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INDIAN TRUST COUNSEL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 2035

A BILL TO PROVIDE FOR THE CREATION OF THE INDIAN TRUST COUNSEL AUTHORITY, AND FOR OTHER PURPOSES

NOVEMBER 22 AND 23, 1971

Printed for the use of the
Committee on Interior and Insular Affairs

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INDIAN TRUST COUNSEL AUTHORITY

MONDAY, NOVEMBER 22, 1971

U. S. Senate,
Subcommittee on Indian Affairs,
of the Committee on Interior and Insular Affairs,
Washington, D.C.

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

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

Also present: Jerry T. Verkler, staff director; Forrest J. Gerard, professional staff member; and Charles Cook, minority counsel.

Senator Anderson. The hearing will come to order.

This is the first of a 2-day open public hearing before the Subcommittee on Indian Affairs to take testimony from public and private witnesses on S. 2035, to provide for the creation of the Indian trust counsel authority, and for other purposes.

The purpose of this proposal, as set forth in section 1, is to establish an Indian trust counsel authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

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

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

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

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

(The documents referred to follow:)

92D CONGRESS
1ST SESSION

S. 2035

IN THE SENATE OF THE UNITED STATES

JUNE 9, 1971

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

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That in reaffirming the trust and treaty relationships be-
4 tween the United States of America and the American In-
5 dians, and between the United States and the Alaska Natives,
6 which Indians and Natives are hereinafter referred to as
7 "Indians", the purpose of this Act is to establish an Indian
8 Trust Counsel Authority to provide independent legal coun-
9 sel and representation for the preservation and protection of
10 the natural resource rights of the Indians.

II

1 Sec. 2. (a) The Indian Trust Counsel Authority, herein-
2 after referred to as the Authority, is established as an inde-
3 pendent agency in the Executive Branch.
4 (b) The Authority shall be governed by a Board of
5 Directors composed of three members to be appointed by the
6 President by and with the advice and consent of the Senate.
7 (c) At least two of the members of the Board of Direc-
8 tors shall be Indians.
9 (d) The terms of office of members of the Board of
10 Directors shall be four years, except that of the first three
11 members appointed, one shall be appointed for a two-year
12 term, one shall be appointed for a three-year term, and one
13 shall be appointed for a four-year term. A member appointed
14 to fill a vacancy occurring prior to the expiration of the term
15 for which his predecessor was appointed shall be appointed
16 for the remainder of such term. Upon the expiration of his
17 term of office, a member shall serve until his successor has
18 been appointed and qualified. A member of the Board of
19 Directors may be removed by the President only for ineffi-
20 ciency, neglect of duty, or malfeasance in office.
21 (e) The President shall designate one of the Directors
22 to serve as Chairman at his pleasure.
23 (f) The members of the Board of Directors shall receive
24 pay at the daily equivalent of the rate provided for grade
25 GS-18 in section 5332 of title 5, United States Code, for each

1 day they are engaged in the business of the Authority, and
2 shall be allowed travel expenses, including a per diem allow-
3 ance as authorized by section 5703 of title 5, United States
4 Code, in connection with their services for the Authority.
5 SEC. 3. The Board of Directors shall convene at the
6 call of the Chairman, but must convene at least once each
7 quarter, to set policy for the Authority and review its activ-
8 ities. The Board of Directors shall report to the President
9 and the Congress annually on the activities of the Authority.
10 SEC. 4. The Board of Directors shall, without regard to
11 the provisions of title 5, United States Code, governing
12 appointments in the competitive service, appoint and pre-
13 scribe the duties of a chief legal officer for the Authority,
14 who shall have the title of Indian Trust Counsel, and who
15 shall be paid at a rate equal to that provided for in level V
16 of the Executive Schedule (5 U.S.C. 5316), and a Deputy
17 Indian Trust Counsel who shall be paid at a rate not in ex-
18 cess of that provided for grade GS-18 in section 5332 of
19 title 5, United States Code.
20 SEC. 5. (a) The Board of Directors shall appoint, fix
21 the pay of, and prescribe the duties of such attorneys as it
22 deems necessary after consulting with the Indian Trust
23 Counsel.
24 (b) The Board of Directors shall appoint and fix the

1 compensation of such special counsel and experts as it deems
2 necessary.
3 (c) Attorneys or special counsel appointed under this
4 section may, at the direction of the Authority, appear for or
5 represent the Authority in any case in any court, before any
6 commission, or in any administrative proceeding.
7 (d) The Board of Directors may, in the event of a
8 conflict between parties requesting the assistance of or the
9 representation of the Authority under the provisions of sec-
10 tion 8 or 9 hereof, hire special counsel or experts to assist
11 or represent one or all of the parties.
12 SEC. 6. The Board of Directors shall, subject to the
13 provisions of title 5, United States Code, appoint such em-
14 ployees as it deems necessary in exercising its powers and
15 duties.
16 SEC. 7. The Authority, in the exercise of its functions,
17 shall be free from control by any executive department.
18 SEC. 8. The Authority, with the consent of an aggrieved
19 Indian, Indian tribe, band, or other identifiable group of
20 Indians, is authorized to render legal services in regard to
21 rights or claims of the Indians to natural resources, including,
22 but not limited to, rights to land, rights to the use of water,
23 timber, and minerals, and rights to hunt and fish, within the
24 United States trust responsibility owing to the Indians,
25 which services are now rendered by the Department of the

1 Interior or by the Department of Justice, but nothing in this
2 Act shall absolve the Department of the Interior and the
3 Department of Justice of their responsibilities to the Indians,
4 including those which derive from the trust relationship
5 and any treaties between the United States and any Indian
6 or Indian tribe: *Provided,* That the Department of Justice
7 as of the effective date of this Act or as soon thereafter as
8 practicable, is relieved of its responsibility to represent In-
9 dians or Indian tribes with regard to their rights or claims
10 to natural resources, including, but not limited to, rights to
11 land, rights to the use of water, timber, minerals, and rights
12 to hunt and fish. The legal services performed pursuant to
13 this section may include, but shall not be limited to, the in-
14 vestigation and inventorying of Indians' land and water
15 rights, and the preparation and trial and appeal of cases in
16 all courts, before Federal, State, and local commissions, and
17 in all administrative proceedings.
18 SEC. 9. The Authority, with the consent of an aggrieved
19 Indian, Indian tribe, band or other identifiable group of
20 Indians, acting in the name of the United States as trustee
21 for the Indians, may initiate and prosecute to judgment in all
22 courts of the United States, suits against the United States,
23 its officers and employees, and in all courts of the United
24 States and of the States, suits against any of the States, their
25 subdivisions, departments and agencies, or against persons

