STATEMENT OF WALTER J. HICKEL, SECRETARY OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON INDIAN AFFAIRS OF THE SENATE INTERIOR AND INSULAR AFFAIRS COMMITTEE, ON S. 4115 and S. 4165 - SEPTEMBER 21, 1970

Mr. Chairman:

It is a privilege to appear before you this morning to testify in behalf of S. 4115 a bill that will establish a new Assistant Secretary in the Department of the Interior who will be an Assistant Secretary for Indian and Territorial Affairs and S. 4165 a bill which will create within the Executive Office of the President an Indian Trust Counsel Authority. These bills encompass two of the seven proposals submitted by the Department as legislation to implement the Indian policy enunciated by the President in his message to Congress on July 8, 1970.

S. 4115 would add a new Assistant Secretary to the staff of the Department of the Interior who, under the provisions of the bill, would be responsible for those duties assigned to him by the Secretary.

This new Assistant Secretary is needed in the Department to help guide the implementation of the new national policy concerning American Indians which President Nixon enunciated in his message.

In keeping with this new policy and the implementation of it, the new Assistant Secretary will be assigned the duties of supervising the Bureau of Indian Affairs and the Office of Territories and will be given the title of Assistant Secretary of Indians and Territorial Affairs. This office will combine in one office the human resource elements of the Department of the Interior.

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This new position will raise the areas of Indian and territorial responsibility to a new and higher position within the Department. This new position will allow the Indians and the people of our territories to be represented in inter-departmental relations at a level higher than they enjoyed in the past. We feel that this elevation is a direct reflection of the President's concern about the problems of the Indians and the territories.

The creation of the new position will also mean that our Indian people and the people of the territories will no longer have to compete with the natural resource responsibilities of the Department for attention as they now do in the day-to-day operation of the Department. This new position will allow one man -- the new Assistant Secretary -- to focus his full time and attention on the unique problems and concerns of our Indians and the peoples of the territories. One of his principal duties will be to assist in the development of the full potential of those people under his jurisdiction both for their own and the Nation's benefit.

S. 4165 establishes within the Executive Office of the President the Indian Trust Counsel Authority which will provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the Indians. This protection is needed in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

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The Indian Trust Counsel Authority will be governed by a three-man Board, the majority of which must be Indians. It will be, as specifically provided in the Act, free from control of the executive department -- either Interior or Justice. This independence will free the trust authority from having to take into consideration any interest other than that directly bearing on the Indians and their natural resources and will allow it to independently carry out its function of protecting the natural resource rights and interests of the Indians.

It is our intention that the Authority will build from available resources, as well as newly trained attorneys, a cadre of well-trained and devoted attorneys whose energies will be focused on the protection and preservation of the Indians' natural resource rights and interests. The Authority is empowered to use these attorneys upon the request of an aggrieved Indian or group of Indians to assist those Indians in the protection of their natural resource rights and interests in the courts and administrative bodies. It is also given the authority to initiate suits when requested by an aggrieved Indian or group of Indians acting in the name of the United States as trustee for the Indians to protect the Indians' rights and interests in their natural resources, in all courts against the United States and its departments, agencies, and employees, the States or its subdivisions or any public or private person or corporation. The bill provides for a waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority in connection with its suits brought in the name of the United States as trustee for the Indians. This waiver of immunity will be used

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in those cases where the Indians' rights or claims are of such a nature that they are precluded from legal action against the United States because of bars that the United States can raise as a sovereign. This bill specifically bars the Authority from relitigating any claims that are filed or should have been filed before the Indian Claims Commission and will bar the reopening of any claims settled by the Indian Claims Commission as well as any claims settled by the Court of Claims or any other competent court of the United States.

The Authority is authorized to charge a fee for services rendered by it based upon an Indian or Indian group's ability to pay for such services. This provision is included in the bill so that the Authority may lend its assistance and expert help even in those instances where the tribes can afford their own private counsel but want the assistance of the Authority in connection with any of its claims. This fee will vary from tribe to tribe depending upon the tribe's ability to pay. The Indians of this Nation have felt for years that the Federal government, because of inherent conflict between its national interest and the private interest of the Indians, has not given the Indians' rights adequate legal protection. It is our strong belief that this bill will restore the confidence in the Indian in the ability to give their natural resource rights the legal protection to which they are entitled. This bill makes it clear to the American Indian that the United States is meeting the legal obligation it has as a trustee to advance the interest of the beneficiary of the trust without reservation and to the highest degree of its ability and skill.

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This Counsel will give the Indians the opportunity to have their claims brought before the courts for adjudication without a conflict between the national interest and the Indians' interest prejudicing any claim before it can be examined by a court as has often been the case in the past years. The court and not some administrative officer or agency will then be the final arbitrator of Indian claims.

We strongly believe that this new direction will give the Indian greater confidence in his government not only as a trustee but as an institution deserving of his confidence.

Thank you for this opportunity to present the Administration's views on these bills. Present with me are members of the Department's staff including Assistant Secretary Loesch, who has present responsibility for the Indians, Commissioner Bruce and other members of the staff. We stand ready to answer any questions that you might have.

* * *

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THE WHITE HOUSE

WASHINGTON

September 17

LG:

To raise with Hickel:

1. Indian Testimony

Hickel should testify.

Comment:

A. This is Presidential legislation -- not Departmental stuff. Therefore, a Cabinet Officer should represent the President at the outset of hearings -- not an Assistant Secretary who can really represent only the Department. (No derogation to Loesch - he is great).

B. McGovern may be unhappy about the Administration re the defeat he suffered re foreign affairs, but this hearing and this legislation are Indian Affairs - and especially the two bills. On Indian matters, and on this legislative package, McGovern can do us no harm. Even on the mistakes of the past Hickel is not vulnerable -- this is a new approach which puts those mistakes in the past.

C. Tactically, Secretary Hickel can and should make an opening statement and then turn detailed questions over to Mr. Loesch.

D. Hostile or sticky questions are probably few: i.e.

i) The Veeder matter: Anderson's complaint was dealt with by Loesch in a letter to Anderson; Loesch can handle details.

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ii) Specific legal services issues about specific land and water rights questions (Rio Grande, Colorado, Puget Sound etc) can and should be handled as matters which should be gotten into the courts regardlessof their merits -- and we don't need to be drawn into a discussion of the merits.

2. Approaching Republican Senators

The 4 on the Subcommittee are:

Fannin
Bellmon
Hansen
Stevens

We are checking now in attendance Monday.

Fannin and Stevens are running for reelection.

Does the Secretary have any suggestions about approaching them?

3. Substance of the Testimony

A. The Assistant Secretary Bill

No problems here really -- Bellmon's report got delivered this morning.

B. Indian Trust Counsel

Major arguments:

i) The ones in the President's Message

ii) This will ensure Indians their day in Court

iii) This will help "clear the air" in many Indian matters: when land and water cases are pending for long periods of time, plans for industrial development, housing, schools are all put a skew by hopelessly hostile atmosphere engendered by the land and water issue. In a way, this is a "cooling it" bill.

iv) Barratry can be avoided by a sagacious Indian Trust Counsel and a Board of Directors.

4. Alcatraz

Has Secretary seen our Memo for comment?

If he would like to discuss ths situation, or the memo, we can do so.

Brad

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91st Congress
2d Session

COMMITTEE PRINT

A STUDY OF ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES

PREPARED FOR THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

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Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
53-766 WASHINGTON: 1971

3/5/71

Charles, You may want to bring this to the attention of the others who attended the recent meeting with us.

Bob L

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THE WHITE HOUSE

WASHINGTON

February 19, 1971

TO: BRAD PATTERSON

FROM: BOBBIE KILBERG BK

Joseph Muskrat was one of Senator Adlai Stevenson's campaign managers in the '70 election. He is a friend of Iola Hayden and is a native of Oklahoma. AIO has agreed to send his "Proposal for the Development of a National Indian Advocacy Center" around to interested individuals under AIO's auspices. However, this is not an AIO proposal and it is not the same as the AIO legal services program. LaDonna does not feel very strongly about pushing Muskrat's proposal but Iola would like to see it helped along.

Muskrat is evidently an interesting individual and you might enjoy meeting with him. However, he is talking about a private, non-profit corporation and there is not really much substantive help that we as a White House office can give him. He would be better off from a practical point of view talking with OEO though I understand he is well acquainted with everyone over there.

On balance, meet with him if you have time and want to learn something about what he is doing.

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Leibman, Williams, Bennett, Baird and Minow

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OF COUNSEL G. KENNETH CROWELL J. ARTHUR FRIEDLUND JOHN R. GOLDEN

WASHINGTON OFFICE · 1156 FIFTEENTH STREET, N. W. · WASHINGTON, D. C. 20005 · 202 833-8606

February 4, 1971

Mr. Bradley H. Patterson
c/o Mr. Leonard Garment
The White House
Washington, D.C.

Dear Brad:

Donna Bradshaw, who is W. Clement Stone's daughter, has asked me to try to arrange for Mr. Muskrat to meet with one of the gentlemen listed in Paragraph 2 on the first page. Could you possibly arrange for Len to see this man.

Best, as always.

Sincerely,

Morris I. Leibman

MIL/dm
Enclosure

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INTER-OFFICE MEMO

000670-A

CC

Date January 20, 1971

To MRS. DONNA S. BRADSHAW, MR. H. RHEA GRAY

From Len Borman

RE: PROPOSAL FROM JOSEPH MUSKRAT TO DEVELOP A NATIONAL INDIAN ADVOCACY CENTER FUNDED BY THE FEDERAL GOVERNMENT IN WASHINGTON

1. Since you will be meeting with Mr. Stone tonight, it might be advisable to raise this project with him especially since the Office of the Vice President (see the attached letter) has indicated interest in promoting this proposal.

2. Mr. Robertson, in the Office of the Vice President, as well as Mr. Muskrat seek Mr. Stone's assistance in giving visibility to this proposal with some key members in the Administration in Washington. These would be:

   a) Mr. Donald Rumsfeld
   b) Mr. Morton, newly appointed Secretary of Interior
   c) Mr. Erlichman
   d) Mr. Leonard Garment, who wrote the President's message on Indians

3. Evidently while this proposal has been distributed to various members of the Administration, and apparently is fully supported in a bipartisan way as well as by Indian organizations, it hasn't been reviewed by key members of the Administration.

4. The suggestion here would be that Mr. Stone meet with Joe Muskrat, become familiar with his plans and program, and, if he desires, through letter or phone call, make some appropriate contacts for Mr. Muskrat to present his proposal in Washington.

5. Mr. Stone should also know that Mr. Muskrat participated as one of the campaign managers in the campaign for the election of Adlai Stevenson, III.

6. I think the urgency of bringing this to Mr. Stone's attention rests in the interest shown on the part of the Office of the Vice President.

7. If I can be of any help in giving more information, I will be at home this evening.

Leonard D. Borman, Ph.D.

/jp

(Transcribed & forwarded during Dr. Borman's absence from the office.)

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NATIONAL COUNCIL ON INDIAN OPPORTUNITY
OFFICE OF THE VICE PRESIDENT
WASHINGTON 20506
202 (395-3412)

January 12, 1971

W. Clement & Jessie V. Stone
Foundation
Prudential Plaza
Suite 2720
130 East Randolph Street
Chicago, Illinois 60601

Attention: Dr. Leonard Borman

Gentlemen:

Enclosed is a proposal for the Development of a National Indian Advocacy Center, submitted by Mr. Joseph C. Muskrat, lawyer, native of Oklahoma, presently residing at Chesterton, Indiana.

The proposal treats three areas of apparent need in the Indian field:

1. design of Indian-designed programs;

2. provide legal representation and counsel in Washington for those tribes who could not afford legal counsel;

3. publicize Indian goals and aspirations in journals and periodicals.

This appears to be a proposal very well structured to accomplish the needs set forth and deserves your attention.

Sincerely,

Robert Robertson
Executive Director

Enclosure

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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

Submitted under the auspices of:
Americans for Indian Opportunity
1820 Jefferson Place, N. W.
Washington, D. C. 20036
Iola Hayden, Executive Director

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PREFACE

This proposal is submitted to the Office of Economic Opportunity by Joseph C. Muskrat under the auspices of Americans for Indian Opportunity. It is a proposal for a development grant to establish a 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.

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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

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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.

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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.

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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 complete 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.

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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.

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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,

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- 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 OEO.

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

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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.

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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

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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	

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VII. OTHER COSTS

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

TOTAL COSTS $136,380

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

APR 2 1971

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

Dear Mr. Shultz:

This is in response to your request for the views of the Department of Justice on the Department of the Interior draft bill "To provide for the creation of the Indian Trust Counsel Authority, and for other purposes."

The purpose of the legislation is set forth in the proposed Speaker letter of the Secretary of the Interior. As you know, the legislation was the subject of a number of conferences held at the Office of Management and Budget during the last Congress for the purpose of drafting legislation to carry out the Indian program of the President as outlined in his message of July 8, 1970. The instant proposal is similar to that which was drafted in 1970. Accordingly, our comments will be limited to changes reflected in the current draft and to observations not previously made.

Section 8 has been changed by adding to the first sentence the following words:

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

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This addition creates confusion. The first part of this sentence provides that the Department of Justice is relieved of the responsibility to represent Indians or Indian tribes with respect to their rights or claims to natural resources. The added material appears to assume that the Department of Justice will continue to give consideration to Indian natural resources. This confusion is carried into the discussion of Section 8 in the proposed Speaker letter. The added language is contrary to the intent and purpose of the proposed legislation, which would terminate the responsibilities of the Department of Justice for protecting the Indian rights or claims in natural resources and would transfer such responsibilities to the Indian Trust Counsel. This Department has consistently objected to any divided responsibility and continues to do so.

We note that Section 9 provides for the Indian Trust Counsel Authority to litigate on behalf of the Indians in courts of the United States and the several States. Further, the section provides that the litigation may be instituted against departments and agencies of the United States. In our judgment the authorized litigation should be confined to the courts of the United States; the United States should not be required to defend such litigation in the various courts of the States and their governmental subdivisions. In addition, it is unnecessary to provide that suit may be brought against departments and agencies of the United States when it may be brought against the United States itself. Further, as with suits against the United States under the Federal Tort Claims Act and the Tucker Act, a suit authorized by Section 9 should be tried to the court without a jury. As a matter of fact, this was agreed upon last year. To effectuate this recommendation, a final sentence should be added to Section reading "Any such suit should be tried to the court without a jury."

We suggest that Section 10 be amended by adding in the second line after the words "prosecution of" the words "or intervention in". This would make it clear

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that pending tribal cases before the Indian Claims Commission and the Court of Claims shall be prosecuted by tribal counsel.

The reference in Section 10 to the "Act of March 3, 1887, as amended (24 Stat. 505)" should be amended to refer instead to Sections 1346(a)(2) and 1491 of Title 28, United States Code. These constitute the current citations of the Tucker Act. As a drafting matter we suggest that a period be inserted after "United States" in the third from the last line of the section and that the reference to the Tucker Act be stated as a separate sentence reading as follows:

> Sections 1346(a)(2) and 1491 of Title 28, United States Code, shall not be considered special statutes authorizing suits to be instituted by Indians against the United States.

We note that early drafts of the legislation contained a Section 11(5) authorizing the Authority to charge legal fees based upon the Indians' ability to pay. The current draft has no such provision.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

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THE WHITE HOUSE

WASHINGTON

September 15, 1970

MEMORANDUM FOR BRAD PATTERSON

SUBJECT: Witnesses at Indian Hearings

Jerry Cassidy from Senator McGovern's staff has given me the following list as a final list of witnesses:

Secretary Hickel
Commissioner Bruce
Ernie Stevens (I am not clear that Harrison Loesch will have him testify)
Browning Pipestem
Martin Bennett
Senator Kennedy
James Vidawich
Charles Lohah

Jerry says that they removed John Ekelhawk from the Native American Rights Fund because they could not pay travel expenses. However, David Getches, Director of that group, says that they were willing to pay Ekelhawk's way. I did not pursue it further because among those testifying are both an Indian lawyer (Pipestem) and a lawyer who is familar with Pyramid Lake (Vidawich). Therefore, I did not consider it worth jeopardizing a good contact for. As for Monroe Price, he suggested himself that he be removed and that Vidawich be listed in his place.

As you can note, Senator Kennedy is testifying but no Republican Senator is listed. Don't you think we should try to get one?

Bobbie

BOBBIE GREENE

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December 9, 1970

Dear Senator Allott:

Thank you for your letter of December 7.

As you know, my letter to you of October 5, 1970, was sent also to every Republican member of the Senate Interior Committee. In the intervening time between October 5 and December 1, I really have no way of knowing what the other recipients of the letter did with their copies or to whom any of them might have shown them.

Please let me take this occasion to assure you, Senator Allott, as I have done on the telephone, that the respective positions on both sides of the Blue Lake issue were those of honorable men with the best interests of the nation at heart. Nothing in that debate will be allowed to obscure the high personal regard both the President and I have for you and your leadership position on the Committee. I look forward to an occasion where we can get together informally and discuss matters of mutual interest.

Cordially,

Leonard Garment

bcc: Harrison Loesch

The Honorable Gordon Allott
United States Senate
Washington, D. C. 20510

bcc: Harrison Loesch
Kenneth BeLieu
Bobbie Kilberg

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JERRY T. VERKLER, STAFF DIRECTOR

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

December 7, 1970

Honorable Leonard Garment
Special Consultant to the President
The White House
Washington, D. C. 20500

Dear Mr. Garment:

In the Senate's recent considerations of H.R. 471, I was somewhat surprised to find Senator Harris on the floor of the Senate quoting from your October 5, 1970 letter to me (December 1, 1970, Congressional Record, S. 19158).

While the reading of the letter had little effect upon the outcome of the issue, nevertheless, its contents are now in the public domain and stand as an expression of Administration policy, specifically that, "The clean way to assure 'exclusive use' of a piece of land is to confer title upon the users." Your letter did not indicate that you had furnished copies to Senator Harris but only to the Republican members on the Committee, nor was I subsequently advised that you were giving others copies of it.

Under the circumstances it is requested that you advise me of the manner in which the letter sent to me was furnished Senator Harris, if you know.

I am sure you can readily appreciate the necessity of my being advised with respect to the confidentiality or the proposed distribution of our communications.

Sincerely yours,

Gordon Allott

Gordon Allott
United States Senator

GA:dw

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8/18

NEED FOR ACTION ON INDIAN POLICY AND PROGRAMS

Mr. McGOVERN. Mr. President, history and events have converged to provide the Congress with a unique opportunity to address itself to one of our Nation's oldest domestic problems—the plight of American Indians. While Indians and the problems which beset them have been the subject of countless public and private explorations down through the years, with manifold theories, programs, and schemes being advanced for the ultimate solution of this long-standing and perplexing problem, the degree of interest and concern shown by the public and others for the Indian people has reached an all-time high.

The late Senator Robert F. Kennedy was chairman of a Special Senate Subcommittee on Indian Education, with the final work being completed by Senator EDWARD KENNEDY, Senator MONDALE, Senator FANNIN, and other equally dedicated Members of this body. Their findings and recommendations offer hope for improvement in at least one area of critical importance to the Indians and those in the Indian field. In addition, scholars, authors, journalists, advocate groups, and so forth, have, during the past several years, examined the full range of social and economic ills which combine to form a seemingly insurmountable barrier which prevents Indian citizens from sharing in America's bounty. And the Indian people themselves through new and traditional leadership are articulating their needs in a forceful manner with the just demand that their people be given an opportunity to enjoy a better way of life.

Our own actions here in the Congress during the Kennedy-Johnson years have contributed significantly to changing circumstances in the Indian field. Indians are now recipients of new-found aids emanating from several major Federal departments and agencies with an identifiable expenditure of more that $500 million in the 1970 fiscal year alone.

But what has this rediscovery of our Nation's first citizens and an infusion of new-found financial resources into the Indian field really contributed to the lives of the rank and file tribal members? Without belaboring you with a review of complicated statistical tables, one needs only to examine any set of standard indexes to know that Indians, as a group, continue to occupy the lowest rungs of our socioeconomic ladder.

The present administration has addressed itself constructively to the Indian problem through President Nixon's recent message to Congress on the America Indians. In reading the message, I was encouraged to note that the President has proposed several bold departures from traditional practices in the Indian field which reflect his own personal desire to cope with this longstanding problem. On July 15, I stated here in the Senate my support of these proposals in general. It is my hope that all of us will give careful considerations to the President's proposed Indian programs.

As chairman of the Subcommittee on Indian Affairs, I plan to launch a series of formal hearings on the President's proposal and accompanying legislation on September 21 and 25, 1970. These hearings will undoubtedly continue and I hope result in the passage of legislation, during the forthcoming 92d Congress.

This is a problem area that cannot be treated lightly. In order to realize lasting results, we will make certain that Indian people themselves become the center of any hearing process that we launch, so that their views and suggestions will have the proper influence upon the legislation before us.

In conclusion, I want to reiterate my belief that we stand on the threshold of an opportunity to contribute to an improved livelihood for thousands of Indian men, women, and children who are living under conditions of poverty through no fault of their own—other than that they are the victims of unfortunate historical and legal developments. I am hopeful that Members of both parties will join with me in an effort to consider the President's proposals at the earliest possible date.

I ask unanimous consent that a press statement by Senator JACKSON, released August 18, be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

SENATE HEARINGS ON INDIAN POLICY

Chairman Henry M. Jackson of the Senate Interior and Insular Affairs Committee today announced public hearings for September 21 and 25 on President Nixon's recent message to Congress on American Indians.

Jackson said the hearings would start at 10 a.m. each of the two days in Room 3110 of the New Senate Office Building, and be conducted by the Subcommittee on Indian Affairs with Chairman George McGovern presiding.

"President Nixon's message proposed a number of changes which merit careful consideration by the Congress," Jackson said. "I will soon be requesting the views and positions of national and regional Indian associations and tribes on these recommendations.

As Chairman of the Senate Interior and Insular Affairs Committee I will also want to hear a discussion of other alternatives. New policies and new programs must, I believe, originate in and be shaped by the Indian community if they are to be effective.

"By the same token," Jackson said, "whenever it is desired, the Indian community must be given full opportunity to administer and make decisions concerning programs which determine the quality of community life."

Jackson said, "The hearings will continue over several months and a full scale effort will be made to probe into the special problems of our first Americans."

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September 8, 1970

MEMORANDUM FOR SECRETARY HICKEL

SUBJECT: September 21 Testimony on Indian Affairs

I believe it is important if not crucial for the success of the President's Indian legislative package that you personally respond to the Senate Interior Subcommittee's invitation and testify at its opening hearing on September 21.

May I suggest a meeting with you and the other Administration witnesses soon upon your return?

After some checking, I find no indication that Senator McGovern or any of the witnesses so far listed is going to be hostile to the President's proposals; to the contrary several of the scheduled witnesses have spoken about them to me in the most glowing terms.

Our biggest job, in fact, may be to convince the Republican Senators to support the President. Subject to Bill Timmons' sense of timing and propriety, I am going to propose an informal meeting of the Republican Senators on the Subcommittee with some of us prior to the 21st.

Leonard Garment

cc: Bill Timmons

bcc: Bobbie Greene
Harrison Loesch

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INVITED WITNESSES FOR
HEARINGS ON INDIAN BILLS — Sept. 21 & 25

Sept 21:

1. Secretary Hickel
2. Commissioner Bruce and Ernie Stevens (BIA)
3. Browning Pipestem, Attorney with Arnold and Porter, Washington. D.C.

Sept 25:

1. Senator Edward Kennedy
2. Martin Bennett, 1775 Church St., N.W., D.C.
   Munroe Price, School of Law, U.C.L.A.
3. James Vidovich, Pyramid Lake Tribal Council, Box 56, Nixon, Nevada
4. Judge Chalres Lohah, 1145 19th St., N.W., Wash. D.C.

Carlucci of OEO.

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

Office of the White House Press Secretary

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THE WHITE HOUSE

TO THE CONGRESS OF THE UNITED STATES:

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

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

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

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

Self-Determination Without Termination

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

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

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

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

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

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

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

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

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

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

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1. Rejecting Termination

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

2. The Right to Control and Operate Federal Programs

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

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

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

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

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

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

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

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

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

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

3. Restoring the Sacred Lands Near Blue Lake.

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

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

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

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

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

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

4. Indian Education

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

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

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

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

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

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

5. Economic Development Legislation

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

This act would do two things:

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

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

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

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

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

6. More Money for Indian Health

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

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

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

7. Helping Urban Indians

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

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

more (OVER)

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

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

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

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

8. Indian Trust Counsel Authority

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

In order to correct this situation, I am calling on the Congress to establish an Indian Trust Counsel Authority to assure independent legal representation for the Indians' natural resource rights. This Authority would be governed by a three-man board of directors, appointed by the

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

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

9. Assistant Secretary for Indian and Territorial Affairs

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

Continuing Programs

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

RICHARD NIXON

THE WHITE HOUSE,

July 8, 1970.

# # # #

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Office of

SENATOR GEORGE McGOVERN

South Dakota

FOR RELEASE
September 18, 1970

FOR RELEASE
September 18, 1970

MCGOVERN ANNOUNCES HEARINGS
ON NIXON INDIAN MESSAGE

Senator George McGovern, (D-S.D.), Chairman of the Senate Subcommittee on Indian Affairs, today announced the witnesses for the Subcommittee's hearings on President Nixon's proposed legislation for a new, comprehensive program for the American Indians on Monday, September 21. Senator McGovern reiterated his desire for a strong, bipartisan effort to seek passage of what he considers vital legislation.

McGovern believes the Administration proposals are a bold departure from the traditional practices in the Indian field. He thinks that the Administration proposals, which have been widely endorsed by the Indian people themselves, must receive the prompt consideration of Congress at this time before interest wanes on the matter of Indian rights.

The first hearing is scheduled for Monday, September 21. Others will follow shortly thereafter. These early hearings will be on the proposed legislation to create an Office of Assistant Secretary of the Interior for Indian Affairs, and to establish a separate Trust Council Authority, which would represent Indians in their legal claims.

The list of witnesses follows:

Monday, September 21, 1970, 10:00 a.m., Rm. 3110, NSOB

Senator Fred Harris (D-Okla.)

Secretary Walter J. Hickel, U.S. Department of the Interior, accompanied by Assistant Secretary Harrison Loesch, and Legislative Counsel Frank A. Bracken, and Commissioner of Indian Affairs, Louis Bruce.

Mr. Browning Pipestem, Esquire, an Otoe Indian from Oklahoma. Mr. Pipestem now serves as head of the American Bar Association division on Indian Law.

Mr. Robert Dellwo, Esquire, counsel to the Spokane Tribe, Covere-Alene Tribe, Kalispel Tribe, and Affiliated Tribes of Northwest Indians.

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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 24, 1970

FOR: Brad Patterson
C. D. Ward
John Nidecker
Bill Casselman

SUBJECT: Indian Legislation

In view of Senator McGovern's plan to hold hearings on September 21 and 22 on our Indian legislation, it would seem that the strategy meeting, which we have discussed, should be held shortly. It is my understanding that we wanted to get White House Congressional Liaison together with Interior's Congressional Liaison and with other relevant White House and Vice Presidential Staff.

Bobbie Greene

Bobbie Greene

cc: Len Garment
Ken BeLieu
Ken Cole

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THE WHITE HOUSE

WASHINGTON

September 2, 1970

MEMORANDUM FOR BRAD PATTERSON

SUBJECT: Additional Witnesses for Senate Interior Committee Hearings on September 21 and 25

I would recommend these additional witnesses to the list which you read me yesterday:

1. Edgar Cahn
Citizens' Advocate Center
1211 Connecticut Avenue - Room 304
phone - 293-1515

2. California Indian Legal Services
Robert Pelcyger or David Getches,
Associate Attorneys
1080 West Washington Avenue
Escondidido, California 92025
Phone 714 746-8941

3. Mr. Peterson Zah, Deputy Director or
Leo Haven, Director
Dinebeiina Nahilna Be Agaditahe (DNA)
P. O. Box 306
Window Rock, Arizona 86515
phone 602 -871-4151

4. A representative from the American Bar Association
Try to get Bernard Segal
Contact point would be Edgar Cahn

Bobbie
BOBBIE GREENE

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TESTIMONY OF BROWNING PIPESTEM
SUBCOMMITTEE ON INDIAN AFFAIRS OF THE
INTERIOR AND INSULAR AFFAIRS COMMITTEE

United States Senate
September 21, 1970

Senator McGovern and members of the Committee:

My name is Browning Pipestem. I am an Otoe and Osage Indian and currently an associate of the Arnold & Porter law firm here in Washington, D. C.

It is my understanding that the concern of this legislation is with solving the institutional conflicts of interest in the administration of American Indian affairs within the federal government.

I wish to direct the major portion of my testimony to the need for the Indian Trust Counsel Authority outlined in the proposed legislation. The creation of an Assistant Secretary of the Interior to elevate Indian Affairs within the Department of the Interior with the express intention of assuring a prestigious advocate for the Indians in intra-departmental conflicts is an important step, but its enactment will not have the effect,

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nor does it have the extreme importance, of the independent Indian Trust Counsel Authority.

In these days when Gideon v. Wainwright has assured the indigent of effective independent legal counsel, the institutional conflicts of interest existing within the Department of the Interior and the Department of Justice, as noted by the President and the Secretary of the Interior, have bound American Indians to remain as the legal heirs of yesteryear. At present there are no governmental legal representatives whose institutional arrangement allows them undivided attention in preserving and advancing Indian rights in natural resources.

The courts of this Nation have repeatedly affirmed the transcendent obligation of the United States as trustee and protector of American Indian natural resources. A trustee's hallmark is his undivided attention and singular purpose in advancing the interests of his beneficiary. The fiduciary relationship of the United States as trustee for American Indian tribes and individuals flows from the obligation of the Nation to protect the remaining diminished

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Indian rights in land and water. A fiduciary relation is defined as one where a special trust of confidence is reposed by one in the integrity and fidelity of another.

There have been, however, despite the pronouncements of the sacred trust, instances when this trust has been violated by those in whom the Indian beneficiaries have placed their confidence and trust.

Congress' mandate for fulfilling the American Indian trust has been entrusted to the Executive department of the Interior, wherein the Bureau of Indian Affairs is located, and the Department of Justice as litigator of Indian interests. In trust relationships, there is a great potential for abuse. When this potential is realized, an intolerable situation, violative of all principles of equity and good faith, prevails.

There are instances of detrimental conflicts of interest within the government which preclude effective advocacy and fulfillment of the trust. These conflicts of interest flow generally from the inharmonious placing of Indian affairs within the same department of the

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government having agencies who have conflicting claims with the Indians for land and water, which frustrates the United States as trustee. Recently the President and the Secretary of the Interior acknowledged to the Congress the disabilities the Executive department is laboring under with respect to proper fulfillment of the American Indian trust.

President Nixon, in confirming the conflict of interest, stated:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of 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

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> 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."

The Secretary of the Interior acknowledged the daily institutional disenfranchisement of Indian interests in the administrative process by stating:

> We believe that this new position [creating an Assistant Secretary of the Interior to oversee Indian affairs] will raise the areas of Indian and territorial responsibility to their proper role within the Department. The Indian . . . will no longer have to compete with the land and other natural resource problems for attention as they now do in the day-to-day operation of the Department."

And further speaking of the Trust Counsel, the Secretary stated:

> "This independence will free the Trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians."

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In essence, the President and Secretary of the Interior have authoritatively documented and confirmed the existence of the most serious legal problem visited upon American Indians wherein institutional arrangements and competing claims predicate an abdication of Indian trust responsibilities and a competitor rather than protector posture of the United States in the capacity of trustee. Of necessity, this affirms the need for instituting the changes the Executive department confirms as hampering Indian rights to assure Indian affairs a diligent, uncompromised advocate and not an advocate by default.

Rights to land and water for which the United States is trustee are private rights specifically belonging to particular tribes or individual Indians as distinguished from the property and rights held by the United States in the public interest. The ordinary process of dispensing with controversies between federal agencies within the same department by scheduling meetings between the heads of the agencies to discuss their differences and effectuate a compromise on the basis of public

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policy has come under considerable criticism in recent years as not being a reflection of the public interest, but if we make the assumption, it is apparent that the Indian private interests are not derived from the same source nor are the private Indian interests always compatible with the national interest, as viewed by competing federal agencies. As private rights, Indian rights are constitutionally insulated and should be the object of strict advocacy, not administrative accommodation. Controversies and opposing contentions of fact and interpretation of law with respect to private rights are properly decided in judicial forums not as part of political accommodation.

The trust relationship contemplated between the United States and the Indians assumes a stringent governmental protector against hostile interests. From events of the past few years, as noted previously, other governmental agencies, often within the Interior Department, have had competing claims to land and water that would have extinguished the rights of the Indian beneficiaries. The question simply stated is: How is the

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trust invoked inward to protect the Indian rights from the trustee?

It is my opinion that the Indian Trust Counsel Authority concept resolves this problem both for the Indians and the Government.

These are indeed perilous times for the securing of American Indian rights to land and the use of water. The perils of yesteryear with respect to Indian land and water long thought by many to have been interred in the last century have been raised anew.

When a few states seek to lead all fifty states of the Nation into another tragic era of disregarding Indian rights to the use of water as was done on a wholesale scale with land less than one hundred years ago, the need for an independent and strong advocate on behalf of the Indians to protect the interests of the Nation and the Indians is great.

Many of the Indian rights to land and water, though presently secure in current legal principles, are governed by doctrines of law which are continually

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developing and will have to be reapplied and firmly advocated in new and different circumstances. If these legal principles become elastic not by defeat of a competent advocate but sordidly by default for reason that there is no advocate in government who is not subjected to the debilitating institutional arrangement presently prevailing, then all of us Indians, lawyers and legislators will have failed in our clear duty to act to prevent further tragedy.

I have several suggestions to offer relative to strengthening the Authority.

First, one facet of the conflict of interest with respect to legal representation that has been unpublicized and frequently overlooked involves approval of contracts between private attorneys and Indian tribes. All contracts between Indian tribes and private attorneys must be approved by the Secretary of the Interior or his delegated agent. The Secretary's approval of attorney's contracts is an incident of his capacity as trustee for American Indian resources. If a legal controversy emerges

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with the Secretary of the Interior as the offending party, vagaries exist wherein the defendant must approve the plaintiff's selection of counsel to sue him and compliance with the terms of the contract will also be approved by the defendant.

If the Authority is to be an institutional solution to all facets of the conflict of interest of an offending trustee, the approval of attorney's contracts and supervision of full compliance should be placed with the independent Trust Counsel.

Second, the advocacy role of legal counsel is extremely important to preserve, particularly in this instance. The Trust Counsel should have authority to be secure in this role by having authority to seek declaratory or injunctive relief to frustrate any attempt to curtail his independence. If the Trust Counsel is to be allowed this relief under section 9, I suggest that the intent be clearly stated in the legislative history.

Third, section 11(5) authorizing the Trust Counsel Authority to charge fees for representing Indian

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clients, but only within the trust responsibility owing to Indians presently, and under section 8 of the act. This provision will necessarily exclude Indians not under federal jurisdiction, "state" Indians. If limited to actions relative to natural resources, unless I am corrected, I know of no natural resources -- land, water, timber, or minerals -- that are not administered under federal supervision and protected by the Secretary of the Interior in his capacity as trustee. For this reason, all or most of the natural resources referred to in section 8 would have a pre-existing obligation to be protected under the trust. The acceptance of fees would blur the purposes of the Authority -- to provide legal counsel when trust land or natural resources are threatened. And, if the Authority is to act in the stead of the Justice Department, does the Justice Department ever accept fees based on ability to pay? I think not.

