a telephone interview, or an object lesson for Indians on how to get government action.

In either case, Dysart acknowledged, the militant Indians will insist it was their confrontation with police that finally produced the long-sought legal action. "We were afraid something like that was going to happen," he said.

The episode will be discussed this morning, along with other cases of government representation for Indians, at a Senate Interior Committee hearing.

Sen. Edward M. Kennedy, who obtained copies of Dysart's memorandums, will testify in support of the administration proposal for an independent legal agency to represent Indian rights in land and natural resources disputes.

The tribes and Dysart had been urging Justice for months to represent several Indian tribes facing state-court injunctions and to file a broader lawsuit in federal court that would define and protect the tribes' historic fishing rights established by treaties in the 19th century.

The issues include the Indians traditional use of nets to take steelhead trout, a practice that violates the state's sports fishing regulations but predates the state government's existence.

Dysart quoted one Indian woman as saying, "To hear the game commission talk, you'd think the steelheads followed the Mayflower over."

The tribes contend that the treaties and previous legal decisions require the state to provide different rules for them than the regulations covering non-Indian interests. Among other issues, the lawsuit is intended to settle the Indians use of different and longer fishing seasons.

The lawsuit filed last week by the U.S. attorney in Tacoma contends that Indians have not been allowed "a fair and equitable portion of the fish which are available." It also alleges that state officers have "harassed, intimidated and threatened" the Indian fishermen.

At the Justice Department in Washington, Floyd France, a lawyer in the land and natural resources division, said the suit was already well along in preparation when the violence occurred.

"I suppose it may have had some bearing," he said. "Maybe we hurried a little bit."

France said he didn't recall any urgent memo from the Portland office asking for faster action. Perhaps, he said, the warning was not forwarded from Interior to Justice.

The lengthy preparation, France said, was required because of pending state-court cases and because the U.S. lawsuit would cover major issues in the protection of seven tribes on a number of rivers, an action which required "considerable study."

In his memos, Dysart acknowledged the reluctance of the federal government to get into legal fights with state agencies, but insisted that these actions are required by the U.S. trust responsibilities established in the Indian treaties.

PRESERVATION COPY

Reproduced at the Richard Nixon Presidential Library and Museum

September 25, 1970

STATEMENT IN SUPPORT OF S. 4165 "TO PROVIDE FOR THE CREATION OF THE INDIAN TRUST COUNSEL AUTHORITY, AND FOR OTHER PURPOSES"

CONFLICTS OF INTEREST WITHIN THE FEDERAL GOVERNMENT THREATEN AMERICAN INDIANS THROUGHOUT WESTERN UNITED STATES

William H. Veeder [1]

Conflicts of interest within the Interior and Justice Departments respecting American Indians was the subject of a paper which was one of several in a Compendium published by the Congress and released January 18, 1970.[2] It was entitled "Federal Encroachment On Indian Water Rights And The Impairment Of Reservation Development." Outlined in that paper in some detail are numerous examples of conflicts of interest within the mentioned Departments that have so devastated the American Indian Reservations in Western United States. That paper, the examples which it contained, and the documentation in support of those examples, are incorporated by reference into this statement and made a part of it.

1/ STATEMENT BY WILLIAM H. VEEDER BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS, SEPTEMBER 25, 1970

My name is William Hubert Veeder. I am an employee of the Bureau of Indian Affairs in the Department of the Interior. My position is Water Conservation and Utilization Specialist.

I am appearing at the request of the Committee. I am not authorized nor am I presuming to speak for either the Department of the Interior or the Bureau of Indian Affairs. This Committee has heard from Secretary Hickel, Assistant Secretary Loesch and Commissioner Bruce on the pending bills S. 4115 and S. 4165.

If there is any factual information the Committee desires, I will be happy to answer any questions the Committee may feel it is appropriate to ask me.

(The foregoing statement in regard to my appearance was prepared by Assistant Secretary of the Interior Harrison Loesch and delivered to me at 11.45 a.m. September 18, 1970.)

2/ "Toward Economic Development For Native American Communities"- A Compendium of Papers Submitted to the Subcommittee on Economy In Government of the Joint Economic Committee, 91st Congress, 1st Session.

Reproduced at the Richard Nixon Presidential Library and Museum

Those examples, as stated, are representative of the crisis facing the American Indians. They receive wholly inadequate legal services from Federal lawyers whose efforts are frequently restricted due to their ambivalent status - adversaries of the Indians, purported advocates of the Indians. Throughout the Interior and Justice Departments, legal agencies are required by law to represent American Indians and incredibly are likewise required by law to represent antagonistic Federal interests. A prime example is the Pyramid Lake controversy reviewed in detail in the Compendium paper. Because of their duties owing to the Bureau of Reclamation and other agencies of the Interior Department, or their reluctance to challenge the Corps of Engineers, those lawyers never fully advocate the Indian position or fully advise the Indians of their interests.

A case very much in point is that of the Lummi Indians on Puget Sound who have invaluable rights of fishery in the Sound, and its bays. They similarly have rights of fishery and rights to the use of water in the Nooksack River. Anomalous though it may be, the present Lummi leadership had never, until recently, been advised by the Department of the Interior of their prior and paramount rights in the Nooksack River; their rights in Lummi Bay. The Lummis have been afforded inadequate assistance by the Solicitor's Office in connection with the development of their fishery rights which have been challenged by the Corps of Engineers.

Reproduced at the Richard Nixon Presidential Library and Museum

Far to the south of the Lummis the plight of the Quechan Indians on the Fort Yuma Indian Reservation is a National disgrace due to the conflicting interests within the Solicitor's Office. Rather than assisting the Quechans in their desire to attack a fraudulent - probably forged - document purporting to cede much of their lands, the Solicitor's Office has consistently supported the adverse claims of the Bureau of Reclamation and the Bureau of Land Management, both agencies of the Department of the Interior.

No self-respecting law firm would tolerate the conditions which exist in regard to the land title problems on the Fort Mojave Indian Reservation. Those problems are in addition to those alluded to in the January 1970 Compendium. Yet the Solicitor's Office working closely with the Bureau of Reclamation, has created land title controversies which will take years to correct. That Bureau has, by changing the course of the Colorado River, created controversies over the invaluable rights of the Mojaves to access to the Colorado River. It was the obligation of the Solicitor's Office to protect that right of access but it has completely failed to do so. Not only is the Mojave's right of access to the Colorado River gravely challenged through the failure of the Solicitor's Office properly to perform, but the boundary questions on that Reservation, never being fully revealed, partake of a National scandal.

The outrageous attempt to give away 1,500 acres of Mojave land is being reported to this Committee.

Reproduced at the Richard Nixon Presidential Library and Museum

Downstream from the Mojave Reservation the Colorado River Indian Reservation suffers greatly from the failure of the Solicitor's Office adequately or completely to perform the services owing to them. Only recently and at great cost of time and effort has it been possible to overcome an opinion rendered by the Solicitor's Office that can only be described from the Indian point of view as being irrational. Wholly independent of the Solicitor's Office - and over its vigorous opposition - was a hundred-year controversy resolved. Prime beneficiaries of the course adopted by the Solicitor's Office are the Bureau of Reclamation and the Bureau of Land Management which, as stated, are agencies of the Federal Government. At this moment, even though most recently that long-standing dispute as to the boundary of the Colorado River Indian Reservation was resolved, the Solicitor's Office has adopted an obstructionist attitude respecting the leasing of the lands, title to which resides in the Indians in question.

South Dakota's Indians have suffered and are now suffering from a failure fully to inform them of their invaluable rights to the use of water, the invasion of those rights and the need to take vigorous action to protect them. Conflicts of interest within the Solicitor's Office are responsible for this failure properly to recognize and to protect the Indian rights in the Cheyenne River and elsewhere. This, of course, stems from the responsibility of the Solicitor's Office to the Bureau of Reclamation which throughout Western United States has proceeded and is now proceeding with the

Reproduced at the Richard Nixon Presidential Library and Museum

construction of projects in disregard of the prior and paramount rights of the Indians. Indians of South Dakota, like those in North Dakota, Montana and Wyoming, have been and are now being deprived of their rights in the Missouri River, its tributaries, and the benefits to which they are legally and in good conscience entitled from the vast developments within the Missouri River Basin by the Bureau of Reclamation and the Corps of Engineers. The invasion or unauthorized seizure of Indian rights along the Missouri River and its tributaries by agencies of the United States will be found on virtually every Reservation. Rights of the Crows are being gravely invaded by the Bureau of Reclamation both above and below Yellowtail Dam. That most serious threat to the present and future existence of the American Indians in the Missouri River Basin cries out for action at this point in history, whether it is on the Fort Berthold Indian Reservation, or the Wind River Reservation in Wyoming. In every case the basic cause of Indian irreparable damage stems from grossly inadequate or totally lacking legal services within the Justice and Interior Departments.

Incongruously the struggle by Montana's Flathead Indians to preserve their rights, interests and claims in connection with their Reservation is being challenged by Justice Department lawyers acting in concert with lawyers for hostile and adverse non-Indian interests within the Flathead Reservation. History of the seizure of Flathead rights by Federal agencies and the failure of the Solicitor's Office to support the Indians must of necessity shock this Nation's conscience.

The history of the Yakima Indian Reservation in the last half century has been a constant and unending struggle to prevent the destruction of their invaluable streams by the Bureau of

Reproduced at the Richard Nixon Presidential Library and Museum

Reclamation. Repeatedly the Yakimas have been forced to challenge reclamation projects or activities sponsored by the Bureau of Reclamation which threaten them. Most recently their adjudicated rights in the Yakima River were challenged by the Kennewick Extension of the Yakima Federal Reclamation Project. Had it not been for the Indians' immediate action to protect themselves their decreed rights on the main stream of the Yakima would have been most seriously imperiled. In every instance the Bureau of Reclamation has acted upon the legal advice of the Solicitor's Office which has chosen frequently to ignore the basic rights of the Indians to the end that the Federal Reclamation projects could go forward. It is this conflict of interest that shocks the conscience of all those acquainted with the dereliction of duty owed by the United States to the Yakimas as trustee of their rights and interests.