1 and corporations, public or private, all actions in law and
2 equity for the protection, preservation, utilization, conserva-
3 tion, adjudication, or administration of natural resources or
4 interests therein had or claimed by the Indians, including,
5 but not limited to, rights to land, rights to the use of water,
6 timber, and minerals, and rights to fish and hunt. The Au-
7 thority is authorized to prosecute appeals in all courts of the
8 United States and of the States, and to intervene in any Fed-
9 eral, State or local administrative proceeding in order to pro-
10 tect the rights of the Indians. The United States waives its
11 sovereign immunity from suit in connection with litigation
12 initiated by the Authority under this section. Any such suit
13 against the United States, its officers and employees should
14 be tried to the court without a jury.
15 SEC. 10. The powers granted to the Authority by this
16 Act shall not extend to the filing or prosecution of or inter-
17 vention in any action, claim, or other proceeding against the
18 United States relating to any matter as to which a claim has
19 been filed or could have been filed under the Indian Claims
20 Commission Act of 1946, as amended, or any other special
21 statute authorizing a claims suit to be brought by Indians
22 against the United States but shall not include suits that
23 could be brought under the provisions of section 1346 (a) (2)
24 and 1491 of title 28, United States Code: *Provided, how-*
25 *ever,* that the Authority may assist any Indian tribe request-

1 ing such assistance in its claim pending before the Indian
2 Claims Commission.
3 SEC. 11. The Authority is authorized to—
4 (1) make such rules and regulations as it deems
5 necessary to carry out its functions;
6 (2) request from any department, agency, or inde-
7 pendent instrumentality of the Government any informa-
8 tion, personnel, services, or materials it deems necessary
9 to carry out its functions under this Act; and each such
10 department, agency or instrumentality is authorized to
11 cooperate with the Authority and to comply with a
12 request to the extent permitted by law, on a reimburs-
13 able or nonreimbursable basis;
14 (3) receive and use funds or services donated by
15 others; and
16 (4) make such expenditures or grants, either di-
17 rectly or by contract, as may be necessary to carry out
18 its responsibilities under this Act.
19 SEC. 12. There are authorized to be appropriated to the
20 Authority created herein such sums as may be necessary to
21 carry out the provisions of this Act.

United States Department of the Interior,
Office of the Secretary,
Washington, D.C., April 28, 1971.

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

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

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

The purpose of this proposal, as provided in section 1, is to establish an Indian Trust Counsel Authority to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of the Indians in order to reaffirm the trust and treaty relationships between the United States and the American Indians and Alaska Natives.

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

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

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

Section 5 authorizes the Authority to appoint and fix the pay and prescribe the duties of attorneys it employs. It also authorizes the Authority to appoint and fix the compensation of needed special counsel and experts. Finally, it authorizes the attorneys or special counsel appointed by it to appear for and represent the Authority in any case before any court, commission or administrative proceeding pertaining to its responsibilities. Specific authority is given the Board to settle conflicts as to requests for assistance by the Authority by hiring experts or special counsel to represent one or all of the parties in the matter.

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

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

Section 8 authorizes the Authority, with the consent of any aggrieved Indian or Indian tribe, band, or other identifiable group of Indians, to render legal services in regard to rights or claims of the Indians in relationship to their natural resources. The extent of the Indians' rights in their natural resources to be protected by the Authority is set out in this section. This authority shall be exercised in combination with the authority exercised by the Department of the Interior in all of its trust responsibilities to the Indians and in relationship to the Department of Justice in the exercise of its responsibility to the Indians except that the Department of Justice no longer will exercise any responsibility to the Indians in the area of natural resources. This responsibility will be exercised under the provisions of the proposal by the Authority. This section also provides that the Authority may perform services pursuant to this section to include investigation and inventorying of Indians' land and water rights and the preparation, trial and appeal of cases involving the natural resources of the Indians in all courts and before Federal, State and local commissions and administrative bodies.

Section 9 authorizes the Authority, with the consent of any aggrieved Indian, Indian tribe, band or other identifiable group of Indians, acting in the name of the United States as trustee for the Indians, to initiate and prosecute to final

judgment in all Federal courts against the United States or any of its officers or employees, or in the Federal or State courts against any of the States, their subdivisions, departments or employees or against any persons or corporations, public or private, all actions in law and equity for the protection of the natural resource interests and rights of the Indians. The United States waives its sovereign immunity to suit in connection with litigation initiated by the Authority under this section. Suits against the United States and its officers and employees shall be before the court without a jury.

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

Section 11 enumerates the authorities of the Authority.

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

As the President stated in his message of July 8, 1970:

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

This proposal will carry out the policy enunciated in the President's message by establishing the Indian Trust Counsel Authority. The Authority will be, as provided in section 7, free from control of any Executive Department. This independence will free the trust Authority of having to take into consideration any interest other than that directly affecting the Indians and will allow it to independently carry out its function of protecting the natural resource rights and interest of the Indians.

The Authority will be under the direction of a three-man Board of Directors, two of which must be Indians. This majority control of the Board of Directors by the Indians will assure the Indians that they will have a majority voice in the direction of the activities of the Authority. Further, the Board is given the authority in the proposal to hire necessary attorneys including the chief legal officer and his deputy and such other personnel as they deem necessary to carry out the functions given them by the proposal. The majority control will assure the Indians that the people hired by the Authority to carry out the responsibilities of the Authority will be those people that are acceptable to them. This assurance should, from the inception of the Authority, make the Authority a body that has the confidence and trust of the Indians.

The proposal provides that the Indian Trust Counsel, who is the chief legal officer for the Authority, shall be a level V in the Executive Schedule. We feel that this level is necessary in order for the Authority to be able to obtain the kind of person that it needs to direct the legal activities of the Authority and at the same time given him sufficient stature to be able to deal with cabinet and

sub-cabinet members of the Executive Department. The Board of Directors is also authorized, in section 5 of the proposal, to hire, fix the pay and prescribe the duties of such attorneys, including special counsel, as it deems necessary. It is also given the authority to hire experts in connection with its work. These attorneys will be the working group that will carry out the responsibilities and functions of the Authority. It is the Administration's intention that the Authority will build up a cadre of well-trained and devoted attorneys whose energies will be turned to the protection and preservation of the Indians' natural resource rights and interests.

The authority to hire special counsel is needed in those instances when the Authority must go outside of its own attorney staff to hire an individual who is uniquely qualified to assist in the preparation of trial and appeal material regarding a special case. This also applies to its authority to hire outside experts.

Section 8 of the proposal authorizes the Authority to, upon the request of an aggrieved Indian or group of Indians, assist those Indians in the protection of their natural resource rights and interests in the courts and before administrative bodies. This authority will be used when a tribe has a justifiable claim and feels that it needs the assistance of the Authority for prosecuting its claim. The Authority is authorized to lend its assistance in the area of natural resource rights and interests to such Indian or Indian group. The section, however, makes it clear that the assistance rendered by the Authority in this section in protecting the rights of the Indians in their justifiable claims to natural resources, and the rights attached thereto, is in addition to the responsibilities that the Deparment of the Interior has to protect the Indians, not only in their natural resource rights, but in all rights protected by the trust relationship between the United States and the American Indians. The section also provides that the Department of Justice will, after the enactment of the proposal, be relieved of its responsibility to the Indians in the area of natural resources but will continue to fulfill whatever responsibility it may have with regard to Indian generally. This relieving of Justice's responsibility is subject to Justice, in pursuing a litigating position that affects the natural resource rights of the Indians, recognizing the responsibility of the United States arising from its trust responsibilities to the Indians.

