REPORT IN SUPPORT OF RECOMMENDATION 72–2

CONFLICTS OF INTEREST IN THE ADMINISTRATION OF THE FEDERAL TRUST RESPONSIBILITY

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Preface

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. 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

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summarized its views in this separate report. The Committee, however, relies on Professor Chambers' 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, 92 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.

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. Appendix B also contains a summary of contents received from various agencies and groups on the final text of the proposed recommendation.

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 Interior, 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 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.

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 intended 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 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."

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. 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 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, 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. Par-

ticipation 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.

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.

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 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.

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.[3] 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,[4] 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?[5]

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[3] *E.g., United States* v. *Kagama,* 118 U.S. 375 (1886); Message of President Nixon to Congress on Indian Affairs, July 8, 1970.

[4] 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."

[5] 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).

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 sufficient portion of these vital resources, Indian reservations can attain a level of economic development which permits their cuture 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*.[6] 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 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* [7]

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[6] A. Scott, *Trusts*, § 176–77.

[7] *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).

of those lands which they retained.[8] 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,[9] it is not clear how far they may depart from the initial agriculutral use served by irrigation.[10] Can, for example, the Crow Tribe claim water under the Winters Doctrine for the mining of coal? [11] 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 of 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 [12] and for management and utilization of public land and water resources in the western United States.[13] The Department's Solicitor, the agency's general 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.[14] As

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[8] See generally Veeder, *Winters Doctrine Rights; Keystone of National Programs for Western Land and Water Conservation and Utilization,* 26 Montana L. Rev. 149 (1965).

[9] "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).

[10] 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.

[11] See pp. 23–28, *infra.*

[12] 25 U.S.C. §§ 1, 2, 9 ; 43 U.S.C. § 1457 (10).

[13] 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.

[14] 25 U.S.C. § 175. See discussion, pp. 64–65, and Note 1, p. 64.

a final complication, moreover, the Department of Justice defends Indian Claims Commission proceedings for the United States.[15]

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.

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." [16] 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." [17] He explained that Indian tribes, while in some sense possessing attributes of national sovereignty, are "domestic dependent nations," dependent on the United States for

[15] See pp. 39–43.
[16] Felix S. Cohen, *Handbook of Federal Indian Law* (hereafter "Cohen"), p. 169.
[17] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 at 17.

protection. Marshall concluded that "their relation to the United States resembles that of a ward to his guardian." [18] 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:

> "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . ." [19]

It then went on to state that:

> "From their very weakness and helplessness . . . *there arises the duty of protection*, and with it the power." [20]

The principal teaching of *Kabama* 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, [21] leased [22] or even disposed of by will [23] except with federal approval. Contracts may not be executed [24] nor tribal attorney hired [25] without consent of the federal executive.

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[18] *Id.* at 18 (emphasis supplied).

[19] 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."

[20] *Id.* at 384 (emphasis supplied).

[21] 25 U.S.C. § 177.

[22] *E.g.*, 25 U.S.C. § 415.

[23] 25 U.S.C. § 373.

[24] 25 U.S.C. §§ 81, 85.

[25] 25 U.S.C. §§ 31a *et seq.*

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 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.[26] 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.[27]

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.[28] Since these duties appear, under the case law to be reviewed, to be legal rather than moral obligations of the sovereign,[29] 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[30] 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.[31]

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[26] Cohen, p. 169.

[27] Compare Cohen, p. 169.

[28] *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, *Senaca 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.

[29] 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.

[30] 25 U.S.C. §§ 70 *et seq.*

[31] 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.

The Courts have rather often held that, where the trust relationship exists,[32] the same principles of law should apply to federal executive officials, when dealing with Indian trust property, "as would be applied to an ordinary fiduciary," [33] *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 every-

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[32] 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.

[33] 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.

thing reasonable under the circumstances to protect the tribal assets, and has thus satisfied the fiduciary's duty of exercising reasonable care.

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" owned by a fiduciary.[34] While the 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.

[34] A. Scott, Trusts, p. 1297 and Sections 170–171.

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, 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).[35] But in *United States* v. *Creek Nations*, 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 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.

[35] 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).