Gravest crisis confronting the American Indians in Western United States in general and in the Colorado River Basin in particular is the Eagle River Adjudication[3/] now pending before the Supreme Court. Briefly the important facts and issues of the Eagle River Adjudication as it relates to the Indians are these:

1. Seventy percent (70%) of all of the water in the Colorado River rises in the State of Colorado. Eagle River is a principle tributary of the Colorado River within the last mentioned State.

3/ United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado and the Judge thereof, the Honorable Harold A. Grant, Respondents, The Colorado River Water Conservation District, City and County of Denver, acting by and through its Board of Water Commissioners, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenors, No. 87 in the Supreme Court of the United States, October Term, 1970.

Reproduced at the Richard Nixon Presidential Library and Museum

2. The Colorado River is grossly overappropriated largely due to projects built either by Federal agencies or in conjunction with the States within the Colorado River drainage system or subdivisions of those States.

3. Gross overappropriation by the Federal Government is but one aspect of the crisis facing the American Indians in the Colorado River Basin. Pollution of that stream is an ever-increasing and immediate threat particularly to the main-stream Reservations - Fort Mojave, Chemehuevi, Colorado River Indian Reservation, Cocopah and Fort Yuma. That pollution of the stream is due to man-made depletions - reservoir evaporation losses; diversions, both in-basin and transmountain, by the Federal Government or cooperating agencies; and evapotranspiration.

4. Any relinquishment by the Federal Government of rights to the use of water in the Eagle River or other tributaries of the Colorado River, or the failure fully to assert American Indian rights in those tributaries, and correctly to represent those Indian interests, constitutes a grave threat not only to the main-stream Reservations but Reservations which rely upon the Green River, San Juan, Little Colorado and tributaries of those streams.

5. Loss of Indian rights on any of the tributaries of the Colorado River necessitates that the deficit in water supply thus created be compensated by increased burdens upon

Reproduced at the Richard Nixon Presidential Library and Museum

the other tributaries, the San Juan River and its tributaries, the Green River and its tributaries, for example.

6. Invaluable rights to the use of water are held by Indians and Indian Tribes throughout the Colorado River Basin, on the mainstream, the tributaries, and tributaries of tributaries, all inter-related, all inter-dependent. These include, but are not limited to, the Reservations of the Navajos, the Southern Utes, the Ute Mountain, the Uintah-Ouray, the Fort Mojaves, Chemehuevis, Hualapais, Colorado River Indian Tribes, the Cocopahs, Fort Yumas, among others.

7. These basic principles respecting the Indian Winters Doctrine prior and paramount rights in the Colorado River Basin must be kept in the foreground in this consideration:

(a) Indian Winters Doctrine rights to the use of water in the streams which arise upon, border or traverse the Indian Reservations are part and parcel of the land itself, having all the dignity of a freehold interest in real property;

(b) Indian rights to the use of water are private interests in real property held in trust for the Indians by the National Government for the benefit of the Indians;

(c) Indian rights, being private interests in real property and held in trust for the benefit of the Indians, are not the property of the United States available for its use as distinguished from the Indian use;

Reproduced at the Richard Nixon Presidential Library and Museum

(d) In its status as trustee of the Indian rights to the use of water the National Government must, in protection and preservation of them, exercise the highest degree of care, skill and diligence, as a consequence of which it must, among other things, assert the full measure and extent of those rights throughout the Colorado River Basin.

(e) Indian rights to the use of water in the Colorado River Basin so gravely threatened by the gross overappropriation of that stream - the pollution of it - may thus be characterized:

(i) they entitle the Indians for whom they are held in trust to quantities of water sufficient to meet their present and future water requirements;

(ii) the title to rights to the use of water held in trust by the Nation for them, in whatever source or stream they exist, extends to the very well springs of the stream system which supply the water, including but not limited to the Eagle River in Colorado;

(iii) the Indian rights to the use of water relate not only to a quantity of water to meet present and future needs, but those rights relate to the maintenance of a quality of water - not polluted water - which can reasonably be utilized by the Indians.

8. Failure by the National Government, Trustee, to assert Indian rights throughout the Colorado River Basin, in the Eagle River or other tributaries, threatens those rights not only as

Reproduced at the Richard Nixon Presidential Library and Museum

to quantity but likewise quality, which is inextricably interrelated to quantity.

9. Eagle River Adjudication as conducted before the Supreme Court - a threat not only to Indian rights to the use of water in the Colorado River Basin, but could give rise to a precedent subjecting Indian rights to State courts and laws with disastrous consequences. A prime issue presented by the Justice Department to the Highest Court for resolution in the Eagle County Adjudication:

> Did the United States waive its sovereign immunity from suit in regard to its "reserved rights" to the use of water when Congress enacted 43 U.S.C. 666? 4/

This query: Does it apply to Indian rights?

4/ 43 U.S.C. 666, Act of July 10, 1952, 66 Stat. 560:

> Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs--
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

Reproduced at the Richard Nixon Presidential Library and Museum

Reference at this juncture is made to the Presidential condemnation of the conflict of interest within the Justice Department respecting Indian rights to the use of water. There the President in his July 8, 1970, message, having described that "inherent conflict of interest," said, among other things, to the Congress: "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."

In keeping with the Presidential condemnation, without in any way advising the Supreme Court that the Winters Doctrine Indian rights to the use of water are private in character - totally different from the standpoint of the law from the rights of the Nation itself - the Justice Department in its brief defined in error the "Reserved rights" as follows:

> "Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, * * * Arizona v. California, 373 U. S. 546, 595-601." 5/ (Emphasis supplied)

Under no circumstances can the American Indians tolerate the Justice Department erroneous assertion to the Supreme Court that the "Reserved rights" as defined in Arizona v. California is "the entitlement of the United States to use" water. Yet the Justice Department Petition

---

5/ No. 87 In the Supreme Court of the United States, October Term, 1970, United States v. The District Court in and for the County of Eagle and the State of Colorado * * *.

Reproduced at the Richard Nixon Presidential Library and Museum

for Certiorari, its brief and all supporting data, reiterate and reaffirm that error without at any time declaring that the Indian rights do not - could not - come within the erroneous definition of "Reserved rights" presented to the Court.

In the Petition for Certiorari the failure to distinguish the Indian private rights from the Nation's public rights is well demonstrated by this excerpt from it: Having again alluded to the "federal government's reserved water rights"; "the rights of the United States to use the water on its public land"; the Justice Department describes the magnitude of its problem in the Eagle River Adjudication by stating: "* * * about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests * * *." 6/ This entirely incorrect endeavor to meld; to categorize the Indian rights with the Federal rights to use water, threaten a catastrophe to the Indians if 43 U.S.C. 666 is held to be applicable to the Federal rights, which as presented by the Justice Department to the Supreme Court, would necessarily embrace those Indian rights. Nevertheless throughout the brief of the Justice Department to the Highest Court, that error is repeated and compounded on numerous occasions. 7/ A striking aspect of the brief is this:

6/ Petition for Certiorari to the Supreme Court of the State of Colorado, pages 10-11.

7/ See in particular Brief for the United States, pages 3-14.

Reproduced at the Richard Nixon Presidential Library and Museum

Although never distinguishing Indian rights to the use of water from Federal rights to the use of water, the Justice Department, with possibly a single exception, relies on decisions which relate entirely or predominantly to the Indian private rights held in trust for them by the National Government.

10. Failure of Justice Department to distinguish Indian private rights held in trust by the United States, from Federal rights held for the public, threatens -

(a) To subject Indian rights to the waiver of immunity from suit under 43 U.S.C. 666;

(b) To subject Indian rights to State court jurisdiction;

(c) To subject Indian rights to State law with all of the attendant irreparable damage to American Indians.

There have been reviewed in detail the Justice Department Petition for Certiorari and Brief that:

Failed to advise the Supreme Court that Indian private rights to the use of water held in trust for them, are drastically different from Federal rights held for the public at large; are governed by vastly different laws and concepts;

Failed to advise the Court that there are innumerable Treaties in which the Indians retained their invaluable immemorial rights and that those rights

Reproduced at the Richard Nixon Presidential Library and Museum

were never part of the public domain, nor were they carved from the public domain as the Justice Department repeatedly stated in error;

Failed to advise the Court that the decisions relied upon involved almost entirely Indian rights or were predominantly Indian rights, and did not pertain to Federal "Reserved rights" for national parks, national forests, Bureau of Land Management properties.

Consistent with its failure to distinguish the Indian rights, private in nature, held in trust by the National Government, from federally owned "Reserved rights" for public purposes, the Justice Department likewise failed to inform the Supreme Court that:

The Congressional waiver of sovereign immunity from suit in 43 U.S.C. 666 did not include the Indian rights to the use of water in the Colorado River Basin or elsewhere in the United States.

Let these principles be emphasized:

Indian Tribes are sovereigns in their own right - albeit limited - and as sovereigns they are, and their properties are: (a) immune from suit in the absence of express waiver of that immunity, which 43 U.S.C. 666 most assuredly is not; (b) not subject to State court jurisdiction; (c) not subject to State law.

Reproduced at the Richard Nixon Presidential Library and Museum

Yet, irrespective of those precepts of Indian law, the Justice Department in its Petition and Brief to the Supreme Court, failed to make reference to them. Hence a decision can reasonably be anticipated to the effect that the "Reserved rights" of the National Government include the Indian private rights held in trust, which is denied; that 43 U.S.C. 666 constitutes a Congressional waiver of the sovereign immunity from suit in regard to the Indian rights, which is likewise denied.