Also, Secretary Hickel's letter of July 29, 1970 transmitting the Trust Counsel legislation stated:

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"[T]he credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists." The acceptance of fees by the Trust Counsel Authority would tend to create a competitive air between the Authority's staff and private attorneys possibly in derogation of the high purpose for creating the Authority. And, if the attorney's contract approval and supervision of compliance under the contract were vested in the Authority, clearly one of the competitors could not approve the selection of counsel. I am of the opinion that this legislation addresses itself directly to the solution of a smouldering issue in Indian affairs and should be promptly enacted.

In the alternative, if Trust Counsel is allowed to accept fees, the fees should be placed in an account for the benefit of the Authority rather than going into a "miscellaneous" account.

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It is a safe assumption there will be a considerable period of time before this legislation is enacted into law and the Authority becomes operative. This administration has made the important step of translating rhetoric into specificity by authoring these bills. That same insight and firm resolution can devise an interim measure to ensure the protection of Indian rights.

Congress has previously authorized the President general authority to institute the specific goals outlined in his speech. The President, the Secretary of the Interior, and the Commissioner of Indian Affairs have a broad range of authority to act vested in them by the Congress.

25 U.S.C.A. § 9 provides:

> "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

Such regulations promulgated by the President under this authority have been held to have equal legal dignity with statutes.

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With 25 U.S.C.A. § 2 which provides:

> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

Regulations instituted pursuant to Section 2 and the foregoing Section 9 have been held to be authorized by law and consistent with the previous authority have the force and effect of statute.

It would, therefore, be possible for the President, acting through the Secretary of the Interior and the Commissioner of Indian Affairs, to promulgate regulations that strengthen and clarify existing statutory authority to immediately institute a new policy consistent with these existing statutes while seeking new legislation.

It is established beyond question that federal statutes concerning Indian affairs should be construed, in the event of ambiguity or silence, so as to give maximum benefit to the Indians.

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This rule of construction has been adhered to by the Supreme Court since 1912.

Regardless of the conflict of interest problem, there should be no problems with having government counsel for Indians in light of 25 U.S.C.A. § 175. Section 175 provides:

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

This statute has been construed as being discretionary and not mandatory in requiring the United States Attorney to represent Indians. This is a narrow construction of this statute and not consistent with previously cited authority establishing rules of construction for statutes benefiting Indians. The standard for determining whether to represent the Indians or invoke the discretion has not been provided for by the President.

The President can establish regulations, not to reverse the judicial construction, but to set the limits of the discretion and when the discretion will be invoked.

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The President can establish regulations, not to reverse the judicial construction, but to set the limits of the discretion and when the discretion will be invoked.

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If a controversy arises between a federal agency and the Indians, it is possible for the President to resolve these conflicts by promulgating regulations limiting the discretion of the United States Attorney and directing him to represent the Indians in furtherance of his duty as chief trustee. In the alternative, the President may, under his authority to settle the "accounts of Indian affairs," authorize the Commission of Indian Affairs, under his general authority contained in section 2, "to have the management of all Indian affairs and of all matters arising out of Indian relations" to proceed to fulfill his duty to the Indians by expending funds in furtherance of the trust under 25 U.S.C.A. § 13, the general authorizing statute for expenditures by the Bureau of Indian Affairs, to pay private attorneys to represent the Indians. These expenditures would also involve the time and transfer of federal employees to the tribe who have pertinent knowledge or are outstanding authorities in specialized fields.

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Under the previously discussed authority the President has authority to act immediately to establish interim procedures for resolving the conflicts of interest discussed in his Message to Congress, July 8, 1970. Although such interim procedures would not approach an acceptable permanent resolution of this problem as would the creation of the Trust Counsel Authority, a method can be devised to ameliorate the effects of the conflicts of interest in the administration of Indian affairs.

I urge the members of this Committee to request the President to establish interim procedures under his previously discussed authority until the Congress has enacted the Indian Trust Counsel Authority and the Authority is operating.

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IN REPLY REFER TO:

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

JUN 17 1970

Mr. Brad Patterson
Executive Office of the President
Room 188½, Executive Office Building
Washington, D. C. 20500

Dear Mr. Patterson:

While Associate Solicitor Goss and I were in your office on June 5, you asked whether there were any materials concerning Federal-Indian legal obligations outside the trustee responsibility of the United States over Indian property. We indicated our belief that there were no decided cases which recognized such obligations, as legal commitments, as distinguished from moral or social undertakings.

In a recent case decided by the Court of Claims on an appeal from the Indian Claims Commission, the claimant Indian tribe sought a money judgment on the ground that the United States had a duty to the tribe, which it failed to perform, to provide adequate educational and medical facilities and services and to refrain from cultural subjugation. Gila River Pima-Maricopa Indian Community, et al., v. United States, February 2, 1970. The Court of Claims examined the legislative history of the Indian Claims Commission Act, after observing that "this precise type of claim has not, to our knowledge, been previously brought for adjudication." The Court held that there was no right of recovery under Section 2(5) of the act, which gives the Indian Claims Commission broad jurisdiction to hear and determine claims against the United States "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

A copy of the opinion of the Court of Claims and a copy of the opinion of the Indian Claims Commission are enclosed. The tribe has petitioned the Supreme Court for a writ of certiorari, but that Court has not yet acted on the petition.

Sincerely yours,

Charles M. Soller
Assistant Solicitor
Indian Legal Activities

Enclosures

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236-K, L, M

In the United States Court of Claims

Appeal Nos. 1-69, 2-69, 3-69

Indian Claims Commission

Docket Nos. 236-K, 236-L, and 236-M

20 Ind. Cl. Comm. 131

(Decided February 20, 1970)

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL. v. THE UNITED STATES

L. Simpson Cox, attorney of record, for appellant. *Cox and Cox, L. J. Cox, Jr., Alfred S. Cox, George S. Livermore, David L. Cox, Stephen L. Cox* and *Ira I. Schneier*, of counsel.

David M. Marshall, with whom was *Assistant Attorney General Shiro Kashiwa*, for appellee.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

DURFEE, *Judge*, delivered the opinion of the court:

This is an appeal from an order of the Indian Claims Commission dismissing appellant's petitions in Docket Nos. 236-K, 236-L and 236-M.

Appellant, the Gila River Indian Community, sued for itself and for and on behalf of members of the Pima and Maricopa Tribes of Indians.

The petitions, which were dealt with jointly by the Commission, asserted claims based on damages to the Tribe resulting from the Government's breach of its alleged general obligation as guardian of the Indians and from the breach of

375-974—70

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an obligation created by affirmative acts of providing Indian education, health services and administration. Docket No. 236-K alleged that damage was based on the Government's failure to provide adequate educational facilities, instructors and instruction in particular subjects. Docket No. 236-L alleged that damage was based on the Government's failure to provide adequate medical facilities and personnel to care for the health and safety of the appellant tribes. Finally, Docket No. 236-M alleged that damage was caused by the Government when it "undertook to, and did, subjugate petitioner under wardship to a stagnation of self-expression * * * [and] bridled petitioner into cultural impotency."

The basis of jurisdiction upon which appellant was relying before the Commission was the "fair and honorable dealings" section of the Indian Claims Commission Act, section 2(5), 25 U.S.C. § 70a(5) (1964).[1]

The Government moved for summary judgment on the grounds that all three petitions failed to state claims which are tribal claims,[2] and that all three petitions failed to state claims upon which relief could be granted.

The Commission assumed, for the purposes of passing on the Government's motion, that this was indeed a tribal claim. Nevertheless, it held that there was nothing in the legislative history of the Indian Claims Commission Act which suggested that claims this broad were intended to come within the broad grant of jurisdiction to the Commission. *Gila River Pima-Maricopa Indian Community, et al.* v. *United States*, 20 Ind. Cl. Comm. 131, 132 (1968). It also held that there could be no judicial establishment of a standard of care in providing these services. *Id.* at 134. The Commission did not find any specific acts of less than fair and honorable dealings,

[1] Section 2 is the jurisdictional section of the Indian Claims Commission Act, 25 U.S.C. § 70, *et seq.* (1964), and states in pertinent part:

§ 70a. Jurisdiction; claims considered; offsets and counterclaims.

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians, residing within the territorial limits of the United States or Alaska: * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

[2] Section 2 of the Act gives the Commission jurisdiction of claims against the United States on behalf of a tribe, band, or other identifiable group of American Indians. Individual claims, however, are not cognizable under the Act. See, *e.g., Cherokee Freedmen, et al.* v. *United States*, 161 Ct. Cl. 787 (1963); *Absentee Shawnee Tribe of Oklahoma, et al.* v. *United States*, 165 Ct. Cl. 510 (1964).

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nor the violation of any statute, treaty or other agreement or obligation, but only conduct over an extended period of time which is alleged to have damaged the Indians. *Id.* at 132–3.

Petitioner is now before this court in order to establish its right to prove damages. We agree with the Commission that because the claims are not cognizable under the Act, the Commission does not have jurisdiction over this action. Before going further, however, we should first state that we do not agree with one of the grounds for dismissal of the petitions as stated in its opinion:

> Even going so far to accept the theory of the petitions, we cannot find in the pleadings any setting out of a duty on the part of the defendant that is subject to judicial definition. Generally speaking we would assume that when defendant undertook to provide the various services it undertook to do no harm by them; the petitions do not allege an intent of the defendant to cause harm to the petitioner. But a Government cannot be a guarantor that beneficial results will always flow to a group from its furnishing of educational and health services and administration. Whether its obligation to the petitioner requires the exercise of "due care," or the "highest standard of care," *we hold that there can be no judicial establishment of a standard of care in providing these services.* [Emphasis supplied]. *Id.* at 134.

In the footnote to this portion of the opinion, the Commission cited *Oneida Tribe of Indians of Wisconsin* v. *United States*, 165 Ct. Cl. 487, 493–94, *cert. denied*, 379 U.S. 946 (1964).

The important distinction is that in the *Oneida* case, *supra*, the court found that the Government did owe a duty, similar to that of a fiduciary, toward the Oneida Tribe under the "fair and honorable dealings" provision, section 2(5) of the Indian Claims Commission Act, in dealing with the reservation timber of the Tribe. Having found that there was this duty or obligation of the Government under the Act, the court then said:

> It is unimportant, in this case, to characterize that obligation precisely. Whether the responsibility be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be

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> the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances, to save the timber? *That is the standard.* [Emphasis supplied]. *Id.* at 194.

In applying the general standard, the court in *Oneida*, *supra*, relied upon further specific and established standards of evidence and law applicable to the case. However, the court decided that the Government had at least fulfilled its minimum obligation to the Tribe, and concurred with the dismissal of the Oneida petition by the Indian Claims Commission.

In the present case, we find that there was no duty of the Government to perform the specific obligations alleged in the petitions. But we are not prepared to agree with the statement of the Commission that "even going so far as to accept the theory of the petitions, we cannot find in the pleadings any setting out of any duty on the part of the defendant that is subject to judicial definition" and its further statement that "there can be no judicial establishment of a standard of care in providing these services." If we were to accept the theory, as alleged in the petitions, that there is *a duty of the Government as a guardian to adequately provide the specific services* which petitioner alleges it undertook to perform for them, there could then be judicial establishment of a standard of care for the Government in providing these services, just as this court did in *Oneida*, *supra*.

The Commission, in questioning what standard could be used to define the extent of defendant's duty, used education as an extreme example of the insoluble problems to be encountered in attempting to define the scope of defendant's duty.

Nevertheless, our Supreme Court, once having determined the constitutional duty of state and local governments to provide adequate educational facilities, has thereupon judicially established a standard of care required in providing these facilities.

In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), the Supreme Court found that a law school established by the State of

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Texas for Negroes did not provide them with educational opportunities equal to those offered by the State to white students of the University of Texas. In arriving at this conclusion, the Court stated, at p. 633–4, "* * * In terms of number of faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. * * *" These were standards judicially determined to test whether the Negro petitioner had received his full constitutional right to legal education equivalent to that offered by the State to students of other races.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Supreme Court in determining that the segregation of children in public schools solely on the basis of race deprived the children of the minority group of equal educational opportunities, cited *Sweatt*, *supra*. The Court relied upon certain "intangible considerations" which are nevertheless judicial standards for equal educational opportunities.

Certainly the standards which could be required in this case would be different and perhaps more difficult to establish than the judicial standards for equal education adopted by the Supreme Court under constitutional requirements. If the theory of the petitions as to the duty of the Government to provide the services alleged in the petitions is accepted for the purpose of argument, and it was accepted by the Commission on this question, then petitioner should have been allowed to try to meet this burden of proof of law and fact required to establish satisfactory standards for the objective measurement of the degree of care required, and for the measurement of money damages, rather than dismissal of the petition because "there can be no judicial establishment of a standard of care in providing these services."

We now turn to the claim by petitioner that the Government failed in its obligations as guardian of the Indians in three specific respects. Since this precise type of claim has not, to our knowledge, been previously brought for adjudication, we must examine the legislation and its history to make an initial determination.

The legislative history of the Act has been chronicled in *Otoe and Missouria Tribe of Indians* v. *United States*, 131

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Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955). In the course of his learned opinion, Judge Littleton made the following remarks:

> The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimants apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in preexisting statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress. Fortunately, under these circumstances, rules of interpretation and construction are subordinate to the principle that the object of all construction and interpretation is the just and reasonable operation of the particular statute, and accordingly it should be possible to construe the statute liberally to affect its remedial purpose and intent, and strictly to limit undue abrogation of fundamental rights or to prevent undue extension of extraordinary remedies. *Id.* at 602, 131 F. Supp. at 271.

One of the extraordinary remedies provided for in this Act was the cause of action based on "fair and honorable dealings" in section 2(5). While the remedial purpose and intent of that section should be effectuated, its scope should not be unduly extended. With this caveat in mind, appellant's allegations can be analyzed, both as to their inherent validity and as to their relationship to section 2(5).

Appellant fails to indicate the source of the alleged guardianship obligations of the Government. The crucial question is how, or in what manner, did the Government undertake the role of guardian, and its concomitant obligations?

Appellant admits that there was no treaty, agreement, order or statute which expressly obligated the United States to perform these services. This, we feel, is fatal to appellant's case. As we have stated before, in a case dealing with this very tribe:

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the *express provisions* of the particular treaty, agreement, executive order, or statute under which the claim presented arises.

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> It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. * * * [Emphasis supplied]. *Gila River Pima-Maricopa Indian Community, et al.* v. *United States*, 135 Ct. Cl. 180, 189, 140 F. Supp. 776, 780–81 (1956).

Here, of course, there is no language which we could construe as creating a guardian-ward type relationship even under liberal rules of construction. Accordingly, appellant cannot prevail on this argument.

Appellant contends that there is another basis for the Government's obligation—the affirmative acts of providing education, health services and administration. In its petitions before the Commission, appellant alleged that the Government undertook, by an affirmative course of action for many years to provide certain services. It undertook, it is alleged, to provide appellant with an adequate educational system, but instead provided incompetent and inadequate facilities and methods, and failed to teach the necessary knowledge of certain agricultural skills, Indian arts, language and culture, and ideas and ideals of self-government, domestic science, business methods and practical trades (Docket No. 236–K). It is also alleged that the Government undertook to provide, control and administer sufficient medical, dental and sanitation facilities, but instead, did not provide adequate facilities, and has provided personnel who were without proper training, understanding and ability to adequately care for petitioner, and who, in fact, did not properly care for petitioner (Docket 236–L). Finally, it is alleged that the Government undertook, as guardian, to shelter, protect and shield the Indians from all wrongful, unlawful and unconscionable acts of all third persons, but instead, subjugated the Indians under wardship (Docket 236–M).

Appellant characterizes the alleged failure to maintain

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adequate educational and health facilities as "wrongful conduct" or "maladministration." These words do not in and of themselves lead us to a solution. "The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances, * * *? That is the standard." *Oneida*, *supra*, at 494.

As we have already stated, the United States did not assume any obligation as a guardian here. Moreover, there was no other special relationship or obligation here which created liability on the part of the United States. There have been a number of cases where this court has called the relationship between the Government and the Indians a "special" relationship, and the court thereby found that the Government owed an obligation. Each case rested on its own facts, and in our view, the facts and circumstances in this case did not create any "special" relationship.

In the case of *Lipan Apache Tribe, et al.* v. *United States*, 180 Ct. Cl. 487 (1967), the court, on appeal from a dismissal by the Indian Claims Commission, reversed and remanded the case to the Commission to determine if any special relationship had been created. In discussing whether the United States could be held liable under the "fair and honorable dealings" section of the Act, the court stated that "* * * The required nexus for liability could rest upon * * * *an established special relationship* between the Government and the claimant Indians affecting the controverted subject matter. * * *" [Emphasis supplied]. *Id.* at 502. The established special relationship which the court thought could provide the nexus was a series of treaties betwen the United States and the tribes bringing suit. By these treaties, the Indians acknowledged either that they were under the protection solely of the United States, or that they submitted to the power and authority of the United States. *Id.* at 500–501.

It can therefore be seen that more is needed to create such a "special relationship" than mere "affirmative actions." This is borne out by the final paragraph of the *Lipan Apache* opinion, *supra:*

> The tribes insist that the United States, by statutes, treaties, and representations of its agents, undertook to

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> protect their occupancy rights from the alleged encroachments. It is essential, therefore, to determine if a special relationship was created; the nature and scope of any responsibilities assumed by the United States; and whether the Federal Government met these obligations. * * * *Id.* at 502.

Thus, the court realized that a special relationship could be created, but based this conclusion on the possible existence of statutes, treaties or representations. Affirmative acts such as those allegedly undertaken in our case may lead to liability if they are indeed less than "fair and honorable," and if there is a duty owed; they do not, in and of themselves, create that duty.

Special relationships may also be present when the Government supervises the affairs and transactions of the Indians. This is closely akin to the guardian-type or fiduciary-type relationship discussed previously. In *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 912 (1965), the tribe based its claim partially on the ground that the Federal Government, as a fiduciary for it, was responsible for not having recaptured a tract of land taken by New York State by eminent domain. Although in that case the action was brought for the Government's *failure* to act, the court reasoned that absent the special relationship, there was no obligation to act, under the "fair and honorable dealings" section. The crux of the situation was that the tribe had not shown that the Federal Government had failed to do "whatever it was required to, in the circumstances." *Id.* at 916. Similarly, appellant has not shown us that the Government has failed to do "whatever it was required to, *in the circumstances*." [Emphasis added].

Had appellant adduced any facts or evidence which would have given even the slightest indication of an agreement with the Government, we might have been able to find an obligation. In that event, we might have been more willing to order a trial, to determine whether that obligation had been breached, the standards of care required and the measurement of damages. However, appellant has not aided the court in this respect, and we must therefore presume that there was no basis for an obligation.

At oral argument, appellant made the contention, albeit not fervently, that its situation was akin to the "Good Samar-

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itan" cases. We need not consider the merits of this characterization, since any claim which would fall under the "Good Samaritan" rules would be brought under § 2(2) of the Indian Claims Commission Act, 25 U.S.C. § 70a(2). That section encompasses claims sounding in tort, while the claim before us has been brought under the "fair and honorable dealings" section.[3]

While we recognize that Congress wished to make the Commission's jurisdiction as broad as possible, we must be cognizant of the fact that the jurisdictional section of the Act is a synthesis of those "* * * classes of cases * * * which have heretofore received congressional consideration in the form of special jurisdictional acts. * * *" H. Rep. No. 1466, 79th Cong., 1st Sess., (1945) p. 10.[4] And, as has already been mentioned, this particular claim is one of first impression. Hence, it is reasonable to conclude that, despite the broad range of claims intended to be included in the Act, this particular claim was not among them.

We agree with the Commission "* * * that the petitions state complaints that may well reflect a valid criticism of one-time governmental policies * * * [which] may be redressed through the political process * * *." 20 Ind. Cl. Comm. at 135–36.[5]

We also concur with the conclusion of the Commission that the petitions do not state causes of action cognizable as claims under the standards of jurisdiction set forth in the Indian Claims Commission Act. Therefore, the appeal is denied, and the decision of the Commission is affirmed.

Affirmed.

DAVIS, *Judge*, concurring:

Throughout the nation's history there have always been

[3] The language of Section 2(5) indicates that "fair and honorable dealings" provides a yardstick for claims which would not otherwise fall within established legal or equitable principles. Thus, if in fact, appellant's claim is similar to a "Good Samaritan" claim, then the claim would not be encompassed by Section 2(5). Of course, we mention this only in passing, and make no judgment as to the validity of appellant's claim if it were couched in terms of a tortious action.

[4] This report accompanied H.R. 4497, which was eventually enacted with minor changes into the Indian Claims Commission Act.

[5] The legislative history of the Act indicates that Congress was aware that some new type of case may arise in the future which would not be covered by Section 2. Thus, H. Rep. 1466, *supra*, p. 10, stated: "* * * If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. * * *"

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some individuals, usually but a handful, who have been sensitive, in the large, to the injuries done to the Indians' interests and way-of-life by our course of westward settlement. The number of the concerned has been growing and, over the years, there have been various efforts at some sort of redress. The Indian Claims Commission Act of 1946 is a major reflection of this trend. In recent years recognition of the total shape of the harm done by our national Indian policy has become both deeper and more widespread. But it would be wrong for judges to read into the Indian Claims Commission Act, passed almost twenty-five years ago, currents of thought which are emerging today but were not infused into that 1946 statute. The Act was not designed to grant compensation for all the detriment accruing to the Indians by our ongoing policy toward them but, rather, had the more limited goal of paying for specific deprivations of land or property or rights protected by treaty, statute, or then-existing law. The instances cited in the Congressional history are of that kind. There is no intimation at all in the legislative background that the "fair and honorable dealings" clause was a catch-all allowing monetary redress for the general harm—psychological, social, cultural, economic—done the Indians by the historical national policy of semi-apartheid.

To the extent they escape the prohibition against claims for individual injury,[1] appellants' petitions seek a remedy for the generalized harm which the Claims Commission Act does not cover. The complaint is that the Federal Government has destroyed Indian peoplehood by failing to provide proper education, medical care, and self-government. This is a charge which could undoubtedly be brought by all Indian tribes and groups, but it is significant that appellants are the only ones who have sought to make it under the 1946 Act. That type of generalized "reparations" for a traditional policy, accused of aborting Indian development, Congress has not yet granted.

[1] In the process of legislative consideration of the measure which ultimately became the Indian Claims Commission Act, a prominent spokesman for the Indians (Mr. Ernest Wilkinson) twice objected, in their behalf, to allowing the Government's educational expenses as offsets to awards, on the ground that such educational expenses were largely for individual rather than tribal benefit. See Hearings on S. 3083, 76th Cong., 3d Sess. (1940), p. 83; Hearings on H.R. 4496, 79th Cong., 2d Sess. (1946). The Act bars the offset, among other things, of "agency or other administrative, educational, health" expenses. 25 U.S.C. § 70a.

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I do not join the court's discussion, in the latter part of its opinion, of guardianship and "special relationship" because I do not believe that that is the nub of the problem before us, and also because I would avoid the danger that that rationale could be misused in the future to deny recovery for claims for specific injuries truly redressable under the Claims Commission Act. My position is that, even if a "special relationship" did exist as to the matters on which petitioners sue, Congress did not intend in this Act to give redress for that type of injury. I do agree, however, with the court's rejection, in the first part of its opinion, of the Commission's holding that there can be no judicial establishment of a standard of care in providing educational, health, and governmental services.

NICHOLS, *Judge*, concurring:

I join in the opinion of the court and in the concurring opinion of Judge Davis.

In addition to both, I would like to point out that in using the word "claims" five times in Section 2 of the Act, to designate five classes of cases over which the Commission would have jurisdiction, the Congress was not using a novel or freshly coined word. "Claim" is a word of art and it does not include, for instance, every case or controversy that may arise between a citizen and the United States, *e.g.*, *Tracy* v. *Gleason*, 379 F. 2d 469 (D.C. Cir. 1967); *United States* v. *Bergson*, 119 F. Supp. 459 (Dist. Ct. D.C. 1954). Thus, when the House Committee said, as quoted by plaintiff:

> * * * it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. * * *

U.S.C. Cong. Serv. 79th Cong., 2d Sess. (1946) at pp. 1355–56, it did not mean that the Commission was to be the arbiter of every possible dispute that might have arisen between the United States and the Indians in 170 years of history, or that it was to settle every grievance. The Congress did not in 1946 intend to fasten upon the administration of Indian affairs the system of Government by litigation that so many of our citizens seem to be coming to believe in today.

U.S. GOVERNMENT PRINTING OFFICE: 1973

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BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA.

Defendant.

Docket Nos. 236-K, L, and M

Appeal dismissed 2/20/70

Decided: December 12, 1968

Appearances:
Z. Simpson Cox, Esq. Attorney for Petitioner.

David M. Marshall, Esq., with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for the Defendant.

OPINION

Yarborough, Commissioner, delivered the Opinion of the Commission:

The defendant has moved for a summary judgment dismissing the claims in Docket Nos. 236-K, L and M. Inasmuch as the defendant has not presented matters outside the pleadings, we shall treat them as motions to dismiss.

Those petitions assert claims based on damages to the tribal petitioner resulting from defendant's breach of its obligation as guardian of Indians generally and an obligation created by affirmative acts of providing Indian education, health services and administration. Damage is alleged based on defendant's failure to provide adequate educational facilities and instructors and instruction in particular

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subjects (Docket No. 236-K). Damage is alleged for defendant's failure to provide adequate medical facilities and personnel to care for the health and safety of the petitioner (Docket No. 236-L). And damage is alleged because defendant "undertook to, and did, subjugate petitioner under wardship to a stagnation of self-expression...[and] bridled petitioner into cultural impotency." (Docket No. 236-M)

Defendant's motion for summary judgment is directed to the three petitions as failing to state claims which are tribal rather than individual (over which the Indian Claims Commission has no jurisdiction), and failing to state claims on which relief can be granted. It seems agreed that the same principles are applicable in testing each of these claims.

If there has been damage to the tribe as a result of failures in performance of some of defendant's activities, there would be responsibility under the Indian Claims Commission Act only under that clause giving the Commission jurisdiction over "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." [25 U.S.C. §70a(5)]

The short answer to petitioner's suit is that we can find nothing in the legislative history of the Indian Claims Commission Act to suggest that claims this broad were intended to be embraced in the designedly broad grant of jurisdiction to the Indian Claims Commission. We conceive that the Act is designed to provide corrections for specific acts of less than fair and honorable

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dealings with the Indian tribes, not provide for an assessment of the possible damaging consequences of the whole history of United States Indian policy, which is the essence of petitioner's claim.

Accepting petitioner's allegation that the United States did undertake to provide some educational and health services to petitioners, and assumed administrative direction of the petitioner's reservation, it is not alleged that the United States violated any statute, treaty or other agreement or obligation in its manner of furnishing those services. The Government's duty is alleged to arise from its affirmative action in providing the services, and a subsequent failure of performance that resulted in damage to the tribe. The petitions do not allege specific acts that caused specific damage to the tribe, but seem grounded on defendant's whole conduct over an extended period of time.

Of course, any such detriment as visited on or shown by an individual would not give rise to a claim within the Commission's jurisdiction (see Cherokee Freedmen v. United States, 10 Ind. Cl. Comm. 109 (1961) affirmed in part; remanded in part for further proceedings, 161 Ct. Cls. 787 (1963)).

1/ Exclusion of health, education, and agency administrative expenses from consideration as possible offsets under our Act provides some support for asserting that any actions taken by the Government in those areas were intended to be outside the purview of the Commission.

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For the purpose of testing the petition, we shall entertain the concept that damage to the tribe as an entity could be shown, giving rise to a truly tribal claim as opposed to the collective claims of individuals.

Even going so far to accept the theory of the petitions, we cannot find in the pleadings any setting out of a duty on the part of the defendant that is subject to judicial definition. Generally speaking we would assume that when defendant undertook to provide the various services it undertook to do no harm by them; the petitions do not allege an intent of the defendant to cause harm to the petitioner. But a government cannot be a guarantor that beneficial results will always flow to a group from its furnishing of educational and health services and administration. Whether its obligation to the petitioner requires the exercise of "due care," or the "highest standard of care,"[2/] we hold that there can be no judicial establishment of a standard of care in providing these services.

2/ See the discussion by the Court of Claims in the Oneida case:

> "We think, similarly, that in this suit under the Indian Claims Commission Act we must hold that the United States had an obligation to the Oneidas greater than that of a non-participating bystander, or of a sovereign toward its ordinary citizens, or of a landowner toward his tenant. The relationship was special and from it there stemmed a special responsibility."
>
> "It is unimportant, in this case, to characterize that obligation precisely. Whether the responsibility

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In education, for example, what standard should be used to define the extent of defendant's duty? Should schools have been provided as good as any others in the immediate area, or Arizona, or the Southwest, or the United States? Should they be tested by the educational standards of that year, or the decade past, or the decade to come? Should more "Indian culture" as opposed to "white culture" have been taught, and in day schools or boarding schools? Considering petitioner's situation, what type of education was most appropriate, college--preparatory or vocational, or some reasonable mixture, as now to be determined by the Commission? Stating the problems that would arise in attempting to define the defendant's duty makes it plain that there is not here the type of obligation whose scope can be defined with satisfactory exactness to find a breach giving rise to a cause of action for damages by the tribe, even under the broad jurisdiction of the Indian Claims Commission Act.

The result reached here is not to ignore that the petitions state complaints that may well reflect a valid criticism of one-time governmental policies. As such the complaints would presumably

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2/ be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration." Oneida Tribe of Indians v. U.S., 165 Ct. Cls. 487, 493-494 (1964).

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be common to many Indian tribes, and may be redressed through the political process, if indeed they have not already been redressed by more generous and enlightened governmental Indian policies. However, we do not think the petitions state causes of action cognizable as claims under the standards of jurisdiction set forth in the Indian Claims Commission Act.

Richard W. Yarborough, Commissioner

We Concur:

John T. Vance, Chairman

Jerome K. Kuykendall, Commissioner

Margaret H. Pierce, Commissioner

Theo. R. McKeldin, Commissioner

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May 15, 1972

Dear Roger:

I want to thank you for your letter of April 5 and for sending me the material concerning the Indian Trust Counsel from your Committee on Claims Adjudications.

The Committee's proposal (in Section B) speaks of the importance of the Departments of the Interior and Justice taking appropriate steps to ameliorate conflict of interest problems concerning Indian natural resources rights.

I am pleased to be able to report to you and to the Administrative Conference that at White House instigation a new procedure in the nature of one of these ameliorations has been instituted by the Departments of Interior and Justice. These two Departments have now agreed (a) that any of the several divisions of the Department of Justice which are conducting litigation which might challenge or threaten Indian natural resources trust rights will notify Interior of such cases promptly and (b) if the Secretary or the Solicitor of the Department of the Interior requests it, any brief filed by Justice in any such case shall include supplementary matter setting forth the views of the Department of the Interior with respect to the Indian natural resources trust interest. (Briefs for filing in the Supreme Court present a special problem, which is receiving further study; until this study is completed this category of briefs will not be subject to the above procedures.)

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It is a pleasure to see the interest and support of yourself and your esteemed colleagues in this area of legal protection; we certainly hope that both Houses of the Congress give the President's proposal a full and fair hearing.

Cordially,

Bradley H. Patterson, Jr.

Mr. Roger C. Cramton
Chairman
Administrative Conference of the United States
726 Jackson Place, NW
Washington, D. C. 20506

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506
(202) 395-3753

April 5, 1972

Mr. Brad Patterson
The White House
Washington, D.C.

Dear Brad:

I am enclosing for your information a copy of the report and recommendation of the Conference's Committee on Claims Adjudications endorsing the creation of an Indian Trust Counsel Authority.

The recommendation will be discussed by the Council of the Administrative Conference in mid-May, and, if placed on the agenda by the Council, will be considered at the Conference's plenary session on June 8-9, 1972.

If you have any comments or reactions to the proposal, I would appreciate receiving them prior to the Council meeting on May 17.

Sincerely yours,

Roger

Roger C. Cramton
Chairman

RCC/jms

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Counsel for Parties.

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Interstate Commerce Act indicates a congressional purpose to amend prior statutes which imposed primary responsibility on the Attorney General to seek judicial redress for the Government. P. 431–432.

(c) The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest; and the Commission and the railroads in this case have availed themselves of the statutory authorization. P. 432.

3. The District Court had jurisdiction of the action under 28 U. S. C. § 41 (28) [now § 1336], and that jurisdiction was not barred in this case by § 9 of the Interstate Commerce Act, 49 U. S. C. § 9. Pp. 432–440.

(a) Section 9 does not give complete finality to a Commission order merely because a shipper elected to file a complaint with the Commission. Pp. 433–440.

(b) A Commission order dismissing a shipper's claim for damages under 49 U. S. C. § 9 is an "order" subject to challenge under 28 U. S. C. § 41 (28) [now § 1336]. Pp. 440–441.

4. Judicial review of a Commission order denying reparations does not require a three-judge court. Pp. 441–443.

5. The fact that this case was heard and determined by a District Court of three judges, rather than by one judge, does not require dismissal here; and the cause is remanded to the District Court for determination on the merits of the allegations of the complaint. Pp. 443–444.

78 F. Supp. 580, reversed.

A District Court of three judges dismissed a suit brought by the United States to set aside an order of the Interstate Commerce Commission (269 I. C. C. 141) denying an award of reparations to the Government as a shipper. 78 F. Supp. 580. The United States took a direct appeal to this Court. *Reversed and remanded,* p. 444.

Stanley M. Silverberg and *David O. Mathews* argued the cause for the United States. With them on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *Philip Elman.*

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Daniel W. Knowlton argued the cause and filed a brief for the Interstate Commerce Commission, appellee.

Windsor F. Cousins argued the cause for the Pennsylvania Railroad Co. et al., appellees. With him on the brief were *Hugh B. Cox, Robert C. Barnard, Charles P. Reynolds* and *Charles Clark.*

MR. JUSTICE BLACK delivered the opinion of the Court.

It is contended here that the United States as a shipper is barred from challenging in federal courts an Interstate Commerce Commission order which denies the Government a recovery in damages for exaction of an allegedly unlawful railroad rate. Other contentions if sustained would deny federal courts all power to entertain an action by any shipper challenging a Commission order denying damages to the shipper.

During the war, existing tariffs of many railroads embodied wharfage charges to compensate the railroads for moving goods from railroad cars to piers and from piers to railroad cars. When the United States took over certain piers at Norfolk, Virginia, it began to perform these wharfage services for itself and requested the railroads to make the United States an allowance for the expenses incurred in performing the services. The railroads refused to make an allowance. Upon this refusal the Government requested the railroads to perform the services themselves. The railroads refused to perform the services.

The United States filed with the Interstate Commerce Commission a complaint against the railroads charging that exaction of pay for unperformed services was unjust, unreasonable, discriminatory, excessive, and in violation of certain sections of the Interstate Commerce Act.[1] The

[1] 49 U. S. C. §§ 1 (5) (a), 1 (6), 2, 6 (8), 15 (13).