Section 9 authorizes the Authority to initiate suits, when requested by an aggrieved Indian or group of Indians, acting in the name of the United States as trustee for the Indians, to protect the rights of the Indians in their natural resources from the United States or any of its departments, agencies, officers or employees as well as against the States, their subdivisions, departments and agencies or against any private or public person or corporation. This section also provides for the waiver of sovereign immunity of the United States in connection with litigation initiated by the Authority pursuant to this section. The Authority will use the power granted it by this section in those cases where the Indians' rights or claims are of such a nature that they are precluded from bringing suit against the United States because of bars that the United States has as a sovereign to suits generally. These bars will be removed by the provisions waiving United States' sovereign immunity as it relates to actions brought by the Authority. The proposal clearly limits the waiver of sovereign immunity to the narrow area of litigation initiated by the Authority.

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

Section 11 authorizes the Authority to make rules and regulations, to request assistance from any department, agency, or independent instrumentality of the Federal government to carry out its functions under this proposal and such assistance may be given to the Authority on a reimbursable or non-reimbursable basis. The Authority is authorized to receive and use funds authorized or donated to it by others. It is also authorized to make expenditures or grants, either directly or by contract, as may be necessary to carry out its responsibilities.

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

The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest of the beneficiaries of the trust without reservation and to the highest degree of its ability and skill.

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

Sincerely yours,

ROGERS C. B. MORTON,
Secretary of the Interior.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., November 26, 1971.

Hon. HENRY M. JACKSON,
Chairman, Senate Committee on Interior and Insular Affairs, U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 2035, a bill "To provide for the creation of the Indian Trust Counsel Authority, and for other purposes."

On July 8, 1970, in his Message to the Congress concerning Indian policy, the President called for legislation to create an Indian Trust Counsel Authority "to assure independent legal representation for the Indians' natural resource rights." S. 2035 would carry out that recommendation by creating such an authority, independent of any Executive department, which would represent Indian tribes and their members in matters relating to their natural resources. The bill would relieve the Department of Justice of its responsibility to furnish legal counsel or representation to Indian tribes and their members with respect to their rights or claims to natural resources.

The Department of Justice recommends enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

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

STATEMENT OF HON. ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ACCOMPANIED BY ASSISTANT SECRETARY HARRISON LOESCH AND FRANK BRACKEN

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

Mr. Chairman and members of the committee, I am pleased to appear here to support enactment of S. 2035. We have anxiously awaited action on the President's Indian message legislation and I welcome this opportunity to express my strong support for one of the most important items in that package. It is difficult to say which of the

bills is most important. But there is no question in my mind that S. 2035 stands at least on an equal footing with S. 2036, the Indian financing bill, which would have immediate and substantial values to the Indian on the reservation, and S. 1573, the transfer of control bill, which would lend speed and flexibility to the implementation of the President's goal of Indian self-determination.

Senator ANDERSON. Mr. Secretary, could I interrupt for a second. There is a vote going on now. I think we are going to have to stop for a vote in the next few minutes. I hope you understand that.

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

Senator ANDERSON. That would be very kind.

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

Mr. MORTON. We will miss you, sir.

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

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

As you know, the U.S. Government is charged with a "trust responsibility" with regard to Indians. This term is often misunderstood. It applies to resources, not to persons. This trusteeship is tied to the protection, preservation, and development of tribal and individual Indian resources, such as land, water, fishing and hunting rights, mineral development, and timber. This trust responsibility is frequently compared to the duties of a private trustee, such as the administrator of an estate. But the analogy is faulty because of a unique feature in the U.S. Indian trust responsibility: the assets of this trust must be managed and administered with the consent of the beneficiary—that is, the tribe or individual Indian. This factor complicates the decisions which must be made and at times makes a wholly satisfactory decision almost impossible to reach.

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

It is to assist in resolving this difficulty that S. 2035 is designed. This bill established an independent entity, the Indian Trust Counsel Authority. The sole objective and duty of the Trust Counsel would be the active advocacy of the trust resource rights and interests of Indians,

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untrammeled by other considerations of public policy. The Counsel would provide in this area the skilled and partisan service which a private individual would have a right to expect from his lawyer.

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

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

I would be even more delighted than I am to appear before you today if I were testifying on behalf of the entire Indian legislative package submitted to you for consideration by this administration. I urge you to give early consideration to the other bills which make up the portfolio but, in the meantime and for a start, I urge your prompt and favorable consideration on S. 2035, the Trust Counsel Authority bill.

Thank you.

Mr. Chairman, I would like to include in the record a recent statement by the Attorney General at the NCIO meeting in the office of the Vice President on October 29, 1971.

(The statement referred to follows:)

Remarks of Attorney General John N. Mitchell at Indian Economic Development Meeting October 29, 1971

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

As I am sure many of you know, a substantial number of the assets of the Indian tribes are lands held in trust for their benefit by the public by the United States government. And this imposes a major responsibility upon the United States government to see that those lands are properly administered and that the rights of the Indians therein are fully protected.

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

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

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

The substantive changes, of course, will in addition to providing counsel in the matter, also bestow upon the Indian interest the right to sue the United States

where their conflicting interests appear, and the legislation of course contains the necessary waiver of government immunity so that this may be carried out to the fullest extent and for the fullest advantage of the protection of the Indian rights.

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

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

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

Senator ALLOTT. Mr. Secretary, the documents that you have will be placed into the record in full at the conclusion of your testimony.

Could you stay a few minutes, Mr. Secretary?

Mr. MORTON. Sure, you bet.

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

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

Senator FANNIN. Just a couple of questions.

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

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

Mr. MORTON. I don't feel that the establishment of the Trust Counsel in any way ameliorates or diminishes the trust responsibility that exists in either the Department of Interior or the Department of Justice. I think what we are dealing with here is an opportunity for the Indians to shore up their representations in matters where Indian rights are, let us say, in conflict with the rights of others or, better said, Indian interests are in conflict with other interests. I think we must be careful to remember that we are not establishing here an administration of any kind, we are establishing here a representation. A representation for the Indian in legal matters. The creation of an advocate's position as opposed to an administrative position.

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

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

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

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

Mr. MORTON. Well, what is your time schedule? We are perfectly willing to recess for half an hour.

Senator FANNIN. Well, it is rather difficult to give you that information because the votes are on a 30-minute schedule. Thirty minutes on each side, but they are not taking that length of time so I don't know whether they will be voting again in 10 minutes.

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

Senator FANNIN. Thank you very much.

Could the Assistant Secretary stay for a few minutes?

Mr. MORTON. Sure.

Senator FANNIN. Thank you very much, I have about 1 minute.

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

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

But basically the Trust Counsel in no way reduces our trust responsibility. It simply provides a mechanism and an easier way in which conflicts of interest can be resolved in the courts and in no way interferes with the Indian's position in the Court of Claims.