Indian prior and paramount rights are legally and conceptually different from the rights to the use of water acquired under the doctrine of prior appropriation strictly adhered to in Colorado and other like-minded States. As a consequence, to subject the Indian rights to the use of water in the Colorado River or the tributaries to that stream to State courts or laws would be tantamount to a confiscation of those rights and the Indian priorities which are property rights protected under the National and State constitutions. This disaster to the American Indians may very well ensue by reason of the facts and law as presented by the Justice Department to the Supreme Court in the Eagle River Adjudication.

11. A proposition has been offered by Justice to the Colorado courts which the American Indians cannot tolerate.

In the Eagle River Adjudication the Justice Department made no reference to the Indian rights in the tributaries of the Colorado River. It asserted only the "Reserved rights" of the Nation for the National Forests and the Bureau of Land Management. That case thus becomes the classic example of the conflicts of interest within the

Reproduced at the Richard Nixon Presidential Library and Museum

Department of Justice. It ignores completely the fact that Eagle River and other tributaries are the life blood of the American Indians throughout the Colorado River Basin and that the Indians own invaluable rights in those tributaries.

Confronted with adverse rulings in the Eagle River Adjudication, holding that 43 U.S.C. 666 awarded jurisdiction to the State courts, this proposition was made to the Supreme Court of Colorado: 8/

> "It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances." (Emphasis supplied)

8/ United States v. The District Court in and for the County of Eagle and State of Colorado, on Writ of Certiorari to the Supreme Court of the State of Colorado, Appendix, page 14. - No. 87 in the Supreme Court of the United States, October Term 1970.

Reproduced at the Richard Nixon Presidential Library and Museum

That proposition must be viewed on this background:

(a) Only Forest Service rights and Bureau of Land Management rights would be presented;

(b) On the western slope of Colorado there are at least eleven other Water Districts involving State adjudications comparable to the Eagle River Adjudication, which would benefit from the Justice proposition, indeed that proposition specifically relates to at least three other State court adjudications; 9/

(c) No mention is made of the downstream rights of the Indians the very existence of which is predicated upon the Eagle River and other streams, all as emphasized above.

Should the Justice Department proceed to fulfill its offer to the Colorado Court, the Indians in the Colorado River Basin would suffer irreparable and lasting damage.

Every phase and aspect of the Eagle River Adjudication reviewed at some length above, has been thoroughly researched. If this Committee desires a presentation of that research and documentation supporting the conclusions expressed, it will be presented upon request and made a part of this statement.

The examples set forth are but a few of the conflicts of interest involving Indian rights within the Interior and Justice Departments which have brought disaster to the American Indians throughout Western United States.

9/ Note: 1969 changes in the administration of rights to the use of water in the State of Colorado in no way change the basic concepts set forth in this statement.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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."

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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 non-irrigable 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

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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."

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

(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

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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 hydrologographic 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]

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

(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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

"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 irrigbility 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

---

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

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

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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.)

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

"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.

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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.

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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 Riverfront 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 independence 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]

---

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).

Reproduced at the Richard Nixon Presidential Library and Museum

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]

---

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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.

Reproduced at the Richard Nixon Presidential Library and Museum

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

Reproduced at the Richard Nixon Presidential Library and Museum

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

Reproduced at the Richard Nixon Presidential Library and Museum

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,

Reproduced at the Richard Nixon Presidential Library and Museum

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-

Reproduced at the Richard Nixon Presidential Library and Museum

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

Reproduced at the Richard Nixon Presidential Library and Museum

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.

Reproduced at the Richard Nixon Presidential Library and Museum

February 19, 1971

MEMORANDUM FOR: HENRY CASHEN

FROM: BRADLEY H. PATTERSON, JR.

SUBJECT: National Indian Advocacy Center

I would be happy to arrange a time when I could sit down with Jack Corber.

Permit me to comment a bit on the Muskrat proposal as he has drafted it.

Of his six program ideas:

Number 1 is presumably what the National Congress of American Indians (now struggling to reconstitute itself) ought to do as a privately financed Washington office directly representative of Indian organizations. There is also the Americans for Indian Opportunity which I believe sees this as one of its roles.

Number 2 would be the function of the newly proposed Indian Trust Counsel Authority, insofar as the questions are natural resources rights are concerned. I wonder whether Mr. Muskrat is familiar with the draft bill on this subject.

Number 3 is clearly a job that needs doing but is what I would assume a non-government-funded organization such as NCAI would see as one of its primary tasks.

Numbers 4, 5 and 6, I think, need doing and no one is performing this function now as far as I know. An Advocacy Center might well fill this role.

One more point about Numbers 1 and 3: the credibility of an organization with those functions would require that it be entirely independent of government funds and influence.

Maybe Bobbie Kilberg and you and I can get together with [redacted] Mr. Corber at your convenience.

cc: Mrs. Kilberg

Reproduced at the Richard Nixon Presidential Library and Museum

NOTE TO HENRY CASHEN

Subject: National Indian Advocacy Center

I would be happy to arrange a time when I could sit down with Jack Corber.

Permit me to comment a bit on the Muskrat proposal as he has drafted it.

Of his six program ideas:

Number 1 is presumably what the National Congress of American Indians (now struggling to reconstitute itself) ought to do as a privately financed a Washington office directly representative of Indian organizations. There is also the Americans for Indian Opportunity which I believe sees this as one of its roles.

Number 2 would be the function of the newly proposed Indian Trust Counsel Authority, insofar as the questions are natural resources rights are concerned. I wonder whether Mr. Muskrat is familiar with the draft bill on this subject.

Number 3 is clearly a job that needs doing but is what I would assume a non-government-funded organization such as NCAI would see as one of its primary tasks.

Numbers 4 and 5, and 6 I think, need doing and no one is ~~doing this~~ performing this function now as far as I know. An Advocacy Center might well fill this role.

One more point about Numbers 1 and 3: the credibility of an organization with those functions would require that it be entirely independent of government funds and influence.

Maybe Bobbie Kilberg and you and I can get together with you and Mr. Corber at your convenience

~~bzzzz~~ cc:Mrs. Kilberg BHPjr

Reproduced at the Richard Nixon Presidential Library and Museum

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

February 17, 1971

MEMORANDUM FOR BRAD PATTERSON, THE WHITE HOUSE

Subject: Proposal for the Development of a National Indian Advocacy Center

Returned herewith is the proposal submitted by Mr. Joseph C. Muskrat for the development of a National Indian Advocacy Center. The proposal is interesting even though I find the intention of the center rather vague and ill-defined. I would propose that some greater specificity be obtained prior to any funding of this proposal by the Government. There is also the possibility that this program would compete with the Indian Trust Counsel Authority.

I personally feel that a program of this kind would be helpful to the Indian community especially in the choosing of selected cases of vital Indian interest and in advertising those cases to the Indian community.

Robert C. Bruce

Robert C. Bruce
Attorney-Adviser
Office of the Legislative Counsel

Enclosure

Reproduced at the Richard Nixon Presidential Library and Museum

THE WHITE HOUSE

WASHINGTON

February 8, 1971

MEMO FOR LEN GARMENT

Do you have any interest in pursuing the attached proposal for establishment of a national legal service center for Indians? If so, please give me a call at your convenience and we can set up a meeting with Jack Corber, who is a good friend of the Administration.

Many thanks, Len.

Henry C. Cashen II

Attachment.

Reproduced at the Richard Nixon Presidential Library and Museum

STEPTOE & JOHNSON

ATTORNEYS AT LAW

1250 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036
(202) 223-4800

LOUIS A. JOHNSON (1891-1966)
WILLIAM E. MILLER
I. MARTIN LEAVITT
STEPHEN AILES
PAUL F. MICKEY
HENRY C. IKENBERRY
LAIDLER B. MACKALL
WILLIAM B. DEVANEY
RICHARD A. WHITING
ROBERT J. CORBER
CALVIN H. COBB, JR.
STANLEY C. MORRIS, JR.
GEORGE B. MICKUM, III
MONROE LEIGH
RICHARD P. TAYLOR
JOHN E. NOLAN, JR.
ROBERT D. WALLICK
THOMPSON POWERS
WILLIAM K. CONDRELL
ROBERT M. GOOLRICK
JAMES P. HOLDEN
HERBERT E. FORREST

HUBERT A. SCHNEIDER
JEREMIAH C. WATERMAN
OF COUNSEL

RICHARD A. BEHRENS
MICHAEL D. CAMPBELL
WILLIAM G. CHRISTOPHER
RICHARD O. CUNNINGHAM
JAMES V. DOLAN
HOMER L. ELLIOTT
EDMUND B. FROST
LAURENCE J. HOFFMAN
JAMES K. JACKSON
JANE LANG McGREW
JAMES L. McHUGH, JR.
ROBERT E. McLAUGHLIN
J. DAPRAY MUIR
SHIRLEY D. PETERSON
JAMES H. PIPKIN, JR.
DANIEL J. PLAINE
EDWARD F. SCHIFF
MARTIN D. SCHNEIDERMAN
SCOTT R. SCHOENFELD
GLENN J. SEDAM, JR.
G. COPE STEWART, III
PHILIP R. TRACY

CLARKSBURG, WEST VIRGINIA
UNION BANK BUILDING

CHARLESTON, WEST VIRGINIA
KANAWHA VALLEY BUILDING

February 5, 1971

The Hon. Henry Cashen
Executive Offices
The White House
Washington, D. C.

Dear Henry:

Enclosed is a statement of the proposal of Joseph C. Muskrat for establishment of a national legal service center for Indians. His thesis is, consistent with the position stated in President Nixon's July message to Congress, that broader participation by Indians in Government programs specifically designed for their race and more responsibility for administration of such programs by Indians are required. In the past Indians have either rejected Government programs as indigestible White Man's medicine or have not understood how to preserve what the Government provided. Mr. Muskrat's proposal would lead to a service center that protects Indians' rights and involves them directly in its operations.