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complaint asked the Commission to find the charges unlawful. Further relief asked, under the Interstate Commerce Act,[2] was that the Government be awarded damages (reparations) on account of the alleged unlawful exactions. The Commission found that the charges were not unjustly discriminatory, unreasonable, or otherwise in violation of the Act. Accordingly, the Commission denied reparations and ordered the complaint dismissed. *United States* v. *Aberdeen & Rockfish R. Co.*, 269 I. C. C. 141 (1947).

The United States brought this action in a United States District Court to set aside the Commission order. The complaint charged that the Commission's conclusions were not supported by its findings, that the findings were not supported by any substantial evidence, that the order was based on a misapplication of law and was "otherwise arbitrary, capricious and without support in and contrary to law and the evidence." The Interstate Commerce Commission was made a defendant. The United States was also made a defendant because of a statutory requirement that any action to set aside an order of the Interstate Commerce Commission "shall be brought . . . against the United States." 28 U. S. C. (1946 ed.) § 46, now § 2322. Railroads that collected the wharfage charges intervened as defendants under authority of 28 U. S. C. (1946 ed.) § 45a, now § 2323. The Attorney General appeared for the Government as both plaintiff and defendant. Without reaching the merits of the case, the District Court composed of three judges dismissed the cause on the theory that the Government could not maintain a suit against itself. The court also indicated its belief that a three-judge court was without jurisdiction

[2] 49 U. S. C. §§ 8, 9. The complaint also sought relief from future exactions, but prior to the Commission's final order the piers were returned to private ownership and this prayer was abandoned.

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of the suit. 78 F. Supp. 580. The case is here on direct appeal under 28 U. S. C. (1946 ed.) § 47a, now § 1253.

In this Court the Commission and the railroad intervenor defendants support the District Court's dismissal for the reasons given by that court. Alternative reasons are also urged. We hold that the dismissal was error and that the case should have been considered on its merits.

First. There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.

While this case is *United States* v. *United States, et al.*, it involves controversies of a type which are traditionally justiciable. The basic question is whether railroads have illegally exacted sums of money from the United States. Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection. To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission. In pursuit of the same objective the Government challenged the legality of the Commission's action. This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads. The order if valid would defeat the Government's claim to that

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money. But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. *Chicago Junction Case,* 264 U. S. 258, 262-266. Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

Second. It is contended that the provisions of the Act making the Government a statutory defendant in court actions challenging Commission orders, show a congressional purpose to bar the Government from challenging such orders. Legislative history is cited in support of this contention. If the contention be accepted, Congress by making the Government a statutory defendant in such cases has deprived the United States as a shipper of powers of self-protection accorded all other shippers. We cannot agree that Congress intended to make it impossible for the Government to press a just claim which could be vindicated only by a court challenge of a Commission order. See *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279.

In support of their contention that Congress did not intend for the Government to press its claims as a shipper, the Commission and railroads emphasize the anomaly of having the Attorney General appear on both sides of the same controversy. However anomalous, this situation results from the statutes defining the Attorney General's duties. The Interstate Commerce Act requires the Attorney General to appear for the Government as a statutory defendant in cases challenging Commission orders. 28 U. S. C. (1946 ed.) § 45a, now § 2323. The Attorney General is also under a statutory duty "to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases." *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279. See also *United*

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States v. *California,* 332 U. S. 19, 26–29. Nothing in the Interstate Commerce Act indicates a congressional purpose to amend prior statutes which had imposed primary responsibility on the Attorney General to seek judicial redress for the Government.

Although the formal appearance of the Attorney General for the Government as statutory defendant does create a surface anomaly, his representation of the Government as a shipper does not in any way prevent a full defense of the Commission's order. The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest. For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses to the Government's charges and claims that can be interposed to charges and claims of other shippers. In this case the Commission and the railroads have availed themselves of this statutory authorization. They have vigorously defended the legality of the allowances and the validity of the Commission order at every stage of the litigation.

Third. 28 U. S. C. (1946 ed.) § 41 (28)[3] provides that "The district courts shall have original jurisdiction . . . Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The legal consequences of this order if upheld will finally relieve the railroad of any obligations to the Government on account of the alleged unlawful

[3] The substance of 28 U. S. C. § 41 (28) of the 1946 United States Code now appears as § 1336 of the 1948 Code. The provision for judicial review of Interstate Commerce Commission orders first appeared in 1910 in an Act creating the Commerce Court. 36 Stat. 539. Congress abolished the Commerce Court in 1913 and transferred to district courts the Commerce Court's jurisdiction to review Commission orders. Urgent Deficiencies Act, 38 Stat. 208, 219–220.

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ATTENDANCE LIST--OTHER GUESTS--Cont.

from p. 7

Mr. Robert E. Cowley
General Manager
Dallas Manufacturing Plant

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

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

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

Staff:

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

Mr. Bob Robertson
Executive Director
National Council on Indian Opportunity

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

Mr. Marsh Thompson
Office of the Vice President

Other guests:

Mr. J. Bradway Butler
Arnold & Porter

Mr. Myron P. Curzan
Arnold & Porter

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

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

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

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

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

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

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

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

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

(Continued on p. 9)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on p. 10)

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Solicitor General
as
FPC Counsel Solomon

397 US 428
385 US 927

UDALL v FPC
387 US 428, 429 (1967)

Jeny of Ir challenged
award of FPC to of license
to Pacific Northwest Power
to build Dam at Hells
Mountain Sheep or Snake
River.

Northern Indiana Energy Corp.

US v. ICC et al
396 US 491 (1970)

Richardson Brimwood vs Kahn of ICC

US v. ICC 337 US 426, 427
(1949) 435

— US was allowed
US to sue ICC when
the only other party of US v US
which gen person cannot sue bcuz
the US because it was a contro

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THE WHITE HOUSE

WASHINGTON

April 17, 1972

- what rationale not to include

MEMORANDUM FOR: JOHN EHRLICHMAN

SUBJECT: INDIAN WATER RIGHTS - UNCOMPLETED BUSINESS

Several converging matters prompt me to suggest that it would be timely and helpful if you would invite Solicitor-General Griswold to lunch so that we could cut a few knots that have developed in the Indian water rights area.

1. Response to your Memorandum of February 15 (Tab A)

Attorney General Mitchell's answer (Tab B) left a very important question open: will we or won't we include Supreme Court briefs in the procedure you suggested to Messrs. Morton and Mitchell? It is the Solicitor General who has doubts about this and an informal lunch I had with one of his senior staff (Mr. Wallace) indicated that only a conversation with the Dean would get this clarified.

isn't justice still studying this - Tab B - initially per Patterson

The Stevens tax case (in the 9th Circuit) has set the precedent and I believe we should press Dean Griswold to OK the procedure for that last and most important category of government appeals.

2. Trust Counsel Legislation: Answers to Senator Allott's Questions

As an outgrowth of the Senate Interior Subcommittee's hearings on the Indian Trust Counsel bill, Senator Allott directed a series of questions to Justice and Interior. The lead-off question to Justice, and the answer which I worked out to it with Assistant Attorney General Frizzell, are attached as Tab C. The Agua Caliente case is cited, factually, as a very current example of the "conflict" the President described in his July 8, 1970 message proposing the Trust Counsel. The Solicitor General refuses to clear this response with the Agua Caliente narrative in it; I think he needs a nudge from you to clarify that this is a truthful example of what the President really meant. Unless we give the Senate a convincing response, the Trust Counsel bill will get nowhere. The

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skeptics there just don't believe there are any examples of "conflicts."

3. The Invitation from the Administrative Conference of the United States

I have received a letter from Chairman Roger Cramton (Tab D) inviting a White House comment on the favorable and supportive Report about the Trust Counsel by the Conference's Committee on Claims Adjudications. It will go to the Plenary Conference. One of the Committee's recommendations is that

> "Prior to or in the absence of legislation, the Department of the Interior and the Department of Justice should take appropriate steps to ameliorate existing conflict-of-interest problems with respect to the handling of matters involving natural resources of Indians."

I would like to respond by citing the exchange of memoranda between you and the Attorney General -- it is a real accomplishment -- but that takes us back to the importance of Item 1: getting Dean Griswold on board. In my response I would also like to cite the Agua Caliente example (showing among other things the White House willingness to intervene in landmark Indian cases) but this brings us back to Item 2.

4. Pyramid Lake

(This one does not involve the Solicitor General -- yet).

I am told in confidence that a rather active debate is now going on within Interior in front of Secretary Morton as to whether or not to ask Justice to initiate a Supreme Court suit jointly against Nevada and California to adjudicate theIndian rights to Pyramid Lake. (This can be done with the Supreme Court as original jurisdiction when two States are involved.

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Personally I believe this issue is too significant to be settled without your familiarizing yourself with the issue -- and I therefore recommend you sign the attached note to Rog. (Tab E).

Leonard concurs with these suggestions.

Bradley H. Patterson, Jr.

Otherwise White House will never get worked.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

COMMITTEE ON CLAIMS ADJUDICATIONS

RECOMMENDATION NO. : Conflict-of-Interest Problems in Dealing With Natural Resources of Indian Tribes.

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

RECOMMENDATION

A. Creation of Indian Trust Counsel Authority

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

The Indian Trust Counsel Authority should be empowered to:

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

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

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

(d) Receive the benefits and rights of the United States as a litigant.

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

3. The Departments of Agriculture, Defense and the Interior should give notice to the Indian Trust Counsel Authority and any affected tribe of any proposed action which may significantly affect or impair the rights or claims of Indians. The Authority and tribe should have a reasonable opportunity to participate, in the manner appropriate to the nature of the proceeding, in the agency process resulting in any such action. This notice requirement, however, should be judicially enforceable only by the Authority or by the affected tribe.

B. Administrative Solutions

Prior to or in the absence of legislation, the Department of the Interior and the Department of Justice should take appropriate steps to ameliorate existing conflict-of-interest problems with respect to the handling of matters involving natural resources of Indians. The Department of the Interior should give consideration to expanding the application of recent measures which established a separate Indian Water Rights Office to other types of Indian matters.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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COMMITTEE ON CLAIMS ADJUDICATIONS

CONFLICT-OF-INTEREST PROBLEMS IN DEALING WITH NATURAL RESOURCES OF INDIAN TRIBES

Report of the Committee on Claims Adjudication
in Support of a Proposed Recommendation

April 1972

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Introduction

The Committee on Claims Adjudications of the Administrative Conference of the United States has been concerned for some time with the institutional conflict-of-interest faced by Federal agencies in dealing with the natural resources of Indian tribes. At present, the Department of the Interior is obligated to act in a dual capacity in many situations -- as a fiduciary acting for Indians and as an officer exercising responsibilities with respect to public lands and natural resources. The Department of Justice sometimes is involved in the same troublesome predicament. The Committee favors the elimination of the dual representation and conflict-of-interest inherent in this situation. Accordingly, it endorses the establishment of an Indian Trust Counsel Authority as an independent federal agency which will provide legal services to the Indians to protect their land and resource rights.

The Committee on Claims Adjudications has reached these conclusions after more than a year of consideration. In studying this matter the Committee has had the able assistance of Professor Reid P. Chambers of the UCLA Law School. Professor Chambers has prepared an extensive report on the subject, a copy of which is appended to this report as Appendix A.

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Professor Chambers' report describes the legal nature of the Federal Government's trust responsibility towards the Indians, and analyzes the history and problems of Federal agencies in meeting that responsibility in their dealings with Indian lands and resources. While the basic conclusions are the same, the Committee's recommendation and report differ in detail to a degree from the views of Professor Chambers. For that reason the Committee has summarized its views in this separate report. The Committee, however, relies on Professor Chamber's report for its illumination of the conflict-of-interest problem and the need for a solution.

During the period in which the Committee has considered this subject other forces have also been at work. The Department of the Interior has taken certain steps which ameliorate the conflict-of-interest problem. The Administration has proposed legislation to create an Indian Trust Counsel Authority. Hearings on this bill, S. 2035, 92d Cong., 1st Sess. (1971), were held before the Senate Committee on Interior and Insular Affairs in November 1971. At the request of the Committee on Claims Adjudication, Chairman Cramton submitted a statement expressing the views of the Committee. S. 2035, if enacted, would accomplish a major part of the objective of the Committee's recommendation.

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The Committee has also had the benefit of the views of three interested Federal agencies, the Department of Interior, the Department of Justice, and the Department of the Army of the Department of Defense. The Committee's tentative recommendation was revised in the light of the comments received from these departments. Copies of these communications are contained in Appendix B to this report.

The remainder of this report briefly discusses each of the provisions of the Committee's recommendation.

A. Creation of Indian Trust Counsel Authority

The problem is particularly acute in the Department of the Interior, which has administrative responsibility for carrying out trust responsibilities to the Indians and for promoting the development of the nation's public lands and natural resources. A reclamation project of the Department of the Inteior, for example, may affect the water, fishing or other rights of Indians. The dispute may be mediated by the Solicitor's office, which functions as an attorney for the Bureau which wants to build the project as well as for Indian interests. If the Department's decision is adverse to the affected Indians, the Department of Justice is unlikely to seek judicial review on behalf of the Indians, even though an

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independent advocate might well do so in the not infrequent situations in which the answers to legal questions are unclear. Furthermore, an independent advocate would have the leverage in departmental or inter-agency negotiations that come from the ability ultimately to seek court relief.

There are difficulties, as well, in ensuring adequate Government representation of Indian claims in disputes with State or private interests. The dispute may involve rights in water or other resources which will be affected by a planned Federal project. The Government may be interested in seeing these disputes settled quickly in order to speed development of the project, but this may conflict with the Indians' interest in pursuing their claims.

In practice, conflicts between Indian interests and other Federal policies have not always been resolved against the Indians. Agency officials have tried to be conscientious. But they are being asked to carry out an awkward and inconsistent role. If nothing else, the situation creates an appearance of divided loyalty that weakens the confidence of the Indian beneficiaries in the fairness of the system.

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A basic responsibility of any trustee is to be loyal to his trust, to conserve trust property and to avoid self-dealing with trust assets. He must not appropriate trust property, nor manage it for his own benefit. The dual responsibility of Federal agencies to protect Indian interests and promote conflicting Government policies places stress upon these ordinary fiduciary obligations.

Similarly, under principles of good administrative procedure, an agency should not have an institutional responsibility for representing both sides in a dispute, particularly when it is also the decision-maker. Nor should an advocate for a particular interest be expected to weigh competing interests in deciding whether to pursue its client's interests. The present arrangement is undesirable in terms of these established concepts of administrative procedure and of fiduciary responsibility, and, in addition, as a matter of fairness to the agency officials who are assigned inconsistent roles.

The Committee, on the basis of its extended study of this question, has concluded that a new instrumentality should be created to provide Indians with an independent, effective voice to speak for their land and resource claims. This step would

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ensure a full presentation of Indian interests in agency and court proceedings, and enable the agency to concentrate on the proper resolution of the dispute. The proposed Indian Trust Counsel Authority would be such a spokesman, and the Committee on Claims Adjudications endorses its establishment.

1. The advocacy function.

The essential powers of an effective agency to advocate Indian interests are spelled out in Part A of the Committee's recommendation. The advocacy function is broadly defined so that the Authority would be empowered to represent, in the capacity of either a plaintiff or defendant, the rights or claims of an aggrieved Indian, Indian tribe, or other identifiable group of Indians "in any formal or informal administrative or judicial proceeding before any agency or court of a State or of the United States." The Authority would have the same powers and responsibilities in any proceeding as any other party to the proceeding, except that in court litigation it might avail itself of the special rights of the United States as a litigant. Representation would be contingent, however, upon the consent of an aggrieved Indian or group of Indians. Hence the Authority would have a continuing responsibility to view interested Indians as its "client."

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The recommendation, of course, does not make the Authority the exclusive spokesman of the diverse interest and views of Indians. Individual Indians and Indian tribes would be able to participate in administrative and court proceedings in their own names and rights to the same extent as at present.

Moreover, since Indian tribes may have conflicting interests among themselves, the recommendation appropriately authorizes the Authority to use special counsel. The Authority may retain special counsel in other situations as well, such as when the time of its staff attorneys is fully committed. In lieu of special counsel employed by the Authority, the volunteered services of attorneys and others may be utilized by the Authority.

The Indian Trust Counsel Authority, as a Federal agency, should be entitled to the benefits and rights of the United States as a litigant. The United States, for example, need not post a bond to obtain injunctive relief, and the Authority, as a responsible agency of the United States, should not have to do so either. Other special privileges of the United States as a party litigant relate to such matters as: time to answer and to appeal, assessment of costs, special statutes of limitations, etc.

The funding and resources of the Authority must be commensurate with its given role as the vehicle by which the Federal Government fulfills its trust responsibility to protect Indian lands.

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Congressional appropriations must be adequate to that responsibility.

To supplement its funds, the Authority is authorized to accept donations. The Committee believes it would be useful to provide explicitly that the contributions will be tax-exempt.

2. Waiver of sovereign immunity.

The fundamental reason for establishing the Authority is to create an independent advocate in disputes with the Federal Government. The representation function, however, would be largely ineffective unless it is accompanied by a waiver of sovereign immunity on the part of the United States. Hence paragraph 2 of Part A of the recommendation provides for this limited waiver of sovereign immunity. Recommendation 19 of the Administrative Conference, "Statutory Reform of the Sovereign Immunity Doctrine," does not cover the situation entirely since it deals only with situations involving judicial review of administrative action.

3. Notice of proposed agency actions that may significantly affect Indian rights.

Indian tribes in the past have oftentimes been unaware that a Federal agency was considering a new dam or other project which

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may adversely affect them. Consequently, the Committee believes it important to make some provision for notifying the independent Authority and affected tribes about proposed actions which may significantly affect Indian lands or natural resources.

On the other hand, the Committee was concerned that agencies not be overburdened with detailed and costly notice requirements. Agencies are already subject to new and pervasive notice requirements, such as the environmental impact statements required by the National Environmental Policy Act of 1969, the full implications of which are still being worked out. A requirement that applied to any Federal agency action affecting Indians could require additional paperwork for a multitude of daily actions -- many of them very unstructured -- and inundate the Authority in a multitude of notices that would obscure the important actions needing attention. Consequently, the Committee suggests that only significant proceedings be reported to the Authority and to the affected tribe.

This notice requirement would also apply only to the three Federal agencies whose projects most frequently affect Indians: Interior, Agriculture, and the Department of Defense (including the civil and military activities of the Army Corps of Engineers). The required notice should give an adequate indication of the nature of the proposed action and the interests to be affected,

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but need not contain the detailed discussion of alternatives that is required in environmental impact statements. In many situations, of course, the environmental impact statements required by section 102 of the National Environmental Protection Act would accomplish this notification function, thus eliminating the necessity of preparation of a separate notice.

After being notified, the Authority and the affected tribe should have a reasonable opportunity to participate in the agency proceeding in the manner appropriate to the nature of that proceeding. Participation by the Authority in unstructured proceedings -- the so-called informal administrative process -- would be subject to agency discretion and control to the same extent as it now is with respect to other affected persons. The Authority would have the same rights and privileges as other interested persons in informal proceedings.

Only the Authority or the affected tribe should be able to enforce any notice provision. Private parties, such as an environmental group or an adjacent landowner, should not be able to invalidate a Federal action merely because the Authority did not receive this special notice. The notice requirement exists to make the Authority an effective representative of the Federal trust responsibility, and it, along with the affected tribe, should be empowered to insist upon its benefits.

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4. Trust responsibilities of Justice and other Federal agencies.

The creation of the Indian Trust Counsel Authority would relieve the Department of Justice of its obligation to represent Indians in protecting Indian natural resource claims, but it would not end the Federal trust responsibility toward the Indians. (See the letter from Richard Kleindienst, Deputy Attorney General, Department of Justice, to Neil Hosenball, Chairman, Committee on Claims Adjudications, which is reproduced in Appendix B.) Quite rightfully, Federal agencies will have to consider in their decisions the interests of the Indians and the Federal Government's trust obligations towards them.

The Committee believes that, if the Authority is established as an independent advocate for the Indian wards of the United States, the Department may properly be relieved of any obligation to provide representation of individual Indians or Indian tribes. The Department should not be exposed to criticism for failure to provide separate representation for Indians in situations in which the Authority has concluded that the claim lacks merit or is not sufficiently important for the Authority to provide representation.

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The Department of Justice, of course, would be free to intervene or participate in litigation on behalf of the United States as trustee of the rights of Indian tribes. And the Department, and other agencies, would have a continuing obligation to act in the best interests of the Indian wards of the United States. The Committee interprets the provisions of S. 2035, which relieve the Department of Justice of its representation responsibilities on behalf of Indian wards who would be represented by the Authority, as not impairing this continuing obligation. While the Authority will have the responsibility to represent the Indians' interest in the trust, Justice will continue to have the responsibility for representing the United States as trustee when such action is needed to protect the trust's natural resources.

B. Administrative Solutions

Part B of the Committee's recommendation asks the Department of the Interior and the Department of Justice to take appropriate steps to ameliorate existing conflict-of-interest problems with respect to the handling of matters involving natural resources of Indians. In October 1971 the Department of the Interior took a significant step in this direction. See page 3 of the letter from Mitchell Melich, Solicitor, Department of the Interior, to

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Neil Hosenball, Chairman, Committee on Claims Adjudications, which is reproduced in Appendix B. Professor Chambers' report, at pages 68-75, discusses the desirability of further administrative measures of this character which do not require legislation, and the Committee adopts this discussion as its own.

Conclusion

The Committee on Claims Adjudications urges the adoption by the Administrative Conference of its proposed recommendation on conflict-of-interest problems in dealing with natural resources of Indian tribes.

S. Neil Hosenball
Chairman

Attachments

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THE WHITE HOUSE

WASHINGTON

April 17, 1972

MEMORANDUM FOR: JOHN EHRLICHMAN

SUBJECT: INDIAN WATER RIGHTS - UNCOMPLETED BUSINESS

Several converging matters prompt me to suggest that it would be timely and helpful if you would invite Solicitor-General Griswold to lunch so that we could cut a few knots that have developed in the Indian water rights area.

1. Response to your Memorandum of February 15 (Tab A)

Attorney General Mitchell's answer (Tab B) left a very important question open: will we or won't we include Supreme Court briefs in the procedure you suggested to Messrs. Morton and Mitchell? It is the Solicitor General who has doubts about this and an informal lunch I had with one of his senior staff (Mr. Wallace) indicated that only a conversation with the Dean would get this clarified.

The Stevens tax case(in the 9th Circuit) has set the precedent and I believe we should press Dean Griswold to OK the procedure for that last and most important category of government appeals.

2. Trust Counsel Legislation: Answers to Senator Allott's Questions

As an outgrowth of the Senate Interior Subcommittee's hearings on the Indian Trust Counsel bill, Senator Allott directed a series of questions to Justice and Interior. The lead-off question to Justice, and the answer which I worked out to it with Assistant Attorney General Frizzell, are attached as Tab C. The Agua Caliente case is cited, factually, as a very current example of the "conflict" the President described in his July 8, 1970 message proposing the Trust Counsel. The Solicitor General refuses to clear this response with the Agua Caliente narrative in it; I think he needs a nudge from you to clarify that this is a truthful example of what the President really meant. Unless we give the Senate a convincing response, the Trust Counsel bill will get nowhere. The

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skeptics there just don't believe there are any examples of "conflicts."

3. The Invitation from the Administrative Conference of the United States

I have received a letter from Chairman Roger Cramton (Tab D) inviting a White House comment on the favorable and supportive Report about the Trust Counsel by the Conference's Committee on Claims Adjudications. It will go to the Plenary Conference. One of the Committee's recommendations is that

> "Prior to or in the absence of legislation, the Department of the Interior and the Department of Justice should take appropriate steps to ameliorate existing conflict-of-interest problems with respect to the handling of matters involving natural resources of Indians."

I would like to respond by citing the exchange of memoranda between you and the Attorney General -- it is a real accomplishment -- but that takes us back to the importance of Item 1: getting Dean Griswold on board. In my response I would also like to cite the Agua Caliente example (showing among other things the White House willingness to intervene in landmark Indian cases) but this brings us back to Item 2.

4. Pyramid Lake

(This one does not involve the Solicitor General -- yet).

I am told in confidence that a rather active debate is now going on within Interior in front of Secretary Morton as to whether or not to ask Justice to initiate a Supreme Court suit jointly against Nevada and California to adjudicate theIndian rights to Pyramid Lake. (This can be done with the Supreme Court as original jurisdiction when two States are involved.

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Personally I believe this issue is too significant to be settled without your familiarizing yourself with the issue -- and I therefore recommend you sign the attached note to Rog. (Tab E).

Leonard concurs with these suggestions.

Brad

Bradley H. Patterson, Jr.

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ANSWERS TO QUESTIONS FOR JUSTICE DEPARTMENT WITNESSES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506
(202) 395-3753

April 5, 1972

Mr. Brad Patterson
The White House
Washington, D.C.

Dear Brad:

I am enclosing for your information a copy of the report and recommendation of the Conference's Committee on Claims Adjudications endorsing the creation of an Indian Trust Counsel Authority.

The recommendation will be discussed by the Council of the Administrative Conference in mid-May, and, if placed on the agenda by the Council, will be considered at the Conference's plenary session on June 8-9, 1972.

If you have any comments or reactions to the proposal, I would appreciate receiving them prior to the Council meeting on May 17.

Sincerely yours,

Roger

Roger C. Cramton
Chairman

RCC/jms

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L. Garment

THE WHITE HOUSE

WASHINGTON

February 15, 1972

MEMORANDUM FOR:

THE ATTORNEY GENERAL
THE SECRETARY OF THE INTERIOR

SUBJECT: INDIAN TRUST RIGHTS

The Department of Justice has a responsibility, using the broad standard of the public interest, independently to evaluate the litigative proposals of any Executive Branch Department or Agency and, as the litigating agent of the United States, to have the principal voice in the content of briefs forwarded to the Courts.

Cases involving the trust rights of Indian tribes form an exception of sorts, since the United States is the trustee of those rights and thus has an advocate as well as a litigative responsibility. As you know, the President has proposed the creation of an Indian Trust Counsel Authority to discharge that Executive Branch responsibility.

Pending the creation of the Trust Counsel Authority, I would appreciate it if you would arrange a procedure whereby, in addition to whatever brief is forwarded to any Court by the Department of Justice on behalf of the United States in matters affecting Indian trust interests, the Department of Justice will also, when requested by the Secretary or (acting for him) the Solicitor of the Department of the Interior, forward a supplementary brief speaking specifically and exclusively as Trustee for Indian natural resources rights.

We would wish to employ this procedure judiciously and this is why I believe the option should be exercised only by the Secretary or the Solicitor.

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Implicit in this arrangement would be a procedure for Justice to notify Interior of the existence of all pending cases in which Indian natural resources rights are challenged or threatened.

I believe the spirit of the President's Indian Trust Counsel proposal requires us to make this exceptional arrangement in the interim until the new legislation is enacted.

Please notify me by March 1 of the procedures you plan to employ.

John D. Ehrlichman

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THE WHITE HOUSE

WASHINGTON

Agreed Version 2/28/72

January 28, 1972

Dear Kent:

The Office of Management and Budget, according to its usual procedures, has sent me for review the proposed answers of the Justice Department to 34 questions propounded by Senator Allott about the Indian Trust Counsel bill (S 2035).

Several of the proposed responses would leave the President out on a long limb and do not effectively state the case for S 2035.

Rather than just toss them back to your staff, however, I have corrected them with new language, in an attempt to be helpful to you and Dick Kleindienst. The corrections are given in the attachment here.

What this new language does is state the positive case for the Trust Counsel and in so doing keep us out of the false trap which the wording of some of those questions would try to create, namely that the Department of Justice has been "derelict", or some other perjorative intimations.

My view is that no Department or person is necessarily "derelict" but that the system of rules and structure we have been using has not been adequate -- and that we can and should change that system (as the President, the Attorney General and S 2035 would do) without implying that the merits of any Departmental judgements have necessarily been wrong.

In other words, the Department of Justice must continue to be a tough and independent evaluator of federal litigation proposals but we must all make an exception in that unusual type of cases where the United States is a Trustee. The Trust Counsel is

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that exception. To say these things and to propose the necessary structural changes to accomplish them is not at all the same as saying that any person high or low has been "derelict".

I think the examples I have cited are necessary to make this argument and I am quite sure they are factually accurate, but would welcome your comment.

If your Department believes we must go back to the kind of responses originally drafted, please inform me, since we would then wish to take this matter to John Ehrlichman and the President.

I understand that there is still the list of cases on which your staff is working pursuant to the questions raised on pages 51, 55 and 57-58 of the November 22, 1971 Senate Interior Committee transcript. I am anxious to look this material over before it is sent.

Cordially,

Brad

Bradley H. Patterson, Jr.

Mr. Kent Frizzell
Assistant Attorney General
Lands Division
Department of Justice
Washington, D.C.

cc: Wilf Rommel, OMB

attachment

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CORRECTIONS

ANSWER 1 - Strike all of present draft and substitute as follows:

The Department of Justice in its capacity as the litigating agent of the United States traditionally exercises an independent judgment and evaluation when any other Department proposes a litigating position in a given case. A principal standard in this judgment is the interests of all the people of all the United States. Another standard is whether the litigative materials being supplied by the requesting Department are sufficient to make a strong case in Court.

The standard of the interests of "all the people of all the United States" may of course differ in the opinion of the Department of Justice from the interests of the requesting Department or of its clientele among the public. The recommendations of the Department of the Interior and the interests of the Indians as a special clientele group may therefore be superceded when the Justice Department makes the independent judgement referred to. There would be nothing exceptional about this (as compared to recommendations coming from any other Departments) except for one thing: the natural resources rights of Indian people are the res of a trust, and the Government of the United States is the Trustee. As does any Trustee the Government bears a special responsibility to put forward and advocate the interests of its wards and to represent them forcefully when the substance of that trust is in any way threatened. This responsibility may conflict with the Department of Justice's responsibility to act after its independent judgement and evaluation and according to that broader standard -- it is this which is the "inherent conflict of interest" to which the President referred in his Message to the Congress of July 8, 1970.

"When such situations arise" said the President, "the Indians are the losers". As the Attorney General said in a public statement of October 29, 1971,

"This provided a very difficult problem for some of the government departments, particularly that of the Department of Justice, because when litigation arose in connection with these properties or the interests therein the Department of Justice was put in the area of conflict, having

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to represent the interests of the Indians on one side and of course of the public and the United States government on the other side."

Examples of this conflict could be researched over the last century of Indian litigation, but as Assistant Attorney General Kashiwa said in his testimony before the Senate Interior Committee on November 30, 1971, "I am not here this morning to defend the decades and Administrations of the past."

A very current example is the case Agua Caliente Band of Mission Indians et al v. the County of Riverside. The Solicitor of the Department of the Interior recommended that the United States in its Trustee capacity join as amicus in the Indians' petition for certiorari to the Supreme Court. The Solicitor General, using the standard referred to at the opening of this response, declined. The Supreme Court then requested an amicus brief from the United States. The Solicitor General disagreed with the recommendation of the Solicitor of the Department of the Interior and independently decided to file a brief which opposed the Indians' position. The Supreme Court thus ~~is unaware~~ was not separately advised of the position of the United States speaking as Trustee for the Indians. ~~[and the Indians' interests may be adversely affected]~~

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

Recognizing the importance of having the Trustee's voice being heard by the Court, this Department and the Department of the Treasury agreed to expand the Government's brief to include the views of the Department of the Interior, speaking as Trustee. In this case, the Court was ~~made aware~~ separately advised of the Government's view in its Trustee capacity, as well as of the contrary views of the Department of Justice and the Department of the Treasury. This particular brief was a rare exception, perhaps the first of its kind. (The Court ruled in favor of the Indians and of the Trustee.)

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The Department of Justice may also differ with a requesting Department about the sufficiency of the evidence to argue a case, and in these instances also the Department of Justice's word is usually final. If it is the Department of the Interior that is being overruled in such an instance, and in an Indian case, the Trustee's position never gets presented to the Courts, whereas if the Secretary of the Interior were a private Trustee, he would go to Court if he felt he had sufficient supporting evidence. An example of this conflict is the issue of fish ladders to benefit the Klamath Indians on a dam built by the California Oregon Power Company. For some twelve years this Department differed with the Department of the Interior about the sufficiency of the evidence; the Indians' case never was presented whereas if the Secretary of the Interior were a private Trustee he clearly would have gone to Court in this instance.

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

ANSWER 2 - Strike the words "potential or apparent" and "arguably".

ANSWER 3 - Strike the first word "Yes" and at the end of the answer add the clause "but if they do not have the forceful support of their Trustee, the United States Government, these other remedies lack a significant component of support."

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ANSWER 6 - After the word "Authority" in the first paragraph, add "and, more important, would not be acting with the authority, impact and official weight of the United States and would not be discharging the U.S. Government's duty as a Trustee".

ANSWER 7 - Strike the last sentence.

ANSWER 9 - Strike all of the present draft and substitute: "Our answer to question 1 indicates why only the creation of an Indian Trust Counsel Authority would meet the President's and the Attorney General's objective."

ANSWER 10 - Strike all of the present draft and substitute: "~~Several~~ Two specific cases are cited in the response to Question 1, but it is not a matter of "improper" action by the Department of Justice. This Department is fulfilling its obligation very properly but as part of a system which itself needs the amendation and improvement which the President has identified and which this Bill incorporates."

ANSWER 16 - Insert after the second sentence: "In making its evaluation of these issues and of its position on them, the Department would be guided by that language of the Bill which reads: "...but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe."
Add the words "in the Courtroom" to the end of the last sentence. yes

ANSWER 18 - Delete the final "which" clause and substitute: "which, as explained in the response to Question 1, may leave the Courts unaware of the position of the United States speaking specifically as the Trustee for Indian natural resources rights."

ANSWER 24 - After the first word, insert the following: "The Attorney General's full statement, made on October 29, 1971, concerning the Indian Trust Counsel is as follows: [and insert the full text of the remarks on pages 8 and 9 of the attached NCIO newsletter.]

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ANSWER 25 - Please check these answers with Mr. Gershuny of the Department of the Interior. We may have only one or two trust areas in Alaska; obviously only where there are trust areas would the Trust Counsel bill apply. Conceivably S 2035's opening sentence now needs to be amended to conform to the Alaska Claims Settlement Act.

✓ ANSWER 34 - Add the following paragraph at the end: "In issues which arise in Courts and regulatory bodies, however, the "partisan fiduciary duty" of the United States as Trustee for Indian natural resources rights is to ensure that the Trustee's voice is forcefully presented. The decisions will be the Courts' of course but not to provide for the Trustee to have its say to the Courts is a serious flaw in our governmental structure which the President wishes to correct. The continuance of that flaw undermines Indian confidence in governmental system. We want to eliminate the flaw; we want Courts always to hear the Trustee's voice; we want to build back the confidence of Indian people in their government. For these reasons we strongly urge enactment of S 2035.

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THE WHITE HOUSE

WASHINGTON

April 28, 1972

MEMORANDUM FOR

BRAD PATTERSON

Attached is the file with regard to Indian Water Rights - Uncompleted Business. Why doesn't Len have lunch with Solicitor General Griswold?

I would be happy to sit in if somebody wants to take the time to brief me so that I am up to speed, but I think Len ought to be able to handle this himself.