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

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

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

Mr. LOESCH. In response, Mr. Anderson, let me say that first of all the only true procedural change that I see is when a matter in which the Department or Bureau was interested was to go to suit, the request for such suit would be made by the Department, the Solicitor's office of the Trust Counsel would have the authority rather than the Justice Department as the case is now. On an administrative level the

bill contemplates that the Trust Counsel would, at the request of its Indian clients, take part in the administrative matters within the Department as well as after it left the Department.

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

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

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

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

I don't think it can be said that the Indians have come out of the last 200 years in a position of equity with other segments of the society. I think it is most important that we recognize this and I think we might call it a failure on the part of the system. I don't think we can point a finger at any segment of government, but it is the failure of government across the board. It is the failure of the Congress, failure of the Executive, the failure of perhaps the State and local governments in their responsibility to the Indian people.

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

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

Senator Allott has some more questions, sir, but these are the ones he could submit if he couldn't get back—unless Secretary Loesch wants to wait a few minutes to do it that way.

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

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

Mr. LOESCH. No; I have no statement.

Senator ANDERSON. I think we had better wait for Senator Allott.

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

Mr. MORTON. Good morning.

Senator GRAVEL. I have no questions, I just wanted to say good morning.

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

Senator GRAVEL. We would appreciate that very much.

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

Senator GRAVEL. Very good.

Senator ANDERSON. Mr. Fannin.

Senator FANNIN. Thank you, Mr. Chairman.

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

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

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

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

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

Now, does that answer your question?

Senator FANNIN. Well, on page 5 of the bill, on line 6, it says:

"The Department of Justice as of the effective date of this act or as soon thereafter as practicable is relieved of its responsibility to represent Indian Tribes with regard to their rights."

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

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

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

Mr. LOESCH. Yes.

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

What would happen in the area of natural resources claims representations, if the funds appropriated should not be sufficient?

Mr. LOESCH. Well, Senator, of course, it is just like everything else in the Government, there is never enough money to do everything that

you want to do all at once. I presume priorities would have to be ordered to fit the budget. But I have no notion but what the appropriation process would be responsible in this regard.

Senator FANNIN. Well, the question arises because if many lawsuits are filed claiming the Indians are entitled to existing water, land, or minerals in the country, the public pressure might demand a cutback of the funds for the Authority.

Mr. LOESCH. Yes.

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

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

Senator FANNIN. There seems to be some question on this. On line 1, page 5, the bill states: nothing in the act absolves Interior or Justice of any responsibility including trust responsibility and the question is, how can Justice properly perform its trust responsibility when the subsequent provisions of the bill relieve it of representation of Indian's legal rights? Do you think it is clear in this bill?

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

Senator FANNIN. Well, Mr. Secretary, one of the questions: Will the trust counsel authority be subject to any control by the Office of Management and Budget?

Mr. LOESCH. Presumably so, Senator Fannin.

Senator FANNIN. The same as any other administrative agency.

Mr. LOESCH. Yes.

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

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

Senator FANNIN. The reason I ask that, is the sentence on page 4, which says, "the Authority in the exercise of its functions shall be free from control by any executive department".

Mr. MORTON. I think perhaps the bill is—we might shore it up in that regard because just the same as any other independent agency has to reflect its responsibility to the budget and to its own administrative housekeeping, I think what was intended here is that it is not to be

subordinated by any other mission agencies which have an interest that well may be in conflict with this.

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

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

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

Mr. MORTON. Yes.

Senator FANNIN. I have no further questions.

Senator ANDERSON. Mr. Gravel.

Senator GRAVEL. I have some questions.

No. 1, I want to compliment your office and whoever is responsible for initiating this. I understand it is the administration's bill. I think the advocacy principle really offers people an opportunity to make corrections in society that Government appears unable to do. So, let me just underscore my compliment to the administration in that regard.

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

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

That was because a very purist attitude was adopted. Unless it is 101 percent Indian, they won't contract such authority. I thought that was a mistake, since the population of Fort Yukon is probably 99 percent Indian.

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

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

I think you share the same view that I have if I recall the testimony at that time. To hang on to the fact that only one person was not a native, I think that would be a very specious way of avoiding what is a good principle; that is, the contracting with the natives.

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

I feel we need a clearer direction and a clearer authority from the Congress in the form of a mandate of how to proceed.

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

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

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

Secretary MORTON. It is right up there with you.

Senator GRAVEL. Well, I will look at it.

The other question I have, I don't recall specifically, you probably read the Post item this morning concerning Mr. Bruce and the elevation of some of the younger braves to positions of importance. Is there any rhubarb that we should know of in this regard?

Secretary MORTON. No. In the first place, we are trying to get a greater sense of the motion in the Department. We are trying to get a greater sense of motion in the bureau toward the development of a better intrastructure for the reservation, for more beneficial programing, and I think the Assistant Secretary and the Deputy Assistant Secretary and the Commissioner are all trying to accomplish the same thing.

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

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

The only thing that can hold us back now is a failure of the Congress to act on the legislation that we need to give us the real authority to move ahead in these areas.

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

Secretary MORTON. We appreciate a compliment.

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

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

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

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

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

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

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

(The document referred to follows:)

[From the Washington Post, Nov. 22, 1971]

INDIAN BUREAU SHIFTS UNCERTAIN

(By William Greider)

The Department of Interior usually keeps a short leash on the Bureau of Indian Affairs. Anything important that the BIA wants to do has to be cleared across the street. But this time the Indians were told first—and Interior officials heard about it afterwards.

Indian Commissioner Louis R. Bruce ordered a reshuffling of top personnel in the BIA to strengthen the position of young Indian activists on his staff. The Interior Department promptly described his actions as "temporary personnel changes" still subject to review.

The commissioner's announcement of transfer and appointments was made this week in Reno, Nev., before the National Congress of American Indians, and the actions could resolve the bureaucratic in fighting that has divided the federal agency for four or five months.

Bruce, a Mohawk-Sioux, elevated many of the young Indians who have been the center of controversy, at the expense of older career officials, most of whom are white. If his choices are not sustained by his superiors at Interior, it will be clear to tribal leaders that Bruce has lost the battle for control.

Lee Cook, a 31-year-old Red Lake Chippewa from Minneapolis who was elected president of the NCAI at the Reno convention, endorsed Bruce's proposed changes. Cook, a former BIA official himself, resigned several weeks ago, critizing the slow pace of reform.

In general, Bruce's "all-Indian team" has complained that the old-line agency bureaucrats block reforms, particularly the Nixon administration's goal of self-determination contracts through which Indian tribes can take over the operation of government programs on reservations. The career officials, on the other hand, contend that the activists' eagerness for change has resulted in sloppy management and improper contracts.

In July, Interior Secretary Rogers C. B. Morton appointed a deputy commissioner, John O. Crow, to serve under Bruce but with board authority to provide "good management." Though Crow is a Cherokee himself, the other Indians regarded him as an ally of the old-line BIA employees and interpreted his appointment as a further obstacle to reform.