I had a long interview with him and found him to be intelligent, able, and without political ambitions. I am convinced that he is sincere in his dedication to uplifting Indian society throughout the nation. It is apparent that, as a result of his past pexperience and his status as an Indian, his contacts in the Indian community are pervasive and will enable him to succeed if he can gain some Government support for the program he has offered.

Reproduced at the Richard Nixon Presidential Library and Museum

I believe it would serve Administration objectives to review seriously this proposal and to discuss the matter further with Mr. Muskrat. I hope a meeting might be arranged with Mr. Garment.

With best regards,

Sincerely,

Robert J. Corber

Enclosure

Reproduced at the Richard Nixon Presidential Library and Museum

PROPOSAL FOR THE DEVELOPMENT OF A

NATIONAL INDIAN ADVOCACY CENTER

December 16, 1970

Submitted by:
Joseph C. Muskrat
36 East Road
Dune Acres
Chesterton, Indiana 46304
(219) 926-4240

Submitted under the auspices of:
National Congress of American Indians
1346 Connecticut Avenue N.W.
Washington, D.C. 20036
Leo Vacu Acting Director

Reproduced at the Richard Nixon Presidential Library and Museum

INDEX

Proposal. National Indian Advocacy Center A

Proposal developed at Adlai Stevenson Institute of International Affairs which formed the basis for the above proposal B

Summary: President's Address to Congress of the United States on Indian Affairs, July 8, 1970 C

President's Address to Congress of the United States on Indian Affairs, July 8, 1970 D

Reproduced at the Richard Nixon Presidential Library and Museum

PREFACE

It is necessary to give a brief background of the genesis and sponsorship of this proposal to the Department of Justice for a development grant to establish a national Indian Advocacy Center. The proposal has been prepared by Joseph C. Muskrat, former Assistant Attorney General, State of Oklahoma, himself an Indian and attorney for the Cherokee Nation.

The preparation of the proposal was made possible by a Fellowship grant from the Adlai Stevenson Institute, Chicago, Illinois. The Institute's sponsorship was based on a sense that there was an immediate need for a national organization to defend the rights of the oldest and by far the most disadvantaged American community.

In developing this proposal, we proceeded on two assumptions. The first, and the most important was that the Indian political culture stresses tribal and communal goals over individual accomplishments. Hence, for any organization to succeed, it must obtain their generalized consensus on the modalities of achieving a communally-defined goal. For this reason, a great part of my one and one-half years of Fellowship at the Institute was spent in traveling and meeting various Indian communities to find out what they felt would be a first step toward restoring a modicum of their long-neglected, albeit violated, rights.

The second assumption which underlies this proposal is that the American society-at-large, and the Federal Government in particular, recognizes that (a) grave injustices have been done to the Indian people; (b) that the violations, in spirit if not always in form, of treaties and statutes are still a common practice with regard to American Indians; (c) that the structure and the functioning of the Bureau of Indian Affairs has been deficient in serving Indian communities; and (d) finally, that it is time that something serious and honest be done to restore at least a modicum of justice

Reproduced at the Richard Nixon Presidential Library and Museum

and self-respect to the Indian people.

Since the Federal Government has historically claimed the 'guardianship' of the Indian people, and since it is also spearheading the effort at restoring the civil rights of minority communities in America, it was felt that its agencies would be the natural vehicles for promoting the establishment of the National Indian Advocacy Center.

The Center would be a non-profit institute directed toward the decentralization of the administration of Indian affairs, the goal of the current administration.

The Center would provide training for lawyers and Indian lay advocates in the field of Indian law; provide legal representation for unrepresented tribes, non-tribal groups and urban Indians; publicize Indian goals and aspirations and act as a research and back-up center for lawyers serving Indians.

In this proposal, the problem that gives rise to the need for such a Center is detailed; the goals of the Center are presented; the general organizational structure of the Center is outlined and a one-year program for planning, staffing and operating the Center is presented.

Reproduced at the Richard Nixon Presidential Library and Museum

THE PROBLEM

The major facts are not in dispute: American Indians are the poorest of the poor--the worse educated, clothed, fed, and housed group in the nation. The Indians' rates of disease are four or five times as high as those for white Americans; unemployment is endemic. The lot of the Indian in American society rivals in bitterness and misery that of the Appalachian white, the migrant Mexican farm worker and the slum black.

This is true despite the fact that the United States Government, primarily through the Bureau of Indian Affairs, has done virtually everything for the American Indian community that practitioners of foreign aid believe ideal to promote development throughout the world. Infrastructural development, health facilities, education, honest administration, all at a yearly cost of approximately $1,250 per Indian served, have been available for long periods and in continuous supply. In addition to the Bureau of Indian Affairs, other agencies of the Federal government are implementing programs designed toward Indian development; HUD, HEW, Department of Labor, to name but a few. Their success has been as limited as that of the Bureau.

Even where adequate medical services, food, employment, economic development, and educational facilities are available, they have either been inadequately used or rejected outright by the Indians.

While men of good will may differ as to the adequacy of federal aid to the Indian community, it is indisputable that the core of their despondency and frustration is not totally economic. Various indices of the contemporary Indian condition point to a different identification of the problem.

The average suicide rate for Indians is ten times that of the white. On the Shoshone Bannock Reservation at Fort Hall, Idaho, a Senate Subcommittee was recently told that suicide rates for teenagers were perhaps as high as 100 times the national average. For the nation as a whole the rate of Indian criminality is nearly seven times that of the national average. The Indian rate of arrests is almost three times that of Negroes and eight times that of whites. Non-alcohol related crimes are six times

Reproduced at the Richard Nixon Presidential Library and Museum

those of the nation's blacks. The Indian community is obviously a community under extreme stress.

The Indians' problems, while economic, educational, health-oriented, and occupational in their manifestations, are at their root, in the broad sense of the term, political. The major consequence of the conflict between the Indians and the whites was that the Indian communities were literally politically castrated and the Indians became an administered people. This fact, together with white racism, a total change in the tribal economy, and the inevitable clash of cultures has resulted in a pervasive apathy, distrust, and withdrawal. Unless changed, this posture will make virtually all developmental activities either meaningless or of high cost and low effectiveness. Thus, the conclusion is that the core of the Indians' problem is the inability of the community to achieve a sense of control over its own destiny.

Americans have a limited and stereotyped view of the Indians. They are more familiar with the history and cultures of many foreign nations than with those of their Indian citizens. The stereotype is evident and pervasive. But, even where accurate and of genuine enthnographic value, the little knowledge available paradoxically appears to obscure the reality of contemporary American Indian life. The partial appreciation of the Indian problem--as much as ignorance, apathy, or hostility--has led to expensive programs which have failed to produce the sought after results.

In the aftermath of the Indian Wars, military occupation was replaced with civilian administration by the Bureau of Indian Affairs, the oldest civilian bureau in the Federal government. The physical condition of the Indian communities varied considerably in terms of access to outside assistance, contacts with the whites, cohesion, standard of living, and the like. However, in spite of the diversity of the Indians' physical and cultural distinctions, there was a shared political fact: the Indians did not participate actively in controlling their own affairs or in setting the course of their future action. The assumption that the Indians were incapable of managing their own affairs created a dependency syndrome which hastened the rapid disintegration of their remaining indigenous institutions.

Reproduced at the Richard Nixon Presidential Library and Museum

As a result of their contact with the whites, the Indians developed a deep sense of injustice, grievance, and fear of the white community. So wide-spread were the examples of white duplicity and hostility, that virtually every Indian knew of at least one major example which would lead him to distrust and fear the whites, no matter how benign their motives appeared to be. These circumstances have caused the Indians to fail to respond even passively to efforts made on their behalf by non-Indians.

The failure of the past policy on Indian affairs was recognized by President Nixon in his historic message to Congress of July 8, 1970. As the Chairman of the National Council on Indian Opportunity, Vice President Spiro T. Agnew, stated: "The cornerstone of President Nixon's policy on Indian affairs is broad participation by Indian people in developing Federal policies and programs which affect them."

The Bureau of Indian Affairs, in conformity with the President's message, is proposing an internal reorganization to provide Indians with more control of their own affairs. The decentralization of Indian administration is of paramount importance to their political, social, and economic development.

As an administered people, Indians occupy a unique position in American jurisprudence. There are over ten thousand treaties, statutes, regulations, and Solicitors' Opinions regarding Indians. Few lawyers are familiar enough with either the unique cultural, social, and economic problems of Indians or with the applicable laws to give representation of the necessary quality.

Lawyers have often been referred to as "social advocates," i.e. through the judicial process they are often able to make the dreams and aspirations of their clients operational. On a national level, however, there are no lawyer advocates.

There are presently eight Indian legal services programs serving almost entirely Indian clients. There are numerous other programs with a substantial Indian target population, e.g., the legal service program in Alaska. There are many other legal services programs interested in serving Indian clients but lack personnel or expertise. No program is advocating on a national basis.

Reproduced at the Richard Nixon Presidential Library and Museum

While some of the large tribes are able to retain counsel, their counsel represents only the interests of the client tribe and may well involve litigation against another tribe. The smaller tribes cannot afford counsel and are not represented, or even worse, inadequately represented. Yet the court precedents set for the smaller tribes, be they in the area of hunting and fishing rights, land tenure, sovereignty rights, election of tribal officials, taxation of land and personal property, etc., are sometimes applicable to all tribes, large and small alike. Moreover, non-tribal groups, individual Indians, and urban Indians go completely unrepresented, notwithstanding the fact that they, too, may raise legal issues of the utmost importance to Indians nationally.