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 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 practice—aptly describes the result of most, although not all,[36] cases where a conflict of intereste has arisen in the discharge of the federal trust responsibility.

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[36] 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."

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. 2035 and H.R. 8797.[37]

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

[37] 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."

Program Support Staff recommended that Secretary Udall approve a lease of lands to Yuma County for an airport and park facilities.[38] 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.[39] The Solicitor then determined that the proposed lease was legally unobjectionable so long as one irrigable parcel of land was excluded from it.[40]

In rendering this "opinion", the Solicitor was in reality arbitrating a dispute among various of his "clients." The BIA, on the one hand, resisted the lease; other Bureaus within the Department supported it. Clearly, the Solicitor could not provide complete legal representation to the competing interests. Rather than acting as an advocate, he functioned as an umpire and fashioned a "compromise" solution. Moreover, the critical technical determination as to which lands were irrigable and which were nonirrigable was made by the Bureau of Reclamation, one of the Bureaus which *favored* the lease.[41]

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.[42] 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 once the canal was constructed.

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

[39] Act of August 15, 1894, 28 Stat. 332 (1894).

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

[41] *Id.* at p. 2.

[42] Act of February 15, 1893. 27 Stat. 456 (1893).

Evidence introduced before the Indian Claims Commission [43] 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.[44] 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.[45]

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." [46] 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.[47] This legislation was far less advantageous to the Quechans than the 1893 agreement, for the entire cost of the irrigation project was to be borne by them, and the land was to be sold at its value prior to reclamation, rather than by auction at market value as provided in the 1894 Act. Allotments were not made until 1912, nearly twenty years after the 1893 agreement.[48]

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,[49] 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

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[43] 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.

[44] 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 disposd of under the reclamation laws of the United States.

[45] 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."

[46] 28 Stat. 286. 336 *et seq.*

[47] 33 Stat. 189 at 224 (1904).

[48] Veeder memorandum, *supra*, p. 22, n. 3, at pp. 23–24.

[49] This was recognized in an earlier opinion by the Solicitor, January 8, 1936. M–28198, pp. 10–11.

issue, of course, is not whether these arguments would ultimately be sustained: the crucial point is that they were never articulated by the Solicitor.

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

The Bureau of Reclamation is the other agency within the Interior Department which most often has claims which conflict with Indian trust property rights. The federal reclamation program, originally limited to the construction of irrigation works for both public and private users, has expanded over the past seventy years to provide water for power, municipal, commercial, and industrial users.[50] Reclamation projects may store and sell surplus waters, and may advance such objectives and navigation flood control.[51]

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 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.[52] 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.[53] Without legal opposition from within the government,

[50] 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.

[51] J. Sax, "Federal Reclamation Law." *Water and Water Rights,* p. 121.

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

[53] *United States* v. *5677.94 Acres of Land,* 162 F. Supp. 108 (D. Mont. 1958).

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,[54] 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.[55] The Field Solicitor proposed a restrictive interpretation of the *Winters* case, which would limit the rights conferred by the doctrine to uses in agricultural production. Since the Crow Tribe is primarily desirous of developing coal deposits on the reservation—estimated at up to one billion tons—the Field Solicitor's opinion would deny them the right to use Big Horn water in preference to Reclamation for this purpose. The Field Solicitor adopted this position while admitting that "it has not been decided whether the use of *Winter's* [sic] Decree water may be changed from irrigation to industrial use." [56] 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 contained in a study that this was all the water which could be made available to the Indians.[57] 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

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

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

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

[57] 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."

would be available from Yellowtail Reservoir for industrial purposes—two-and-one-half times the amount projected in the study preceding the 1968 agreement. It was stated that much of this water had been contracted for and that the sale of industrial water alone would repay the cost of constructing Yellowtail Reservoir earlier than planned. A persuasive argument can be made that the tribe is entitled to sufficient water to meet all of its beneficial needs, including industrial uses, or that it is entitled to compensation for the loss of water rights not covered by the condemnation of the Yellowtail power site. But since this would obviously involve a payment by the government, this claim has not been pressed by the Indians' trustee.[58]

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.[59] 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.[60]

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.[61] The canal steadily depleted the water supply of Pyra-

[58] 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."

[59] 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.