The commissioner has been negotiating for executive changes for several months, but apparently he announced his personnel transfers to the Indian leaders gathered in Reno without first getting them approved by Morton or Interior Department aides.

Bruce appointed Ernest Stevens, an Oneida from Wisconsin, an assistant commissioner for economic development and emphasized the goal of protecting Indian land and water rights as well as stimulating "true Indian economic development." Both will be directed by Stevens, who replaces William Freeman.

Alexander MacNabb, a Micmac Indian and another controversial figure, was named to the new post of assistant commissioner for engineering and construction, where he will supervise the expanding program of reservation road-building

Secretary Morton issued a statement after Bruce's speech expressing general support of the commissioner's objectives, but the statement said the "temporary personnel changes . . . will be reviewed by Secretary Morton and Commissioner Bruce in the very near future."

A spokesman for the Secretary, Virginia Hart, said that "in no case are these personnel actions final because the paperwork has not been done on them yet. I'm not sure in all cases that the Secretary really has been informed of the commissioner's views on these."

Bruce said, however, "I made my choices and the papers are being prepared and submitted for departmental approval and I have every confidence that they will be approved at that level."

In addition to Stevens and MacNabb, Bruce appointed James Hena, a Teuque Pueblo, as his executive assistant; Flore Lekanof, an Aleut, as acting assistant commissioner for community services, replacing Stevens; and Hanay Geigamah, a Kiowa, as director of youth programs.

The contracting office, the subject of disputes in recent months, will be under Robert Gajdys, who becomes director of administrative services. He is a non-Indian who has been deputy to MacNabb. Harold Cox, a Creek Indian regarded as an ally of Crow, will move down from associate commissioner to director of management services.

Bruce said Crow will continue as deputy commissioner. "He still works for me and he will carry out my assignments," said the commissioner.

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

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

Senator ANDERSON. Thank you, Mr. Secretary.

Secretary MORTON. Thank you very much, Senator.

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

Will you please come forward, Mr. Kashiwa?

STATEMENT OF SHIRO KASHIWA, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY DAVID R. WARNER AND FLOYD L. FRANCE

Mr. KASHIWA. I am here in response to the request of this subcommittee for testimony from the Department of Justice concerning the bill, S. 2035. With me are David R. Warner, the long-time Chief of the General Litigation Section of the Land and Natural Resources Division, and Floyd L. France, Assistant Chief of the same section.

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

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

The bill provides in section 8 that:

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

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

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

It should also be noted that by section 10 the United States would waive its sovereign immunity in connection with litigation initiated by the Authority. This is necessary if the courts are to be enabled to pass on the U.S. fulfillment of its trust responsibilities in Indian natural resource matters. And since the Department of Justice will need to

represent the United States in any such suits, it is fitting that its responsibilities be terminated as soon as practicable with respect to all Indian natural resources matters.

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

Senator ANDERSON. Do you have any additional statement?

Mr. KASHIWA. No, that is our statement.

Senator ANDERSON. Mr. Fannin?

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

Mr. KASHIWA. That is a proviso attached to the first portion. In other words, as to the representation of Indians with relation to natural resources, we will be relieved. That is the intent of that. But, of course, this cannot be done instantaneously and there will be a period whereby something should be worked out between the Authority and the Department of Justice.

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

Senator FANNIN. I see.

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

Mr. KASHIWA. Yes.

Senator FANNIN. That is your answer in that regard?

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

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

Mr. KASHIWA. That is so.

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

Mr. KASHIWA. Well, the exception is rather narrow, but I think it is as you are stating it, Senator. There are cases where the tribe may want to have a private attorney. An exception still could develop under this act because under certain circumstances the Authority has the right to hire private attorneys.

Senator FANNIN. But would they have that same waiver?

Mr. KASHIWA. I think there could be a clarification made.

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

Mr. KASHIWA. Yes.

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

Mr. KASHIWA. That is right. We perhaps should try to clarify that section.

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

Mr. KASHIWA. No. Under that situation we would have the same problem as presently exists.

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

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

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

Mr. KASHIWA. I think so.

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

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

Senator FANNIN. Well, they have long years of performing this service. In other words, work of this nature. Wouldn't their expertise be valuable to the Indian tribes?

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

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

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

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

Mr. KASHIWA. That is right.

Senator ANDERSON. Senator Gravel?

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

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

Senator GRAVEL. Would there be the possibility of taking the report of the claims of the private counsel into court and letting the court make a decision on the amount of money spent and the propriety of the money spent——

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

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

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

Mr. KASHIWA. I mean to say that these regulations could be established by the Trust Counsel agency.

Senator GRAVEL. Oh, itself?

Mr. KASHIWA. Yes, that would be sufficient.

Senator GRAVEL. Thank you, Mr. Chairman.

Senator ANDERSON. Mr. Fannin?

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

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

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

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

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

Mr. KASHIWA. I think this was——

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

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

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

Senator FANNIN. Well, I have a letter here that did review some of the concerns and I think it was more to the point of criticism leveled against the department in handling the Bureau of Indian Affairs and Indian rights than it was a criticism of the bill. So, I will not push that any farther. You do support the legislation at the present time?

Mr. KASHIWA. I do, Senator.

Senator FANNIN. I have no further questions, Mr. Chairman.

Senator ANDERSON. Senator Gravel?

Senator GRAVEL. Thank you, Mr. Chairman.

Could you provide us with the number of cases the Department of Justice has filed for the Indian tribes during the past 3 years?

Mr. KASHIWA. The number of cases?

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

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

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

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

(Information requested follows:)

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., March 1, 1972.

Hon. HENRY M. JACKSON,
Chairman, Senate Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

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

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

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

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

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

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

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

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

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

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

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

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

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

Mr. KASHIWA. That is a very broad duty.

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

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

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

Mr. KASHIWA. No; it won't.

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

Mr. KASHIWA. Yes.

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

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

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

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

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

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

Mr. KASHIWA. Authority for Indians or tribes to retain and pay private counsel is contained in existing law. In many of these cases there is a recovery of a substantial sum for the tribe. In those cases the fees are allowed out of the recovery. This is the usual proceeding in equity, where the court approves the fee out of the amount recovered. This type of thing may come about. For example, if the Trust Counsel feels that there is an amount to be recovered, instead of its doing the work, it may recommend that a private law firm handle it, and a percentage fee would cover this. These things could happen. I don't know what the regulations would be that eventually would be promulgated. So, I cannot definitely say what would occur. It is a very broad and difficult field, but it could be readily controlled by regulations established by the Trust Authority. I am sure they could do that.

Senator GRAVEL. There is no question that the end product of most of this litigation would be some wealth or other. But the wealth may not be transferable into cash flow. If you are talking about water rights, I am sure that the retention of the water rights may be the end product of litigation. How do you transfer that into some cash flow so you can pay your attorneys for keeping what you already have?

You can get yourself into a bind and yet they can spend just as much time on that case as they would on a case that might turn back $2 million or $3 million. You are right, you could take a portion of that and pay off the litigating counsel.

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

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

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

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

Mr. KASHIWA. That is correct.