THE PROGRAM

The program proposal is for a National Indian Advocacy Center. The philosophy of the program would be both the protection of Indian interests, affording them access to American justice so long denied them in the field of law understood by so few attorneys, and the furtherance of the philosophy of the present administration--the decentralization of Indian administration which is paramount to Indian determination and control of their own affairs and destiny. Specifically, the program will operate in six specific areas:

1. Although the American Indian is the most susceptible to the vicissitudes of the Federal government, there is a dearth of Indian-designed programs. The program would be involved in basic research design and publication of such programs.[1]

2. Provide legal representation and act as Washington counsel to those tribes, non-tribal groups and urban Indians unable to afford counsel. The program will concentrate on cases having a multiplier effect, i.e. affecting tribes similarly situated and litigation and negotiations which will transfer control of government programs to the Indians.

---

[1] With the sole exception of the Interior Committee, no Indian or Indian group testifies before Congressional committees even though much proposed legislation is in conflict with Indian interests. The Federal Government annually appropriates almost one-half billion dollars on Indian programs, yet no Indian or Indian group testifies before the budgetary committees.

Reproduced at the Richard Nixon Presidential Library and Museum

3. Publicize Indian goals and aspirations in popular journals and periodicals. Americans are familiar with the needs and desires of, for example, the blacks, but are almost totally ignorant of the desired relationship of the American Indian in white society. The best intentioned efforts are doomed to fail until that understanding is established.

4. Provide a concentrated training course in Indian law for lawyers serving Indian clients or groups.

A recent law graduate entering a legal service program has a basic background in contracts, administrative law, torts, etc., and, though inexperienced, can still serve his clients. A lawyer serving Indians, however, has no basic training in Indian law, and until that training is provided, is unable to serve his clients. Legal service lawyers do not intend to stay with legal service programs more than two or three years, and by the time a lawyer is trained, he is ready to leave the program. There is no existing program or organization providing that training.

Most of the government employees (including lawyers) fail to understand Indian culture, their goals and aspirations and the way the Indian mind functions. The program will provide a training session along these lines which will be conducted by Indians to better educate those serving Indian clients.

5. Provide training for Indian lay advocates. Most of the work done by lawyers does not involve litigation. In the field of Indian affairs the primary problem is dealing with the governmental bureaucracy, filling out forms for the mortgage of trust land, obtaining welfare assistance from the Bureau of Indian Affairs, providing for admissions to Public Health Service Hospitals, etc. Indians can and should be trained to handle these matters, thus freeing the attorneys for more important matters. Once trained, the Indian lay advocates can educate the Indian community as to the duties and obligations of agencies serving them.

Some reservations operate their own court system, employing Indian lay judges and advocates. Training programs to professionalize the Indian bench and bar are imperative.

Reproduced at the Richard Nixon Presidential Library and Museum

6. Provide an Indian law "back-up center." The Office of Economic Opportunity has funded "back-up centers" for example, in the area of housing law. The back-up center specializes in all aspects of, say, housing law. An attorney with a unique housing problem requests assistance from the back-up center which does the research thus freeing the attorney for other tasks.

   In the area of Indian law, the most esoteric area of the law, there is no back-up center. The program would provide this service in the field of Indian law.

ORGANIZATION AND FUNDING

The structure of the program will be identical to that of a legal service program, i.e., a private non-profit corporation with a board of directors composed entirely of Indians and Indian lawyers. The Board of Directors will be selected from the eight regions recognized by the National Council of Indian Opportunity. Selection of board members will be on the basis of their past involvement in Indian affairs and the respect in which they are held in the Indian community.

PROGRAM PLANNING

Although the program concept has been defined, a significant amount of planning has yet to be done.

At this time, full funding would not be reasonable; rather a one-year developmental grant is requested for detailed program planning and for limited operations. This detailed planning would include:

- Defining specific programmatic problems,
- Establishing relationships with tribal, non-tribal and urban Indians throughout the country,
- Defining the publicity aspect of the program to benefit tribal, non-tribal and urban Indians,
- Defining the particular needs of tribal, non-tribal and urban Indians,

Reproduced at the Richard Nixon Presidential Library and Museum

- Reviewing past and current litigation,

- Developing training programs, and

- Developing the necessary strategies and organization.

The proposed staffing for the one-year developmental effort would include a director (attorney), one attorney, two program developers and necessary clerical support. Mr. Joseph C. Muskrat, an attorney with a history of involvement in and commitment to Indian affairs, is available to serve as Director during this effort. (His resume is attached as Appendix A.) Mr. Muskrat is willing to staff the effort and will nominate the board of directors with Americans for Indian Opportunity, other Indian groups and the Department of Justice.

The cost for this one-year effort is attached as Appendix B.

Reproduced at the Richard Nixon Presidential Library and Museum

APPENDIX A

JOSEPH C. MUSKRAT

Joseph C. Muskrat, a 35 year-old native of Oklahoma, has a long history of involvement in and commitment to Indian affairs and self-determination.

Mr. Muskrat received his undergraduate degree from the University of Oklahoma, majoring in economics. He became one of the few Indian lawyers in the country when he graduated from the College of Law, University of Oklahoma in 1964. After graduation, he was appointed Assistant Attorney General of the State of Oklahoma, serving the state for two years. He was engaged in the private practice of law in Oklahoma City until he accepted a Fellowship at the Adlai Stevenson Institute at the University of Chicago where he engaged in a concentrated study of the problems of the American Indians.

Mr. Muskrat has published several articles on Indian problems in leading journals and assisted in the preparation of Our Brother's Keeper: The Indian in White America.

As an attorney, he has represented Indian tribes, tribal-affiliated groups as well as urban Indians and groups.

His most recent activity has been the evaluation for the Office of Economic Opportunity of Indian Legal Service Programs and programs serving a substantial Indian target population.'

The proposal for an Indian Advocacy Center is the result of the above activities as well as the need for such a program expressed through countless meetings, both formal and informal, with Indian activists, tribal officials, councils and traditional Indians.

Mr. Muskrat will be available to work on this program.

Reproduced at the Richard Nixon Presidential Library and Museum

APPENDIX B

PROPOSED BUDGET

I. PERSONNEL

1 Director (Attorney) $23,000 - $27,000 ($25,000 average)	$25,000	
1 Attorney ($13,000 - $17,000 ($15,000 average)	15,000	
2 Program Developers $9,000 - $12,000 ($11,000 average)	22,000	
2 Secretary/Typists $6,000 - $7,500 ($6,000 average)	13,500	
		Subtotal $75,500
FICA and Employee Benefits (10%)	7,550	
		Subtotal $83,050

II. CONSULTANTS AND CONTRACT SERVICES

Consultants		
(30 days @ $100/day)	3,000	
Accounting and Audit	1,000	
		Subtotal $87,050

Reproduced at the Richard Nixon Presidential Library and Museum

III.	TRAVEL	14,000	
	A. Staff and Consultants (70 trips @ $200/trip)		
	Per diem (200 days @ $25/day)	5,000	
	B. BOARD OF DIRECTORS		
	Meetings	1,600	
	8 directors, annual meeting (8 trips @ $200/trip)	20,600	Subtotal 107,650
IV.	SPACE COSTS AND RENTALS		
	Office Rent (12 months @ $700 month)	8,400	Subtotal 116,050
V.	SUPPLIES		
	Consumable Supplies (12 months @ $200/month)	2,400	
	Library	1,000	
	Postage (12 months @ 500/month	6,000 9,400	Subtotal 125,450
VI.	RENTAL, LEASE, PURCHASE OF EQUIPMENT		
	Typewriters (2 @ $450)	900	
	Dictaphone (2 @ $90)	180	
	Office Equipment (Desks, Chairs, Lamps, etc.)	1,500	
	Postage Meter	250	
		2,830	

Reproduced at the Richard Nixon Presidential Library and Museum

VII. OTHER COSTS

Insurance (bonding, property, etc.)	$ 900	
Telephone ($600/month for 12 months)	7,200	
	Subtotal	8,100

TOTAL COSTS $136,380

Reproduced at the Richard Nixon Presidential Library and Museum

The purpose of this document is to present a background analysis and explanation of the work of the Adlai Stevenson Institute of International Affairs in the field of American Indian Affairs. Due to the considerable amount of misinformation, misconception and distortion about American Indians, it is necessary to specify in some detail the nature of the problem. The existence of the problems themselves demand a solution. A thorough understanding of the problem, however, is essential to an intelligent approach to that solution.

Joseph C. Muskrat
The Adlai Stevenson Institute
of International Affairs
Chicago, Illinois

Reproduced at the Richard Nixon Presidential Library and Museum

INTRODUCTION

The Adlai Stevenson Institute has just completed a two-year study of the problems of contemporary American Indians. The following is a brief summary of the major aspects of the findings and a proposal for a program designed to make a modest contribution to the solution of what we regard as the core of the problem.

THE PROBLEM

Americans have a limited and stereotyped view of the Indians. They are more familiar with the history and cultures of many foreign nations than with those of their Indian citizens. The stereotype is evident and pervasive. But, even where accurate and of genuine ethnographic value, the little knowledge available paradoxically appears to obscure the reality of contemporary American Indian life. The partial appreciation of the Indian problem -- as much as ignorance, apathy or hostility -- has led to expensive programs which have failed to produce the sought for results.

The fundamental question is why various kinds of approaches to the betterment of the Indian condition have failed. This question calls for a reexamination of the nature of the Indian condition, questioning of the assumptions derived from that definition as to the nature of the "problem" and an analysis of the programs undertaken.

Reproduced at the Richard Nixon Presidential Library and Museum

The major facts are not in dispute:

American Indians are the poorest of the poor -- the worst educated, clothed, fed and housed group in the nation. The Indians' rates of disease are four or five times as high as those for white Americans; unemployment is endemic. The lot of the Indian in American society rivals in bitterness and misery that of the Appalachian white, the migrant Mexican farm worker and the slum black.

This is true despite the fact that the United States Government, primarily through the Bureau of Indian Affairs, has done virtually everything for the American Indian community that practitioners of foreign aid believe ideal to promote development throughout the world. Infrastructure development, health facilities, education, honest administration, all at a yearly cost of approximately $1,250 per Indian served, has been available for long periods and in continuous supply. It is striking to compare per capita expenditures on the Indian community with those of the foreign aid field. In no instance of overseas aid has per capita expenditure from all sources reached ten percent of the figure spent on Indians.