[60] *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.

[61] Veeder Committee Print, pp. 499–500. The Carson River runs south of, and generally parallel to, the Truckee.

mid Lake, reducing its level and ultimately destroying its natural fishery.

After the canal was constructed, the United States initiated quiet title actions to adjudicate the rights of water users along the Carson and Truckee Rivers. A temporary decree was entered in 1950 in *United States* v. *Alpine Land and Reservoir Co.*, Equity No. D–183 (D. Nev.) adjudicating the respective rights of the Newlands project and private users to Carson River water. A final decree along the Truckee, the *Orr Water Ditch* decree, was entered in 1944.[62] 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.[63] The United States did, however, assert and secure a water right for the Newlands Project to divert Truckee water.[64] 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 [65]—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.[66] This project has two principal components: (1) Stampede Dam on the upper Truckee River, and (2) Watasheamu Dam and Reservoir on the Carson River, upstream from the canal and Newlands Project. The major threat posed by this project to Pyramid Lake is the construction and authorization of Watasheamu Dam and Reservoir. If operated for the benefit of upstream Carson

[62] *United States* v. *Orr Water Ditch Co.*, Equity No. A–3 (D. Nev.).

[63] 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. 78 (1918).

[64] 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.

[65] Memorandum, Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs, May 5, 1955, M36282.

[66] Act of August 1, 1957, ch. 809, § 2(a) 70 Stat. 775, 43 U.S.C. § 614a (a) *et seq.*

users, it would have the certain effect 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." [67] 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 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.[68] The motion to intervene was opposed by Justice and denied by the District Court and the Court of Appeals for the Ninth Circuit.[69]

(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.[70] 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

[67] 43 U.S.C. § 614c.
[68] Veeder Committee Print, pp. 507–508.
[69] *United States* v. *Alpine Land and Reservoir Co.*, No. 24, 156 (9th Cir. Aug. 24, 1970).
[70] *Pyramid Lake Paiute Tribe* v. *Hickel*, Civil No. 2506–70 (D.D.C. filed Aug. 21, 1970).

the lake's fishery, and to cease wasteful diversions of Truckee River water for the Newlands Project. 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.[71] 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." [72]

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.[73] 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 [74] 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.[75] Thus the federal attorney for the pueblos is aware

[71] Ethical Consideration 5–15.

[72] *Jedwabny* v. *Philadelphia Transportation Co.*, 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 906 (1958).

[73] The San Juan Chama Project was authorized in 1962. 76 Stat. 96.

[74] *New Mexico* v. *Aamodt*, No. 6639, U.S. District Court, D. New Mexico.

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

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. . . .[76] 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 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.[77] 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.[78] 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 administrative procedures under New Mexico State law, notwithstanding the federal nature of Indian water rights.[79] When it filed its complaint, the State prepared an elaborate hydrographic 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

[76] Complaint, paragraph VI(a).

[77] Rosenfelt Report, p. 28.

[78] 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.

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

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.[80] 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.[81]

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.

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 [82] to be held in aboriginal "Indian title" [83] 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." [84] Nonetheless, when consent was refused by the Tribal Council, the firm constructed the road without the permission of either the Indians or the BLM.[85]

In January 1969, the Tlingits and Haidas requested the Solicitor for the Interior Department to take action against the builder for its trespass.[86] 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 described in some detail the factual results

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[80] Rosenfelt Report, p. 39.

[81] *Id.* at 43.

[82] *Tlingit and Haida Indian* v. *United States,* 147 Ct. Cl. 130 (1968).

[83] 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) ; *Chocteau* 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).

[84] Letter, James W. Scott, Manager, Anchorage District Office, BLM, to Moore & Roeser, Inc., May 21, 1968.

[85] Letter, I. S. Weissbrodt to Edward Weinberg, Solicitor, Department of the Interior.

[86] *Ibid.*

of the investigation.[87] 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.[88] Ultimately, the action was dismissed by the United States.

The Solicitor's Office, evidently, did not wish to claim that aboriginal "Indian title" give 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.[89] 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,[90] 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,[91] 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, which would pass over lands claimed by Alaskan natives by virtue of Indian title.[92]

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

The Department of Justice's statutory duty [93] 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

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

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

[89] *United States* v. *Sante Fe Pacific R. Co.*, 314 U.S. 339 (1941).