Senator GRAVEL. So, if there is some monetary return, it can be done, but it doesn't have to be done?

Mr. KASHIWA. Yes.

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

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

Mr. KASHIWA. Well, the Trust Counsel would still be Government. I don't know of any other specific instances. Cases have come up in the Department of Justice, and some of the Attorneys General have run into this problem, where, because of some difficult position the Government is in, they cannot advocate a position and they have appointed special attorneys to handle the case.

Now, those are very special instances. I think the Attorney General does have authority in certain of those instances, but as to legislation to meet a broad area of problems, I think this is about the first, unless you count TVA and some Government agencies which handle their own litigations. But I do know of cases where even State attorneys general do hire outside attorneys to handle a situation which becomes difficult.

Senator GRAVEL. What about legal services initiated under OEO? Is that a similar concept where the Government pays for attorneys?

Mr. KASHIWA. That has risen under the OEO setup.

Senator GRAVEL. That is the same concept as this?

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

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

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

As I see the Trust Counsel Authority, it will be an agency of the United States. It will be authorized to take actions in the name of the United States and it will be carrying out the U.S. obligation with respect to the representation of Indians. In that regard, it will be a different agency from the present agency which will be providing the legal services for the Indians in the matters that the Authority is authorized to function with respect to. But the employees, as I see it, are going to be employees of the United States. They will be carrying out directly the Government's responsibilities.

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

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

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

We are paying these people to go out and find out what the Indian interest is and bring it to light whether it bothers people in the establishment or not. So, if we could provided—

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

Senator GRAVEL (continuing.) Yes, a statistical record as I asked for and a comparison with OEO. I think that would be something definitive.

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

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

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

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

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

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

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

Mr. KASHIWA. We may be confused about sovereign immunity. You mean U.S. sovereign immunity or tribal sovereign immunity?

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

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

Senator ANDERSON. Will we have a new contract for Indian care, Indian responsibility? You spoke a while ago about the mission of the Federal Government with respect to the tribes. Do you have a problem there on contracts with the Indian tribes or not?

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

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

Mr. KASHIWA. Well, what you are referring to, I do not know the scope, but we don't go into the area of approval or nonapproval. We are involved only in the case when something is litigated and for that reason sent over to the Department of Justice. So, the administration functions you can get a better view of by inquiring to the people in the Department of the Interior.

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

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

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

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

Senator ANDERSON. What sort of relationship is contemplated in this legislation between those persons in the Federal Government representing Indian water rights, on one hand, and those persons in the Government representing contracts and contractual rights on the other? Are you satisfied with the bill's provisions in respect to this?

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

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

Senator ANDERSON. In a New Mexico suit on the water rights adjudication, there were certain stipulations on the part of the Indians prior to filing that suit. Have you examined that at all? Would you care to comment on that, as to whether it is good or bad?

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

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

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

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

Senator ANDERSON. Well, let's take another view at the moment with respect to uranium. Are you now criticizing the field of uranium rights? Yes; as far as I am concerned. I have questions on water rights, uranium rights, and mining properties. Are they being handled properly? What are the theories behind this bill is what I am trying to find out?

Mr. KASHIWA. Well, these are very general questions. We would like to have questions in particular. Otherwise, they are very difficult to answer. If they are any questions listed and given to us, we would be only too happy to answer the questions.

Senator ANDERSON. Very well.

Senator HANSEN. There will be a recess until this rollcall vote is over. We will be back.

(Recess.)

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

Senator Hansen?

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

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

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

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

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

Senator HANSEN. Why does this bill provide for lawsuits against individual officers and employees of the Federal Government in section 9?

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

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

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

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

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

Senator HANSEN. Isn't there going to be a conflict in deciding which attorneys are hired or how much they are paid?

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

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

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

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

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

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

Mr. KASHIWA. And that was?

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

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

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

Mr. KASHIWA. That could happen, yes.

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

Mr. KASHIWA. The way I look at it, if the Trust Authority is formed, we will try to transfer the duties of representing the tribes or the Indians as soon as possible. As I have stated before, these are cases pending in court and their transfer doesn't have to be instantaneous. I am sure the people who will be appointed to the Authority, the three who are to be appointed, will be reasonable people, and we can work out a fair transition.

Senator HANSEN. Yes.

Thank you, Mr. Chairman.

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

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

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

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

Mr. KASHIWA. That is a very important question. Will you repeat that?

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

Mr. WARNER. We know of no such case.

Mr. GERARD. Then I presume the followup question, Why the need for the bill if there is no such case?

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

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

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

There are many, many judgments that have to be made in the handling of any particular litigation. The practice in the Department over the years with respect to handling water rights as well as other cases in which there have been involved Indian interests, has been

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

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

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

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

Mr. GERARD. This leads me to the next question, again by Senator Anderson. He would like to have for the record a list of cases handled by Justice to protect the rights of Indians and showing the outcome in each case for the previous 10 years.

Now, Senator Gravel asked for a 3-year reporting period. Senator Anderson is requesting that you report for the previous 10 years.

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

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

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

(The information requested was not received in time for inclusion in the record.)

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

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

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

Mr. KASHIWA. Thank you very much.

Senator ANDERSON. Thank you.

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

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

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

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

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

We believe that our long contact with Indians and Indian tribes, our interest in their welfare and our daily observations of the problems the U.S. Government has experienced in serving as trustee for the Indians especially qualify us to comment on S. 2035.

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

Senator ANDERSON. Without objection, that will be done.

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

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

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

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

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

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

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

We remember well one instance in one tribe we represented the Quinault Tribe which has since been the subject of termination. Earlier, about the turn of the century, the United States had given permission to the California-Oregon Power Co. to erect a dam and in order to preserve the salmon run of the Quinault Indians, that company was required to build fish ladders so that salmon run was not disturbed. Either those ladders were not installed, or they didn't work. The fish runs stopped. The Indians were deprived of that valuable right and resource. It was too late when we were hired to bring a suit on behalf of the tribe because we would face a defense of the statute of limitation. That defense did not apply if the United States acted on behalf of the tribe.

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

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

Now, all competent observers, in our judgment, realize that the Secretary of the Interior is umpiring a tug-of-war between several bureaus within his department. The Bureau of Indian Affairs tries its best to protect the interest of the Indians. But then we have the Bureau of Reclamation. It has another mission. Its mission is the development of reclamation and irrigation projects. Many of these requirements, sometimes we have felt, have degraded the Indian rights in reaching the goals of the Department through the Bureau of Reclamation.

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

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

We think this authority should have the opportunity to be in on executive department decisions from the beginning. We all know that much litigation could be avoided if people can sit down and talk and

reason before any litigation is instigated. We believe this would be an important factor.

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

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

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

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

We think there might be some confusion arising from this because of the inconsistency in prohibiting authorities from filing and prosecuting of, or intervention in any action before the Indian Claims Commission.

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

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

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

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

In all jurisdictional acts with which we are acquainted—in fact, in the Indian Claims Commission Act itself—the Government departments and agencies are required to demand such information and we think it should be provided to the authority.