However, even where adequate medical services, food, employment and educational facilities are available, they have either been inadequately used or rejected outright by the Indians.

While men of good will may differ as to the adequacy of federal aid to the Indian community, it appears indisputable that the core of the problem is not economic.

Reproduced at the Richard Nixon Presidential Library and Museum

Various indices of the contemporary Indian condition point to a different identification of the problem.

The average suicide rate for Indians is ten times that of the white. On the Shoshone Bannock Reservation at Fort Hall, Idaho, a Senate Subcommittee was recently told that suicide rates for teen-agers were perhaps as high as 100 times the national average. For the nation as a whole the rate of Indian criminality is nearly seven times that of the national average. The Indian rate of arrests is almost three times that of Negroes and eight times that of whites. Non-alcohol related crimes are six times those of the nation as a whole and twice those of the nation's blacks. Arrests for alcoholism are twelve times those of the nation's blacks. Urban Indian arrests for alcohol-related crimes are thirty-seven times those of the nation's blacks. The Indian community is obviously a community under extreme stress.

As will be shown below, the Indians' problems, while economic, educational, health-orientated and occupational in their manifestations, are at their root, in the broad snese of the term, political. The major consequence of the conflict between the Indians and the whites was that the Indian communities were literally politically castrated and the Indians became an administered people. This fact, together with white racism, a total change in the tribal economy and the inevitable clash of cultures has resulted in a pervasive apathy, distrust and withdrawal. Unless changed, this posture will make virtually all developmental activities either meaningless or of high cost and low effectiveness.

Thus, it is our conclusion that the core of the Indians' problem

Reproduced at the Richard Nixon Presidential Library and Museum

is the inability of the community to achieve a sense of control over its own destiny.

THE ROOTS OF THE PROBLEM

Four aspects of the Indian communities appear crucial to an understanding of contemporary Indians: First, the complexity and diversity of the Indian cultures and tribes; second, the orientation of the "tribal personality" toward cooperation, competition, cultural conservatism and preservation; third, the long and formative clash with white society which left the Indians shattered, impoverished and decimated; and fourth, over one-hundred thirty-five years of life as an administered, refugee and powerless people.

1) As an ethnic group, there are no American Indians. Unlike the black community which lost whatever sense of society and diversity of culture and language it had brought from Africa, the American Indian community, even when defeated and shattered, was sufficiently protected by the residues of its cultural heritage to remain to a large extent impervious to the penetration of white society. Thus, to this day, much of the Indian community has not adopted the English language nor blended its folkways into the dominant white culture and unlike the European immigrants, the Indians have not found easy access to the mores and organizations of the dominant society. The consequence of these statements is clear: Indians have not only been excluded but have excluded themselves from the dominant culture of America.

Reproduced at the Richard Nixon Presidential Library and Museum

An important consequence of the strength of the Indian cultural traditions is the apparent inability of the Indian communities to coalesce in any meaningful form. Despite economic, geographical, educational and political diversity, the contemporary black feels a sense of homogeniety in his blackness. While there has recently arisen a growing sense of "Indianness" the internal cohesion of the tribal group inhibits, comparatively speaking, a sense of shared aspirations, dangers and "brotherhood" with other Indian groups.

2) While Indian cultures are diverse, they nevertheless share an essential trait of fundamental importance -- Indians are "tribal" people and have a distinct and perceivable world view. In its simplest terms, this view holds that man is an integral part of a world order. His position within that world is largely set. His role is harmonious and complimentary to his fellowmen and the order of nature and the task of the individual is maintaining that harmony. As a result, he is not individualistic or competitive in fulfilling his role. His attitude and behavior toward individuals and institutions outside of his group are generally determined by his concern for preserving the cohesion, identity and autonomy of the community. His most important characteristic is his unyielding determination to maintain the group and its cultural identity.

Ironically, the Indians' basic instinct of cultural conservatism and preservation have been strengthened by the consequences of his confrontation with white society. The early policy of apartheid,

Reproduced at the Richard Nixon Presidential Library and Museum

of placing Indians on reservations, strengthened the determination of the shattered and decimated populations to cling to their last remaining point of cultural and political focus.

When the Indians were removed to reservations they were separated from white America. There they lived, adjusting to their new situation only so far as was necessary. Later, many of the reservations were broken up and the lands settled by whites. The Indians, whose relationship with the whites had in the past been anything but pleasant, reacted by withdrawing from white contact. Rather than acting as an integrative force, white contact posed an external threat, bringing the Indians even closer together. Thus, many Indians today live in distinctly Indian communities, speaking their own language and following their own customs and traditions. Even in an urban setting, when totally surrounded by whites, many have managed to retain their cultural identity. The distinctiveness of the Mohawks in New York was described by Edmund Wilson in Apologies to the Iroquois. A group of Tewa Pueblos were found living in the center of San Antonio, Texas. They had retained their language, their religion and their traditional way of life.

A much more disastrous effect was achieved by the attempts at assimilation. The results of attempts to assimilate the Indians were well illustrated by the policies of allotment and termination. The allotment acts allotted to Indians as individuals lands previously held by the tribe communally. The lands not allotted, called "surplus lands," were open to white settlement. The Indians quickly lost their lands to their more avaricious white neighbors. As a result of the allotment

Reproduced at the Richard Nixon Presidential Library and Museum

policy, 90 million acres, two-thirds of the Indians' land base, was lost.

The policy of termination, which is still the official policy of the Federal Government, is similar to allotment. Termination of an Indian tribe is akin to corporate liquidation. The details of termination vary with the tribe, but generally involve allotment of communally held lands (in tax exempt status) to the Indians as individuals (and subject to taxation), the withdrawal of government-furnished infrastructural services, such as police, education, road construction and maintenance, health services, etc., and the abolition of tribal government by federal fiat. Few, if any Indian tribes have an economic base sufficient to support the group, and they soon loose what little they have. The Menominee Tribe of Wisconsin, once one of the wealthiest tribes in the country, underwent termination. The tribe today is bankrupt, and the land is rapidly being lost.

3) The effect of the attempt to extinguish the American Indian tribes has never been documented in its political context. Briefly told, the tribes were pushed ever westward by the advancing white settlers. Sporatic attempts at resistence or reconquest were savagely put down. Even when treaties had been negotiated and the tribes were living in peace on the lands provided them, the treaties were violated and the Indians forced to move or be massacred. Even the effect of such notable and widely acclaimed acts as the Homestead Act was the destruction of the Indian community. The western saying "the only good Indian

Reproduced at the Richard Nixon Presidential Library and Museum

is a dead Indian" was a crude but accurate summary of an unofficial policy of genocide.

The effect of the engagements with white society on the Indians was clear, pervasive and disastrous. Not only were hundreds of thousands of people killed outright but whole communities of once proud hunter-warriors were reduced to starving, diseased pitiable refugees. The effect was not only to shatter the Indian community militarily, but politically as well. It is an index of this fact that as American anthropologists began a generation later to study the American Indian communities, they found essentially no political structure. This is, as a footnote to intellectual history, an important reason why American anthropology emphasized "culture" while British "social" anthropology, drawing on the still intact tribes of the Sudan, was more social and politically orientated. The American Indians, quite simply, have lost their ability to govern themselves, to influence their destiny or to protect their lands and persons.

As a result of their contact with the whites, the Indians developed a deep sense of injustice, grievance and fear of the white community. So wide-spread were the examples of white duplicity and hostility, that virtually every Indian knew of at least one major example which would lead him to distrust and fear the whites, no matter how benign their motives appeared to be.

4) In the aftermath of the Indian Wars, military occupation was replaced with civilian administration by the Bureau of Indian Affairs, the oldest civilian bureau in the Federal Government. The

Reproduced at the Richard Nixon Presidential Library and Museum

physical condition of the Indian communities varied considerably in terms of access to outside assistance, contacts with the whites, cohesion, standard of living and the like. However, in spite of the diversity of the Indians' physical condition, there was a shared political fact: the Indians did not participate actively in controlling their own affairs or in setting the course of their future action. The assumption that the Indians were incapable of managing their own affairs created a dependency syndrome which hastened the rapid disintegration of their remaining indiginous institutions. Like the refugee peoples in other parts of the world, most recently the Arab refugees in the Middle East, the Indians came to exhibit the listlessness and lack of purpose now commonly associated with them. These circumstances, compounded by the three previous concepts have caused the Indians to fail to respond even passively to efforts made on their behalf by non-Indians. As previously mentioned, they have exhibited a far higher rate of disease, suicide, alcoholism and crime than would appear reasonable under the circumstances in which they live. As a corollary, they have failed to organize themselves effectively to deal with their own needs and aspirations. What organizations there are, are anomic or factionated to the state of impotency.

In light of the foregoing, it is obvious that the problem is how to motivate and organize the Indian community for one of two alternative courses; a satisfactory integrative position in white society,

Reproduced at the Richard Nixon Presidential Library and Museum

a course which appears unattractive to the Indians at this time and only abstractly attractive to the whites; or the development of sufficient internal cohesion, resources and capabilities to create a satisfactory position within the American society. In short, the choice is assimilation or pluralism. It is also obvious that there is no simple or even complex quick solution. It is possible, however, to begin a series of small steps in a proper direction.

SOME PRACTICAL ASPECTS OF THE PROBLEM

The Bureau of Indian Affairs, (BIA) as the principle agency dealing with Indians, is usually singled out as the primary cause of the Indian condition. The BIA, however, is only partially to blame. The position of the BIA in the Department of the Interior causes it to compete with more influential agencies such as the Bureau of Reclamation, and the Indians lose their water rights. The BIA is caught between Congress, which sees no need for continued outlays of money for an ethnic anachronism, and the Indians, who demand that the BIA do more than it is presently doing. The tribal governments find themselves completely dependent on the Federal Government in general, and the BIA in particular, for funds and management ability. If they complain too much, they foresee the withdrawal of those funds and services. If they are too successful in self-development, they foresee termination before they are prepared for it. These conditions result in a strong resistance to any meaningful change.