KEN COLE

Attachment

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THE WHITE HOUSE

WASHINGTON

January 28, 1972

Dear Kent:

The Office of Management and Budget, according to its usual procedures, has sent me for review the proposed answers of the Justice Department to 34 questions propounded by Senator Allott about the Indian Trust Counsel bill (S 2035).

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Brad

Bradley H. Patterson, Jr.

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Assistant Attorney General
Lands Division
Department of Justice
Washington, D. C.

cc: Wilf Rommel, OMB

attachment

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Recognizing the importance of having the Trustee's voice being heard by the Court, this Department and the Department of the Treasury agreed to expand the Government's brief to include the views of the Department of the Interior, speaking as Trustee. In this case, the Court was made aware of the Government's view in its Trustee capacity, as well as of the contrary views of the Department of Justice and the Department of the Treasury. This particular brief was a rare exception, perhaps the first of its kind. (The Court ruled in favor of the Indians and of the Trustee.)

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The Department of Justice may also differ with a requesting Department about the sufficiency of the evidence to argue a case, and in these instances also the Department of Justice's word is usually final. If it is the Department of the Interior that is being overruled in such an instance, and in an Indian case, the Trustee's position never gets presented to the Courts, whereas if the Secretary of the Interior were a private Trustee, he would go to Court if he felt he had sufficient supporting evidence. An example of this conflict is the issue of fish ladders to benefit the Klamath Indians on a dam built by the California Oregon Power Company. For some twelve years this Department differed with the Department of the Interior about the sufficiency of the evidence; the Indians' case never was presented whereas if the Secretary of the Interior were a private Trustee he clearly would have gone to Court in this instance.

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

ANSWER 2 - Strike the words "potential or apparent" and "arguably".

ANSWER 3 - Strike the first word "Yes" and at the end of the answer add the clause "but if they do not have the forceful support of their Trustee, the United States Government, these other remedies lack a significant component of support."

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ANSWER 6 - After the word "Authority" in the first paragraph, add "and, more important, would not be acting with the authority, impact and official weight of the United States and would not be discharging the U.S. Government's duty as a Trustee".

ANSWER 7 - Strike the last sentence.

ANSWER 9 - Strike all of the present draft and substitute:
"Our answer to question 1 indicates why only the creation of an Indian Trust Counsel Authority would meet the President's and the Attorney General's objective."

ANSWER 10 - Strike all of the present draft and substitute: "Several specific cases are cited in the response to Question 1, but it is not a matter of "improper" action by the Department of Justice. This Department is fulfilling its obligation very properly but as part of a system which itself needs the amendation and improvement which the President has identified and which this Bill incorporates."

ANSWER 16 - Insert after the second sentence: "In making its evaluation of these issues and of its position on them, the Department would be guided by that language of the Bill which reads: "...but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe."
Add the words "in the Courtroom" to the end of the last sentence.

ANSWER 18 - Delete the final "which" clause and substitute: "which, as explained in the response to Question 1, may leave the Courts unaware of the position of the United States speaking specifically as the Trustee for Indian natural resources rights."

ANSWER 24 - After the first word, insert the following: "The Attorney General's full statement, made on October 29, 1971, concerning the Indian Trust Counsel is as follows: [and insert the full text of the remarks on pages 8 and 9 of the attached NCIO newsletter.]

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ANSWER 25 - Please check these answers with Mr. Gershuny of the Department of the Interior. We may have only one or two trust areas in Alaska; obviously only where there are trust areas would the Trust Counsel bill apply. Conceivably S 2035's opening sentence now needs to be amended to conform to the Alaska Claims Settlement Act.

ANSWER 34 - Add the following paragraph at the end: "In issues which arise in Courts and regulatory bodies, however, the "partisan fiduciary duty" of the United States as Trustee for Indian natural resources rights is to ensure that the Trustee's voice is forcefully presented. The decisions will be the Courts' of course but not to provide for the Trustee to have its say to the Courts is a serious flaw in our governmental structure which the President wishes to correct. The continuance of that flaw undermines Indian confidence in governmental system. We want to eliminate the flaw; we want Courts always to hear the Trustee's voice; we want to build back the confidence of Indian people in their government. For these reasons we strongly urge enactment of S 2035.

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OFFICE OF THE SOLICITOR

ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS

4-7

Brad —

Re our Conversation about "Dep. Ass't AG for Ind. Affairs" at Justice, I just said attached Recommendations from one Committee of Adm. Conference of U.S., which will be submitted to Conference this June.

Note Recommendation B entitled "Administrative Solutions".

Bill

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United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

APR 7 1972

Memorandum

To: Solicitor

From: Associate Solicitor, Indian Affairs

Subject: Departmental conflicts of interest in dealing with Indian natural resources; recommendations of Committee of Administrative Conference of United States

Attached is a copy of the recommendations and report of the Committee on Claims Adjudications of the Administrative Conference of the United States, which will be submitted to the Conference at its plenary session in June 1972. The Committee recommends that the Conference: (1) endorse legislation creating an independent Indian Trust Counsel Authority, and (2) propose that Justice and Interior take administrative steps to "ameliorate" existing conflicts of interest. It is the latter recommendation which is discussed in this memorandum.

The Administrative Conference is established under 5 U.S.C. §§ 571-576 to study administrative procedures and to develop recommendations for action by departments and agencies. The Secretary or his designee is by statute a member of the Conference. § 573(b)(3).

In recommending solutions which Justice and Interior might take administratively, the Committee "adopts * * * as its own" the report of Professor Reid Chambers. The report, incidentally, is a tailored version of an earlier one which he submitted to Senator Kennedy and is not a particularly unbiased analysis of the problem. Professor Chambers' proposals (pp. 68-75) adopted by the Committee include the following:

1. Promulgation of Departmental regulation requiring all Bureaus to notify BIA in cases where proposed action may affect Indian claims to natural resources. DM 110.1.11 and Solicitor's Regulation 2 already requires such coordination within the Department and the February 28, 1972, agreement with Justice insures coordination between the two departments.

2. Provide BIA with legal counsel independent of Solicitor's Office. The "General Counsel for Indian Affairs" would, like the Solicitor,

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report directly to the Secretary and, thus, would limit the Department's conflicting position to a single official -- the Secretary. This proposal would necessitate the "General Counsel's office" having field offices to serve the BIA's area offices. Chambers likens this proposal to the Secretary's creation of the Indian Water Rights Office, which reports through the Commissioner directly to the Secretary, although Chambers may have the mistaken impression that the Water Rights Office directs its litigation proposals to Justice without going through the Solicitor. Of course, the creation of the Water Rights Office independent of the Assistant Secretary for Public Land Management was consistent with the Administration's proposal to create a new Assistant Secretary for Indian Affairs. Neither, however, contemplated a by-passing of the Solicitor's Office.

Chambers does not discuss the provisions of 43 U.S.C. § 1455 which provides that the Department's legal work "shall" be performed under the direction and supervision of the Solicitor.

3. Use of BIA funds for payment of fees of attorneys retained by tribe. Chambers, who it should be remembered is one of the attorneys for the Pyramid Lake Tribe, suggests that the Secretary may lack statutory authority to provide legal services directly to the tribe, citing the Veeder incident in the Rio Grande litigation. But while BIA lacks authority to "assign BIA attorneys to represent tribes, in my opinion it has the authority (although perhaps an inadequate fund) under 25 U.S.C. § 13 to pay fees for attorneys retained by a tribe "for development of water supplies." While the litigative position and rights of a tribe are not as great as when suit is brought by the Government on its behalf, nevertheless it may be a good solution in those otherwise unhappy and insolvable situations where conflicting Indian-Federal interests exist.

A copy of this memorandum, together with the recommendations and report of the Committee, is being sent to the Assistant Secretary, Public Land Management.

The Committee's proposals should be studied carefully and these and other administrative solutions to the conflicts problem should be given serious consideration.

The Committee has invited our comments and this should be done before the June session of the Administrative Conference.

William A. Gershuny

Attachments

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work to other agencies under its control. The resources of the defendant are tremendous. It commands the services of a large number and variety of experts, and yet it contends that it cannot answer the request of the petitioners because the work of one small segment of its staff is limited to financial and monetary considerations.

It should be noted that when it came to managing the petitioners' properties, the defendant did not hesitate to assume that it possessed the expertise necessary to control all facets of the petitioners' economic existence for more than 100 years.[6/]

III

Fiduciary Duty To Account For Stewardship Of Property Other Than Money

The government challenges petitioners' right to an accounting with respect to its stewardship of property other than money on the ground that petitioners have failed to establish that the government had an express statutory fiduciary duty with respect to each specific property for which an accounting is demanded.

6/ Petitioners note that the defendant has no basis for the contention that it has accounted even for "all funds received" (emphasis supplied), Def. Opp. at 5. See Pet. Motion at 24 regarding Blackfeet oil and gas proceeds and at 44 regarding $39,000 in Blackfeet 4% funds misdeposited to a government account. In addition, see Pet. Ex. 179 at 47 indicating that the entire receipts of the Blackfeet Tribe for some years may have been deposited to an Individual Indian Money account. Such accounts may not have been examined or included in defendant's reports, see Tr. at 337, 339, 343.

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A similar argument was made to the Commission in Te-Moak Bands of Western Shoshone Indians v. United States in Docket 326-A where, in its memorandum dated August 20, 1969, in response to petitioners' motion for partial summary judgment (pp. 7-8), and in resistance to petitioners' demand that additional information be supplied in the accounting, the defendant argued that petitioners had failed to establish whether a "true fiduciary relationship existed with respect to any of the transactions about which they complain. . . ." While the Commission did not discuss this point expressly in its Te-Moak decision, it tacitly rejected the argument in granting petitioners the relief they requested.

Defendant's argument as to fiduciary duty ignores the weight of authority. In many cases the Commission and the Court of Claims have held the United States to the standard of a fiduciary with respect to Indian property that it has undertaken to manage for the Indians' benefit--including property other than money--without reference to specific language of a treaty, statute or executive order. In the instant case, the United States assumed control of and purported to manage all of petitioners' property and thus assumed fiduciary obligations with respect to all of such property. (See discussion, infra, pp. 16-18.) The cases cited by defendant merely demonstrate

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that the United States will not be held to technical fiduciary standards simply because the complainants are Indians. They do not gainsay the basic principle that the United States will be held accountable as a trustee with respect to Indian property over which it has in fact assumed stewardship.

In Navajo Tribe of Indians v. United States, 176 Ct.Cl. 502, 364 F.2d 320 (1966), the United States was held to the standard of a fiduciary with respect to its supervision of oil and gas leases on tribal property. Without relying on any particular treaty, executive order or statutory provision, and merely pointing out that the United States "was responsible for supervision of the affairs of the tribe, including, in particular, supervision of oil and gas leases on tribal property," the court agreed with the Indians' assertion that "in judging the conduct of the Government 'the most exacting fiduciary standards' must be applied." The court noted that the "defendant does not challenge this concept as such." Id. at 507. In holding the government liable for taking for itself a lease assignment which the lessee wished to surrender to the lessor-tribe, the court gave "adequate weight to 'fiduciary standards.'" Id. at 508.

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In Oneida Tribe of Indians of Wisconsin v. United States, 12 Ind.Cl.Comm. 1 (1962), aff'd 165 Ct.Cl. 487, cert den., 379 U.S. 946 (1964), the Indian Claims Commission rejected a claim by the Oneida Tribe for damages due to losses of tribal timber which occurred because government agents, who supervised the timber, permitted it to be depleted by individual members of the tribe. The Commission, relying on the fact that "in the treaty in the instant case, there are no words of any fiduciary relationship whatsoever," ruled that the petitioner "has not established a guardian-ward or fiduciary relationship." 12 Ind.Cl.Comm. at 19.

On appeal, the Court of Claims affirmed the Commission's ultimate holding against the Indians, but based on the rationale that the defendant had done all that it was required to do to protect the Indians in the circumstances. The court expressly rejected the Commission's determination that the United States was not under a duty to protect the timber which it supervised. Noting the Commission's ruling that "the appellant 'has not established a guardian-ward or fiduciary relationship,'" the court held that the Commission erred "if the opinion meant by this to hold that the defendant

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had no special relationship to the tribe's property. . . ." 165 Ct.Cl. at 494. Without relying on any specific statutory language, the court determined that the United States did have a special relationship and a special responsibility to safeguard the Indians' timber. The court ruled:

> "It is unimportant in this case to characterize that obligation precisely. Whether the responsibility be termed that of a guardian, a fiduciary, a trustee, a protector or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurers level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: did the Federal Government do whatever it was required to do in the circumstances to save the timber? That is the standard." (Emphasis supplied.) Id.

In a number of other cases the United States has been held to the standards of a fiduciary both with respect to its stewardship of Indian property other than money,[7/] or money,[8/] without reference to a specific statute,

7/ Creek Tribe v. United States, 16 Ind.Cl.Comm. 431, 465-469 (1965) (Government held to standard of fiduciary with respect to its stewardship of Indian tribal land which was conveyed to third parties); The Ottawa and Chippewa Indians v. United States, 42 Ct.Cl. 240-247 (1907) (Government liable as a trustee with respect to its handling of government securities); Chickasaw Nation v. United States, 7 Ind.Cl.Comm. 64, 89 (1959) (Government held to be "in the nature of a trustee for liquidation purposes" with respect to land allotted to Choctaw Freedmen).

8/ See Menominee Tribe v. United States, 101 Ct.Cl. 10 (1944), (continued on following page)

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treaty or executive order creating a trust relationship.

It is true that in some cases the courts have required proof of specific facts creating a fiduciary relationship between the United States and an Indian tribe before holding the United States to a trustee's strict legal obligations. But none of those cases involved a situation where a fiduciary relationship was asserted on the basis of the defendant's actual exercise of stewardship over assets of the Indians.

Thus, in Gila River Indian Community, et al. v. United States, 190 Ct.Cl. 790 (1970), the Court of Claims rejected the contention that the United States had assumed the strict obligations of a guardian with respect to providing education, health services and administration to the Indians.

8/ (Continued from preceding page.)
where the court announced that it would "test the conduct of the government in its handling of the funds of the plaintiff Indians by the standards applicable to a trustee. . . ." It should be noted that Section 3 of the jurisdictional act, under which the Menominee case was brought, required that the court apply to the United States the same principles "as would be applied to an ordinary fiduciary. . . ." However, the Court of Claims ruled that the "provisions of Section 3 of the Jurisdictional Act concerning the principles applicable to an 'ordinary fiduciary' add little to the settled doctrine that the United States as regards its dealings with the property of the Indians is a trustee." Id. at 19. See also, Kaw Tribe v. United States, 1 Ind.Cl.Comm. 608-642 (1951).

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In that circumstance, which did not involve the management of the Indians' assets, the court ruled that no "special" or "fiduciary" relationship arose in the absence of a specific undertaking by the United States to assume that role. However, the court expressly noted that such a special or fiduciary relationship could arise without an express undertaking to that effect:

> "Special relationships may also be present when the government supervises the affairs and transactions of the Indians. This is closely akin to the guardian type or the fiduciary type relationship discussed previously. . . ." (190 Ct.Cl. at 800.)

By the above discussion we do not mean to imply that the United States always stands in a strict fiduciary relationship to the assets of the Indians. The presence or absence in fact of federal stewardship over "the affairs and transactions of the Indians" appears to be the critical factor in determining whether a fiduciary relationship exists. In Seneca Nation of Indians v. United States, 173 Ct.Cl. 912 (1965), the Court of Claims rejected the argument that the United States was liable as a fiduciary for failing to reclaim a tract of tribal land taken by the State of New York. In ruling that the government did not have fiduciary responsibility with respect to this transaction, the court relied on the fact that "unlike its

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relationship to some other Indian groups, the Federal Government was not in constant supervision over the Seneca Nation's affairs and transactions." Id. at 916.

None of the other cases cited by the defendant where no fiduciary relationship was found involve situations where the United States assumed supervision and control over the Indians' assets. Rather they involve special circumstances, not present in the instant case.

In Creek Nation v. United States, 20 Ind.Cl.Comm. 44 and 56 (1968), the court ruled that the United States was not liable as a fiduciary for its alleged breaches of treaty during the Civil War, because the Creeks had abrogated the trust relationship by aiding the Confederacy. Id. at 46. In both Osage Nation v. United States, 1 Ind. Cl.Comm. 43 (1948)[9/] and Sac and Fox Tribe v. United States, 179 Ct.Cl. 8 at 27, 383 F.2d 991 (1967), cert den., 389 U.S. 900 (1967), it was held that the government was not accountable as a trustee of tribal lands ceded to the United States by treaty. Finding a fiduciary relationship as to the ceded lands would have permitted the Indians to recover the proceeds received by the United States in disposing of the lands rather than damages based upon the

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9/ Rev'd on other grounds, 119 Ct.Cl. 592, 97 F.Supp. 381 (1951), cert den., 342 U.S. 896.

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fair market value of the lands at the time of cession. It is significant that in the Osage case the Indian Claims Commission relied on the fact that the imposition of the fiduciary obligation contended for by the petitioners "would be inconsistent with the government's treaty making powers which existed at the time of the treaty of cession of 1865 was concluded." 1 Ind.Cl.Comm. at 71. Moreover, the United States did not manage the land ceded prior to the cession.

In discussing the Osage decision, the defendant points out that the Commission relied on the fact that there was deleted from the proposed Indian Claims Commission Act a provision which would have required the Commission "in determining whether a claimant is entitled to relief on legal grounds" to "apply with respect to the United States the same principles of law as would be applied to an ordinary fiduciary." The defendant does not mention the fact that in the conference report, which explained why the conference committee of the two houses agreed to the elimination of the provision, it was stated as follows:

> "The conferees agreed to the elimination of this provision because it is now well settled that without express language the United States owes a very high degree of fiduciary duty to Indian tribes." (Report No. 2693, p. 6, House, 79th Congress, 2nd Session) 1 Ind.Cl.Comm. at 67.

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Tribal Claims Branch was "fully committed" until the end of FY 1971, its own expert witness and Chief of the Tribal Claims Branch declared at the trial that the Tribal Claims Branch had completed all of the accountings which were promised. Tr. _____ (228)

On the basis of the Southern Ute case, the petitioners are entitled to an up-to-date accounting. The accounting filed by defendant is prima facie incomplete in that it contains no information for the period after June 30, 1951, and defendant has no adequate defense for this insufficiency. It should therefore be ordered to commence necessary work and bring its accounting up to date forthwith.

IV. EXCEPTION NO. II

In general, Petitioners' Exception No. 2 deals with the defendant's failure to provide an adequate accounting for petitioners' property other than money--including grazing lands, real estate, timber, and other resources such as oil, gas, and riprap. The defendant denies any obligation to account for these properties and further, contends that petitioners are on a "fishing expedition" which is unwarranted by any substantive evidence, Def. Response, p. 3.

The defendant's first argument is legally insupportable. The petitions filed in both dockets clearly demand an

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accounting for properties other than money.[14/] The defendant does not deny that the petitioners possessed such assets or that the defendant controlled and administered them for more than 100 years. Yet, it maintains that it is not accountable to petitioners for that administration.

The courts have consistently held that the government has a fiduciary duty to its Indian wards when handling their funds and properties. In Seminole Tribe v. United States, 316 U.S. 286, 297 (1942), the Supreme Court declared that, in its dealings with the Indians the government should be judged by the "most exacting fiduciary standards." In Menominee Tribe v. United States, 101 Ct.Cl. 10, 19-20 (1944), the Court considered it "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee," whose conduct is to

14/ The petition filed in Docket No. 279-C contains the following paragraph: "WHEREFORE, petitioners pray that defendant be required to make a full and complete accounting for all property or funds received or receivable and expended for and on behalf of petitioners, and for all interest paid for due to be paid on any and all funds of petitioners; and that the Commission grant such other and further relief as may appear just and equitable." [Emphasis supplied.]

The language of the petition in Docket No. 250-A is similar:

"WHEREFORE, petitioner prays that defendant be required to make a full, just and complete accounting of all funds received and expended for petitioner commencing with May 1, 1888, and to make a full and fair report and disclosure of all facts concerning the defendant's use, management and disposition of all land, buildings and other property belonging to petitioner, including the rental value thereof and all rents and income derived therefrom, and further prays that after the allowance of all proper credits and offsets, the Commission shall enter judgment for petitioner for whatever amount may be shown to be due to it, and for such other and further relief as may be just and equitable." [Emphasis supplied.]

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be tested "by the standards applicable to trustees. . . ."

Surely, no ordinary trustee would have the temerity to inform a court of equity that it would account only for those portions of its ward's estate which suited its convenience. The doctrine is too well settled that the guardian is chargeable in his accounts "with all the estate of his ward, real and personal, and the proceeds thereof." [Emphasis supplied.] 39 Am. Jur. 2d, Guard., §176.[15/]

Neither does the allegation that the petitioners are on a "fishing expedition" have substance. Even a cursory perusal of the petitioners' exhibits makes it clear that petitioners have given documentary substantiation,

15/ In the case of Frethy v. Durant, 48 NYS 839, 24 App. Div. 58, 61, 62 (1898), the court stated, "It is assumed that the agent or trustee has means of knowing and does know what the principal or cestui que trust cannot know, and it is bound to reveal the entire truth. . . ."

"It is not necessary in such a case as this, that the plaintiff show that there will be something found due to her on the accounting.

"That fact can never be known with certainty until the account has been taken.

"The right to this accounting results from the facts that the fiduciary relation has been created and assumed by the agent or trustee, and that the princial or cestui que trust is not informed and does not know what has been done with reference to the property or property interest confided to the agent or trustee."

See, also, Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 F. 166, 179 (8th Cir, 1913); and In re Pittsburgh Rys Co., 117 F. 2d 1007 (3rd Cir. 1941), aff'd Philadelphia Company v. Dipple, 312 U.S. 168 (1941), where the court stated, "There is no more fundamental duty imposed on those who hold property for others than that of rendering an account of its management...." 117 F.2d at 1008.

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not only for their general allegation that defendant's reports are inadequate, but also for the specific allegations enumerated in their exceptions.

a. Failure to Account Adequately for Management of Petitioners' Grazing Resources.

Petitioners' Exception No. 2(a) alleges that the defendant has failed to adequately account for its management of grazing lands on the Blackfeet and Fort Belknap Reservations. As determined by the Commission in Docket No. 279-A,[16/] petitioners' lands are primarily suited for grazing. These lands, which constitute one of the petitioners' most important economic resources, have been under the continuous management of the defendant since 1873.[17/] Yet, the defendant's entire accounting for this management consists of two lines in the list of IMPL revenues, see 1969 Report, p. 11; 1970 Report, p. 9. In the case of Blackfeet petitioner, grazing income is not even segregated from rights-of-way and trespass fees in the reports. Only in defendant's response is there an annualized statement

16/ Blackfeet and Gros Ventre Tribes v. United States, 18 Ind.Cl.Comm. 241, 273 (1967).

17/ A reservation for the Blackfeet Nation was first established by the Executive Order of July 5, 1873. The Blackfeet Agency predated the establishment of the reservation by almost two decades, see Report of the Commissioner of Indian Affairs, 1856, p. 74.

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of grazing receipts and a segregation of grazing from other income,[18] which is only the first and most elementary step in the accounting for the management of petitioners' grazing resources.

These accounts show the Blackfeet Tribe has received approximately $260,000 for grazing receipts, permits, leases, etc., for the period from 1886 to 1951, making the Tribe's average annual income from grazing sources less than $4,000 for that period.[19] The Indians of the Fort Belknap Reservation received approximately $400,000 from similar sources during the period 1887 to 1951, or approximately $6,250 per annum on the average.

Considering the substantial acreages involved on those

18/ This information was provided to petitioners on the eve of the trial only after considerable expenditure of time by the GSA Tribal Claims staff. It could have been compiled with almost no additional effort had defendant originally included it in its accounting reports since the compilation was made by reexamining the exact records used to prepare the reports. See Tr. _____(259-60). This information is among the data Mr. Gillis, petitioners' expert witness, testified was essential to a proper accounting for grazing receipts. Tr. _____ (17)

19/ Defendant's response also shows approximately $150,000 in receipts for "Lease of Tribal Land" for the same period. It is possible that, at least some of this land was leased for grazing purposes but that cannot be determined with any certainty from the information provided by the defendant.

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In its decision in Osage, the Commission noted the language of the conference report, expressed agreement with it, but held that the imposition of such fiduciary duty "falls far short of imposing upon the government the duties and responsibilities of an ordinary guardian or trustee in transactions involving the acquisition, through treaties, of Indian lands." 1 Ind.Cl.Comm. at 67. (Emph. supp.)

We do not disagree with this characterization of the import of the legislative history. We merely wish to point out that, in context, the Commission's reliance upon the legislative history was directed to the assertion that Congress had not imposed fiduciary duties on the United States with respect to treaty acquisitions of Indian lands.

In Gila River Pima Maricopa Indians v. United States, 135 Ct.Cl. 180, 140 F.Supp. 776 (1956), a case primarily relied upon by the defendant, the question before the court was whether it could proceed to hear certain claims mainly involving water rights of the tribe, when the identical claims were also pending before the Indian Claims Commission. The plaintiffs argued that the claims were distinguishable because in the Court of Claims an additional theory of recovery based upon the breach of

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fiduciary duty by the government was being urged. The court did not reach the question of whether such a fiduciary relationship existed because it ruled that whether or not a breach of fiduciary relationship (which it "assumed" existed, without deciding) was involved, the resolution of that issue was within the competence of the Indian Claims Commission. 135 Ct.Cl. at 189.

While petitioners believe that the United States assumed the relationship of a trustee with respect to its handling of their assets, the Commission is not required to determine that petitioners are correct in that characterization in order to compel the defendant to render the accounting demanded with respect to property other than money.

It must be remembered that petitioners occupy reservations in Montana, set aside for them under the Act of May 1, 1888, 25 Stat. 113, under which the petitioners relinquished their rights in a vast area of land and agreed to accept their separate reservations as permanent homes. The Blackfeet and Fort Belknap Indian Agencies, established by the defendant, predated the existence of the petitioners' separate reservations and were continued by the defendant subsequent to the 1888 Agreement. The

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defendant assumed direct control and supervision over the assets of both reservations. It undertook to manage virtually all of the petitioners' valuable property.[10/] The defendant determined what programs would be created with the monies provided for under the 1888 Agreement and who would be licensed to trade on the reservations. The defendant granted rights-of-way and leases on the reservation.[11/] and authorized permits and terms and conditions

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10/ See Petitioners' Exceptions (Exception No. 2) in which petitioners set out various acts of Congress under which defendant assumed control over petitioners' property other than money and purported to manage it for petitioners' benefit.

11/ The Agreement of May 1, 1888, 25 Stat. 113 at 115-16, provides:

> "It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned." (Emphasis supplied.)

In the Agreement of 1896, 29 Stat. 356, this authority was expanded to include telephone lines, canals and irrigating ditches. These were not the first delegations of such authority the defendant made to itself. In the Treaty of October 17, 1855, 11 Stat. 657 at 658-59, the defendant reserved the right to establish at its own discretion "roads of every description," telegraph lines and military posts, and to use materials of every description found on the land for any purpose.

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to remove minerals and other natural resources from the reservations and to allow outsiders to graze livestock on the reservations.[12/] The defendant decided to build irrigation systems, to foster growing of crops where it was not feasible,[13/] and in 1907 and 1921 to allot and sell off portions of the reservations at prices and under terms and conditions which it fixed.[14/]

The situation is analogous to the one considered by the Commission in the early case of Iowa Tribe v. United States, 2 Ind.Cl.Comm. 167 (1952), cited in petitioners' memorandum at 4. That case involved a claim for a general

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12/ The Act of February 28, 1891, 26 Stat. 794, 25 U.S.C. 397, authorizes the lease of Indian lands for grazing and mining under the supervision of the Indian agent and with the approval of the Secretary of the Interior. See also Pet. Mem. at 13-16 and Pet. Ex. 148-168, indicating the scope of defendant's control of petitioners' grazing resources and the manner in which they were mismanaged by defendant.

13/ See Pet. Ex. 105-115 regarding the economic unsoundness of the Blackfeet Irrigation Project.

14/ Both Agreements of 1896, 29 Stat. 321 and 29 Stat. 350, respectively, declared the petitioners' reservations to be wholly unfit for agriculture and promised that they would be held in common to facilitate stock raising. Nevertheless both reservations were allotted by defendant and "surplus" lands sold off. Act of March 1, 1907, 34 Stat. 1015; Act of June 30, 1919, 41 Stat. 3; Act of March 3, 1921, 41 Stat. 1355.

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accounting in which the petitioners prayed for "a complete discovery and accounting of the manner in which defendant fulfilled its obligations under the several treaties and Acts of Congress listed above." Id. at 168. The Commission stated:

> "The allegations of the amended petition . . . show a number of treaties and Congressional Acts by which the defendant in same obligated itself to the Iowa to pay certain sums of money and perform services and furnish implements, livestock, supplies, etc., in consideration of the cessions of land, and in others, it is alleged defendant sold land for the benefit of the Iowa to mention but a few of the obligations assumed by the defendant. While many of the obligations of defendant would seem to be contractual rather than fiduciary, the fact is that in its dealings with the tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations." Id. at 176.

The Commission went on to rule that the petitioners were not entitled to discovery because this was unnecessary. The Commission stated:

> "It is difficult to see why this is necessary because if the Government is required to report to the petitioners the manner in which it fulfilled its several obligations there will be accomplished everything in the main action that could be accomplished by what petitioners conceive to be suit for discovery. If the claims here asserted are in the nature of an accounting in equity, as we assume them to be, all facts necessary for a determination of the rights of the

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parties can be made available to each party under the Indian Claims Commission Act." Id. at 176.

Here, as in the Iowa case, the defendant, by its actual exercise of supervision and control over the assets of the Blackfeet and Fort Belknap Reservations, created a special relationship with its Indian wards and became "accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations." Here, as in Iowa, "the government is required to report to petitioners the manner in which it fulfilled its several obligations. . . ." Here, as in the Iowa case, petitioners invoke the broad equitable powers of the Commission under the Indian Claims Commission Act to compel the defendant to make a full and fair disclosure of its actions with respect to petitioners' property.

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the guardian benefitted substantially by self-dealing in the ward's property.

When dealing with its ward, a guardian may not divest itself of its fiduciary obligations and pursue its own advantage to the detriment of its unsuspecting ward.[38/] On the contrary, it is required to act in the interest of its ward even at its own expense. Menominee Tribe v. United States, 101 Ct.Cl. 10, 20 (1944); Navajo Tribe v. United States, 176 Ct.Cl. 502, 507 (1966).

In this instance, it appears that the defendant trustee pursued its own interests above those of its wards in that it contracted with itself on their behalf to sell riprap at less than fair market value;[39/] permitted removal

38/ As Judge Cardozo eloquently stated the rule in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928):

> ". . . . Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Wendt v. Fishcer, 243 N.Y. 439, 444, 154 N.E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." 164 N.E. at 546.

39/ In an arm's-length transaction, the fair market value of the riprap would have reflected, among other things, the substantial transportation savings to the buyer in purchasing from Snake Butte.

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United States Senate

COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS

As per conversation with

Forrest Gerard

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S. 2035

COPY

April 12, 1972

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D. C.

My dear Mr. Secretary:

This letter is in reference to additional information requested by the Committee on S. 2035, to provide for the creation of the Indian Trust Counsel Authority.

Hearings on this measure were held before the Subcommittee on Indian Affairs on November 22 and 23, 1971, at which time Administration and other witnesses presented testimony. During the hearings the Departmental witnesses were requested to provide specific information for the record. Following the Committee hearings, several Senators submitted additional questions to your Department in connection with S. 2035.

Because of the prolonged delay on the part of your Department in responding to the questions posed during and following the hearings on S. 2035, the Committee decided to proceed with the printing of the November 22 and 23 hearings in view of the public interest in the proposed legislation.

You appreciate that our further consideration of S. 2035 has necessarily been delayed until such time as we receive the information requested of your Department. The Committee would appreciate receiving the additional information requested on S. 2035 no later than three weeks from the date of this letter so that we may proceed to consider this measure in light of the pertinent information and facts.

Your early attention to this matter will be appreciated.

Sincerely yours,

Henry M. Jackson
Chairman

HMJ:fgr

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S. 2035

COPY

April 12, 1972

Honorable Richard G. Kleindienst
Acting Attorney General of the United States
Department of Justice
Washington, D. C.

My dear Mr. Attorney General:

This letter is in reference to additional information requested by the Committee on Interior and Insular Affairs on S. 2035, a bill to provide for the creation of the Indian Trust Counsel Authority.

Hearings on this measure were held before the Subcommittee on Indian Affairs on November 22 and 23, 1971, at which time Administration and other witnesses presented testimony. During the hearings the Departmental witnesses were requested to provide specific information for the record. Following the Committee hearings, several Senators submitted additional questions to your Department in connection with S. 2035.

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Sincerely yours,

Henry M. Jackson
Chairman

HMJ:fgr

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A very current example of a conflict between the Indian viewpoint and the Department of Justice's independently-determined view of the legal arguments which it believes to be in the national interest is the case of Agua Caliente Bank of Mission Indians, et. al. v. The County of Riverside, cert. denied, February 22, 1972, 40 L.W. 3400. The tribal council of the Indians and the allottees of the tribal lands sought to establish that the County of Riverside could not tax the use of the Indians' lands by lessees. The Solicitor General, applying the standard of national or public interest, quite correctly declined to join the Indians. He filed an amicus brief which argued that the use of the lands could be taxed by the local government. He noted that the Indians' lessees attract guests who use the highways; they have employees whose children use the schools; they present public health problems, and require fire and police protection, all of which come basically as a local charge. The lessees should not be immune from bearing their normal, nondiscriminatory share of these costs in the absence of a clear provision to that effect by Congress. The law and the facts in this case did, therefore, dictate that the United States, represented by the Solicitor General, should oppose the partisan interests of the Indians.

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An independent agency, such as the proposed Indian Trust Council, not charged with protection of the overall public interest, could have argued in support of the Indian's contention.

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

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

Dear Senator:

This will acknowledge your letter of November 24, 1971, with which you enclosed a list of questions in addition to those addressed to witnesses for this Department at the hearing of November 22, before the Indian Affairs Subcommittee of the Interior and Insular Affairs Committee with respect to S. 2035.

We have prepared answers to the questions submitted with this letter insofar as information is available to this Department. Four copies of the answers are enclosed.

This Department is preparing other information requested by the Subcommittee which will be submitted to the Subcommittee chairman as soon as it is complete.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

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RETURN TO MRS. OGG - ROOM 4118

RGK:WHJ:HEH:HMD:rp
90-2-01

JAN 22 1971

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

Dear Senator:

The Attorney General has asked me to thank you for having afforded us the opportunity to read the preliminary transcript of the hearings held on S. 4165, legislation "To provide for the creation of the Indian Trust Counsel Authority, and for other purposes", which I am returning.

We have reviewed the transcript in detail and deeply regret the criticisms leveled against the Department and its handling of Indian affairs. We strongly feel that these allegations are unwarranted and that in each case they are based either upon erroneous information or a lack of understanding of the legal considerations which govern. The Department has always in the past attempted to discharge its responsibilities fairly and without favor and in the future shall strive to do likewise. In this vein, in those instances in which the Department has represented Indian interests, we have worked with the same diligence as we have in any other representation; similarly, we have carried out our congressionally-imposed responsibility to defend the United States in litigation instituted against it by Indians represented by private counsel.