In line with the thought that the authority should be involved in the process of negotiation or consultation, at least, while early decisions and policies are being formulated by the executive department, we

suggest that the bill include a provision that the authority be informed by the appropriate departments and agencies before decisions have been made so that it will have the opportunity to make the wishes, desires, and rights of the Indian tribes known to the department or agency before the decisions are polarized, and before they get in a position where it is impossible or improbable that legislation can be avoided.

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

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

Senator ANDERSON. Fine. Senator Fannin?

Senator FANNIN. Thank you, Mr. Chairman.

Mr. Wilkinson, I commend you for a very comprehensive statement, and for your recommendations. I think you were here when I asked a question about section 7 on page 4 of the bill.

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

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

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

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

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

Senator FANNIN. Yes.

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

Senator HANSEN. Mr. Wilkinson, the bill contains specific directions about law suits, their preparation and profit. I find no endeavor to make compromises or peacefully resolve disputes. As long as the specific language is in about the duties of lawyers to file law suits, wouldnt' it be consistent with the duties of attorneys to also put in some specific words about first trying to resolve the cases peacefully and to compromise wherever possible?

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

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

Mr. WILKINSON. It may be implied in the very fact that litigation is involved and I think when people litigate there is always a presumption that they can settle the litigation at some stage, but I cer-

tainly would favor such an amendment if there is any doubt that that implication or presumption is not present.

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

Mr. WILKINSON. If you are making an analogy between the authority which would be created by this bill and the so-called public interest law firms, I dont' see a danger in this, that that situation would be reached.

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

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

Senator HANSEN. Section 11 pertains to nonreimbursable or reimbursable cooperation by all Federal departments, agencies, et cetera. The Authority indicates they will provide information, personnel, services or materials to the Authority.

Based on your knowledge of the expense and complications concerning a law case, would you agree it would be unfair for the Indians alone to have the free attorneys plus all of these Government resources when it is suing a State, county, city or private individual and that we should provide both sides of the dispute would receive equal treatment in this regard?

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

Senator HANSEN. That is the question.

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

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

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

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

I think this should be a major function of the board of directors of the organization and there should be a very selective process in what litigation is pursued.

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

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

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

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

Mr. WILKINSON. Yes, sir.

Senator ANDERSON. Thank you very much, gentlemen.

Mr. WILKINSON. Thank you, gentlemen.

(The prepared statement of Mr. Wilkinson follows:)

STATEMENT OF
GLEN A. WILKINSON, PARTNER,
LAW FIRM OF WILKINSON, CRAGUN & BARKER,
ON S.2305, A BILL TO PROVIDE FOR THE
CREATION OF THE INDIAN TRUST COUNSEL AUTHORITY

November 22, 1971

My name is Glen A. Wilkinson. I appear today to present the views of my law firm, Wilkinson, Cragun & Barker, on S.2305, a bill to provide for the creation of the Indian Trust Counsel Authority. For more than 35 years, our firm has been involved in representing American Indians, Indian tribes and Indian organizations. We now represent 21 Indian tribes in claims against the United States and five Indian tribes as general counsel - the Three Affiliated Tribes of the Fort Berthold Reservation, the Hoopa Valley Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Arapahoe Tribe and the Quinault Tribe. We are also general counsel to the National Congress of American Indians as well as counsel to the Northwest Alaska Native Association. In the past, I served for a while as a member of the Board of Directors of Arrow, Inc. We believe that our long contact with Indians and Indian tribes, our interest in their welfare and our daily observations of the problems the United States government has experienced in serving as trustee for the Indians especially qualify us to comment on S.2035.

We appear before this committee to support the concept of an Indian Trust Counsel Authority or some similar organization which will be able to provide legal services

for Indians and Indian tribes both in the policy making area and for those Indians or tribes unable to obtain legal representation through usual channels because such individuals or tribes may not have funds to allow them to retain attorneys (and may have just causes where contingent fee arrangements are impossible or impracticable), so that valuable property rights allegedly owned by such individuals or tribes will not forever be lost because of inability to obtain legal representation.

Few of us doubt that the United States, as a government and as a people, is interested in the welfare and advancement of the American Indian. The main problem, as in the case of much public administration, is failure to translate that feeling of interest and concern into effective action by the persons and the agencies responsible to act for the United States and its people. Sometimes, immediate pressures of conflicting interests within the government prevent effective action. Some of these conflicts of interests exist in the very structure of the government agencies charged with protecting the interests of Indians. President Nixon noted this anomaly when he proposed legislation such as that now before this Committee. In his July 8, 1970 message, he said:

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

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> the same time advance <u>both</u> the <u>national</u> interest in the use of <u>land</u> and <u>water rights</u> <u>and</u> the <u>private</u> interests of Indians in land which the government holds as trustee.
>
> "Every trustee has a legal obligation to advance the interests of beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.
>
> "In order to correct this situation, I am calling on the Congress to establish an Indian Trust Counsel Authority to assure independent legal representation for the Indians' natural resource rights. . . ."

As indicated in that statement, if a law firm or a bank or trust company sought to represent clients with conflicting interests, there would be justifiable public criticism. Yet, our governmental agencies undertake to represent conflicting interests in the field of Indian affairs on a regular and continuing basis. As a government function it seeks to advance the national interests and, at the same time, it undertakes to be trustee and protector of the American Indians. Often, the interests of the Indians in the preservation and enhancement of their natural resources are in direct conflict with the programs, proposals and the objectives of the Bureau of Land Management, the National Park Service, the Bureau of Sport Fisheries and Wildlife, the Bureau of Reclamation, the

Corps of Engineers, the Forest Service or other government agencies. Most of these functions are under the supervision of the Secretary of the Interior who is also charged with the primary responsibility of being guardian and trustee for the Indians.

The lawyers representing the government are usually in the Department of Justice. These lawyers are charged with the responsibility of defending the United States in litigation. At the same time, they have a responsibility to guide legal policy and represent the United States in carrying out its duties as trustee for the Indians. In many circumstances, this places the Department of Justice in an almost untenable position.

We well remember one glaring example of the conflicts which frequently face government lawyers. When we became general counsel for the Klamath Indian Tribe more than 25 years ago, we undertook a study of the past dealings between the tribe and the United States. We became aware that the United States, near the turn of the century, had granted to the California-Oregon Power Company (COPCO) permission to build a dam on a river which had long furnished valuable salmon to the Klamath Tribe. The permission was accompanied by a requirement that adequate fish ladders be installed so that the Klamath Indians would not be deprived of their supply of salmon. The ladders did not operate effectively from the beginning or soon became inoperative.