Reproduced at the Richard Nixon Presidential Library and Museum

The national Indian organizations, or organizations formed for the benefit of Indians are seldom more effective than the BIA. The organizations fall under one of three categories:

1) Organizations allied with tribal governments. This class of organization is ineffective because of the inherent conservatism of the existing system of administration and the threat of termination. They are controlled by tribal leaders, many of whom have a vested interest in maintaining the status quo.

2) Organizations staffed and run by whites. Such organizations tend to become microcosms of the BIA, sharing the philosophy that they will do the planning and implementation of programs for the Indians rather than allowing the Indians to do it themselves. While this may be benevolent paternalism, it is paternalism nevertheless and only worsens the dependency syndrome.

3) Organizations of Indian youths, which should hold the most promise, tend to develop into personality cults which soon disintegrate when the charisma of the current leader wears thin. They are without direction or specific purpose. For example, the current program of one youth organization is an attempt to impeach the present Secretary of the Interior, a move sure to fail, and of questionable consequence if successful.

There are perhaps a dozen legal service programs for Indians, funded by the Office of Economic Opportunity, which have had some degree of success, depending on the philosophy and ability of the program's director. For example, the California program has been

Reproduced at the Richard Nixon Presidential Library and Museum

successful in exposing many abuses of Indian rights by the State and the BIA. The Navajo program, however, has involved itself deeply in tribal politics and was ordered off of the reservation by the tribal government. A lawsuit resulted in the program's return, but the fight continues at the expense on both sides of funds and abilities needed for more constructive purposes. There is now a serious danger that OEO legal service programs will be curtailed. A bill has been introduced by Senator George Murphy of California with the avowed purpose of preventing legal service suits against government agencies. Such a bill would severely hamper Indian programs since it is the unresponsiveness of State as well as Federal Government that cause the bulk of their problems.

The American Friends Service Committee has done much in Indian affairs, and is one of the more successful organizations, but their efforts have been only on a local and ad hoc basis.

Unfortunately, on a national basis, there are no effective Indian advocates. The Federal Government annually appropriates almost one-half billion dollars for Indian programs, yet no Indian or Indian representative testifies before the budget committee!

Not only have Indians been prohibited from developing as a group, they are actually losing ground. Indian land is being leased to whites with Indians receiving in some cases less than one percent of the net profits. Terminated Indians are losing their trust funds through mismanagement. The problem of multiple ownership by Indians of trust lands is solved by leasing the land to whites. Whites

Reproduced at the Richard Nixon Presidential Library and Museum

purchase "key tracts," e.g., land in the arid southwest that has the only water, and thus control the remainder of the land held by Indians. The State of California took 3,000 acres of Indian land in proceedings in which the Indians were not even represented! The Indians in California and other states are rapidly losing their most valuable asset, their water rights. A project of the U. S. Bureau of Reclamation is draining Pyramid Lake, the sacred lake of the Paiutes. The Paiutes make their living by selling fishing and boating permits on a lake doomed to extinction.

Indians need effective advocates not only to develop, but to maintain what little resources they have been able to retain.

A BEGINNING STEP

It is proposed by the Adlai Stevenson Institute that a national Indian Professional Services program be formed.

The program will have three functions:

1) To act as a national Indian legal service agency;

2) To provide technical and professional consultation to Indian tribes, groups or organizations; and

3) To publish a newsletter for Indians and articles for the general public as a part of an informational outreach program.

PHILOSOPHY

The type of activities undertaken by the Program will be intentionally broad and flexible. Rather than concentrating on

Reproduced at the Richard Nixon Presidential Library and Museum

specific parts of a broader problem such as water rights, the heirship problem or hunting and fishing rights, the Program will attack the broader problem of political and economic development.

In the past local autonomy has made possible group economic institutions, rapid internal modernization and an increase in political power. Unlike other minorities, Indians do not enjoy local autonomy. Thus, one strategy of the Program would be a decentralization of BIA administration that is directed towards Indian controlled and operated economic and social institutions. One means of implementing that strategy would be the planning and negotiation of programs under a "buy Indian" contract with the BIA.

Economic power has become highly centralized. Today, fledgling business is forced to compete not with equally marginal concerns as in the past, but with corporate giants and conglomerates with enormous resources. Indians require assistance not afforded others in order to begin competition on an equal basis. Such assistance could take many forms, e.g., tax incentives and exemptions, training grants, preferential treatment in regulated industries, preferential treatment for government purchases, etc. The Program's activities will be directed towards this end also.

Therefore, the activities of the Program, by the very basis of its nature, must remain broad and flexible and be directed towards the ultimate goals of political and economic decentralization. Each undertaking must therefore be decided on an ad hoc basis.

Reproduced at the Richard Nixon Presidential Library and Museum

THE PROGRAM

1) The Legal Service Program will consist of three parts; (a) litigation directed at law reform on behalf of Indian groups; (b) legal research preparatory to statutory law reform; and (c) the coordination of the above with existing legal service and "community organization" programs directed towards Indians.

The law relating to American Indians is an esoteric field. There are over ten thousand treaties, statutes, regulations and Solicitors' Opinions regarding Indians. Few lawyers are familiar enough with either the unique social and economic problems of Indians or with the applicable laws to give representation of the necessary quality. While most of the large tribes retain counsel, the smaller tribes cannot afford counsel and are not represented. Yet the precedents set for the smaller tribes, be they in the area of hunting or fishing rights (which are of extreme importance to Indians), land tenure, sovereignty rights on the reservation, election of tribal officials, etc., are generally applicable to all tribes, large and small alike. Moreover, Indian groups and individuals often go completely unrepresented, notwithstanding the fact they they, too, may raise legal issues of the greatest importance to Indians nationally.

The Program will offer representation to those tribes, groups and Indian organizations and individuals unable to afford full-time counsel, in cases of national applicability. It will also act as a research arm for existing legal service programs and tribal attorneys.

Reproduced at the Richard Nixon Presidential Library and Museum

For example, the Program will provide a depository for all briefs on hunting and fishing rights that will be available to any attorney requesting them.

Governmental agencies are notorious for not following the law and unlawfully expanding their powers. Most domestic groups dealing with administrative agencies employ full-time attorneys. An outstanding exception is the American Indian. The tribes retaining Washington, D. C. counsel are represented, but even then only on an ad hoc basis. The smaller tribes are not, even though their interests are seriously affected. The Program will offer to represent any group or tribe in its dealings with the BIA or other governmental agency.

The Program will be involved in statutory law reform through legislative research. Although the Federal Government spends almost one-half billion dollars per annum on programs directed towards American Indians, no Indians or Indian representatives testify before the appropriation committees. Only when hearings are held locally are the Indians heard, and then only perfunctorily. An example is the hearings for the Indian Resources Development Act of 1967, commonly called the Indian Omnibus Bill. While the hearings were being held the Department of the Interior made a copy of the bill public, convincing the Indians that their opinions were not going to be considered. Another aspect of the Program will be to provide testimony and research material for the use of Indian representatives testifying before

Reproduced at the Richard Nixon Presidential Library and Museum

legislative boards and commissions.

2) While the Program will emphasize legal services at the outset, it will have as its long-range goal providing technical and professional consultation to Indian groups. For example, the Indian community on the Navajo Reservation at Rough Rock has gained control of its school. Departing from the usual pattern of Indian education, the Rough Rock school teaches the children to become Navajo/Americans rather than middle-class white children. Many tribes (the Mesquakie Indians in Iowa, for example) would like to copy the Rough Rock experiment, but lack the professional experience to design curriculum, prepare budgets, recruit teachers, etc. The Program would help to furnish this type of professional assistance, at first on an ad hoc basis, with a view toward bringing the professional into the program when it is perceived that his full-time services are required.

3) Finally, the Program will employ a full-time editor who will publish a quarterly newsletter detailing its activities. In addition, he will devote himself to the task of keeping the issues concerning Indians before the American public. He will prepare articles for newspapers, magazines and radio/television commentaries.