[90] PLO 4582, 34 Fed. Reg. 1025 (1967).

[91] Federal Field Committee for Development Planning in Alaska, *Alaskan Natives and the Land* 453 (1968).

[92] 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).

[93] 25 U.S.C. § 70n.

claimed by the Indians.[94] Despite repeated requests, and a growing urgency as negotiations progressed concerning the terms under which the water company would sell all its assets to the City of Escondido and liquidate, the government refused to make any decision.[95] 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.[96]

The government's reluctance to commence litigation proceeded in part from a desire not to embark upon general riverwide water rights adjudications.[97] 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.[98] 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

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[94] Letter, Robert S. Pelcyger, California Indian Legal Services, to Mr. William F. Finale, Bureau of Indian Affairs, October 31, 1968.

[95] During the course of discussions between the Indians and their attorneys with California Indian Legal Services, on the one hand, and the Departments 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 Departments of Justice and the Interior have interests adverse to those of their Indian beneficiaries.

[96] *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, No. 69–217–S (S.D. Cal., filed July 25, 1969).

[97] 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.

[98] 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.

asserting their water rights.[99] If such an adjudication is a desirable means to protect the trust property, the government as trustee should have brought it. Similarly, if the statutory requirement that the Department of Justice defend Indian Claims Commission actions makes that agency less vigorous in protecting Indian trust property, new institutional arrangements should be created to fulfill that vital function.

Indeed, the Department of Justice has acknowledged that the pendency of the claims proceeding and concern that the United States could be liable for its sanctioning of the water company's diversion (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 determination that the riverfront lands were non-irrigable may have been motivated by a desire to minimize their value before the Claims Commission.[3]

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 Secre-

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[99] 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.

[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.

[3] See Letter, Roy R. Young, to Honorable Stewart L. Udall, March 13, 1968.

tary 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.[4] 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 consider this matter of great priority." [5]

The exertion of political influence which intercedes between the attorney and his clients is barred by the Code of Professional Responsibility.[6] 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 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.

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[4] *Ibid.*

[5] Memorandum, Secretary of the Interior, to Commissioner, Bureau of Reclamation, March 22, 1968.

[6] 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."

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

On July 16, 1969, a meeting was convened by the Assistant Secretary for Public Land Management, attended by representatives from the tribe, the National Congress of American Indians, the Bureau of Reclamation, Interior's Legislative Counsel, and members of the Solicitor's Office representing *both* Indian Affairs and Reclamation. All present agreed that a 1945 court decree constituted a full and complete adjudication of water rights in the Yakima River above the contemplated project and of all waters in tributaries to the Yakima River flowing through the Yakimas' land—particularly Toppenish and Satus Creeks, where two Indian irrigation projects were planned by the tribe. At this meeting Reclamation officials stated that they would make no use of tributary water, and the Assistant Secretary accepted their technical determination that the hydrology of the river did not require their use of these waters.[7] This assurance however, was directly contradictory to a prior House Report, wherein Reclamation had stated that, in order to establish project feasibility, it did rely on the inflows from these tributaries during certain times of the year.[8]

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

[8] 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 irri-

The Bureau of Reclamation's July disclaimer [9] is also inconsistent with a memorandum less than one month earlier, which stated that the extension would utilize *only* "return flow from upstream irrigation and uncontrolled spills past the point of diversion.[10]

Despite these plain inconsistencies in Reclamation's reports, the Assistant Secretary stated that his study confirmed Reclamation's disclaimer,[11] and on August 12, Secretary Hickel reaffirmed his support for the Kennewick Dam Extension.[12]

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.

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 [13] 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.[14] The grounds for the

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gation 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.)

[9] Jim Letter, p. 3.

[10] 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.

[11] Jim Letter, p. 3.

[12] Letter to Senator Jackson, August 12, 1969.

[13] 43 U.S.C. § 981 et seq.

[14] Speech, Representative Pettis of California, December 4, 1969 (H. 11816, Cong. Rec. Daily ed.) (hereafter referred to as Pettis speech).

petitions were that the Indian Claims Commission had determined the lands in question to be held by the Mohaves by "Indian title" in 1850.[15]

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 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.[16] 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 Pueblos 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.