We very much appreciate your consideration and courtesy in calling this matter to our attention. Again, our thanks for allowing us to examine the transcript. We would, of course, be glad to discuss any portion of it with you at any time.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

Signed by
R.G. Kleindienst
1-22-71

Enclosures
cc: Lands

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ANSWERS TO QUESTIONS FOR JUSTICE DEPARTMENT WITNESSES

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

ANSWER: No. We believe that review of the decisions defining Indian rights, especially their natural resource rights, discloses that the Department of Justice has effectively advocated those rights.

INSERT (1)

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

ANSWER: The Department of Justice reviewed the transcript of the 1970 hearings on S. 4165 which you furnished us, and, in a letter to you dated January 22, 1971, stated its position on the allegations made in the hearings. A copy of that letter is attached for your information.

Although the Committee staff has permitted us to examine the transcript of Mr. Kashiwa's testimony of November 22 at the Committee's office, we have no information at all as to testimony on November 23. We have no comments to add to our written and oral testimony at those hearings, except to

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reiterate our position that a Trust Counsel Authority as provided by the bill would eliminate any potential or apparent conflicts which arguably may exist within this Department between its representation of Indian interests and other Government interests. We therefore wholeheartedly support the bill.

3. If the Department of Interior, as a trustee, fails in its fiduciary duties by not referring legal matters to its attorneys, the Justice Department, or fails to otherwise properly proceed, don't the beneficiaries, the Indians, presently have any remedy?

ANSWER: ~~Yes.~~ They may employ private counsel or they may seek the assistance of Congress, such as in the amendment of legislation, but if they do not have the forceful support of their Trustee, the United States Government, these other remedies lack a significant component of support.

4. According to the testimony in the hearings on this proposal last year, one of the primary functions of the Trust Counsel will be to give legal representation to permit the Tribes to take action to require the Department of Interior to properly perform its trust duties. Most Trustees are under some sort of court supervision and are appointed by them, aren't they? (e.g. Trustees in decedents' estates, Trustees in minors' estates, Trustees in mental incompetents' estates, Trustees in bankruptcy, etc.)

(a) If a trustee is not properly performing his duties, ordinarily, isn't the usual remedy to replace the Trustee with one who can, and will, do the job properly?

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ANSWER: (a) Replacement of a trustee is one remedy, but not the usual remedy. The usual remedy is an action for accounting with money damages assessed for the breach of trust, or an action might be brought for an order requiring performance by the trustee.

(b) Wouldn't a court in one of those instances I mentioned, refuse to authorize the beneficiaries to hire their own attorney, to compel the Trustee to do his duty in the future because if that's necessary, the court should merely replace the Trustee and isn't that just the position Congress is in on this bill?

ANSWER: Usually, only beneficiaries and co-trustees may institute an action for removal. Some states (i.e. Pa.) have by statute conferred jurisdiction on the courts to remove trustees on their own motion.

5. How do you interpret Section 8 of this bill which says the Justice Department continues to have duties to Indians, including those which derive from the trust relationship and concerning treaties but not responsibility for legal representation in regard to natural resources - that is, how can you have one without the other?

ANSWER: The provision of Section 8 to which you refer would remove from the Department of Justice only those aspects of the United States' trust responsibilities to the Indians which are related to representation of Indians or Indian tribes with regard to their claims to natural resource rights. The Department would continue to represent the Indians in litigation in matters not affecting natural resources, such as civil rights matters, including such things as voting rights in

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both tribal and non-Indian elections. We do not believe that this separation of the litigation aspects of the United States' trust responsibilities will handicap the Department, the proposed Indian Trust Counsel Authority, or the Indians themselves.

(a) Are all Indian problems with which the Justice Department has contact clearly separable into independent situations so that those relating to natural resources do not interrelate with other Indian legal problems and if not, how will the Justice Department be in less of a "conflict of interest" situation by having only 1/2, or some other fraction, of the entire problem?

ANSWER: We believe the matters are separable and anticipate no conflict.

(b) Wouldn't it be more feasible, if the Justice Department is not to have the natural resource duties, to give all of its other Indian legal duties including those trust duties and tribe duties to the Trust Counsel so they will all be handled by, and be the responsibility of, that Trust Counsel which can coordinate and manage the legal problems in their entirety?

ANSWER: Because many Indian cases involve specializations different from those involved in Indian natural resource cases, we do not believe that it would be feasible to transfer all Indian duties to the Authority. For example, the Civil Rights Division of the Department of Justice is uniquely qualified to handle civil rights cases, whether they involve Indians or other persons.

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(c) When the Justice Department or the Interior Department see a situation where legal representation on a natural resource claim is necessary in their judgment pursuant to their trust responsibilities which Section 8 preserves, they will have to refer it to the Trust Counsel won't they?

ANSWER: Yes.

(d) Section 7 states that the Trust Counsel will be free of control by any Executive Department. This means that neither the Justice Department nor the Interior Department could require the Trust Counsel to do anything for the Indians, doesn't it?

ANSWER: Yes.

6. Why should a Tribe be required to use the Trust Counsel to protect its natural resources rather than providing funds for an attorney of that Tribe's own choice?

ANSWER: Under the proposed legislation the Tribe would not be prevented from employing its own counsel. Such counsel would, however, not be paid by the Authority, and, more important, would not be acting with the authority, impact and official weight of the United States and would not be discharging the U.S. Government's duty as Trustee.

(a) Would you support a provision in this bill which would provide for paying whatever attorney the Tribe, or individual Indians, chooses?

ANSWER: The Department of Justice believes that the legislation would adequately protect the interests of the Indians in having competent counsel represent them in protecting their natural resource rights. Under section 2(c) of S. 2035, two of the three members of the Board of Directors would be Indians. Under section 5(d) the Board of Directors would be able to appoint special counsel for an Indian party if there were a conflict between parties seeking the assistance or representation of the Authority. Accordingly, the

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Department of Justice would not support an amendment to provide for payment of whatever attorney the Indians chose to represent them.

7. Why is it equitable to waive the sovereign immunity of the United States only if the natural resources claim is filed by the Trust Counsel Authority as provided in Section 9, and not in cases filed by other attorneys for the Indians?

ANSWER: It was the intention of the draftsmen of this legislation to create a means by which the Indians could bring suit against the United States to protect their natural resource rights. As we stated in our response to question 6(a), we believe that S. 2035 would provide adequate representation of those interests. Accordingly, we believe that it is unnecessary to broaden the provision for waiver of sovereign immunity. Under the provisions of S. 2035, even opposing Indian interests, such as where the United States and two Indian tribes claimed the same natural resource rights, could be represented by the Authority or through the Authority's appointment of special counsel. Further, the complete waiver of sovereign immunity in this area might lead to the bringing of frivolous suits.

8. Why should this bill provide that the Tribes, or individual Indians, are not entitled to have a jury to adjudicate disputed fact situations or to determine the value of a resource, as is provided in Section 9?

ANSWER: When the United States waives its sovereign immunity it does so on such terms as Congress deems advisable. Congress has consistently provided that actions against the United States under waivers of sovereign immunity shall be tried to the court without a jury. Experience over a period of more than 100 years has demonstrated the advisability of this provision and no reason has been shown

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why an exception should be made in the waiver of sovereign immunity as to suits brought by the Trust Counsel Authority.

9. If the Justice Department had adequate staffing and funds, is there any reason, in your opinion, that it cannot, perhaps with a little reorganizing, give a Tribe or an individual Indian fair and impartial representation?

ANSWER: We believe that the Department has always given the Indians and Indian Tribes fair and impartial representation. However, in order to avoid any appearance of a conflict of interest, we recommend enactment of the Indian Trust Counsel Authority legislation.

Our answer to Question 1 indicates why only the creation of an Indian Trust Counsel Authority would meet the President's and the Attorney General's objective.

10. Do you know of any specific cases where the Indians have not received proper representation from the Justice Department and, if so, what are they?

ANSWER: No. We recognize, however, that this is a matter of opinion and that there are undoubtedly cases which it might be argued should have been handled differently than they were.

Several specific cases are cited in the response to Question 1., but it is not a matter of "improper" action by the Department of Justice. This Department is fulfilling its obligation very properly but as part of a a system which itself needs the amendation and improvement which the President has identifie and which this Bill incorporates.

11. As you see it, what specific instances should this Trust Counsel Authority take up first in providing the legal representation?

ANSWER: Under the proposed legislation the Trust Counsel Authority will be responsible for representing the Indians in all litigation affecting their natural resources. It is not believed practicable to set up any order of priority.

12. Would the Justice Department have objection to an amendment providing, in some way, that the legal responsibilities for Indian natural resources representation is shared by the Justice Department and the Trust Counsel Authority, and please explain your answer?

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ANSWER: The Department of Justice would not support an amendment providing for the sharing by the Department and the Indian Trust Counsel Authority of the responsibility for representing Indians with respect to their natural resource claims. It is our belief that this responsibility should reside entirely in one agency in order to avoid the confusion which would result if the responsibilities of the agencies overlapped.

13. Why does this bill provide for lawsuits against individual officers and employees of the federal government in Section 9?

ANSWER: It is anticipated that claims may be asserted that officers or employees have acted illegally or refuse to act when under a duty to do so. The remedy would be a suit against the individual rather than against the United States.

14. If two or more Tribes are in a dispute over some natural resources, say a strip of land, isn't the Trust Counsel going to be in a situation which could be claimed to involve a conflict of interest, even if it hires, and pays, outside attorneys to represent one or both of the Tribes?

ANSWER: Yes. The purpose of the legislation is to eliminate any appearance of any conflict between the representation of Indian interests and other Federal interests. It is unfortunately impossible to eliminate all possibility of conflict between representation of different Indian interests unless only one Indian interest is represented by the Authority or by counsel funded by the Authority or another Federal Government source.

(a) Isn't there going to be a "conflict" in deciding which attorneys are hired or how much they are paid?

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ANSWER: We assume that the Board of Directors of the Authority, in its policymaking capacity, will strive to avoid conflict in the hiring and payment of special counsel as much as possible.

(b) As you see it, in such a case would the authority have to decide whether there were merits on both sides or would it proceed with any lawsuit against another tribe paying out all funds the Tribe wants to spend?

ANSWER: Presumably, the former.

(c) If the Authority refuses to file a case, or to hire an attorney, to sue another Tribe or refuses to give the Tribe all the money and assistance it says it needs, that Tribe can claim the reason for not doing so is because the Authority is "protecting" the second Tribe, can't it?

ANSWER: Such a claim could be made.

(d) As you see it, who would determine when the time has arrived under Section 8 for the Trust Counsel to have exclusive responsibility for all Indian natural resource claims, and, would the Justice Department be willing to proceed for an indefinite transition period with both the Trust Counsel and the Justice Department performing the legal duties for the Indians?

ANSWER: It is assumed that transition would be worked out amicably with the Trust Counsel Authority. It is not believed it would be in accord with the spirit of the legislation to have an indefinite transition period but that the transition should take place as soon as the Trust Counsel Authority is in a position to handle the litigation.

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15. As you see it, how would the Trust Counsel proceed when an individual member of a tribe, believing it necessary to protect his individual natural resource rights or his individual share, desires to contest instructions the Tribe has given the Authority in regard to a specific case - wouldn't the Counsel have to suspend further proceeding while it provided attorneys to see to it the rights of the individual were represented?

ANSWER: When the Authority decides to provide representation for two or more parties to an inter-Indian controversy it is quite possible the decisions involved and the employment of separate counsel, if necessary, may cause some delay. We would suppose, however, this would not present a substantial problem.

16. If the legal responsibilities for representing Indian natural resource claims is given to this Trust Counsel, is it correct to assume the Justice Department will provide thereafter vigorous and active legal opposition to those cases on behalf of the other interests which are alleged to presently be in conflict with the Indian rights - for example, when a case is filed to establish that the Indians own waters involved in federal reclamation projects, the Justice Department will provide active legal representation against those claims so that those cases may be resolved in the Courts on the basis of "strict, rather than administrative accommodation," to use the words of Mr. Pipestem who testified in support of the bill last year?

ANSWER: The Department of Justice would represent non-Indian interests involved in the litigation. Whether that would involve vigorous opposition to Indian interests would depend upon the issues involved. We do not understand that under the situation asserted, this Department would have any duty to represent the Indian interest in the courtroom. In making its evaluation of these issues, ~~of course,~~ and of its position on them, the Department would be guided by that language of the Bill which reads:

"...but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe;"

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(a) Will the Justice Department agree to provide notice to this committee at anytime it is unable to properly respond to these lawsuits in order to protect these other alleged conflicting interests, or duties, within the jurisdiction of the Department of the Interior?

ANSWER: We do not understand the import of this question but this Department would endeavor to furnish the committee notices of any actions which the committee might request.

(b) I suppose other examples of instances where the Justice Department will have to provide active representation against the Indians would be where the Indians claim the waters of a National Wild and Scenic River, public lands which have Wilderness status, or National Park status or which have valuable minerals, do you agree?

ANSWER: These are possibilities, but at the present time we are not aware of any litigation of this character.

17. You appeared quite recently before this Committee in regard to the extension of the life of the Indian Claims Commission.

Would you please comment on the difference between Section 10 of the bill now before this Committee and Section 10 of last year's Trust Counsel Authority bill so that the absolute prohibition against Trust Counsel appearances before the Indian Claims Commission has been changed to permit it in any instance where it is requested?

ANSWER: The wording of the bill has been changed in an effort to remove any possible ambiguities.

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In both there is a prohibition against the Trust Counsel Authority's bringing any new actions or intervening in any pending actions before the Indian Claims Commission, but under the present bill it is clear that the Authority may assist in the prosecution of pending actions. It is our understanding that the reason for this provision is that the Authority may have information or evidence which would be of assistance in the prosecution of pending cases and that this should not be denied the Tribe.

18. In the hearings on the Indian Claims Commission, I believe you denied that the Justice Department has been derelict by delaying the completion of the work of the Commission. I do not believe you said you have conflicts of interest which have caused delay in the cases before the Commission.

If you don't have such conflicts there, why should you have them in other instances?

ANSWER: In cases before the Indian Claims Commission, the Department of Justice represents the United States' interests against the claims of the Indian Tribes, which are represented by private counsel. Thus, the role of the Department in these actions is clearly defined, and there can be no conflict since the Department has no responsibility to represent the Indians' interests before the Indian Claims Commission. In other cases, such as water rights cases, however, the interests of both the Indians and the United States generally may be involved. As stated in our oral testimony, our attorneys carefully attempt to avoid detriment to Indian interests where they may be called on to represent such interests and other Government interests. Ordinarily there is no conflict problem because of our practice of putting our representation of the Indians ahead of other Government interests. But even under this

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which, as explained in the response to Question 1, may leave the Courts unaware of the position of the United - 13 - States speaking specifically as the Trustee for Indian natural resources rights."

practice, broad public policy considerations may lead to litigation decisions ~~which the Indian interests do not favor and in this sense they may feel the decisions are influenced by conflicting interests. as explained in my response to Question 1.~~

19. Section 10 concerning the Indian Claims Commission cases now mentions a request for representation by the tribe to the Trust Counsel Authority. Can you explain why Sections 8 and 9 should not have similar language instead of merely indicating the Trust Counsel takes the initiative to file the cases and only obtains the "consent" of the tribe or the individual Indian?

ANSWER: Sections 8 and 9 do have the provision that the Trust Counsel Authority will act "with the consent of the aggrieved Indian, Indian Tribe," etc. Section 10 authorizes the Authority to act at the request of a Tribe. Since the Tribes are already represented by counsel in cases pending before the Indian Claims Commission, it is believed the Authority should act only if affirmatively requested to do so.

(a) Do you honestly believe Congress can reasonably expect that the attorneys and other officers and employees of the Trust Counsel Authority will diligently try to work themselves out of a job by only becoming involved in matters which clearly demand legal services or do you believe it is likely that the employees of this independent agency will endeavor to elevate its status and extend its need by ferretting out every little possible Indian claim that some court might listen to?

ANSWER: It is intended that the Indian Trust Counsel Authority be a permanent, rather than a temporary, agency because cases involving Indian natural resource rights could arise at any time. We have no reason to believe the Authority would bring frivolous suits.

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20. The bill contains specific directions about lawsuits, their preparation and trial but I find no directive to endeavor to make compromises or peacefully resolve disputes. As long as the specific language is in about the duties of lawyers to file lawsuits, wouldn't it be consistent with the duties of attorneys to also put in some specific words about first trying to resolve the cases peacefully and to compromise wherever possible.

ANSWER: We do not interpret Sections 8 and 9 as denying to the Authority the power to resolve cases peacefully or to compromise whenever possible. To place a "requirement" in the bill that the Authority attempt to do so would subject the Authority to the possibility of mandamus actions. We doubt the advisability of such a provision.

21. Do you agree that the fact that a person is going to have to pay his attorney fees serves to keep needless litigation out of the Courts, as Chief Justice Burger has been quoted as indicating when he had expressed concern about the volume of litigation in our courts filed by publicly paid lawyers?

ANSWER: We assume that cost of litigation has some effect on the volume of litigation, but have no figures to indicate the extent that the necessity for paying an attorney would reduce the volume. We should note that many of the cases which would be brought by the Indian Trust Counsel Authority are the same as those which are now brought by the Department of Justice in exercising the United States' trust responsibilities with regard to the Indians' natural resource rights. The Indians, of course, do not pay the Department for exercising this responsibility, and the fact that they would not pay the Authority for bringing those cases should not have an appreciable effect on the number of cases in that category which are instituted.

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22. Can you explain, with examples, just why this bill specifically refers to the Authority filing lawsuits against our states and local governments (Section 9)?

ANSWER: There is always the possibility of litigation with states or their subdivisions over land titles, boundaries, use of land and other natural resources, etc. An example is Ricci v. County of Riverside, California, Civil No. 71-1136, C.D. California, involving the application of the zoning laws of Riverside County to Indian lands.

23. Sections 8 and 9 describe natural resource claims which the Authority may represent as being those involving, but not limited to, land, water, timber, minerals and the right to fish and hunt. The phrase "but not limited to" implies there may be other instances. Can you give me examples of other instances?

ANSWER: The listing appears fairly complete. One additional item is the claimed right to gather wild rice free of state control.

(a) Do you believe this bill gives the Authority jurisdiction to appear in a case concerning education funds for a school on Indian land, or to sue to obtain payments on a contract which a tribe has with an oil company, to sue to charge ranchers for grazing cattle on alleged Indian land, to oppose a suit by a material supplier for materials used by a tribe to construct a building on Indian land and other cases which are less than cases to obtain possession or title to natural resources and, if so, aren't most aspects of Tribal existence and function going to be included in its jurisdiction?

ANSWER: More explicit information would be required to make a definite determination, but of the examples stated, the claim for grazing fees would appear to involve natural

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resources. We believe there may be many aspects of tribal existence not directly related to natural resources.

24. Was the Justice Department involved in any way in the preparation of this bill or in formulation of the concept which it advances?

ANSWER: Yes. The Attorney General's full statement, made on October 29, 1971 concerning the Indian Trust Counsel bill is as follows:

25. Senator Kennedy, as you know, testified in favor of this bill last year on September 25th. In the fourth sentence of his statement he referred to a situation where he said, the United States is not supporting "Indian treaty fishing rights in Washington." Please explain that situation and whether you believe it is a "natural resource case".

ANSWER: The Treaty fishing rights cases in the State of Washington are natural resource cases. Contrary to the statement made by Senator Kennedy, the United States is actively asserting the validity of the Indian Treaty fishing rights in several cases now pending in the state and federal courts in the state of Washington.

26. Senator Kennedy said "the Justice Department and the Interior Solicitor's office continue to short Indian water rights from New Mexico to Washington, from Nebraska to California", and "the Justice Department has refused to carry out its responsibility to represent Indian tribes in litigation or Justice has delayed its decision interminably". Do you agree and please explain.

ANSWER: No. On November 30, 1971, Mr. Walter Kiechel, Jr. testified for the Department before the Senate Judiciary Subcommittee on Administrative Practice and Procedure, chaired by Senator Kennedy, on the subject of Indian water rights. His testimony discusses these matters in some detail. I have attached a copy of his statement for your information.

27. Do I understand that you disagree with the statement made by Mr. Veeder in last year's hearings that "there has been a dereliction on the part of the Department of Justice.

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in regard to the (Eagle River) case" in the Supreme Court at that time, making specific reference to a conflict of interest (page 140 and 143)?

ANSWER: Yes.

28. This bill includes Alaska Natives and I have several questions about that:

(a) What would be their treaty rights this bill refers to protecting?

ANSWER: The Indians and the Natives of Alaska have no treaties with the United States.

(b) Has the Justice Department or the Interior Department specific trustee duties to the Alaska Natives?

ANSWER: The United States has assumed some trust duties to the Alaska Natives.

(c) Have either the Justice Department or Interior been requested to take action to protect the Alaska Natives' natural resources which they have refused and if so, where is the specific duty spelled out?

ANSWER: The list of cases being prepared at the request of Senator Anderson will indicate whether there have been any such instances during the last few years. At the moment, we know of none.

(d) As you know, the Alaska Natives have claimed much of Alaska and, as a result, legislation has now passed both Houses of Congress to constitute a final legislative settlement of those claims. Do you, therefore, see that the Trust Counsel Authority would have a role to perform to obtain something further for the Natives, if the Alaska Native Claims legislation becomes law?

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ANSWER: We presently know of no instance where the Trust Counsel Authority would be called upon to obtain rights in natural resources beyond what is provided for them in the Act.

29. As you read this bill, specifically Section 7, do you believe this independent Authority would be subject to audit by governmental agencies?

ANSWER: The Authority would be subject to audit by the General Accounting Office. It would also, of course, be subject to the same budgetary control by the Office of Management and Budget as any other administrative agency. The purpose of Section 7 is to preclude policy control of the Authority by any executive department.

30. Please tell the Committee what sources of legal representation other than the Justice (Department) the Indians now have (O.E.O., Legal Services, Ford Foundation and other foundations and institutes, private attorneys, etc.).

ANSWER: This Department is not fully informed as to what sources of legal representation are available to the Indians other than those provided by the Government and by private attorneys employed by them. Presumably the services available to indigent citizens are available to indigent Indians. We have had experience with a number of O.E.O. funded legal services representing Indian interests, and it is our understanding that the Native American Rights Fund is at least partially supported by one or more private foundations.

31. Would a provision in this bill prohibiting the solicitation of litigation be consistent with the ethical codes which govern the practice of law?

ANSWER: We assume what is meant is solicitation by the Trust Counsel Authority. We know of

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nothing in the codes of ethics directly applicable to the carrying out of the trust responsibility of the United States to the Indians. We would not consider the development of a case for the purpose of carrying out the United States' trust responsibility to be solicitation of litigation.

32. Would you anticipate that this Trust Counsel Authority might be taking Acts of Congress into court and trying to get them voided in the area of Indian natural resources?

ANSWER: This is possible.

33. Section 11 pertains to nonreimbursable or reimbursable cooperation by all federal departments, agencies, etc., with the Authority and indicates they will provide "information, personnel, services or materials" to the Authority. Based on your knowledge of the expense and complications of building a law case, would you agree that it would be unfair for the Indians, alone, to have the attorneys plus all these other government resources, when it is suing a state, county, city or private individual and that we should provide that both sides to the dispute will receive equal treatment in this regard?

ANSWER: The Department of Justice does not think that it is unfair for the Government to provide legal services to the Indians when it does not provide these services to opposing parties. The United States has certain trust responsibilities for the Indians, and because of that has certain duties to perform for which it should not charge fees.

34. At least some members of this Committee received, not long ago, a copy of a statement by Robert Jim, Chairman of the Yakima Indian Council, asking for rectification of an alleged wrong by transferring 21,000 acres of land to the tribe in the State of Washington. Among other things, it

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APPENDIX B

1. Letter of Mitchell Melich, Solicitor, Department of the Interior, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated November 1, 1971.

2. Letter of Robert W. Berry, General Counsel, Department of the Army, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated November 2, 1971.

3. Letter of Richard G. Kleindienst, Deputy Attorney General, Department of Justice, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated December 27, 1971.

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IN REPLY REFER TO:

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

NOV 1 1971

Mr. S. Neil Hosenball
Deputy General Counsel
[Chairman, Committee on Claims
Adjudications, Administrative
Conference of the United States]
National Aeronautics and Space Administration
Washington, D. C. 20546

Dear Mr. Hosenball:

This responds to your letter of October 12, 1971, written as Chairman of the Committee on Claims Adjudications of the Administrative Conference of the United States, concerning the proposed legislation to create an Indian Trust Counsel Authority.

The Administration's revised proposal has been introduced in the Senate as S. 2035. We observe that the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs has scheduled open hearings on the bill for November 22 and 23 (117 Cong Rec. S. 16318, October 15, 1971).

Your letter asks for my views on the recommendations of Professor Reid Peyton Chambers, as set forth in his letter of August 27, 1971, and his memorandum of March 31, 1971, to Chairman Cramton. It would not be appropriate for me to comment on his proposed revision of Section 8, which concerns relieving the Department of Justice of its responsibilities to represent Indians in natural resource matters. As you know, Section 8 was worked out with Justice Department representatives in an effort to draft a bill which could be supported by all concerned agencies of the United States, and, in transmitting the proposed bill to the Congress, this Department endorsed the language now found in S. 2035.

Professor Chambers urges that your committee propose the addition of a new section to the bill which would require the Department of the Interior and the Department of the Army to notify the Trust Counsel and the Indians of any proposed action which might affect or impair Indian natural resource rights or claims. Without some information from our various bureaus on the impact such a requirement might have on their operations, we do not feel that this proposal can properly be evaluated.

The proposal that United States District Courts be authorized to award attorneys fees and litigation expenses to the Trust Counsel

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Authority and against the United States is somewhat of an anomaly. In litigation in which the Trust Counsel would appear for an Indian or an Indian tribe the United States would already be paying such fees and expenses, through the appropriation process. To impose a book-keeping transfer or reimbursement of one agency's funds from another agency's account because of the latter agency's actions against a third party has no statutory precedent. Although that alone is not condemnation of a novel proposal, we do not believe the funding problem here being considered will be resolved by this approach. If, however, the committee accepts this proposal, we suggest that language be inserted which will enable the Trust Counsel Authority to expend the transferred funds without further appropriation.

The proposed amendment of Section 11(3) is probably unnecessary. The first amendatory paragraph does expand the subject-matter of acceptable donations, but we have no doubt that donations to the Trust Counsel Authority would, without the addition of express language, be considered for tax purposes as gifts to the United States.

The proposed amendment of Section 11(4) is unnecessary. Existing Section 11(3) permits the acceptance of donated services, which would include contracting with attorneys without compensation. Moreover, the suggested language change is somewhat solecistic insofar as it recognizes the possibility of an expenditure or grant "without compensation."

We see no real objection to the inclusion of the disclaimer language suggested on page 4 of Professor Chamber's March 31 memorandum, but again we do not believe it is necessary. The obvious purpose of S. 2035 is to give to the Indians remedies and procedures not now available, and there is no conflict or inconsistency between it and the retention of the right of tribes to sue in their own names. We point out, however, that the proposed new provision, by the use of the word "other," seems to imply that 28 U.S.C. § 1362 constitutes a waiver of the sovereign immunity of the United States. We do not believe that such an implication is warranted.

Lastly, Professor Chambers suggests that Section 9 should be changed to empower the Indian Trust Counsel Authority to initiate as well as to intervene in administrative proceedings. We believe such authority is already contained in the last sentence of Section 8 of the bill.

We do not wish to appear unjustifiably negative about the suggestions made by Professor Chambers. On the other hand, the bill was drafted with the assistance of this Department, and was approved in its present form by this Office, prior to its transmission to the Congress for consideration.

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Your letter also refers to a recent news story concerning certain administrative steps being taken within this Department to minimize potential conflicts of interest which the Indian Trust Counsel Authority bill is intended to correct. At a press conference held on October 4, 1971, Secretary Morton announced several actions he was taking in the field of Indian affairs, one being the establishment of an Indian Water Rights Office. A copy of the news release issued at that conference is enclosed for your information.

The establishment of the office is intended as an interim measure only, pending enactment of the Trust Counsel Authority Legislation. It will be composed of employees of the Bureau of Indian Affairs, the Geological Survey, and this office, but will be responsible to the Commissioner of Indian Affairs, who in turn will report directly to the Secretary. This will eliminate potentially conflicting demands within the Office of the Assistant Secretary for Public Land Management in Indian water rights matters. Representatives of the National Tribal Chairman's Association are being consulted concerning the selection of a director and staff of the office.

Thank you for the opportunity to review and comment on the proposals.

Sincerely yours,

Solicitor

Enclosure

Mitchell Melich

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DEPARTMENT of the INTERIOR

news release

STATEMENT ON INDIAN AFFAIRS
BY SECRETARY OF THE INTERIOR ROGERS C. B. MORTON

Press Conference, October 4, 1971, Washington, D. C.

I have called this news conference today to announce a series of actions relating to Indian water rights, contracts, roads, self-government, and legislative programs.

My purpose in taking these initiatives towards Indian self-government is setting a course for the Bureau of Indian Affairs designed to protect Indian resources and deal effectively with the root of Indian dissatisfaction -- poverty, unemployment, and inadequate educational background. In my opinion this approach will do much to advance the cause of the Indian people of this Nation.

First, Water Rights. Most reservations are in the arid West and depend for development upon adequate water supplies. In the past, Indian rights have not been protected. I intend to change that. I intend to do my best to see that Indians get their fair share of water.

To insure effective advocacy of Indian water rights, I am establishing an Indian Water Rights Office. It will serve as an interim body until enactment of legislation proposed by the President which calls for creation of an Indian Trust Counsel Authority.

This Office will include members of the Solicitor's Office, the Bureau of Indian Affairs, and the Geological Survey. It will be the focal point for seeing that appropriate action is taken to protect Indian water rights -- including timely preparation of suits for submission to the Justice Department for filing in the courts.

This Office will report to the Commissioner of Indian Affairs, and he will report directly to me on water rights matters. In this way, we can assure that proper emphasis and priority continues to be given to this activity. I am also inviting the National Tribal Chairmen's Association to appoint an advisory board to work with the Indian Water Rights Office.

After further consultation with Indian leaders, we will announce the director, deputy director and other appointees to this Office. Supplementing their work will be field teams correspondingly constituted.

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Two million dollars will be funded for the first year's operation of the Indian Water Rights Office and its field team program.

I have recommended to the Justice Department that it file suit to protect underground water rights of the Lummi Indians in the State of Washington. The Department is also intervening in the Escondido case now before the Federal Power Commission, and in a State of Idaho proceeding (Duck Valley). Moreover, the Department also intends to intervene in another Federal Power Commission matter involving the Chippewa Dam.

Next, Contracting and Self-Government Programs.

The expressed desire of many Indian tribes and groups is to contract with the BIA so that they may provide services hitherto performed by the BIA. In addition to the 724 contracts with Indians that have been renewed since May 1, 1971, I have approved 93 new contracts with a total value of $2,435,000.

These numbers show that contracting has by no means come to a halt, despite allegations from a few quarters that this is the case. Nevertheless, there is much more to be done in this direction.

I feel confident that the House and Senate Interior Committees will soon provide us an opportunity to appear before them in support of the President's proposed new legislation providing for broader contracting authority.

In the meantime we will continue to work out self-governing agreements under the authority of the Snyder Act, the Johnson-O'Malley Act and the Buy Indian Act. To the greatest extent possible within budgetary restraints we will continue to issue contracts for the procurement of goods and services from Indians and Indian groups.

Moreover, we are establishing a full-time training program to train BIA employees and prospective contractors in procedures and methods relating to the contracting process, to insure that effective arrangements will result. We will also work with Indian organizations, tribal or otherwise, to help them equip themselves to qualify for contracts. Existing training projects now handled under the Office of Economic Opportunity will be expanded. Tribal and government management training contracts will be set up in cooperation with the Department of Labor.

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Next, Roads for Indian Reservations.

A modern network of roads is the prime physical system upon which social and economic development depend. Indian reservation communities live in the 1930's with respect to the adequacy of their surface transportation roadways. This is an obstruction to health services, to day schooling, to industry, tourism, to housing and sanitation.

Until 1935, no roads were constructed on Federally related Indian reservations. Since that time, the pace of construction has fallen far short of being commensurate with highway and road-building in the U. S. as a whole. The Indian areas are doomed to continuing isolation and poverty until modern roads are built. The BIA has developed a comprehensive construction plan under the direction of Alexander McNabb. I am working with the Office of Management and Budget and the Department of Transportation to seek funding that will open up Indian communities through modern roads systems.

Now, A Few Comments on Legislation.

I am releasing the text of a letter (attached) of September 20, 1971, from Assistant Secretary Loesch to Senate Interior Committee Chairman Henry Jackson clarifying the Department's position on the importance of items in the President's Indian legislation program. Certainly, the creation of an Indian Trust Counsel Authority is of prime importance to implement the President's program for Indians.

I will be the lead-off witness for the Indian Trust Counsel and other Presidential legislative proposals as soon as the Senate Interior Committee confirms its schedule of hearings on these bills.

I am delighted to see the House and Senate Interior Committee action on the Alaskan Native Claim bill, a matter so important to Indians. The bills reported out are very close to the version proposed by the President. What this shows is that there is a consensus among the Executive and the lawmakers of both parties reflecting fairness and equity in matters vitally affecting this Nation's first Americans. I am sure the other Indian measures proposed by the President will receive equally favorable treatment in Congress.

Now, Two Other Actions I Am Taking.

On the recommendation of the Board of Directors of the National Tribal Chairmen's Association, I am creating an advisory board to assure better communications among the Bureau of Indian Affairs, the Secretary's office and the national Indian community. As the NTCA Board suggested, the group will be comprised of 15 members, including representatives from the National Congress of American Indians, the National Tribal Chairmen's Association, and other Indian groups, both reservation and otherwise.

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I am instructing Assistant Secretary Loesch and Commissioner Bruce to have a special briefing prepared on the fiscal year 1973 Budget of the Bureau of Indian Affairs. This briefing will be presented for information and advice to officers of the National Tribal Chairmen's Association and of the National Congress of American Indians prior to the Secretary's final approval thereof.

I feel that these measures will help move the BIA efficiently and successfully on its course of implementing President Nixon's program which he outlined in his July 1970 Message to Congress.

But I do not suggest that these steps are the only ones necessary. As further needs become apparent, or additional new directions are needed we are committed to responding constructively to them.

# # #

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

COPY

September 20, 1971

Dear Mr. Chairman:

This is in response to your letter of September 8 asking again for our view of the relative priority of Administration proposed legislation on Indian affairs.

There are a number of bills before the Committee enumerated in the President's special message of July 8, 1970, as well as another bill, S. 2237, subsequently recommended by this Department.

We believe all of these to be highly important and urge the Congress to act on them during this session. Among them we consider as most important the Indian Trust Counsel authorization and the two Indian self-help bills, S. 1573 and S. 1574. We hope, however, that any need for protracted hearings on any one of these bills would not become an obstacle to early enactment of the others.