LOCATION, ORGANIZATIONAL STAFFING

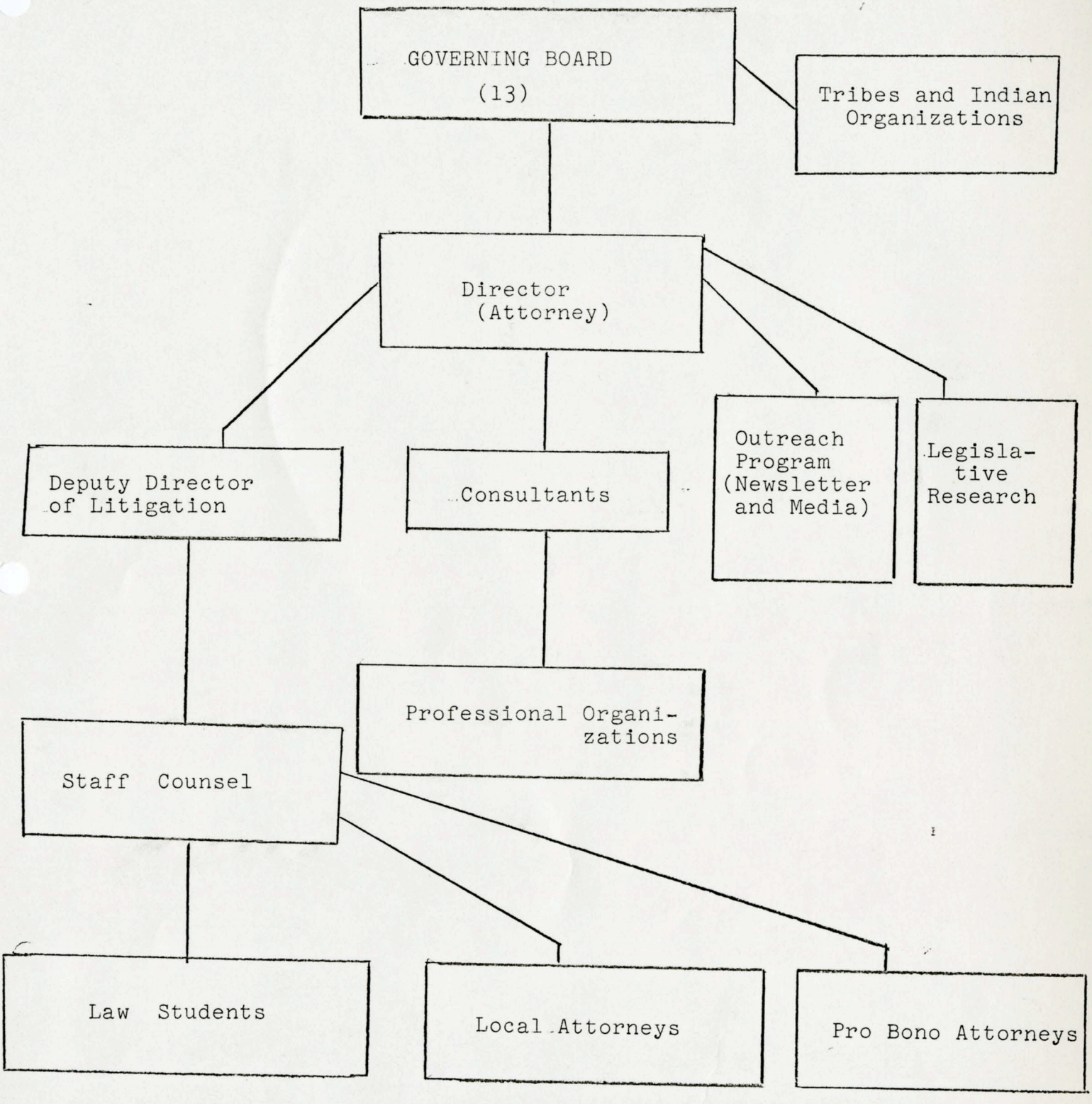
It is essential that the Program be associated with a major law school in a centrally located urban area. This will make it possible to cut costs and increase effectiveness, for example, by

Reproduced at the Richard Nixon Presidential Library and Museum

making use of law students as legal researchers and volunteer attorneys, by obtaining office space and access to a large law library, by developing the curriculum for a course on Indian legal problems, etc. Negotiations have begun with representatives of leading law schools in the country. (See Appendix "A" for a list of the schools).

A staff organization chart follows:

Reproduced at the Richard Nixon Presidential Library and Museum



Reproduced at the Richard Nixon Presidential Library and Museum

Little difficulty is anticipated in filling the six staff positions with highly qualified men and women. The Institute has contacted several people who have expressed interest in the Program. (See Appendix "B" for their names and experience).

The Program will be controlled by a governing board composed of thirteen persons selected from eight regions throughout the country, including Alaska.

MODUS OPERANDI

Briefly, cases will be accepted by the Director and Deputy Director of Litigation on the basis of their national importance as precedent-setters, and their strategy importance as affecting the lives and property of large numbers of similarly situated Indians. The difficulty, of course, will not be in finding cases of sufficient importance to prosecute, but in winnowing out of a great many good claims and causes those which promise to have a "multiplier effect" if successfully concluded. Where a case is accepted, normal procedure will be to assign it to a staff counsel as supervisor; he will sub-assign it wherever possible to pro bono attorneys or (for research) to law students. Primary legal assistance, of course, will be given to those organizations, groups, and individuals who are able to afford adequate representation, and fees will be based upon ability to pay. Efforts will be made during the first four years of operation to render the organization self-supporting; these are summarized under

Reproduced at the Richard Nixon Presidential Library and Museum

the heading Funding, infra.

The legislative research section of the program is predicated upon close liaison with Indian organizations, experts on Indian problems throughout the United States and the staffs of the Indian Affairs Subcommittees of the House and Senate. An effort to combine imaginative and realistic legislative drafting with attempts to determine what Indians need and want in the way of relationships with government is long overdue. Similarly, through its newsletter and other informational outreach devices, the program will attempt to communicate with American Indian communities at the grassroots level. (For example, one of the first activities of the editor of the newsletter will be to poll Indians on certain matters of immediate concern, and to publish the results; the legal staff will then translate these concerns into action). Toward these ends the program budget provides for consultations with technical experts, social scientists and the like (see, Budget, infra).

Finally, association with a major unversity will have a substantive effect on the program and on the problem area. For example, one of the Program Director's initial activities will be to design a law school course on Indian legal problems and to attract into the field a number of law students, both Indian and white. In this way the Program will be training persons who may wish to work with it, directly or indirectly, in the future. Similar affiliations will be attempted with university departments of anthropology, sociology government and education.

Reproduced at the Richard Nixon Presidential Library and Museum

FUNDING

Funding in the first three years of operation will be obtained from the following sources, and in the following approximate proportions of total budget:

Year 1	Year 2	Year 3
Foundation Grant (100%)	Foundation Grant (75%)	Foundation Grant (50%)
Law School (0%)	Law School (15%)	Law School (15%)
Fees (0%)	Fees (5%)	Fees (15%)
Private Donors (0%)	Private Donors (5%)	Private Donors (20%)

Year 4	Year 5 and thereafter
Foundation Grant (25%)	Foundation Grant (0%)
Law School (15%)	Law School (15%)
Fees (20%)	Fees (25%)
Private Donors (40%)	Private Donors (60%)

In other words, the aim of the Program will be to decrease foundation participation to zero in four stages; to continue association with a university that will cover a fixed proportion of costs; to cover a maximum of 25% of costs by providing services for which

Reproduced at the Richard Nixon Presidential Library and Museum

clients are able to pay, and to shift the burden of costs (60%) to private donors by year five. This is reflected in the enclosed budget. These percentages are, of course, speculative; for example, it is possible that one particularly lucrative case or project accepted in year one will make it possible to lower the percentages of participation of all other donors in subsequent years. The maximum of 25%-of-costs figure assigned to fee projects is intended to reflect the Program's determination to devote the great bulk of its time and energies to serving those who cannot obtain adequate service elsewhere.

Reproduced at the Richard Nixon Presidential Library and Museum

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

Office of the White House Press Secretary

THE WHITE HOUSE

Summary of Message to the Congress on Indian Affairs

By almost every index of measurement, the Indians are America's most neglected minority group. Past government policy toward Indians has been one of immense injustice. The time has come to break decisively with the past and to present a new Indian policy for the nation.

The new policy of the Nixon Administration rejects two harsh and unacceptable extremes which have dominated past policies.

1. First, it explicitly repudiates the policy of forced termination, and asks the Congress to do the same. Termination means that the Federal trusteeship responsibility to Indians would be discontinued. The Administration policy would affirm the historic relationship between the Federal government and the Indian communities and guarantee that it cannot be abridged without the Indians' consent.

2. Secondly, the Administration rejects the extreme policy of constant paternalism. It proposes "contracting out" legislation which would enable any Indian community to vote to take over the control or operation of Federally-funded and administered Indian programs in the Departments of Interior and HEW.

Other Administration proposals concerning the American Indians are as follows:

3. Restoration of 48,000 acres of sacred lands near Blue Lake, New Mexico, to the Taos Pueblo Indians.

4. Encouraging greater Indian control over education through the right of Indian tribes or communities to the transfer of school control to local Indian schools boards, and through an amendment to the Johnson-O'Malley Act which would permit the channeling of funds directly to Indian tribes and communities as well as to public school districts.

5. Economic initiatives including:

-- Increased authorization for the existing Revolving Loan Authority, which lends money for Indian economic development projects, from approximately $25 million to $75 million;

-- Authorization of $200 million to provide additional incentives to private lenders to encourage them to lend more money for Indian economic projects;

-- Permission for any tribe to enter into leases of its land for up to 99 years; and

-- Further emphasis on economic development planning.

6. Allocation of an additional $10 million to improve Indian health programs.

more

(OVER)

Reproduced at the Richard Nixon Presidential Library and Museum

7. New efforts to help Indians who have left the reservation and are now dwelling in urban areas, principally through urban Indian centers which will act as links between existing service programs and the urban Indians.

8. Establishing a new Indian Trust Counsel Authority, separate from the Departments of Interior and Justice, which would ensure independent legal representation for the Indians' natural resource rights.

9. Establishment of a new position in the Department of the Interior -- Assistant Secretary for Indian and Territorial Affairs.

The President's message to Congress concerning Indian affairs also discusses efforts which the Administration has made during the last 17 months to improve Indian programs. And it calls for continuing close consultation with Indians in the development of new programs and policies.

# # #

Reproduced at the Richard Nixon Presidential Library and Museum

FOR RELEASE AT 12.00 NOON, EDT July 8, 1970

Office of the White House Press Secretary

- -

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

Reproduced at the Richard Nixon Presidential Library and Museum

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.

more

Reproduced at the Richard Nixon Presidential Library and Museum

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.

more

Reproduced at the Richard Nixon Presidential Library and Museum

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

more

Reproduced at the Richard Nixon Presidential Library and Museum

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

more

Reproduced at the Richard Nixon Presidential Library and Museum

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

Reproduced at the Richard Nixon Presidential Library and Museum

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 toIndians 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

more

Reproduced at the Richard Nixon Presidential Library and Museum

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

more

Reproduced at the Richard Nixon Presidential Library and Museum

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.

more

Reproduced at the Richard Nixon Presidential Library and Museum

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

Reproduced at the Richard Nixon Presidential Library and Museum

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.

# # # #

Reproduced at the Richard Nixon Presidential Library and Museum