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

[15] 7 Ind. Cl. Com. 219. The Supreme Court has declared the Swamp and Overflow Land Act to be in applicable 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.).

[16] Pettis speech.

them, so the Commissioner assigned him to the pueblos themselves,[17] 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.

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 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

[17] 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."

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 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.[18] 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.[19] The Board would, in turn, appoint an "Indian Trust Counsel" to be the Authority's chief legal officer.[20]

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" [21] in opposition to States and private claimants,[22] 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

[18] S. 2035 and H.R. 8797.
[19] S. 2035, sec. 2(b).
[20] *Id*, sec. 4.
[21] *Id*, sec. 8.
[22] *Id*, sec. 9.

a defense to such litigation.[23] This waiver of sovereign immunity represents a very 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 [24] and the Administrative Conference has proposed that the defense be abolished,[25] it has been reaffirmed several times by the Supreme Court in the past decade.[26] Sovereign immunity has a particular tenacity in Indian law,[27] 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 studied. And since Indians can recover money damages for takings of their property in the Indian Claims Commission [28] or, in the case of takings since 1946, in the Court of Claims,[29] it is sometimes thought by courts that equitable relief is precluded.

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, for there are two separate interests involved.[30] 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

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[23] *Ibid.*

[24] *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).

[25] *Recommendations and Reports of the Administrative Conference of the United States*, Vol. 1, p. 23.

[26] *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).

[27] *E.g., Scholder* v. *United States*, 428 F. 2d 1123 (9th Cir. 1970).

[28] 25 U.S.C. § 70 et seq.

[29] 28 U.S.C. § 1505.

[30] 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.

States in its general governmental capacity.[31] 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.[32] Government counsel has occasionally appeared on both sides of a controversy, where agencies are in disagreement,[33] or where one side—as here—represents the government's interests in a non-governmental capacity.[34]

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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[31] 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.

[32] See generally, Note, *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 Harv. L. Rev. 1050, 1055–56 (1949).

[33] 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. Th Secretary urged that the dam should be constructed by the Government and the dam site had been set aside for public development by Congress.

[34] *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.

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.[35] The Secretary must also notify water quality control officials in each state and include all state agency reports in his submission to Congress.[36] State fish and wildlife officials must similarly be consulted and their views considered and submitted. The Secretary is under a statutory duty to include in his reclamation project plans "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." [37] 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.

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[35] 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.

[36] 33 U.S.C. § 466a (b) (1).

[37] 16 U.S.C. § 662 (b).

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; 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 to assist in carrying out its functions [38] and allows it to hire "such . . . [independent] experts as it deems necessary." [39]

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 confiict 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

[38] S. 2035, sec. 11(2).
[39] Id., sec. 5(b).

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.

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.[40]

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 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." [41]

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[40] 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.

[41] In *Siniscal* v. *United States*, 208 F.2d 406 (9th Cir. 1968), *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

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 ranches 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 claims.[42] 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

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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).

[42] 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.

the *Orr Water Ditch* case.[43] 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.

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 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.

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[43] 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 Watch Ditch* case, the action is brought by Justice, it should not be permitted to confront the Authority with the dilemma of devoting a disproprotionate 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.

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 confiict 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 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.[44] The ABA's Code of Professional Responsibility provides that an attorney "should resolve all doubts against the propriety of" representing multiple clients.[45] The "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

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[44] 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 the 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).

[45] 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).

Solicitor is placed in the ethically troublesome position of "mediating" between his clients.[46]

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.

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 conflecting legal opinions and views would at least be arbitrated by the chief administrative official in the Department.[47]

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." [48] 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.

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

[46] 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.

[47] A different problem, the role of the Solicitor in deciding administrative appeals within the Dpartment 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.

[48] Secretary Morton, Press Conference on October 4, 1971 (hereafter "Morton Press Conference").

its level of appropriations is relatively high; for the first year, the Secretary has reserved two million dollars.[49]

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.

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,[50] 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,[51] and the independence of the Authority from any obligations to an existing executive department appears preferable.