Sincerely yours,

(Sgd.) Harrison Loesch

Assistant Secretary of the Interior

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

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ATTACHMENT "A"

NAME OF CONTRACT	TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Cherokee Boys Club	Dump Truck Rental	9/14	$15,000.
Miccosukee Corporation	Management & Operation of educational and social welfare programs for Miccosukee Indian people.	5/14	23,904.
Cherokee Boys Club	Youth Conservation Corps Camp	5/17	35,800.
Cherokee Boys Club	Housing Improvement Program	9/13	14,416.
Shoshone-Piaute Tribe Duck Valley	Land subjugation	6/28	234,751.
Less S. Thomas, LST Construction	Provide and install L.P. Gas System, Keams Canyon	6/28	25,182
Blackfeet Indian Housing Authority	Housing Development	5/5	5,000.
Blackfeet Land Management Service	Irrigation Pasture Demonstration	5/27	2,650.
Blackfeet Indian Housing Authority	Home Ownership Training	5/27	10,200
Confederated Salish & Kootenai Tribes	Forest Rehabilitation	5/17	5,000
Confederated Salish & Kootenai Housing Authority	Housing Development	5/19	6,000
Confederated Salish & Kootenai Housing Authority	Home Ownership Training	5/27	8,400.
Ft. Belknap Housing Authority	Home Ownership Training	5/27	4,200.
Ft. Peck Housing Authority	Home Ownership Training	5/13	4,200.

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SEP 21 1971

ATTACHMENT

NAME OF CONTRACTOR	TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Lummi Tribe	Ground Water Study	5/20	7,000
Spokane Tribe	Water Resources Inventory	5/17	25,000
Yakima Tribe	Water Resources Inventory	5/17	36,000
Colville Tribe	Training for AFDC Recipient	5/1	6,000
Colville Tribe	Community Development Project	5/25	7,000
Shoshone Bannock	Training of Truck Drivers and Heavy Equipment Operators	5/1	4,480
Warm Springs Tribe	Furnish Field Data for Timber Sales	5/3	5,803
Quileute Tribe	Management Services for Organizing a Housing Authority	6/17	1,500
Swinomish Tribe	Management Services for HUD low rent projects	6/16	1,500
Lummi Tribe	Water Resources Inventory	6/7	20,000
Lower Elwha Tribal Council	Management Services for HUD projects	6/9	1,500
Frank Archambault	Study of Modular Home Industry	6/7	3,000
Tulalip Tribe	Construct Duplex building	6/7	13,000
Muckleshoot Tribe	Home repairs	6/7	6,930
Quileute Tribe	Survey of resources	6/2	5,000
Muckleshoot	Management Services for HUD	6/1	2,000
Quinault	Management Services for HUD	6/1	2,000
Yakima Indian Contractors	Repair water line	6/4	1,475

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ATTACHMENT "C"

NAME OF CONTRACT	TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Northern Cheyenne Housing Authority	Housing Landscape Development	5/18	$3,000
Northern Cheyenne Housing Authority	Home Ownership Training	5/21	11,000
Chippewa-Cree Housing Authority	Home Ownership Training	5/24	5,400
Chippewa-Cree Tribe	General Assistance & Tribal Work Experience Program	7/1	83,000
Wind River Housing Authority	Home Ownership Training	5/4	4,200
Shoshone & Arapahoe	Housing Improvement Program	7/1	75,000
R.C.K. Inc., Albuquerque	Maintenance & Custodial Services - SWPT Inst.	7/1	348,413
R.C.K. Inc. Albuquerque	Install water filter Zuni, Blackrock	5/25	21,771
Ramah Navajo Chapter	Tribal Work Experience	5/6	3,125
Southern Ute Tribe, Igancio	Indian Education	5/27	5,000
Santa Dominto Pueblo	Summer Program	7/1	3,500
Mescalero Apache Tribe	Receiving Home Services	7/1	9,280
~~All Indian Pueblo Council~~	~~Administering Higher Educ. Scholarship Program~~	~~7/1~~	~~43,650~~
Zuni Tribe	Compile & Publish Zuni History text	6/3	12,500
Nez Perce Tribe of Idaho	Develop cultural material & publish history text	5/14	15,000
Lukee Enterprises, Grants	Laundry Services	7/21	14.700
Ute Fabricating Ltd. (Ft. Duchesne)	Furniture - Haskell	8/23	23,800
Ute Fabricating Ltd.	Dorm Furniture - Intermountain	8/23	424,502
Ute Fabricating Ltd.	Kitchen Cabinets	9/7	5,327

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ATTACHMENT "D"

OF CONTRACTOR	TYPE OF SI ES PROVIDED	DATE AWARDED	AM
Smith Electric Co.	Install Electric Service	5/27	2,129
Yakima Indian Contractors	Roofing of building	5/21	2,415
Yakima Indian Contractors	Framing of building	5/4	2,465
Hoopa Valley Tribe	Sidewalks and curbs	5/13	2,030
Hoopa Valley Tribe	Irrigation System	5/21	7,000
Pit River Coop. Assn.	Repairs to Pit River Flume	5/28	2,000
Pala Indian Tribe	Housing Material	5/28	1,000
Tule River Tribe	Repairs to Irrigation Systems	5/27	2,000
Susanville Indian Rancheria	Adult Education Training Center	6/28	2,520
Inter-Tribal Council of California	Welfare Grants	5/24	5,000
Covelo Indian Community	Meetings	8/12	2,000
Ft. Bidwell Indian Tribe	House Repairs (HIP)	5/24	1,200
Hoopa Valley Tribe	Forestry aid services and look=out services	8/27	6,700

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ATTACHMENT "

NAME OF CONTRACTOR	TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Standing Rock Sioux Tribe	Library reference resource material - Adult Education	5/19	2,835
Yankton Sioux Tribe	Summer Education and Recration Program	5/21	11,175
Standing Rock Sioux Tribe	Summer Education and Recreation Program	5/21	15,500
Standing Rock Sioux Tribe	Judicial and Enforcement Services	5/21	15,000
Flandreau Santee Sioux Tribe	Furnish and Spread Gravel	5/4	5,000
White Eagle Industries Inc.	Mattresses	6/5	6,803.25
Rosebud Sioux Tribe	Rental earth moving equipment	5/10	3,000
Rosebud Sioux Tribe	Rental earth moving equipment	5/10	2,220
Cheyenne River Sioux Tribe	Warehouse rental	5/21	1,000
LaRosa Industries	Lawn Services	5/22	3,000
Winnebago Tribe	Provide Indian Culture Program (encampment 50 youth on welfare)	6/21	12,700.
Crow Creek Sioux Tribe	Advertising & promotion Ft. Thompson Complex	6/22	33,000
Three Affiliated Tribes	Advertising & promotion of Four Beak Park	6/22	35,000
Yankton Sioux Tribe	Employment Assistance	7/1	10,000
Omaha Tribe of Nebraska	Employment Assistance	7/1	32,393
Nebraska Indian Inter-Tribal	Training and employment project	7/1	13,386
Omaha Tribe of Nebraska	Scholarship and boarding school processing	7/1	97,450
Omaha Tribe of Nebraska	Adult education	7/1	9,750

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ATTACHMENT "F"

NAME OF CONTRACTOR	TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Turtle Mountain Band of Chippewa Indians	Adult Education	7/9	12,500
Sisseton Wahpeton Sioux Tribe	Adult Education	7/1	41,282
Devils Lake Sioux Tribe	Operation of St. Michael's School	7/9	220,000
Yankton Sioux Tribe	Judicial Prevention and Enforcement	7/1	32,000
Sisseton Wahpeton Sioux Tribe	Administer Reservation Program	7/8	25,000
Yankton Sioux Tribe	Administer Community Development Program	7/1	17,900
Sisseton Wahpeton Sioux Tribe	Administering a guidance and Counselling Program	8/16	26,544
Standing Rock Sioux Tribe	Comprehensive Pilot Program Title VIB	9/15	22,520.78
T.P. Construction	Refinish Gym Floor	9/22	3,490
Donald D. Isberg	School building addition	9/21	47,530.88
T.P. Construction	Rework windows - heating plant	9/21	2,960
Philip S. Byrnes Sr.	Grading and draining on 2.140 miles of Cedar Creek Road	9/9	24,568.59

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DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20310

2 NOV 1971

S. Neil Hosenball, Esq.
Deputy General Counsel
National Aeronautics and
Space Administration
Washington, D. C. 20546

Dear Mr. Hosenball:

I have completed my consideration of the changes proposed for S. 2035, providing for the creation of the Indian Trust Counsel Authority. I offer the following comments in the hope that they may be of some assistance to the Committee on Claims Adjudication of the Administrative Conference of the United States in formulating its recommendations to Congress.

The effort to provide notice of proposed and final action that may affect natural resource interests of the Indians as well as to ensure participation in deliberations leading to final action is commendable. Yet I question whether the purpose of such notice and participation is served by limiting the coverage of the section to the Department of the Interior and the Department of the Army. Members of my staff have observed the similarity of projects engaged in by, and overlap in responsibility between, the Army Corps of Engineers and, for example, the Department of Agriculture. Rather than attempt to predict or foresee which agencies of the government may engage in action of interest to the Authority and the Indians, the purpose of the section would be better served, in my view, if no agencies are enumerated and the first clause is expanded to include a general reference to all agencies of the federal government. A convenient definition of the agencies is contained in 5 U. S. C. § 551(1) (1970), a provision of the Administrative Procedure Act, with which you are undoubtedly familiar. The legislation which established the Administrative Conference incorporates this definition as well. See 5 U. S. C. § 572(2) (1970).

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My remaining comments concern paragraph (2) of the proposed change in the bill. To avoid any possible ambiguity in the form of participation which the Indian interests will be afforded, I recommend insertion of the word "written" after "submit" and before "comments." This would clarify the distinction between the form of participation when there is a hearing, described in the remaining clauses of the paragraph, and when there is none. A provision in the Administrative Procedure Act similarly sharpens the distinction in the way in which I have suggested. See 5 U.S.C. § 553(c) (1970) (. . . "[T]he agency shall give interested persons an opportunity to participate . . . through submission of written data, views, or arguments with or without the opportunity for oral presentation . . . .")

In line with the previous comment, I recommend the deletion of the words "oral hearing," and the insertion of the phrase "where agency action is required by statute to be determined on the record after opportunity for an agency hearing." To the best of my knowledge, "oral hearing" is not a familiar term of art in administrative procedure. While "oral hearing" conveys the type of hearing the drafters obviously intended -- one in which an oral presentation is permitted -- the phrase I suggested may convey the point more precisely and in a form that comports with existing statutory language. See, e.g., 5 U.S.C. §§ 553(c), 554(a) (1970).

Finally, I would insert the word "such" before "a" and after "hold" in the last clause of paragraph (2) to make clear that it is the type of hearing in which agency action is made on a record, as referred to in the previous clause, to which the right to participate attaches. This construction would mitigate the possibility of claims by outside interests to participate in intra-agency conferences or briefings.

Thus the draft of paragraph (2) which I recommend is:

> (2) afford the Authority and the affected Indian tribes, bands and groups a reasonable opportunity to submit written comments upon the proposed action, and where agency action is required by statute to be determined on a record following an agency hearing, or where the agency deems it appropriate to hold such a hearing, an opportunity to participate therein. (emphasis indicates recommended changes)

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Again, I thank you for the opportunity to comment on the proposed changes in S. 2035. I will be interested in following the progress of the bill. If I can be of any further assistance to you or the Committee, please do not hesitate to contact me.

Sincerely,

Robert W. Berry

Robert W. Berry
General Counsel

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

DEC 27 1971

Mr. S. Neil Hosenball
Deputy General Counsel
National Aeronautics and
Space Administration
Washington, D. C. 20546

Dear Mr. Hosenball:

This letter is in response to your letter of October 12, 1971, to Assistant Attorney General William H. Rehnquist concerning Professor Reid Chambers' suggestions regarding S. 2035, the Administration bill to provide for the creation of the Indian Trust Counsel Authority. The main purpose of the bill is to avoid any appearance of conflicts of interest in cases where both the United States and Indians have an interest in natural resources, by providing for separate legal representation of the Indians by an independent Indian Trust Counsel Authority. I have the following comments on the points mentioned in Professor Chambers' letter and memorandum.

1. Professor Chambers states that S. 2035 absolves the Department of Justice of all responsibility for representing Indians on claims to natural resources. However, Section 8 of the bill explicitly states that the Department would not be absolved of its responsibilities to the Indians, except with respect to performing the legal services which the bill authorizes the Authority to perform. I believe the language of Section 8 is appropriate without the amending language proposed by Professor Chambers, which would relieve the Department of its responsibilities only where the Indians were being represented by the Authority. The suggested amendment would serve only to confuse the respective responsibilities of the Department and the Authority.

2. Professor Chambers' memorandum suggests the addition of a provision requiring the Departments of the

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Interior and the Army to give notice and opportunity for comment to the Authority and affected Indian tribes prior to taking action which may affect or impair the rights or claims of Indians to natural resources. As a matter of general principle, it is of course desirable to afford affected or interested persons an opportunity to comment on proposed governmental action where feasible, even where it is not otherwise required by the Administrative Procedure Act or other law. However, there may be situations where the Department of the Interior or the Army may need to take immediate action. The provision suggested on page 2 of Professor Chambers' memorandum might hamstring those Departments unless exceptions to the pre-notification requirements were made. Moreover, with respect to some governmental actions, such as where the action would obviously benefit the Indians, the pre-notification procedure would serve no useful purpose.

3. Section 12 of the bill contains a conventional appropriation authorization for such sums as may be necessary. Professor Chambers suggests the addition of a section authorizing the assessing of attorneys fees and litigation costs against government agencies that have been found to have acted in breach of fiduciary obligations to aggrieved Indians, as a means for financing the Authority. (page 3 of the memorandum). He suggests that the United States District Court for the District of Columbia should be authorized to award such fees and expenses of the Authority in connection with the participation in administrative proceedings as well. Such a provision would amount to a serious breach of the principle of separation of powers in that it would authorize the courts to assess sums against one Executive branch agency in favor of another, irrespective of Congressional appropriations for those agencies.

4. The language suggested by Professor Chambers for section 11(3) of the bill, designed "to make clear that the Authority is to be a tax-exempt organization" would confuse the nature of the Authority. The Authority is to be an independent agency in the Executive Branch (see sec. 2(a)). Contributions to the Authority would be on the same footing for tax purposes as are gifts to other government agencies and would be deductible. See 26 U.S.C. 170(c),

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2522(a).

5. The suggested amendment to section 11(4), intended to authorize the contracting of services of private attorneys with or without compensation, does not appear to be necessary. Paragraph (3) of that section already authorizes the Authority to receive and use funds and services donated by others, and paragraph (4) authorizes such contracts as may be necessary to carry out the Authority's responsibilities. The suggested addition of the words "without compensation" does not make sense in the context of paragraph (4), which authorizes expenditures or grants.

6. The addition of a provision stating that the Act does not repeal 28 U.S.C. 1362, authorizing Indian tribes, bands or groups to bring suit, suggested on page 4 of the memorandum, is not necessary. There is nothing in the bill to suggest that that section might otherwise be repealed.

7. Finally, Professor Chambers suggests an amendment to section 9 to specifically authorize the Authority to institute actions in Federal, State, or local administrative proceedings. I believe that this addition is also unnecessary, since the last sentence of section 8 contains a broad statement authorizing the Authority to provide legal services in matters before Federal, State, and local commissions, and in all administrative proceedings.

Sincerely,

Richard G. Kleindienst

Richard G. Kleindienst
Deputy Attorney General

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APPENDIX A

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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CONFLICTS OF INTEREST IN THE ADMINISTRATION OF THE FEDERAL TRUST RESPONSIBILITY

by

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January 3, 1972

A Report to the Committee on Claims Adjudications of the Administrative Conference of the United States

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Introduction

It has often been said that the United States serves as guardian or trustee for the property rights of Indian tribes and reservation Indians.[1] Such a trust relationship can most readily be recognized in terms of real property - reservation land is usually held by the United States in trust for the tribe or individual beneficial owner. This raises significant questions, such as: (1) whether the United States owes legal, as distinguished from moral,[2] duties to Indians with respect to that land and, perhaps, other natural resources owned or claimed by the Indians? (2) if legally enforceable duties do exist, what is their scope?[3]

These questions are of singular importance to reservation Indians. As a presently impoverished, rural minority, their ability to function as cultural groups separate from the rest of American society depends very largely on their share of scarce natural resources in the western states where they live - chiefly land, water and rights to hunt and fish. If assured a

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1. E.g., United States v. Kagama, 118 U.S. 375 (1886); Message of President Nixon to Congress on Indian Affairs, July 8, 1970.
2. In some cases, dicta has suggested that the trust responsibility may merely be a "moral duty." For example, in Seminole Nation v. United States, 316 U.S. 286, 297 (1942), the Court stated that the United States "has charged itself with moral obligations of the highest responsibility and trust."
3. The trust relationship, as discussed in this Report, pertains only to property rights in land and natural resources. This Report does not discuss whether its fiduciary duties to Indians require the government to provide adequate health or educational services on reservations. Such a claim was rejected in Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790 (1970).

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sufficient portion of these vital resources, Indian reservations can attain a level of economic development which permits their culture to sustain itself. But as the population of western states grows, these assets are in increasingly short supply relative to demand. Reservation Indians frequently find themselves in competition, in their claims for land and water, with burgeoning cities, industries, ranching and farming interests in the western states.

In this rivalry, the Indians are generally weaker in terms of political and economic power than their adversaries. But to the extent that the federal government is obligated to be their "trustee," Indians may have a very significant ally. In general law, for example, a trustee or guardian has a legal duty to protect and preserve the trust property and enforce reasonable legal claims by the beneficiary or ward to property included in the trust res.[1] Such duties, if required of the federal government on behalf of Indians, would be of immense importance. Clearly, participation by the government in the process of resource allocation as the champion of the Indians would do much to even this unequal battle. Furthermore, a federal duty to enforce the Indians' legal claims to property is of special value because the "claims" of reservation Indians to land and natural resources are often exceedingly imprecise. The land boundaries of the reservation may be a now-dry river bed, the channel of which needs surveying, or a meandering stream which has changed its course since the reservation was

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1. A. Scott, Trusts, §176-77.

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established. Just as a survey or an action to quiet title may be necessary to determine Indian claims to reservation land, the inventorying of water rights is often required to fix the precise extent of Indian water claims. Without such inventories to measure these claims, Indian water rights are undefined and imprecise. More practically, these rights - if not asserted - are lost as non-Indian users appropriate the water. The basic organic law of Indian water rights is the Supreme Court's decision in Winters v. United States, 207 U.S. 564 (1908). Simply stated, the doctrine of that case holds that when the Indians ceded lands to the federal government, they impliedly retained rights to sufficient water to serve the present and future needs[1] of those lands which they retained.[2] 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,[3] it is not

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1. 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).
2. See generally Veeder, Winters Doctrine Rights; Keystone of National Programs for Western Land and Water Conservation and Utilization, 26 Montana L. Rev. 149 (1965).
3. "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).

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clear how far they may depart from the initial agricultural use served by irrigation.[1] Can, for example, the Crow Tribe claim water under the Winters Doctrine for the mining of coal?[2] Moreover, the measure of the Winters doctrine right is exceedingly complex and time-consuming, involving a present estimate of future beneficial needs.

The value of the trust relationship in terms of confirming and protecting Indian property rights is at present greatly diminished because the federal trustee is tarnished, in many cases, with conflicting interests. The federal government is the proprietor of vast landholdings and water resources in the western United States. Public programs, moreover, designed to spur economic growth of the non-Indian society may result in the taking of land and water claimed by Indians. As the case studies which follow illustrate, these "conflicts of interest" have resulted repeatedly in failures to protect Indian natural resources.

Institutionally, the conflict of interest centers in the Department of the Interior, which is responsible both for management of Indian affairs[3] and for management and utilization of public land and water resources in the western United States.[4] The Department's Solicitor, the agency's general

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1. 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.
2. See pp. 23-28, infra.
3. 25 U.S.C. §§1, 2, 9; 43 U.S.C. §1457 (10).
4. Pursuant to 43 U.S.C. § 1457, the Department of the Interior is charged with the administration of public lands, mines, fish and wildlife, reclamation projects, national parks and petroleum conservation.

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counsel, functions as attorney both to the trustee for Indians - the Bureau of Indian Affairs (BIA) - and to agencies which conflict with Indian property claims - chiefly the Bureau of Reclamation and the Bureau of Land Management (BLM). Similarly, the Department of Justice, which manages all federal litigation, serves as counsel to these conflicting public bureaus; in addition to its public duties to advise and represent the trustee, Justice also appears obligated to provide legal representation to the Indian beneficiaries.[1] As a final complication, moreover, the Department of Justice defends Indian Claims Commission proceedings for the United States.[2]

This Report examines the conflict of interest between the federal trustee's duty to protect Indian property rights and public goals such as non-Indian economic development and ownership and conservation of the public domain. Toward this end, the Report first discusses the sources and historical development of the federal trust responsibility to determine its nature and extent. Secondly, it analyzes several instances in the past five years in which a conflict-of-interest has prevented vigorous protection and advancement of Indian claims to natural resources. In conclusion, the Report evaluates various institutional rearrangements which would diminish the conflict-of-interest and further protection of Indian property rights.

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1. 25 U.S.C. §175. See discussion, pp. 64-65, and note 1, p. 64.
2. See pp. 39-43.

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I. Origins and Nature of the Federal Trust Responsibility.

A. Chief Justice Marshall: The Trust Responsibility as a Protection Against State Regulation

In his Handbook of Federal Indian Law, Felix S. Cohen observed that "the term 'ward' has been applied to Indians in many different senses and the failure to distinguish among these different senses is responsible for a considerable amount of confusion."[1] These different senses reflect the historical evolution of judicial and political perceptions of the government's trust responsibility. The nature of a fiduciary duty developed as a judicial and administrative doctrine during the nineteenth century; its birth was occasioned largely by the need to assert and later to justify various extensions of federal regulatory power into Indian country.

The trust responsibility was the stepchild of Chief Justice John Marshall, whose decisions regarding Indians are expressive of his expansive concept of the role of the federal government vis-a-vis the states. Two decisions by Chief Justice Marshall are singular in their importance for the development of federal Indian law. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831), holding that Indian tribes are not "foreign states" entitled to invoke the original jurisdiction of the Supreme Court, Chief Justice Marshall stated that the relationship between the Indians and the United States "is perhaps unlike that of any other two people in existence."[2] He explained that Indian tribes, while in some sense possessing attributes

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1. Felix S. Cohen, Handbook of Federal Indian Law, (hereafter "Cohen" p. 16
2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 at 17.

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of national sovereignty, are "domestic dependent nations," dependent on the United States for protection. Marshall concluded that "their relation to the United States resembles that of a ward to his guardian."[1] In Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832), Marshall held that a comprehensive state regulatory scheme, adopted by Georgia for the Cherokee Reservation, was unlawful because the federal government's power over reservations was exclusive.

B. Kagama: The Trust Responsibility as a Justification for Federal Power

The Marshallian concept of wardship did not directly result in the extension of federal regulatory power over Indians. Later in the nineteenth century, however, Chief Justice Marshall's fiduciary concept came to be employed for an entirely different purpose - as a justification for the imposition of positive federal regulations over Indian reservations. United States v. Kagama, 118 U.S. 375 (1886), involved the constitutionality of a Major Crimes Act, enacted by Congress to apply to Indian country. The Court held that Article I, Section 3, clause 8 - the "power to regulate commerce . . . with the Indian Tribes" - did not authorize enforcement of a federal criminal code on reservations. But the Court sustained the constitutionality of the act, relying principally on the government's fiduciary duty to protect its Indian wards. The Court expanded the Marshallian notion:

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1. Id. at 18, (emphasis supplied).

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"These Indian tribes are the wards of the nation. They are communities dependent on the United States . . . "[1]

It then went on to state that:

"From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."[2]

The principal teaching of Kagama is that a "duty of protection" creates congressional power; legislation which would be unconstitutional if enacted for non-Indians is authorized by a federal duty to protect Indians. Thus, vast federal administrative powers with respect to Indian trust property are constitutional. Indian property cannot be sold,[3] leased[4] or even disposed of by will[5] except with federal approval. Contracts may not be executed[6] nor tribal attorneys hired[7] without consent of the federal executive.

C. The Trust Responsibility as a Limitation on Federal Executive Power

Notably, Kagama shifts from the notion that the federal relationship to the Indians is similar to a guardianship. It

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1. 118 U.S. at 383-84, (emphasis in original). Accord United States v. Sandoval, 231 U.S. 28, 45-46 (1913).
   "[L]ong continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders."
2. Id. at 384 (emphasis supplied).
3. 25 U.S.C. §177.
4. E.g., 25 U.S.C. §415.
5. 25 U.S.C. §373.
6. 25 U.S.C. §§81, 85.
7. 25 U.S.C. §§81a et seq.

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holds rather that a guardianship actually exists. As Felix S. Cohen has pointed out, it is preposterous to suggest that all elements of a common law guardianship are present.[1] Some aspects of the common law guardianship, such as the power to determine where the ward shall reside and a direct and continuing responsibility to file accountings in court, have no parallel in this federal guardianship.[2]

But the courts seemingly have held the guardian is empowered to manage the Indian ward's property for the ward's benefit, and precluded from profiting at the expense of the ward's estate or acquiring an interest therein.[3] Since these duties appear, under the case law to be reviewed, to be legal

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1. Cohen, p. 169.
2. Compare Cohen, p. 169.
3. Id. This portion of the Report, which considers limitations on federal power imposed by the trust responsibility, discusses only the limitations on executive power. Congress, as distinguished from the executive, has a more plenary power over Indians and may modify, or even terminate, the federal wardship over Indian tribes. However, congressional power over Indian trust property is not absolute and is, of course, subject to constitutional limitations. E.g., Choate v. Trapp, 224 U.S. 665, 677-78 (1913). While the eminent domain power extends to Indian trust lands if their taking is authorized by Congress, Seneca Nation v. Brucker, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959), Congress must make a good faith effort to compensate the Indians. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cls. 1968). The "good faith" standard appears similar to a fiduciary's duties. But whatever the power of Congress in this area, the federal executive is more strictly bound by general law to adhere to ordinary fiduciary duties.

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rather than moral obligations of the sovereign,[1] conflicting interests and purposes do involve a conflict-of-interest in a sense similar to the conflict-of-interest of an ordinary fiduciary.

Twentieth century cases concerning the legal duties of the United States under the trust responsibility have most often arisen under the Indian Claims Commission Act[2] and earlier special jurisdictional statutes authorizing suits against the United States for money damages for all claims at law or equity which constituted violations of Indian property rights.[3]

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1. If the United States were only morally obligated to protect Indian property rights, the value of such protection might be more easily subordinated to conflicting public purposes, such as dams, reclamation projects and other non-Indian projects. In a sense, the political art involves choice between conflicting values, even between moral imperatives.
   A legal constraint is at least functionally different. If it is legally obligated to act as a fiduciary, the United States may for example become liable in damages for a breach of duty. And a legal duty requires subordination of political concerns to the contrary.
2. 25 U.S.C. §§70 et seq.
3. The Indian Claims Commission Act includes "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. §70a. The very passage of this act, recognizing monetary liability for violations of its duties to Indians, signifies congressional recognition that the trust responsibility - including a requirement of "fair and honorable dealings" - is a legal, and not merely a moral duty.

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The Courts have rather often held that, where the trust relationship exists,[1] the same principles of law should apply to federal executive officials, when dealing with Indian trust

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1. It is assumed throughout this Report that, at the present time, the federal government is trustee to all tribes, bands and identifiable groups of Indians, except where the trust relationship has been expressly terminated by Congress with respect to a particular tribe. In a number of cases, the Court of Claims has suggested that the existence of a fiduciary relationship may depend "upon the express provisions of [a]. . . particular treaty, agreement, executive order or statute," and that absent such a treaty, agreement, executive order or statute, the relationship only resembles a trust responsibility in the Cherokee Nation sense rather than being equivalent to it in the Kagama sense. Gila River Pima-Maricopa Indian Community v. United States, 140 F. Supp. 776, 780 (Ct. Cls. 1956). See also Oneida Tribe v. United States, 165 Ct. Cls. 487, cert. denied, 379 U.S. 946 (1964); Sioux Tribe v. United States, 146 F. Supp. 229, 237-38 (Ct. Cls. 1956).

   Considering these cases together, they appear to hold that whether a fiduciary relationship existed between the government and a particular tribe at a particular time in the nineteenth century should be determined by considering the course of dealings between them at that time. Thus, a tribe which was frequently at war with the United States, which had never signed a treaty nor accepted a reservation, might not be a "ward" of the government at the time certain acts took place; thus, a claim against the United States for breach of its fiduciary duties at that time should be denied. Compare Oneida Tribe, supra with Sioux Tribe, supra.

   The situation in the twentieth century is, of course, far different, and it would seem incontestable that a general fiduciary relationship now exists between the government and all tribes, unless terminated by Congress. The Court of Claims has recognized that the course of executive dealings and applicability of congressional enactments to prevent the sale of lands may create a trust relationship. Oneida, supra; Seneca Nation v. United States, 173 Ct. Cls. 917 (1965). The exact terms of that relationship might vary depending on the specific provisions of a treaty or statute, See Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790 (1970), but the general fiduciary duties of loyalty and care would seem present.

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property, "as would be applied to an ordinary fiduciary,"[1] Menominee Tribe v. United States, 101 Ct. Cls. 10, (1944), and that "the most exacting fiduciary standards" should be applied to scrutinize federal management of Indian property. Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Navajo Tribe v. United States, 364 F.2d 320, 324 (Ct. Cls. 1966).

The fiduciary duties seem to involve (a) a duty of reasonable care in protection and preservation of the trust res, (b) a duty of loyalty, with an attendant prohibition against self-dealing or misappropriating the trust res.

In Oneida Tribe v. United States, 165 Ct. Cls. 487, cert. denied, 379 U.S. 946 (1964), a tribal timber resource was cut by certain tribal members and sold by them. The tribe filed a claim before the Indian Claims Commission for damages; its theory of recovery was that the United States was liable for the taking since its officials knew of the practice. The Court of Claims, denying recovery, analyzed the factual situation and determined that the federal government had done everything reasonable under the circumstances to protect the tribal assets, and had thus satisfied the fiduciary's duty of exercising reasonable care.

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1. Section 2 of the Indian Claims Commission Act, 25 U.S.C. §702, originally contained a proviso that the Commission should "apply with respect to the United States the same principles of law as would be applied to an ordinary fiduciary." This was omitted in conference committee "because it seemed that the Commission should be permitted to determine according to the usual principles of law whether the government was a fiduciary in the particular case involved, and if so what fiduciary duties were imposed upon it." S. Rep. No. 1751, 79th Cong. 2d Sess., p. 6.

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Conversely, in Seminole Nation v. United States, 316 U.S. 286 (1942), the Supreme Court sustained, against a motion to dismiss, a claim that the federal government was liable to tribal members for paying to the tribal council sums it was obligated by treaty to pay per capita to individual members. The plaintiffs had alleged that federal officials knew that the council was corrupt and would divert the funds paid to it to its own use.

In Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cls. 1966), tribal lands were leased by the Navajos in 1942 to a private oil company. Upon discovery of a helium deposit, which the lessee did not wish to exploit, the lands were returned to the United States. The U.S. Bureau of Mines extracted the helium. The tribe argued, and the Court held, that the proceeds should have been credited to it.

The Court in Navajo Tribe could simply have held that the lands in question were the property of the tribe, and sub-surface minerals could not lawfully be confiscated, even given the grave public need for helium during World War II, without compensation. Instead, the Court applied trust doctrine. It stated that "the case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." 364 F.2d 324.

Navajo Tribe suggests, then, that the United States owes a "duty of loyalty" to Indian tribes. This duty, and its corollary prohibition against self-dealing, has been called by Austin Scott the "most fundamental duty" owed by a fiduciary.[1] While the

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1. A. Scott, Trusts, p. 1297 and Sections 170-171.

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cases do not hold that the government is barred from self-dealing in trust property in each and every instance, they do require close judicial scrutiny of all such transactions. In Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944), the Court of Claims - while not holding the practice to be per se unlawful - questioned the depositing of tribal funds into the federal treasury as a possible breach of trust. The Court also held that the government was clearly "under a duty to see to it that the property of the Indians was productive of a return to them somewhat comparable to the return which they would have received on trust funds." In a related case, Menominee Tribe v. United States, 102 Ct. Cls. 555 (1945), the Court held the United States liable for breach of trust where it made withdrawals for tribal expenditures from a trust fund bearing five percent interest rather than from a fund bearing four percent interest. Both funds were invested in federal securities.

These cases suggest that the federal trustee possesses a legally enforceable trust responsibility that is in important respects analogous to the duties of a private fiduciary. None of the cases state an explicit fiduciary duty to enforce legal claims of the trust beneficiary, but in the Indian context, some duty in this regard appears necessary if the extent of the trust res is to be defined. One difficulty, however, arises in that the ordinary trustee charges the trust estate when he performs legal services in its behalf. Indian wards are frequently without monetary estates - the nature of the trust responsibility is such that most assets are specific types of property. Assessment of a fee for legal assistance in protecting the trust property,

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however, seems inappropriate at least in those situations where the federal trustee is itself misappropriating or using trust property. A trustee should not, by its own actions, be empowered to compel the ward to expend its resources in resisting the self-dealing.

Within the ambit of these duties, the federal trustee has been accorded wide-ranging discretion to manage trust property - so long as he does not appropriate it. For example, in Fort Peck Indians v. United States, 132 F. Supp. 222 (Ct. Cls. 1955), it was held that federal officials might extend the time for payments, and even excuse the payment of certain sums owed, by purchasers of Indian trust lands. Similarly, where an executive official is authorized by statute to dispose of trust lands, the precise manner of his doing so will not be reviewed by courts. Morrison v. Work, 266 U.S. 481 (1924).[1] But in United States v. Creek Nation, 295 U.S. 103 (1935) federal officials had conveyed to others lands actually belonging to the Creek Indians, which had been excluded from their reservation by an erroneous governmental land survey. The Supreme Court established that the trustee's discretion is not absolute and sketched its outer limits:

> The tribe was a dependent Indian community
> under the guardianship of the United States,
> and therefore its property and affairs were

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1. In a related vein, the Court of Claims has held that Congress may take Indian lands so long as it makes a good faith effort to pay the full value of the land. This "merely transmutes the property from land to money . . . and is a traditional function of the trustee." Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cls. 1968).

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> subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to other, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that would not be an exercise of guardianship, but an action of confiscation. [Emphasis added] 295 U.S. 109-110.

The trustee's discretion does not, then, appear to include a political authority to balance private Indian property rights against public purposes, and to decide upon appropriating the Indian property for the public use without compensation. Navajo Tribe is instructive in this regard, since the case involved a mineral resource in scarce supply needed for military purposes during World War II. The Court of Claims, in sustaining the tribe's claim for damages, held squarely that the United States may not misappropriate Indian trust property. Cases like Ft. Peck Indians and Morrison v. Work are distinguishable, and hold that the trustee has broad managerial discretion so long as he does not convert the property to his own use, or, presumably, violate other fiduciary duties of care to protect the property

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or make it productive.

D. The Conflict of Interest Defined

Within the context of these duties and discretionary powers, the federal government does appear involved in a legal conflict of interest when its agencies use resources owned or claimed by Indians without compensation. 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.