The Secretary may not presently possess statutory authority to provide legal services directly to Indian tribes.[52] 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

[49] Morton Press Conference, p. 4.

[50] 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.

[51] 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.

[52] 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 revokd) and the Zuni Tribe has assumed control over all operations of the local BIA office on the Zuni reservation pursuant to that section.

APPENDIX B

COMMENTS ON PROPOSED RECOMMENDATION

1. Earlier comments of Federal agencies on tentative recommendation.

   a. Letter of Mitchell Melich, Solicitor, Department of the Interior, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated November 1, 1971.

   b. Letter of Robert W. Berry, General Counsel, Department of the Army, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated November 2, 1971.

   c. Letter of Richard G. Kleindienst, Deputy Attorney General, Department of Justice, to S. Neil Hosenball, Chairman, Committee on Claims Adjudications, dated December 27, 1971.

2. Summary of comments on final text of proposed recommendation.

IN REPLY REFER

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. 15318, 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

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.

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

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.

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.

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.

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.

# # #

Attachment
Interior No.
Letter

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

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.

ATTACHMENT "B"

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

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	5,307

NAME OF CONTRACTOR

Smith Electric Co.

Yakima Indian Contractors

Yakima Indian Contractors

Hoopa Valley Tribe

Hoopa Valley Tribe

Pit River Coop. Assn.

Pala Indian Tribe

Tule River Tribe

Susanville Indian Rancheria

Inter-Tribal Council of California

Covelo Indian Community

Ft. Bidwell Indian Tribe

Hoopa Valley Tribe

ATTACHMENT "D"

TYPE OF SERVICES PROVIDED	DATE AWARDED	AMOUNT
Install Electric Service	5/27	2,129
Roofing of building	5/21	2,415
Framing of building	5/4	2,465
Sidewalks and curbs	5/13	2,030
Irrigation System	5/21	7,000
Repairs to Pit River Flume	5/28	2,000
Housing Material	5/28	1,000
Repairs to Irrigation Systems	5/27	2,000
Adult Education Training Center	6/28	2,520
Welfare Grants	5/24	5,000
Meetings	8/12	2,000
House Repairs (HIP)	5/24	1,200
Forestry aid services and look=out services	8/27	6,700

ATTACHMENT "B"

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

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

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).

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)

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
General Counsel

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 1[illegible], 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

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),

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

SUMMARY OF COMMENTS ON FINAL TEXT OF
PROPOSED RECOMMENDATION

1. Mr. Bradley H. Patterson, Jr., Executive Assistant to Mr. Garment, The White House, reports that a new procedure has been instituted by the Departments of Interior and Justice to ameliorate conflict of interest problems, a matter referred to in part B of the Committee's proposal.

2. Department of Defense -- The Department and Army Corps of Engineers have no objection to the requirement that agencies give notice of actions significantly affecting Indian interests. That requirement "would not impose undue administrative burden on the Corps" and appears to be a "desirable extension of present procedures."

3. Department of Agriculture -- Agriculture also has no objection to the proposed Committee recommendation that notice be given of actions significantly affecting Indian natural resources.

4. National Council on Indian Opportunity, Office of the Vice President -- Mr. Robert Robertson, Executive Director, is "hopeful" the Conference will endorse the President's proposed bill. The Council originated the bill's concepts.

5. National Tribal Chairman's Association -- Mr. William Youpee, President, finds most tribal reaction "supportive" of the Trust Counsel concept. His organization testified in support of the bill, but proposed (a) retaining a role for the Justice Department in protecting Indian resources; (b) waiving the sovereign immunity of the U.S. in all Indian resource lawsuits which the courts found "justified;" (c) requiring government agencies to furnish information to the new Authority on request and (d) increasing the size of the Authority's Board of Directors, and giving the Indians a voice in selection.

6. National Congress of American Indians -- The NCIA is in "general accord" with the proposed recommendation, according to Mr. Franklin Ducheneaux, Legislative Consultant. They support the Trust Counsel Authority with certain reservations, some of which coincide with the Committee's proposal. A number of their suggestions relate to the selection and powers of the Authority's Board of Directors. A major concern is to obtain a clarification of the responsibilities of the Justice Department under the pending bill.