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

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practice - aptly describes the result of most, although not all,[1] cases where a conflict of interest has arisen in the discharge of the federal trust responsibility.

Neither extreme appears desirable. One way by which this institutional conflict of interest can be resolved is by legislation. In his Message on Indian Affairs, President Nixon 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. 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. The Board of Directors, in turn, would appoint the Indian Trust Counsel as the chief legal officer. The Indian Trust Counsel bill is now pending before Congress, as S. 2055 and H.R. 8797.[2]

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1. While the case studies described below are ones where the Indian interests appear to have been compromised, this is, of course, not always the resolution when conflicts arise. 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 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."
2. On September 20, 1971, Assistant Secretary of the Interior Harrison Loesch sent a letter to Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, stating that the Indian Trust Counsel measure was "most important" and urging its "early enactment."

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Additionally, various administrative measures may ameliorate the conflict between public goals and Indian property rights. These measures, and the Trust Counsel legislation, steer a middle course between the extreme of holding that public projects which conflict with Indian claimed property rights are per se unlawful, and the extreme of requiring that Indian interests should invariably yield to public purposes and - in effect - be unprotected. The legislative and administrative proposals represent institutional rearrangements whereby Indian property right may be advocated and protected without the present divided loyalty. The legislation, moreover, advances the goal of impartial advocacy and resolution of conflicts by its waiver of sovereign immunity of the United States in connection with actions commenced by the Trust Counsel. Thus, the bill favors the resolution of conflict-of-interests by the judicial branch rather than by executive fiat.

II. 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

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for an airport and park facilities.[1] These lands, which border the Colorado River, were claimed by the Quechan Tribe to be part of their Fort 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 non-irrigable reservation lands had been ceded by an agreement of December 3, 1893, ratified by an act of Congress in 1894.[2] The Solicitor then determined that the proposed lease was legally unobjectionable so long as one irrigable parcel of land was excluded from it.[3]

In rendering this "opinion", the Solicitor was in reality arbitrating a dispute among various of his "clients." The

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1. Memorandum, "Lease of Lands to Yuma County," Acting Director Program Support Staff to Secretary of the Interior, April 20, 1967.
2. Act of August 15, 1894, 28 Stat. 332 (1894).
3. Opinion of June 12, 1968, Status of Land in T.16 SR. 22 and 23 R., SBM Proposal for Lease to Yuma County, Arizona.

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BIA, on the one hand, resisted the lease; other Bureaus within the Department supported it. Clearly, the Solicitor could not provide complete legal representation to the competing interests. Rather than acting as an advocate, he functioned as an umpire and fashioned a "compromise" solution. Moreover, the critical technical determination as to which lands were irrigable and which were nonirrigable was made by the Bureau of Reclamation, one of the Bureaus which favored the lease.[1]

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.[2] 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 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

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1. Id. at p. 2.
2. Act of February 15, 1893. 27 Stat. 456 (1893).

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once the canal was constructed. Evidence introduced before the Indian Claims Commission[1] indicates that the interpreter and commissioners forced some Indians to sign document, forged other signatures, and failed to explain that the agreement would have the effect of ceding the entirety of the reservation.[2] 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.[3]

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."[4] 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.[5] This legislation was far less advantagous

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1. 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 Ft. Yuma Reservation v. United States. Ind. Cl. Com. Docket No. 320.
2. Indeed, the agreement and congressional enactment following it have never been interpreted as extinguishing the Quechans beneficial interest in irrigable lands which have not been disposed of under the reclamation laws of the United States.
3. 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."
4. 28 Stat. 286, 336 et. seq.
5. 33 Stat. 189 at 224 (1904).

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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.[1]

Clearly, an argument can be made--and would be advanced by an uncompromised advocate of the Quechans--that the 1893 agreement 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 never effectuated because of 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,[2] 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

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1. Veeder memorandum, supra, p. 22, n. 3, at pp. 23-24.
2. This was recognized in an earlier opinion by the Solicitor, January 8, 1936. M-28198, pp. 10-11.

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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.[1] Reclamation projects may store and sell surplus waters, and may advance such objectives and navigation flood control.[2]

Frequently, these projects seek to use water to which Indians and Indian tribes have a claim under the "Winters Doctrine." 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, infra.) In a number of instances, the Interior and Justice Departments have desisted from pressing Indian "Winters Rights" claims, 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

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1. 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.
2. J. Sax, "Federal Reclamation Law." Water and Water Rights, p. 121.

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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.[1] 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 owned by the tribe for power generation were condemned for this purpose.[2] 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,[3] 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.[4] 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

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1. Compare Act of August 4, 1939, ch. 418, §9(a), 53 Stat. 1.93, 43 U.S.C. § 485h(a).
2. United States v. 5677.94 Acres of Land, 162 F.Supp. 103 (D. Mont. 1958).
3. United States v. Powers, 93 F.2d 783, 785 (9th Cir. 1939) aff'd 305 U.S. 527 (1939).
4. Memorandum from Field Solicitor to Regional Director, Reclamation, "Diversion of water of Bighorn River under terms of Yellowstone River Compact," November 16, 1967.

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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."[1] 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 assurances

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

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contained in a study that this was all the water which could be made available to the Indians.[1] 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

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1. 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."

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obviously involve a payment by the government, this claim has not been pressed by the Indians' trustee.[1]

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.[2] The Pyramid Lake Paiute 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, had been a fishing people, and the lake's fishery was the chief source of sustenance for the reservation.[3]

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1. 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."
2. The principal 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 Economy 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.
3. United States v. Sturgeon, 27 Fed. Cas. 1357 (No. 16,413) (D.Nev. 1879), aff'd, 27 Fed. Cas. 1358; Veeder Committee Print, pp. 498-99.

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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.[1] The canal steadily depleted the water supply of Pyramid Lake, reducing its level and utlimately 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.[2] Although the Winters doctrine was established when these cases were brought, the Indians' federal fiduciary did not assert their Winters doctrine rights for water to stock Pyramid Lake and protect the dying fishery.[3] The United States did, however, assert and secure a water right for the

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1. Veeder Committee Print, pp. 499-500. The Carson River runs south of, and generally parallel to, the Truckee.
2. United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.).
3. 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, 218 U.S. 73 (1918).

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Newlands Project to divert Truckee water.[1] 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 the tribe 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[2] --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.[3] This project has two principal components: (1) Stampede Dam on the upper Truckee River, and (2) Watasheamu Dam and Reservoir on the Carson River,

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1. 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. 43 U.S.C. § 372.
2. Memorandum, Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs, May 5, 1955, M36282.
3. Act of August 1, 1957, ch. 809, §2(a) 70 Stat. 775, 43 U.S.C. §614a (a) et. seq.

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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.

Of course, Congress could have condemned the tribe's water rights when authorizing the Washoe Project. But when it enacted this legislation, Congress manifested a contrary intention, and specifically directed that "Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit . . . restoration of the Pyramid Lake fishery."[1] Nonetheless, subsequent administrative action by Interior and Justice appeared to the tribe to imperil this congressional indication of purpose.

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 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

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1. 43 U.S.C. §614c.

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the temporary decree by a court-appointed water master has in many respects permitted use of water 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.[1] The motion to intervene was opposed by Justice and denied by the District Court and the Court of Appeals for the Ninth Circuit.[2]

(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 since that request was made. Unable to receive a response from the government, the tribe finally filed suit in the Federal District Court for the District of Columbia against the Secretary of the Interior.[3] 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, and to cease wasteful diversions of Truckee River water for the Newlands Project.

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1. Veeder Committee Print, pp. 507-508.
2. United States v. Alpine Land and Reservoir Co., No. 24, 156 (9th Cir. Aug. 24, 1970).
3. Pyramid Lake Paiute Tribe v. Hickel, Civil No. 2506-70 (D.D.C. filed August 21, 1970).

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The Secretary is charged, inter alia, with violating the provisions of the Reclamation Act which permit only diversion of water for "beneficial use," 43 U.S.C. §372, and with diverting water in excess of that allowed by the Orr Water Ditch decree and his own regulations. A claim requesting that the Attorney General, also originally a defendant, be ordered to initiate litigation to protect the tribe's rights has been dismissed by the Court.

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.[1] 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."[2]

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.[3]

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1. Ethical Consideration 5-15.
2. Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 906 (1958).
3. The San Juan Chama Project was authorized in 1962. 76 Stat. 96.

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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[1] 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.[2] 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 satisfy the maximum needs and purposes of said Pueblos. . . ."[3] 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 not to assert

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1. New Mexico v. Aamodt, No. 6639, U.S. District Court, D. New Mexico.
2. Meeting, October 3, 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 of Pending Litigation" (hereafter cited as "Rosenfelt Report") p.2.
3. Complaint, paragraph VI(a).

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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.[1] 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 claims 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.[2] 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 multimillion-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. For example, the government has failed to contest a "settlement" arrived at between the State and non-Indian users following

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1. Rosenfelt Report, p. 28.
2. See also Memorandum, William H. Veeder to Commissioner of Indian Affairs. "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.

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administrative procedures under New Mexico State law, notwithstanding the federal nature of Indian water rights.[1] When it filed its complaint, the State prepared an elaborate hydrolographic survey showing its determination of all lands which have been irrigated within the Nambe-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 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.[2] 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.[3]

5. Private Trespass Over Tlingit and Haida Lands

The Pueblos' water rights claims to the Rio Grande (just as the Northern Paiutes' 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.

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1. Affidavit of Daniel M. Rosenfelt, April 23, 1970, Case #6339 District of New Mexico.
2. Rosenfelt Report, p. 39.
3. Id. at 43.

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The builder initially sought a permit to construct the road from Bureau of Land Management in Alaska. Since the road would pass over, and use timber situated on, land determined by the Court of Claims[1] to be held in aboriginal "Indian title"[2] 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."[3] Nonetheless, when consent was refused by the Tribal Council, the firm constructed the road without the permission of either the Indians or the BLM.[4]

In January 1969, the Tlingits and Haidas requested the Solicitor for the Interior Department to take action against the builder for its trespass.[5] 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 investigation revealed that the road had indeed been constructed in August 1968 and a report

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1. Tlingit and Haida Indian v. United States, 147 Ct. Cl. 130 (1968).
2. 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 US 111 (1938).
3. Letter, James W. Scott, Manager, Anchorage District Office, BLM, to Moore & Roeser, Inc., May 21, 1968.
4. Letter, I.S. Weissbrodt to Edward Weinberg, Solicitor, Department of the Interior.
5. Ibid.

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described in some detail the factual results of the investigation.[1] 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.[2] 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 recovery of money damages.[3] 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,[4] 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,[5] a claim ignored by the Bureau. To some degree, in addition, 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,

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1. Report from Natural Resources Specialist, Juneau, to District Manager, BLM, Anchorage, "Moore and Roeser, Inc. Timber and Road." May 19, 1969.
2. Letter, I.S. Weissbrodt to Mitchell Melich, Solicitor, Department of the Interior, November 5, 1969.
3. United States v. Sante Fe Pacific R. Co., 314 U.S. 339 (1941).
4. PLO 4582, 34 Fed. Reg. 1025 (1967).
5. Federal Field Committee for Development Planning in Alaska, Alaskan Natives and the Land 453 (1968).

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which would pass over lands claimed by Alaska natives by virtue of Indian title.[1]

B. OTHER CONFLICTING RESPONSIBILITIES OF THE UNITED STATES:

DEFENSE OF INDIAN CLAIMS COMMISSION PROCEEDINGS

The Department of Justice's statutory duty[2] 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.[3] 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

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1. In April 1970, a preliminary injunction was issued against the Secretary of the Interior 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 (D.D.C. filed March 9, 1970).
2. 25 U.S.C. §70n.
3. Letter, Robert S. Pelcyger, California Indian Legal Services, to Mr. William F. Finale, Bureau of Indian Affairs, October 31, 1968.

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to make any decision.[1] 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, represented by private counsel, in the federal district court in San Diego against the 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.[2]

The government's reluctance to commence litigation proceeded in part from a desire not to embark upon general riverwide

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1. 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 1407. This disclosure must be made even if it reveals the trustee's own negligence. American Bar Association, Informal Opinion No. 1010. The government's defense of its action--that the document constituted an attorney's "work product"--constitutes an admission that the Department of Justice and the Interior have interests adverse to those of their Indian beneficiaries.
2. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal., filed July 25, 1969).

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water rights adjudications.[1] 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.[2] 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 before the Commission, 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.[3] 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

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1. In a letter to Representative 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.
2. 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.
3. Memorandum, Robert S. Pelcyger to Thomas M. Susman, Staff, Subcommittee on Administrative Practice and Procedure, U.S. Senate, November 14, 1969, "San Luis Rey Water Case," p. 14.

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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 (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."[1]

The Department of Justice's defense of Indian Claims Commission cases on behalf of the government adversely 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.[2] The government's

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1. Letter to Representative James Utt, August 15, 1969, p. 4.
2. The Quechan Tribe of the Ft. Yuma Reservation, California v. United States, Ind. Cl. Com. Docket No. 320.

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determination that the riverfron lands were non-irrigable may have been motivated by a desire to minimize their value before the Claims Commission.[1]

C. CONFLICT OF INTEREST BETWEEN THE ATTORNEY'S DUTY TO REPRESENT INDIAN TRUST PROPERTY RIGHTS AND POLITICAL INFLUENCES WITHIN THE EXECUTIVE DEPARTMENT

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.[2] Secretary Udall responded to "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

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1. See Letter, Roy R. Young, to Honorable Stewart L. Udall, March 13, 1968.
2. Ibid.

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consider this matter of great priority."[1]

The exertion of political influence which intercedes between the attorney and his clients is barred by the Code of Professional Responsibility.[2] Ethical Consideration 5-23 declares that:

> Since a lawyer must always be free to exercise his professional judgment with 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.

A conflict may thereby be created by the political considerations between the attorney's duty to his client and his dependence on the third person--here, chiefly higher officials in the Department of Justice and Interior and members of Congress. Political considerations which may quite properly determine the government's litigating position on questions entrusted to political discretion seem inappropriate where the government has a legal duty to serve as the fiduciary for private property rights.

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

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1. Memorandum, Secretary of the Interior, to Commissioner, Bureau of Reclamation, March 22, 1968.
2. Ethical Consideration 5-21 reads in part: "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer."

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placed upon the technical determinations made by the Bureau of Reclamation as to the irrigability of the land in controversy. Similarly, the Tlingit and Haidas were required to rely on an investigation of the trespass to their lands by The Bureau of Land Management.

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 <u>both</u> 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 contemplated project and of all waters in tributaries to the Yakima River flowing through the Yakimas' land--particularly Toppenish and Satus Creeks,

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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.[1] 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

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

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tributaries during certain times of the year.[1]

The Bureau of Reclamation's July disclaimer[2] is also inconsistent with a memorandum less than one month earlier, which

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1. H. Rept. 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.)

2. Jim Letter, p. 3

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stated that the extension would utilize only "return flow from upstream irrigation and uncontrolled spills past the point of diversion."[1]

Despite these plain inconsistencies in Reclamation's reports, the Assistant Secretary stated that his study confirmed Reclamation's disclaimer,[2] and on August 12, Secretary Hickel reaffirmed his support for the Kennewick Dam Extension.[3]

E. PRIOR NOTIFICATION TO INDIAN TRIBES OF PROJECTS WHICH MAY AFFECT THEIR INTERESTS: THE "RETURN" OF LANDS CLAIMED BY FORT MOJAVE INDIANS TO THE STATE OF CALIFORNIA

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

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1. 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.
2. Jim Letter, p. 3.
3. Letter to Senator Jackson, August 12, 1969.

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On March 15, 1967, a BLM hearing examiner issued a proposed decision to award to the State of California a substantial portion of the lands claimed by the Mohave Indians to be included within their reservation. The basis for this decision was a determination that the land in question was public land on September 28, 1950, the date the Swamp and Overflow Land Act[1] 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.[2] 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.[3]

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

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1. 43 U.S.C. §981 et. seq.
2. Speech, Representative Pettis of California, December 4, 1969 (H.11818, Cong. Rec. Daily ed.)(hereafter referred to as Pettis speech).
3. 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 to 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.).

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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 conditioned 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.[1] 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.

F. CONFLICTING INTERESTS AMONG INDIAN CLIENTS: INTERVENTION INTO RIO GRANDE LITIGATION BY PEUBLOS OF SANTO DOMINGO AND SAN FELIPE

As discussed earlier (Part IIA(4)) 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.

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1. Pettis speech.

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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,[1] 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 then took the position that Mr. Veeder was only to be an expert witness.

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1. 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."

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III RECOMMENDATIONS

The preceding case studies indicate several instances in the recent past where the fiduciary duty of the federal government to exert reasonable care and efforts in the protection of Indian trust property has been compromised by institutional conflicts-of-interest. Often the government has laid claim to property also claimed by its wards - as by the lease of Colorado riverfront property to Ft. Yuma County and the appropriation of waters in the Truckee, Rio Grande and Big Horn Rivers for federal reclamation projects. Divided loyalty in these instances has detracted from the vigor of federal fiduciary protection of Indian property.

In other situations, where the government is not directly involved as a claimant of the property but the conflicting property claims are between Indians and third parties, federal protection of Indian interests has been nonetheless blemished. In the dispute between the Mission Indians and the Escondido Mutual Water Company, for example, the Department of Justice declined to bring suit because the federal role in the initial agreements with the company might subject the United States to liability in an Indian Claims Commission proceeding if the Indians were to prevail. Its conflicting duty as conservator of the public fisc stymied effective federal action. In a different vein, the government failed to proceed in the Tlingit and Haida trespass action because an Indian victory in that suit could have established a principle which would thwart other public

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projects in Alaska and raise doubts as to the validity of federal title to much of what is regarded as the public domain in that state.

Consequently, the government has often failed to assert and protect Indian property rights against itself and against third persons. In both situations, federal effectiveness has been blunted by conflicting public purposes, and the government's litigating strategy has emerged only upon balancing its different roles. On the one side, it is trustee for certain Indian property rights; on the other side, it is conservator of the public purse as it defends Indian Claims Commission proceedings, proprietor and manager of public lands, and developer and reclaimer of private lands through the management of water resources. A further federal role - manager of federal-state relations - is more obscure in the case studies, but complicates its undivided loyalty as trustee. It will be recalled that in the early, Marshallian cases, the trust doctrine originated as part of a notion that the federal government protects Indians against state regulation. But in two of the case studies, the Quechan lease and the Ft. Mohave land transfer, the United States was engaged in turning over Indian property interests and claims to state governments. The political conditions in a federal system may encourage such transfers, but when these conditions prevail, the Indians lose their trustee.

The primary purpose of institutional reform, then, is to supply the Indian property interests with one uncompromised advocate, unencumbered with conflicting obligations. This can

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be accomplished by legislation, such as the Nixon Administration's proposed Indian Trust Counsel Authority. Alternatively, some administrative measures can diminish existing institutional conflicts.

A. Legislation: The Indian Trust Counsel Authority

Administration bills to establish a new entity, independent of the Executive Branch, to provide legal representation directly to Indians are now pending before Congress.[1] The Authority would be managed by a three-member Board of Directors, at least two of whom would be Indians, appointed by the President with the advice and consent of the Senate.[2] The Board would, in turn, appoint an "Indian Trust Counsel" to be the Authority's chief legal officer.[3]

1. Waiver of Sovereign Immunity.

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" and specifically waives sovereign immunity as a defense to such litigation.[6] This waiver of sovereign immunity represents a very

1. S. 2035 and H.R. 8797.
2. S. 2035, sec. 2(b).
3. Id, sec. 4.
4. Id, sec. 8.
5. Id, sec. 9.
6. Ibid.

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substantial advance in the protection of Indian property and claims to natural resources. Although the doctrine of sovereign immunity has been severely criticized by scholars[1] and the Administrative Conference has proposed that the defense be abolished[2], it has been reaffirmed several times by the Supreme Court in the past decade.[3] Sovereign immunity has a particular tenacity in Indian law,[4] and is asserted as a defense in virtually all suits by Indians against the federal government or executive officials, because it is urged that the "sovereign property" would be affected. The government, so the argument goes, is the owner of reservation land in trust for the Indians. It also "owns" the public land and water resources which the Indians are claiming in the cases studies. And since Indians can recover money damages for takings of their property in the Indian Claims Commission[5] or, in the case of takings since 1946, in the Court of Claims,[6] it is sometimes thought by courts that equitable relief is precluded.

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1. E.g., K. Davis, Administrative Law Treatise, §§ 27.00-27.00-8 (Supp. 1970); Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 29-37 (1963); Byse, Proposed Reforms in Federal "Non-statutory" Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479, 1485-93 (1962); Davis, Sovereign Immunity in Suits Against Officers For Relief Other Than Damages, 40 Corn L.Q. 3, 18-30, 37 (1954).
2. Recommendations and Reports of the Administrative Conference of the United States, Vol. 1, p. 23
3. State of Hawaii v. Gordon, 373 U.S. 57 (1963); Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962).
4. E.g., Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970).
5. 25 U.S.C. § 70 et seq.
6. 28 U.S.C. § 1505

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Thus, decisions like Larson v. Domestic and Foreign Commerce Corp, 337 U.S. 682 (1949) where a federal agency was the holder of property claimed by two private parties, and Malone v. Bowdoin, 369 U.S. 643 (1962), where the plaintiff urged that a forest service official was unlawfully in possession of land owned by him, have been held applicable to many conflict-of-interest type suits.

2. Suits in the Name of the United States.

A suit by the Authority in the name of the United States as trustee against the United States would be a justiciable controversy,[1] for there are two separate interests involved. 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.[2] 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.[3]

1. Of course, much litigation commenced by the Authority challenging the lawfulness of federal actions will seek injunctive and other equitable relief, and hence the United States would not be named as a defendant.

2. 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.

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

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Government counsel has occasionally appeared on both sides of a controversy, where agencies are in disagreement,[1] or where one side--as here--represents the government's interests in a non-governmental capacity.[2]

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1. 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 Carolina v. United States, 56 F.Supp. 606 (E.D. N.C. 1944), rev'd. on other grounds 325 U.S. 507 (1945). See also United States v. FPC, 345 U.S. 153 (1953), where the court held that the United States, representing the Secretary of the Interior, had standing to appeal the grant of a license by the FPC for a private power plant. The Secretary urged that the dam should be constructed by the Government and the dam site had been set aside for public development by Congress.

2. 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.

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3. Administrative Actions With Continuing Conflicts of Interests.

While the substantive tenor of the bill seems designed principally toward commencing litigation, the case studies indicate that conflicts between Indian property rights and federal agencies will continue to be resolved chiefly 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 judgments concerning water allocation and administrative decisions such as permitting Reclamation to rely on unappropriated waters to which there may be an Indian claim.

In order effectively to represent Indian clients at an early stage of administrative 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 such 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 possibility of subsequent litigation or legislative presentations may prove to be the most important function of the Trust Counsel.

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In two of the four above situations - the Kennewick Dam and the Mohave land - the tribes were not even 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 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 the contemplated reclamation projects and an opportunity to submit adverse comments to Congress along with the Secretary's Report.[1/] The Secretary must also notify water quality control officials in each state and include all state agency reports in his submission to Congress.[2/] State fish and wildlife officials must similarly be consulted and their views considered and submitted. The Secretary is

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1/ 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, p. 24, n. 2, p. 156.

2/ 33 U.S.C. § 466a (b) (1).

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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."[1/] The prior notification provision should read as follows:

> The Department of the Interior, the Department of Agriculture and the Department of the Army, shall with respect to any proposed action which may affect or impair the rights or claims of any Indian tribe, band or other identifiable group of Indians to natural resources, including but not limited to rights to land, rights to the use of water, timber and minerals, and rights to hunt and fish within the United States' trust responsibility owing to the Indians:
>
> (1) give notice to the Authority and to affected Indian tribes, bands and groups of the proposed action;
>
> (2) afford the Authority and the affected Indian tribes, bands and groups a reasonable opportunity to submit written comments upon the proposed action, and, where agency action is required by statute to be determined on a record following an agency hearing, or where the agency deems it appropriate to hold a hearing, an opportunity to participate therein.
>
> Upon taking final action with respect to such proposed action, the Department of the Interior, the Department of Agriculture and the Department of the Army shall give notice to the Authority and the affected Indian tribes, bands, and groups of the final action taken.

Additionally, the Authority should have an unambiguous mandate to initiate and commence administrative proceedings. The bill as presently written may be construed to preclude the Authority from initiating administrative proceedings;

1/ 16 U.S.C. § 662 (b).

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Section 9 allows it "to intervene in any Federal, State or local administrative proceeding." Conceivably, this could be read as requiring that a preexisting proceeding be commenced by the agency or a private party, and the Authority would be restricted to the status of an intervenor. To avoid this undesirable interpretation, we propose that the next to last sentence in Section 9 should read:

> "The Authority is authorized to prosecute appeals in all courts of the United States and of the States, and to institute actions and participate in any Federal, State or local administrative proceedings in order to protect the rights of the Indians."

4. 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 responsibility to Indians is rectified by the bill, which both permits the Authority to "request . . . information" from other governmental departments and agencies

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to assist in carrying out its functions[1] and allows it to hire "such . . . [independent] experts as it deems necessary."[2]

5. Appointment of Special Counsel

The bill also permits the hiring of "special counsel" in two places. Section 5 (b) authorizes the Board of Directors to "appoint and fix the compensation of such special counsel . . . as it deems necessary." And Section 5 (d) provides for the hiring of special counsel "in the event of a conflict between parties requesting the assistance of or the representation of the Authority." Frequently, as in the Rio Grande litigation, two or more Indian groups may have conflicting claims to natural resources. However, since the Authority can appoint special counsel under Section 5 (b), it would seem authorized to hire outside counsel even when a conflicting Indian claimant was not involved, but - for example - Authority attorneys were fully committed. This provision appears desirable, but the Authority should unambiguously be able to authorize volunteer attorneys to act in its behalf. In order to make it clear that the Trust Counsel Authority may contract with private attorneys with or without compensation, Section 11.4 should be amended to read:

> Make such expenditures or grants, either directly or indirectly, with or without compensation, as may be necessary to carry out its responsibilities under this Act.

1/ S. 2035, sec. 11 (2).
2/ Id., sec. 5 (b).

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The bill should also provide that such "special counsel" may act for the Authority, so long as supervised by its Board of Directors, and that the waiver of sovereign immunity shall attach to suits brought by them. In addition, Section 5 (b) should provide that special counsel and experts shall be appointed ", without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service."

Finally, a provision should be included to make it clear that Indian tribes may sue in their own names (without, of course, the waiver of sovereign immunity contained in the Bill). The section should read:

> Nothing in this Act shall be construed to repeal Section 1362 of Title 28, United States Code, or any other provision authorizing Indian tribes, bands, or other identifiable Indian groups to bring suit against the United States, its departments, agencies, officers, and employees, any of the States, their subdivisions, divisions, departments or any private person or corporation.[1/]

6. Responsibilities of the Department of Justice.

Section 8 of the bill as presently drafted would relieve the Department of Justice of all responsibility to represent Indians with respect to claims to natural resources. This provision is undesirably broad. First, it may repeal for the natural resources area a mandatory duty by the

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1/ Such a provision is not intended to suggest that Section 1362, which authorizes tribes to sue under the federal question jurisdiction without regard to jurisdictional amount, constitutes a waiver of sovereign immunity.

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Department to represent owners of Indian trust property contained in 25 U.S.C. § 175. That section 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." 1/

1/ In Siniscal v. United States, 208 F.2d 406 (9th Cir. 1958), cert denied, 348 U.S. 818 (1954), 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. The Department indicated that its defense of an Indian Claims Commission proceeding brought by the tribe made its representation of the Indians impossible. 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. This determination is now being appealed to the Court of Appeals.

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

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The greatest practical difficulty facing the Authority will most probably be securing appropriations, since, to the extent it is successful in establishing Indian claims to natural resources, the Authority may offend powerful political groups which favor a contrary use of those resources. Specifically, adverse claimants in the case studies discussed included Yuma County, Arizona (the Quechan 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. And if the Authority's funding is reduced, Indians might be forced to rely on the more compromised advocacy of the Justice Department.

Moreover, it appears undesirable to relieve an agency of the United States government of legal responsibility for considering Indian property rights prior to formulating its actions. For example, in bringing water rights adjudications, such as on the Truckee and Carson Rivers, the government should not be legally free to ignore Indian

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claims.[1] If it does so, as in the Orr Water Ditch case, it should at least be answerable in damages. It is one thing to create an uncompromised advocate to enforce Indian claims to property against the federal government and private parties. It is quite another thing to terminate a federal agency's obligation to serve as trustee. The Authority should, in analogous future situations, for example, be able successfully to prosecute a suit for money damages for breach of trust arising by virtue of Justice's failure to represent the Pyramid Lake Tribe in the Orr Water Ditch case.[2] The bill in its present form would seem to preclude recovery in such a case by relieving the Justice Department of all trust obligations in the area of Indian natural resources. At the very least, Justice should be bound as trustee to consider the impact of its litigation on the protection of Indian natural resources.

1/ Indeed, since the Department of Justice serves as attorney for the Department of Interior, and that Department remains trustee of Indian rights to natural resources, it seems that the Department of Justice remains in any case obligated to protect Indian rights, if for no other reason than to shield its client - Interior - from liability.

2/ It may be argued that the better course would be for the Authority, as an uncompromised advocate, to represent the Indians in all water rights adjudications. The difficulty with this argument is that these are proceedings of vast complexity, and the Authority may lack the financial ability to provide such representation. Particularly where, as in the Orr Water Ditch case, the action is brought by Justice, it should not be permitted to confront the Authority with the dilemma of devoting a disproportionate percentage of its time and resources to the defense of the Indians in that case, or of seeing the Indians' water rights lapse by default.

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It is thus recommended that Section 8 of the bill should be amended to continue the Department of Justice's duty to represent Indians in claims to natural resources where the Indians are not being represented by the Authority. This could be done by adding to Section 8 of the bill, in line 12 after the word "fish" the following:

> " , where such Indians or Indian tribes are being represented by the Authority;"

Admittedly, this solution means that in some cases refused by the Authority, the Indian claimant will proceed to request that the Justice Department act to enforce or protect his rights. To some extent, Justice's evaluation of these claims will duplicate consideration already given to them by the Authority. However, in situations where the Authority believes that a claim has merit but lacks funds to pursue the matter, it seems desirable that claimant should be represented by some arm of his trustee.

7. Tax Exempt Status of Gifts and Bequests.

The Authority is authorized to "receive and use funds donated by others" but the legislation is silent on whether it is to be exempt from federal income taxation. Congress' intent should be precisely fixed in this regard. In order to make clear that the Authority is to be a tax exempt organization, Section 11 (3) should be amended to read as follows:

> To accept, hold, administer, and utilize gifts and bequests of property, both real

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and personal, for the purpose of aiding or facilitating the work of the Authority. Gifts and bequests of money and proceeds from sale of other property received or gifts or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Secretary.

For the purposes of federal income, estate and gift tax, property accepted under this Section shall be considered as a gift or bequest to the United States.

B. Administrative Solutions to the Conflicts-of-Interest

Certain institutional protections contained in the Indian Trust Counsel legislation could be advanced by executive reorganization and regulation. For example, any Bureau proposing a project which may conflict with Indian claims to natural resources could be required by Interior Department regulation to notify the BIA. Similarly, efforts could be made to increase the availability of independent, "in-house" technical services to the BIA.

In addition, the Bureau of Indian Affairs could be provided with legal counsel independent of the Solicitor's Office. In several case studies, the Solicitor's Office was charged with conflicting duties to represent multiple clients - the BIA and other bureaus within the Department. Since the BIA is charged most directly with the trust responsibility, a conflict of interest arises whenever an Interior bureau uses

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or seeks to appropriate property in which Indians claim an interest. The American Bar Association has held that an attorney cannot effectively represent a client whose claimed rights conflict with those of another client.[1/] The ABA's Code of Professional Responsibility provides that an attorney "should resolve all doubts against the propriety of" representing multiple clients.[2/] The

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1/ 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 proceedings, 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. American Bar Association Committee on Ethics, Informal Opinion No. 977 (1967).

2/ Ethical Consideration 5-15, American Bar Association, Code of Professional Responsibility. The federal conflict-of-interest laws protect the Government against any such conflicting interest held by its employees. These laws, buttressed by criminal sanctions against violators, prohibit any federal employee from representing a private party before a court or agency in a matter where the United States has an interest. 18 U.S.C. §§ 203, 205. This prohibition survives for a period of time after a person leaves government employment with respect to matters in which he actively participated while with the government and matters under his official supervision. 18 U.S.C. § 207(a), (b).

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"multiple client" problem seems irremediable so long as the Solicitor is obligated to advise both sets of "clients" as to their legal rights. As such, he is at present charged with resolving the dispute between his "clients" by issuing an "opinion." The Solicitor's "opinion," unlike 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. Consequently, the Solicitor is placed in the ethically troublesome position of "mediating" between his clients.

This mediating and adjudicating function is performed both in the Solicitor's central office in Washington and by the regional solicitors. At the regional level, the conflict of interest is institutionally more pronounced. In Washington, the attorneys in the Solicitor's Office are at least divided into sections - reclamation, Indian affairs and public lands, for example - with the Associate Solicitor for each section reporting directly to the Solicitor. In the regional offices, the regional solicitor himself is charged with advising the conflicting agencies; the conflict comes to rest in one person.

1/ Mediation of disputed interest 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 112.

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Creation of a "General Counsel for Indian Affairs," independent of the Solicitor, would remove this particular conflict. The "General Counsel," like the Solicitor, would report directly to the Secretary, and conflicting legal opinions and views would at least be arbitrated by the chief administrative official in the Department.[1/]

An administrative shift in this direction was announced by Secretary Morton on October 4, 1971, when he established an Indian Water Rights Office. The Secretary stated that the function of the office will be "seeing that appropriate action is taken to protect Indian water rights - including timely preparation of suits for submission to the Justice Department for filing in the courts."[2/] The office seems constructed to make legal recommendations and undertake field investigations, including inventories of Indian claims to water; its staff is to be drawn from the BIA, Solicitor's Office and Geological Survey. The office reports to the Commissioner of the BIA, who reports to the Secretary.

1/ A different problem, the role of the Solicitor in deciding administrative appeals within the Department as in the Mohave land claim, would persist. Here, even after establishment of the "General Counsel for Indian Affairs," the Solicitor would act as counsel for one party and judge in the same case. It is therefore recommended that the Solicitor be divested of all administrative responsibilities for adjudicating internal administrative appeals involving Indian claimants.

2/ Secretary Morton, Press Conference on October 4, 1971 (hereafter "Morton Press Conference").

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In the water resources area, the proposed Water Rights Office appears significantly to alleviate the internal conflict-of-interest within the Solicitor's Office. It seems also to serve the need for providing technical assistance to Indians in water matters independently of other Interior bureaus. The most encouraging aspects of the proposal are: (1) that it does impressively seek to undertake some action to measure and enforce Indian claims to natural resources; and (2) that its level of appropriations is relatively high; for the first year, the Secretary has reserved two million dollars. 1/

A major deficiency in the office is its dependence on the Justice Department for the filing of litigation. If the Department is sluggish about the filing of litigation, the Office's funds should be available to contract with tribal attorneys or outside counsel to commence litigation. In addition, the Office's role in intra-departmental proceedings is unclear; could the Water Rights Office, for example, participate in informal administrative proceedings, such as the authorizations to the Bureau of Reclamation to sell Big Horn water to industrial users? It is likewise not clear whether the office is permitted to represent Indians in more formal administrative hearings, like renewal proceedings for hydroelectric projects before the Federal Power Commission.

1/ Morton Press Conference, p. 4.

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The proposal to establish a Water Rights Office likewise falls short of the promise of the Indian Trust Counsel Authority to provide legal services directly to Indian tribes and individuals affected by the institutional conflict-of-interest. Since the Office reports to the Commissioner of Indian Affairs,[1/] it may function solely as "house counsel" to the trustee. The Authority, on the other hand, would be independent of the trustee, enforcing the beneficiaries' claims against him in fact. The roles of house counsel to the trustee and counsel to the beneficiary need not conflict in every case; they will be harmonious to the extent that the BIA espouses a policy of maximum practicable advocacy of Indian water rights (although, of course, even within the contours of such a commitment, differences of opinion would arise). But the roles are conceptually very different,[2/] and the independence of the Authority from any obligations to an existing executive department appears preferable.

1/ Secretary Morton emphasized that "the Water Rights Office has got to be very close to the Commissioner in every sense of the word." Morton Press Conference, p. 11-12.

2/ Secretary Morton may have recognized this divergence on roles, and blurred the "house counsel" function of the Water Rights Office by inviting the National Tribal Chairman's Association to appoint "an advisory board to work with the Indian Water Rights Office." Morton Press Conference, p. 4.

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The Secretary may not presently possess statutory authority to provide legal services directly to Indian tribes.[1/] But in securing technical assistance, and in his investigations to protect Indian rights, the Indian Water Rights Office may discover instances where litigation would be appropriate, where the Department of Justice may be unwilling to proceed. In such situations, the Office should contract with outside "special counsel" - as provided in the Indian Trust Counsel bill - to commence and handle litigation.

A legislative remedy would also be necessary to remove the institutional conflict of interest within the Justice Department and to ensure that conflicting claims to land, water and other natural resources are presented to courts for resolution. Absent legislation, the Justice Department will continue to serve as attorney for both Indian wards and public agencies, and will control the flow of litigation by both in federal courts.

In terms of presenting Indian claims which conflict with other federal interests to court, and securing their resolution by an impartial judiciary, pursuant to a waiver

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1/ As noted, p. 51 , n. 1 , supra, 25 U.S.C. § 48 may authorize the Commissioner of Indian Affairs to transfer control over BIA employees to competent Tribes. Mr. Veeder was "assigned" to the Rio Grande pueblos under this section (an assignment subsequently revoked) and the Zuni Tribe has assumed control over all operations of the local BIA office on the Zuni reservation pursuant to that section.

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of sovereign immunity, legislation appears necessary. Similarly, the inherent conflict that the Justice Department is charged with defending Indian Claims Commission proceedings, and may hence be less vigorous in protecting Indian property rights in the courts, cannot be removed without legislation. In short, the need for independent presentation of litigation can only be addressed by Congress.

However, the case studies indicate that litigation is not the only, or even the most overriding, necessity for resolution of these administrative conflicts of interest. All of the conflicts studied arose initially with executive determinations by Interior officials, and some involved solely administrative proceedings within the Department. Revisions in administrative procedures within the Interior Department may be more significant in providing protections for Indian rights than altering the control over litigation to enforce the trust responsibility. And clearly, many of the changes contained in the Trust Counsel bill and our recommended amendments can be implemented by executive order.

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Mr. Speaker:

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

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

The purpose of this proposal, as provided in section 1, is to establish an Indian Trust Counsel Authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

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

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

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

Section 5 authorizes the Authority to appoint and fix the pay and prescribe the duties of attorneys it employs. It also authorizes the Authority to appoint and fix the compensation of needed special counsel

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and experts. Finally, it authorizes the attorneys or special counsel appointed by it to appear for and represent the Authority in any case before any court, commission or administrative proceeding pertaining to its responsibilities. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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

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

Section 8 authorizes the Authority, with the consent of any aggrieved Indian or Indian tribe, band, or other identifiable group of Indians, to render legal services in regard to rights or claims of the Indians in relationship to their natural resources. The extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in a combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources, except that the Department of Justice in determining its litigation position with regard to any matter affecting the natural resource rights of Indians shall consider the obligation of the United States resulting from its trust responsibility to the Indians. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the Indians in all courts and before Federal, State and local commissions and administrative bodies.

Section 9 authorizes the Authority, with the consent of any aggrieved Indian, Indian tribe, band or other identifiable group of Indians, acting in the name of the United States as trustee for the Indians, to initiate and prosecute to final judgment in all Federal and State courts against the United States or any of its departments, agencies, officers or employees or against any of the States, their subdivisions, departments or employees or against any persons or corporations, public or private, all actions in law and equity for the protection of the natural resource interests and rights of the Indians. The United States waives its sovereign immunity to suit in connection with litigation initiated by the Authority under this section.

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

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to which a claim has been filed or could have been filed before the Indian Claims Commission or under any special statute authorizing a suit to be brought against the United States, and makes it clear that the prohibition does not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended.

Section 11 enumerates the authorities of the Authority.

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

As the President stated in his message of July 8, 1970:

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

This proposal will carry out the policy enunciated in the President's message by establishing the Indian Trust Counsel Authority. The Authority will be, as provided in section 7, free from control of any Executive Department. This independence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

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The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal to hire necessary attorneys including the chief legal officer and his deputy and such other personnel as they deem necessary to carry out the functions given them by the proposal. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the Indians.

The proposal provides that the Indian Trust Counsel, who is the chief legal officer for the Authority, shall be a level V in the Executive Schedule. We feel that this level is necessary in order for the Authority to be able to obtain the kind of person that it needs to direct the legal activities of the Authority and at the same time give him sufficient stature to be able to deal with cabinet and sub-cabinet members of the Executive Department. The Board of Directors is also authorized, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. These attorneys will be the working group that will carry out the responsibilities and functions of the Authority. It is the Administration's intention that the Authority will build up a cadre of well-trained and devoted attorneys whose energies will be turned to the protection and preservation of the Indians' natural resource rights and interests.

The authority to hire special counsel is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, assist those Indians in the protection of their natural resource rights and interests in the courts and before administrative bodies. This authority will be used when a tribe has a justiciable claim and feels that it needs the assistance of the Authority for prosecuting

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

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from the United States or any of its departments, agencies, officers or employees as well as against the States, their subdivisions, departments and agencies or against any private or public person or corporation. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they are precluded from bringing suit against the United States because of bars that the United States has as a sovereign to suits generally. These bars will be removed by the provision waiving United States' sovereign immunity as it relates to actions brought by the Authority. The proposal clearly limits the waiver of sovereign immunity to the narrow area of litigation initiated by the Authority.

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

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

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

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

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest of the beneficiaries of the trust without reservation and to the highest degree of its ability and skill.

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

Sincerely yours,

Secretary of the Interior

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

Enclosure

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A B I L L

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

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

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

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

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

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

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

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

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

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

SEC. 4. The Board of Directors shall, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, appoint and prescribe the duties of a chief legal officer for the Authority, who shall have the title of Indian

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

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

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

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

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

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

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

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

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

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other special statute authorizing a claims suit to be brought by Indians against the United States but shall not include suits that could be brought under the provisions of the Act of March 3, 1887, as amended (24 Stat. 505).

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SEC. 11. The Authority is authorized to:

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

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

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

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

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

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Senator Allott:

The attached document provides answers to your letter of November 24, 1971.

I am pleased to have the opportunity to be of assistance in regard to the questions concerning S. 2035, the Trust Counsel bill. I hope that I have answered these questions to your satisfaction. Please do not hesitate to call upon me for further elaboration on any of the answers or if you have additional questions.

Sincerely yours,

Secretary of the Interior

Hon. Gordon Allott
Committee on Interior
and Insular Affairs
United States Senate
Washington, D.C. 20510

Enclosures

1/3/71

DDrabelle:lyd
183-6646

cc:
Secy RF (2)
Mr. Hitt - Secretary's ofc
Under Secretary
CL - Mr. Laird
BIA
Assoc Sol - IA
Dennis Drabelle
HOLD
OLRF
Asst Secy--PLM
White House - Brad Patterson
SCCO

CL-25586

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QUESTIONS FOR INTERIOR DEPARTMENT WITNESSES:

1. Please explain the background of the proposed legislation, including the role of the National Council on Indian Opportunity beginning, I believe, in 1967 or 1968?

2. Isn't it true that Mr. William Veeder played a major role in formulating the concept for this legislation and in its acutal drafting?

3. In last year's hearings on this legislation, Mr. Veeder testified in favor of the legislation and was questioned concerning the article he had written proposing a similar approach which had been republished by the Senate Judiciary Committee, sub-committee on Administrative Practices and Procedures.

. . . Mr. Veeder stated that the complete response to the situation this bill is intended to meet was not just the creation of a separate agency to sue the Interior Department and others to protect the Indians and natural resource rights. His article said the complete step which should be taken would be to create a separate agency which would peform all of the trust duties of the United States including filing necessary lawsuits. The logic being, of course, that if the Interior Department does have these unresolvablable conflicts of interests, the Indian responsibility should be given to an agency which does not have such conflicts.

My question is:

(1) Why hasn't this concept been followed to its logical conclusion with a proposal to take the Indian trust duties as to natural resources now assigned to the Interior Department and transfer them to some other agency?

4. Why does this bill (sec. 9) grant a waiver of the sovereign immunity of the United States in the event a natural resource claim is filed by this independent trust counsel authority?

(a) Why should there be waiver only when it is filed by the Trust Counsel Authority but not if the lawsuite is filed by a private attorney chosen by the tribe.

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(b) If the Tribe, for some reason, doesn't want the Authority to represent it, or to have anything to do with it why should it be required by this Section to use the Authority in order to have the waiver of sovereign immunity available?

(c) Isn't this going to put a tribe at the mercy of the Authority so, say one tribe or one Indian wants to sue to overturn a decision in a court case, the Authority may have just obtained, the Authority can stall, delay filing, that case (or having it filed) or, even if it is filed, be less than diligent in moving ahead with it?

5. Under this bill, if a Tribe believes the Trust Counsel Authority will not or cannot properly represent it, will it be able to request the Justice Department to do so?

6. Section 8 says the Justice Department at the earliest date practicable is relieved of responsibility to represent Indian natural resource claims. Wouldn't it be fairer to the Indians to keep the Justice Department expertise available to them?

(a) If the Trust Counsel Authority should prove to be incompetent or unwilling, generally, or in regard to a specific instance, this Section would keep the Justice Department from stepping in to help the Indians with a case even if you request it, wouldn't it?

7. As you see it, who makes the decision under Section 8 that the time has been reached that the Trust Counsel responsibility begins and the Justice Department responsibility ends?

(a) Is it contemplated that both of these events would occur simultaneously or do you propose that there could be a transition period of indefinite length in which both the Trust Counsel Authority and the Justice Department have concurrent responsibility?

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8. In Line 1, page 5 it is stated that nothing in the Act absolves the Interior Department and the Justice Department of any responsibility, including trust responsibilities.

(a) How can Justice perform its responsibilities when the subsequent provision relieves it of representation of Indians?

(b) As to both Interior and Justice, how can either see to it that their trust duties are carried out insofar as necessary litigation is concerned when Section 7 specifically stipulates that no Executive Department shall exercise any control over the Authority?

(c) Nothing precludes the Trust Counsel from exercising authority over the Interior Department or the Justice Department. Isn't this, taken together with Section 7, an indication that the Authority may have such authority?

9. Would the President have control over the authority in the exercise of its functions?

10. As an example, Section 7 seems to mean the Authority would not be subject to the Environmental Policy Act, the Environmental Protection Agency created by Reorganization Plan No. 3 of July 9, 1970 pursuant to Chapter 9 of the U.S. Code and the duties each carries out.
Is there precedent for providing such exemptions to any other federally created body?

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11. Will the Trust Counsel Authority be subject to any control by the Office of Management and Budget?

12. In what ways has the conflict of interest in the Interior Department and the Justice Department prevented or delayed the proper treatment of Indians in the past?

13. Is it your position that the Bureau of Indian Affairs has not properly done its duty in taking necessary action to protect Indian natural resource rights or is it that other interests in the Department which are also concerned with natural resource interests on behalf of the entire United States, have prevailed. Or, would you say that the fault lies with the Justice Department?

14. In the administration of the Interior Department, the job of the Secretary, each day, I am sure, involves the consideration of "conflicts" between alternate courses of action and the resolution of those conflicts with the best information, pro and con, by coming to a decision. Just as an example, we know the Department has decisions to make involving the production of oil and gas from sources offshore of the United States. We know that on the one hand you are told that it is your duty to take whatever action within your power to assure this country of a continuing supply of energy without which much damage would be done such as no energy for hospitals.

On the other hand, we know you are told that the United States is the Trustee of the natural resources of our public lands, waters and oceans and it is your duty to see that they remain environmentally sound and in tact so that no offshore oil production should be permitted.

Litigation, of course, is a very real possibility in such cases and no matter which way your decision goes, when that litigation is filed you will still have duties and interests on both sides of the case. Those duties often involve treaties, laws that make you a trustee by charging you with responsibilities and make the lives of people dependent upon how your decisions.

My questions are:

(1) What is the logic which dictates that the duty you have to our Indian citizens will not permit you to make proper decisions concerning their natural resource claims including whether or not it is a matter which

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should be decided in Court by a referral to the Justice Department?

(2) If there must be an independent and separate agency to maintain litigation to preserve Indian natural resource claims why shouldn't there be such a body to preserve parks, wilderness areas, etc and independently represent the other responsibilities of the Department such as seeing to it that there is adequate water and energy for the country?

15. We recently held hearings on the administration's bill to extend the life of the Indian Claims Commission. In those hearings the Commission placed a large part of the responsibility for its failure to complete it's work on alleged failures of the Justice Department to proceed in an expeditious manner.
Do you agree?

16. Last year, the administration's bill for this Trust Counsel Authority specified that the Authority would not be involved in cases before the Indian Claims Commission.

This year's bill, however, modifies and really reverses, that provision (Sec. 10). It permits the Authority to enter into and take over the representation in any pending case before the Commission and, of course, there aren't supposed to be any cases remaining which are not pending as the cut off date for filing them has passed.

Would you please explain why this amendment was made?

17. This bill has an open ended appropriation authorization but it terminates the responsibility of the Justice Department regardless of whether the Authority has sufficient funds. What would happen to the Indian natural resource claims representation if the funds appropriated should not be sufficient?

(a) It is conceivable that if the Indians should tie up significant waters, lands or minerals in the country through the Authority that public pressure might demand a cut back of funds for the Authority isn't it?

(b) The Justice Department, on the other hand, doesn't get its funds for use in specified areas and it would be more difficult for Congress to "shut down" its Indian natural resources division wouldn't it?

(1) This has been a concern of the tribes, has it not?

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18. Please tell the Committee of the existing specific cases of which you now know in which the Administration believes this Trust Counsel Authority would initiate lawsuits, if Congress enacts this law? (Note: Also have him submit a complete list for the record.)

19. If this Trust Counsel Authority is created it will pretty well be incumbent upon it to file the lawsuits the Indians want filed won't it?

(a) It will be the advocate of the Indian's side of the case so if the Indians want to initiate a lawsuit to have Yellowstone National Park, the Colorado River, Manhattan Island, certain oil and gas reserves or any other natural resource declared to be theirs, the Authority is going to file it, isn't it?

(b) As a corollary, can you unequivocably state that the Interior Department and the Justice Department are going to vigorously defend all those cases at least where there are public lands waters and other natural resources involved?

(c) If not, who will represent the public?

(d) Mr. Secretary, nobody, or agency, (even if they are lawyers) is right 100% of the time and from what you say, the federal government hasn't been coming close to that in the past concerning Inidan natural resources. It is certainly possible therefore, that the Indians could now have some natural resources: land, water, minerals and so on, or the use of them which by all rights they shouldn't have and which should be part of the public domain.

My question is, if Congress creates this independent agency to vigorously persue these Indian natural resource claims, at your request, can we be assured that the rest of the American public will get the same sort of representation from the Interior Department, which is the custodian or trustee of the public resources as well as from the Justice Department, so that if any mistakes have been made in the past or are made in the future, we can expect them to be corrected, even if it means filing a lawsuite against a tribe or an Indian to get it accomplished?

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20. Mr. Secretary, to get to my next question, a hypothetical case, I think, would be helpful to see if this bill really is going to result in merely the open advocacy in Court of different positions with a decision based thereon as in other cases: Assume that a Tribe files a lawsuit against the United States Department of Defense to have it declared that part of a missile range or a military base belongs to the tribe. The Defense Department of course might not take kindly to that because attorneys are convinced the Defense Department title is clear.

Ordinarily, of course, there are court procedures whereby anybody suing the government claiming they own that land could have pertinent documents and data produced for inspection but in this case the Defense Department may find out that the Trust Counsel Authority is building the case of the tribe not from their own research and investigations but with the free full time assistance of personnel from the United States Geological Survey, from the General Services Administration and, perhaps, 10 or 20 other federal agencies. They may produce a pile of maps, charts and documents 50 feet high, all of which tend to show that the Indians do own the land. The Defense Department is convinced it is not true but it is forced to either give up the land or to devote the same amount of time and work to refute the case which is built.

My questions are:

(a) Isn't this what Section 11 (2) (as well as 11 (1)) permits?

(b) Is this going to be well received at the Defense Department?

(c) Because of the influence the Indian cause has, are the other agencies going to be able to turn down the requests for personnel data services and materials etc. which Section 11 (2) authorizes?

(d) The Defense Department is a big federal agency but how is a State, a county, a city or even private individuals going to be able to counter such a collection of resources to properly defend themselves?

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21. Do you agree with the principle of our Anglo Saxon system of jurisprudence that the difficulty, time and most of all, the expense of litigation is a deciding factor in keeping unfounded litigation from being filed and, thus, unnecessarily burdening others in the society from having to defend unnecessary litigation?

(a) What type of controls or safeguards does this bill contain to guarantee that the tribes and individual Indians will not be instituting non meritorious lawsuits?

(b) Doesn't the present system, even though the tribe's rights are represented without charge by the Justice Department, have controls in that the Interior Department and the Justice Department in the first instance, make a judgment as to whether requested litigation is meritorious before it is instituted?

(c) Why do you believe we can expect such an exercise of responsibility from an independent agency whose apparent primary function is to represent the tirbes in litigation or prospective litigation and won't the duration and status of those working for the Authority depend upon how much "business" it is doing?

22. Is the intent of the wording of Sections 8 and 9 to preclude a duty to provide legal respresentation from arising if a tribe, group or individual requests it -- I refer to the beginning language of those sections where the legal service and litigation duties are set out. Instead of beginning "at the request of ...", I would like to know why those sections begin: "The Authority with the consent of the tribe . . . is authorized" to provide those services?

(a) Is the true intent to make it the duty of this new agency to "hunt up" cases where legal services and litigation could be provided or filed and to go ahead with it subject only to getting the agreement of the tribe, individual Indian, etc.?

23. Why does Section 9 rule out jury trials?

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24. Don't the tribes have other sources of legal assistance besides the Justice Department such as OEO Legal Services, California, Legal Services, their own private attorneys, Legal Aid societies and so on and, if so, why isn't it better to rely on these resources?

(a) I have a November 17th Washington Post Article which I am placing in the record. It relates a new For Foundation grant to a program to represent Indian legal rights. The beginning grant is for $1.2 million dollars and the article goes on to relate that two thirds of the program funds are presently coming from federal sources. Can you tell me why this program will not be doing the same job as the Trust Counsel Authority?

(1) Isn't the Trust Counsel Authority going to serve to discourage private foundations etc. from using private funds to help with legal services, leaving this to the taxpayer instead.

25. Mr. Secretary are you aware of Title IX of S.2007 (O.E.O Extension bill) which recently passed both Houses of the Congress and is now in conference, which establishes the "National Legal Services Corporation" to provide free legal services to all segments of our society in need of them?

(a) It is my understanding that this Corporation will be available to Indians and will provide much the same benefits as are provided in the bill before this Committee. Why do we need another separate agency exclusively for Indians?

(b) As I understand it, the only way an Indian might not be eligible for the free services of that corporation would be if he should exceed its criteria relating to income and assets. If this is a possibility and you believe these services should be provided even if the Indian exceeds the eligibility criteria, wouldn't it be more administratively sound to have all free legal services being performed by ust one separate independent agency, rather than having a separate independent legal services corporation for Indians.

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26. Last year, after this Trust Counsel bill was submitted, the National Council on Indian Opportunity which has supported it and other administration bills, held "field hearings" on them. One of the complaints voiced by the Indians was that there had been no prior consultation with them. The Indians were told to submit their proposed changes and the bill would be amended for this Congress in order to reflect the desires of the tribes. What changes appear in this bill as a result of the requests and suggestions of the tribes?

(a) Were any not included and if so what were they?

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ANSWERS TO QUESTIONS IN SENATOR ALLOTT'S LETTER OF NOVEMBER 24, 1971

1. The concept of an independent legal body to protect the natural resources rights of Indians has been circulating in the Indian community for some time. This concept was the subject of some testimony in the hearings held by the first board of the National Council on Indian Opportunity. When discussion of a Presidential message on Indians was started, the NCIO, along with other agencies of the Government that had direct dealings with the Indian community, began to make recommendations as to the items that should be included in any such message. The job of coordinating the activities and recommendations for the Indian message was undertaken by the NCIO. The legislative package that followed the President's Indian Message was drafted in this Department. Included in the legislative proposals were recommendations and ideas from a number of sources, including resolutions from various Indian organizations, items taken from testimony before the NCIO, discussions with persons with contacts in the Indian community, and recommendations of the various Government departments and agencies.

2. Mr. Veeder did not draft the proposal on the Indian Trust Counsel or any of the other bills, but did play a role in the conceptualizing of some of them. In no sense, however, can this bill or any of the others in the package be considered the work of one man.

3. Placing the Indian trust responsibilities in another Federal agency would not alter the fact that ultimately any decision with regard to Indian resources must be consistent with the National interests. Even if all the trust responsibilities with regard to Indians were placed in a separate agency, that agency would still have to reconcile its decisions with regard to Indian rights with the general public welfare, and the Office of Management and Budget would have to insure that these decisions were consistent with the Administration's overall program, including the programs of bureaus in the Department of the Interior. Thus, the conflict of interests would simply be elevated from Interior to a higher level in the Federal Government. We do not believe that this would be in the Indians' best interest or that they would support it. There is an advantage of having conflicts surface at the ground level before the bureaucratic process has become too rigid and where the merits can be explored in greater detail. As a general rule, the higher up in the process a decision is made the narrower must be the focus. Issues must be streamlined and relevant detail is often left behind.

Our bill proposes to deal with the conflict of interests by providing independent advocacy of the Indians' position in court, where a final decision can be made. This, we feel, gives the Indians the best of both worlds, so to speak. To go any further than this, we believe, would simply create another conflict at another level of Government, and sacrifice the advantages of being in on the ground floor of the decision-making process.

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4. The reason for limiting the waiver of sovereign immunity in section 9 to actions in which the Trust Counsel is participating is to discourage frivolous suits. The Trust Counsel Authority will have the responsibility to act in the best interests of all Indians who have trust resource rights. Thus, we believe the Trust Counsel will channel its resources only into substantial claims and suits. Attorneys for individual tribes or Indians do not have a similar broad interest or responsibility, and sovereign immunity is retained as to them.

5. Section 8 of the bill declares that the Justice Department will be "relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources...". Assistant Attorney General Kashiwa's testimony has made it clear that Justice would not honor such a tribal request, pointing out that the very problem that the bill is designed to remedy would arise again if Justice took on such cases (Transcript of Hearings on the Indian Trust Counsel Authority, November 22, 1971, page 32).

6. This question was also addressed by Assistant Attorney General Kashiwa. Pointing out that to make the expertise of the Justice Department available to Indians would cause "the whole picture /to be/ clouded again" (transcript, page 32), he stated that the Trust Counsel Authority would be able to hire competent counsel who would develop Indian law expertise. I concur in Mr. Kashiwa's opinion and want to stress that insofar as possible, all vestiges of the present conflict of interest should be eliminated.

(a) I consider it highly unlikely that the Counsel would refuse to represent Indians in a bona fide non-frivolous claim, or that it would not be competent to do so. But I agree with Assistant Attorney General Kashiwa that the Department of Justice would not step in, since that would put us back where we are now.

7. I believe that the decision as to when authority is actually transferred should be made jointly by the Department of Justice, this Department, and the Trust Counsel Authority. The transfer should occur just as soon as the counsel is ready to operate, and I do not foresee a period of concurrent responsibility.

8. (a) The Justice Department presently has very few trust responsibilities to Indians other than that of legal representation. An example given in the testimony of Mr. Kashiwa (transcript, page 36) is advising the Secretary of the Interior in matters pertaining to Indian wills. The bill would not relieve Justice of such trust responsibilities as this.

(b) Since Justice will no longer be called on to litigate on behalf of Indian resource rights, where litigation is necessary to carry out an Interior trust responsibility, we will have to depend on the Trust Counsel for that.

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(c) Section 7 was inserted to protect the counsel from influence from the Executive Branch. I do not consider this an indication that the counsel can itself assert any control over the Executive Branch.

9. The answer to this question is simply "no". Section 7 is meant to exclude all Executive Branch control over the Counsel Authority save the normal budgetary considerations. However, it should be recalled that the members of the Board of Directors will be appointed by the President, with the advice and consent of the Senate.

10. Although the Act does not specifically exempt the Trust Counsel Authority from the provisions of NEPA, we do not believe that the Trust Counsel would be covered by the requirements of that Act. This is consistent with and follows from the position of this Department that the Federal Government, in its capacity as trustee for Indian resource rights, is no subject to the requirements of NEPA. Those resource rights are private rights. The sole task of the Trust Counsel would be the independent advocacy of those rights. This position is supported by a recent Federal District court decision in a case of first impression Davis v. Morton No. 9190, December 21, 1971, (DC N.M.). That decision held that the Secretary of the Interior's approval of a lease of Indian restricted land was not subject to NEPA, because among other things, the United States was acting as a fiduciary or guardian of the interests of the Indians.

11. As I indicated in answer to this question at the hearing, the Trust Counsel Authority will be subject to the budgetary control of the Office of Management and Budget, just like any administrative agency. However, OMB will not have any policy control over the Counsel because this would be at odds with the concept of independent representation and advocacy of Indians trust resources interests.

12. I believe that the answer to this question has been covered in the oral testimony. In addition, it is my understanding that the Department of Justice, with the assistance of officials of this Department, is preparing additional material for the record which will answer the question.

13. This bill is directed at overcoming a problem created by a conflict of interests, not a neglect of duty. The point is that the Department of the Interior and the Department of Justice are faced with conflicting duties. I would not say that any Bureau or Department is at fault. The "fault" is in the fact that the Federal Government has many responsibilities. The most serious impact of these conflicts is perhaps the credibility damage among Indians suffered as a result of them. Nor would I say that the other Bureaus have always prevailed. We have some very able and persuasive people in the Bureau of Indian Affairs. It is far from a weak sister in relation to the other Bureaus.

14. (a) This Department's trust responsibilities to Indians and our other responsibilities sometime conflict. I believe that the situation we are faced with has been best described by President Nixon in his July 8, 1970, Indian message, where he stated:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of

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extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

"Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in precisely this position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists."

(b) First, the United States has definite treaty obligations to Indians, a situation that does not obtain with respect to other responsibilities of this Department. One of the most important of these obligations is to protect Indian resource rights. Second, we believe it is quite appropriate that Indians be singled out for this separate treatment because, unlike resources, they have their own views as to how their future should be determined. The Trust Counsel will enhance the ability of the Indians to have their voices heard. This rationale does not apply to any other responsibility of this Department.

15. No. I believe that the primary reason for the failure of the Indian Claims Commission to complete its work has been that the claims it has heard have turned out to be far more complex than could have been anticipated. To my knowledge, the Department of Justice under this Administration has proceeded as expeditiously as possible.

16. This amendment was made because on reflection it seemed artificial to give the Trust Counsel Authority the responsibility of representing Indians in land and resource claims and yet to bar it from a forum where a great many of these claims are pending. We could see no sound reason for requiring the Trust Counsel to stay out of ICC claims in which the claimants wished to utilize the Counsel and the Counsel agreed that the matter was important enough to warrant its participation.

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17. If the funds appropriated for the Authority were not sufficient, it, like any other entity dependent on governmental appropriation, would have to reassess its priorities. The important thing is that Indians would make the decision for themselves as to what those priorities should be.

(a) The situation you describe is certainly conceivable. However, I would not expect the Congress to "punish" the Authority for carrying out its statutory responsibilities.

(b) The answer to both questions in this section is "yes". However, again, the Indians and I do not believe that Congress will attempt to undermine the Authority in this way.

18. The one specific case which we would anticipate the Trust Counsel Authority would take over is the matter of Pyramid Lake, upon which this Department and the Department of Justice have been working. The following is a list of relevant projects to be undertaken by this Department's new Indian Water Rights Office. Although we have no way of knowing for certain, we believe it is possible that one or another of these projects would germinate a suit by the Authority.

(a) studies of Indian water needs in the Central Arizona Project;

(b) study of effect of proposed reclamation project on Colville Reservation rights in the State of Washington;

(c) study of irrigable water uses on Chamokane Creek in the State of Washington on behalf of Spokane Reservation Indians;

(d) study of water uses on Jicarilla Reservation in New Mexico to determine effect of San Juan-Chama Reclamation Project;

(e) study of potential land and water uses on Wind River Reservation in Wyoming;

(f) study of ground water on the Yakima Reservation in the State of Washington.

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19. (a) This question comes down to this: will the Trust Counsel Authority prosecute frivolous suits for Indians? Initially, I think it is clear that, like any attorney, the Counsel does not have to take any given case -- he has the discretion to refuse frivolous suits and to concentrate on matters involving legitimate and significant disputes. Secondly, I believe that the Counsel will recognize a grave responsibility to utilize his resources in the best possible way. I believe that the realization that any resources committed to frivolous claims will simply detract from legitimate ones, with Indians the losers, will be sufficient insurance that those resources are used wisely.

(b) and (c) Yes, I can state this unequivocally.

(d) Again, the Department of the Interior will vigorously advance the public welfare with regard to natural resources, including taking steps to correct past mistakes that may have been made.

20. (a) Section 11 is a "permissive" section. It authorizes the Authority to make requests and authorizes Federal agencies to cooperate with the Authority "to the extent permitted by law". I do not think it likely that any agency would commit itself to "free full-time assistance" to the Counsel Authority simply because its limited resources would not permit this.

(b) Although I cannot speak on behalf of the Defense Department, I would expect that all Federal agencies would cooperate as far as possible with reasonable requests of the Authority.

(c) I am not sure what is meant by "the influence the Indian cause has." Certainly there is a growing awareness of the wrongs that have been done to Indians over the years. If this awareness will tend to make agencies sympathetic to Authority requests for information and assistance, I see nothing improper in this. If by the phrase is meant political clout, I am skeptical about the suggestion that Indians have a great deal of this.

(d) I do not believe that the Trust Counsel Authority is likely in any given case to have on overwhelming advantage of resources over the party it is opposing. The limited resources of the Authority will not permit it to present a massive array of legal artillery against, say, a small private landowner who is arguably encroaching on Indian rights. As for States and cities, I believe they would be fully capable of marshalling sufficient resources to match the Authority's commitment to any one case. In any event, I do not see any way to equalize the accidental disparities in legal representation that various groups or persons can obtain. It is a

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problem that pervades the entire range of law and one that unfortunately has no easy solution. Once again, however, it should be borne in mind that, as the President has stated, it is Indians who are generally the losers under the existing situation because their pleas do not reach the courts.

21. (a) and (b) As indicated in the answer to Question 19, I believe that there will be ample incentive for the Trust Counsel Authority to decline to take on frivolous claims. The incentive is that every man-hour spent on a claim that has no merit is a manhour lost to those claims that are substantial. I believe that this awareness on the part of the Counsel will constitute a deterrence to his accepting insubstantial claims. I think it very unlikely that the Counsel will squander his resources in non-meritorious actions.

(c) I think it is unrealistic to think that the Authority will have time to kill by pursuing frivolous claims. I am convinced that there will be more than enough solid "business" for the Authority to insure that its attorneys do not have to create work to justify their existence.

22. I can assure you that the intent of sections 8 and 9 is not to require or encourage the Authority to foment litigation. This is not to say that the Authority could not -- if, say, it discovered an unknown Indian claim or right in the course of its business -- suggest to a tribe that action might be taken. However, I expect that in most instances, the Counsel will be responding to Indians, not the other way around. Certainly the intent of the language in sections 8 and 9 is to assure that the Authority acts in consonance with the wishes of Indians, not to urge it to stir up litigation.

23. Traditionally, the jury system has worked best in resolving questions of fact involving conflicting evidence. It has worked less well in dealing with complex questions of mixed law and fact, in which category Indian trust resource rights surely fall. We believe that these issues can best be handled by judges in trials without jury and a great deal more expeditiously, which is in the interest of all parties concerned.

24. It is true that other agencies and private attorneys give legal aid to Indians, but this occurs in a rather unsystematic way: these agencies and groups have many other responsibilities and clients to take care of. We do not believe that the United States can depend on private groups to carry out Federal responsibilities to Indians.

(a) The specific programs and grants mentioned cannot do the same job as the Trust Counsel Authority because they are not able to sue the United States in its capacity as sovereign and thus cannot protect Indian trust resource rights.

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(b) It is possible that the existence of the Trust Counsel Authority will discourage private donations. However, it should be noted that the Counsel will act only in the area of trust resource rights. There are many other Indian legal interests as to which there will be no lack of incentive for foundation support. Moreover, the Trust Counsel Authority is authorized to accept donations of funds and services. Rather than discouraging private help, the Authority may in fact attract it.

25. In light of the fact that the President vetoed S. 2007 on December 9, 1971, I shall not address myself to its provisions in detail. I would reiterate that Indian trust resource rights are a unique matter, totally unrelated to income level, which was the basic qualifying factor for the assistance of the National Legal Services Corporation. Regardless of whether disadvantaged Indians, like other disadvantaged Americans, are eventually given the kind of legal aid that such a Corporation would provide, the Government's trust responsibilities with regard to the resources of all Indians should be carried out free of conflicting interests.

26. The following suggestions were made concerning the Trust Counsel bill at the National Council on Indian Opportunities field hearings:

(a) The Board of Directors should be composed of seven members rather than four;

(b) The President should appoint the Board members from lists of Indians provided by Indians;

(c) The requirement that two Board members be Indians should be made more specific: i.e., "Indians" should be defined as "enrolled members of federally recognized tribes";

(d) The manner in which conflicting requests for the Trust Counsel's assistance are handled should be clarified;

(e) Justice should not be released of all Indian trust resource obligations;

(f) Make adjustments in the waiver of sovereign immunity;

(g) Clarify Section 10, which limits the past claims that can be sued upon by the Trust Counsel.

(h) Other agencies should be required, not merely authorized, to cooperate with the Trust Counsel Authority's requests for information;

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(l) Delete that provision of the bill which authorizes the Trust Counsel Authority to charge fees to Indian clients.

Items d, e, g, and i are suggestions which we adopted and which are reflected in S. 2035.

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