It was too late for the tribe to sue because it would be faced by a defense based on the statute of

limitations. That statute would not apply against a suit by the government on behalf of the tribe. We requested that the government institute such a suit asking for money damages and installation or repair and maintenance of adequate fish ladders. The Department of the Interior agreed and requested that the Department of Justice proceed. A capable attorney was assigned to the case by the Department of Justice and he spent considerable time in preparation of background material and a complaint to be filed in an appropriate federal court. We made our research available to him and cooperated in all possible ways. However, the case was never filed because the Department of Justice at that time came face to face with cases where it was on the other side - tribes were suing the United States for loss of fish and fishing rights arising from construction of dams by the United States. Anyone can appreciate the inconsistent position forced on the Department of Justice if it pursued the COPCO case. It would be asserting a principle and measure of damages in that case directly contrary to its assertions in the other cases. Thus, the trust obligation owed to the Klamath Tribe was buried by the weight of government self-interest.

This is but one example. There are others, and there will always be others so long as the United States remains in the conflicting position in which it now finds itself.

Water Rights

President Nixon gave prominence to protection of Indian water rights. Over the years, the Indians have felt it most urgent that their rights in the waters of western streams be asserted and established. Economically, there is no more valuable commodity than water in the arid west. The Indians have felt that the United States, as their trustee and guardian, has failed to act adequately to assert and establish the water rights which were recognized by the Supreme Court of the United States in Winters v. United States (207 U.S. 564 (1908)). Many of us have watched with amazement, for many years, as the United States has allowed opportunity after opportunity go by to protect the Indian water rights. This was especially true in the early phase of the Colorado River litigation.

All competent observers realize that the Secretary of the Interior, the Cabinet officer charged with administering Indian affairs, is the umpire of a tug-of-war in his own department. The Bureau of Indian Affairs frequently with commendable zeal tries to protect the interests of the Indians (including their water rights) but the Bureau of Reclamation has, as its mission, the development of reclamation and irrigation projects, many of which require that Indian water rights be strictly limited to those which are economically feasible as determined by the Bureau of Reclamation. We don't read this limitation in the Winters case. But it is only reasonable to ask how the trustee may act fairly amid such conflicts.

S.2035

S.2035 would create a separate entity outside of the Department of the Interior to promote the rights, claims and interests of the Indians in their natural resources, unfettered by the other programs, aims and ambitions of the agencies and bureaus within the Department of the Interior. An earlier version of this bill elicited much discussion and constructive criticism from the Indian community. As a result, on April 28, 1971, the Secretary of the Interior recommended a revised bill to provide for the creation of the Indian Trust Counsel Authority. That bill was introduced as S.2035 on June 9, 1971. It is substantially improved over its predecessor, but still requires additional modifications.

Rather than burden you with a lengthy discussion of the bill and its various provisions, which have been covered by others, I will move immediately into the areas of the bill which we believe should be amended to have the bill fulfill the needs of the Indians.

We have attached, as Attachment A, a list and explanation of four technical amendments which we believe should be made for purposes of clarification.

More major amendments which we feel should be made are as follows:

Sections 8 and 9 - Powers and Duties of the Authority

Our suggestion involves extensive changes in language and the exact means by which the Authority will

accomplish the purposes for which it is to be established. Sections 8 and 9 are the meat of the bill, outlining the exact services and functions the Authority may perform in carrying out its purpose - the preservation and protection of Indian natural resource rights. We believe that the plan proposed by these two sections is somewhat confusing.

Section 8 authorizes the Authority to perform "legal services," and Section 9 authorizes it to sue "for the protection, preservation, utilization, conservation, adjudication, or administration of natural resources or interests" had or claimed. Neither the bill nor the transmittal letter from Secretary Morton to the President of the Senate explains why two sections are necessary. We interpret Section 8 as authorizing the Authority to take over the role of the Departments of Justice and Interior in the area of the protection and preservation of Indian natural resource rights, as the lawyer for an Indian tribe or individual, for the purposes of prosecuting claims and urging Indian interests against third parties. In other words, one role of the Authority would be to replace the Departments of Interior and Justice in rendering legal services involving private parties or corporations, states, their officers or employees to Indians and Indian tribes on claims to and rights in natural resources, especially where a governmental policy might affect the judgment of the Secretary of the Interior or place him in a conflicting position.

We see the role of the Authority under Section 9 as that of an adversary against the United States or its

departments or agencies, states or subdivisions thereof, or corporations, public or private. In this role, the Authority will bring legal actions on behalf of Indians or Indian tribes, often in opposition to the Department of Justice.

We believe that both the language of the two sections and the existence of the two separate sections outlining the duties and powers of the Authority lead to unnecessary and undesirable ambiguities. For example, from those sections it is unclear whether the Authority may bring suits against third parties for money damages. Since Section 10 authorizes suits against the United States pursuant to 28 U.S.C. §§ 1346(a)(2) and 1491, it would seem that the Authority may sue the United States for money damages. This uncertainty should be clarified. The amendment we have suggested would permit suits for money damages only if the suit meets the standards set out in the amendment.

Another ambiguity arises because neither Section 8 nor 9 makes clear the scope of power the Authority has to preserve and protect Indian natural resource rights. For example, is a suit for a tax refund from a state a suit for the protection and preservation of Indian natural resource rights as defined in the bill? We think not. We believe that very few cases involving claims for money damages are actually for the preservation and protection of natural resource rights of Indians as the term is used in the purpose clause of the bill. A claim for money damages usually arises when a resource has been lost, not for its protection or preservation.

Moreover, the need for the Authority may not exist in a suit for damages. In such a case, a fund will or may be produced and may serve as a basis for employment of private counsel on a contingent basis.

Finally, the bill does not make clear whether the Authority may defend suits, or intervene in actions in the name of the United States. The bill does provide that the Authority may sue in the name of the United States. We believe that the Authority should be permitted to "act" in the name of the United States in prosecuting, defending and intervening in suits for or relating to Indian natural resource rights. For example, pursuant to the recent decision of the Supreme Court in the Eagle River case, some western states may attempt to force Indian tribes to enter state proceedings allocating water rights. In these situations, pursuant to 43 U.S.C. § 666, the United States will enter on its own behalf. However, the Authority should be permitted to enter on behalf of the Indian tribes in the name of the United States, since the United States holds the tribes' water rights in trust.

In an attempt to clarify some of these ambiguities, to define clearly the powers of the Authority and to focus more definitely the areas in which the Authority should exercise these powers, we suggest that Sections 8 and 9 be amended to read as follows:

> "Sec. 8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band, or other identifiable group of Indians, acting either in the name of the United States, in the name of the Indian or tribe, or in its own name,

is authorized to render all legal services, now authorized to be rendered by the Department of Interior or the Department of Justice, necessary to preserve and protect natural resource rights of Indians, including, but not limited to rights or claims of the Indians to natural resources, such as rights to land, minerals and timber; rights to the use of water; and rights to hunt and fish. The legal services authorized to be performed pursuant to this section include but shall not be limited to, the investigation and inventorying of Indians' land and water rights; the advocacy of the policy favorable to Indians within the executive branch; the initiation and prosecution to final judgment, in all courts of the United States, and of the States, against the United States, its departments, agencies, officers and employees, or against any of the States, their subdivisions, departments and agencies, or against persons and corporations public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication, or administration of natural resources or interests therein had or claimed by the Indians, including but not limited to, rights to land, timber and minerals; rights to the use of water; and rights to hunt and fish; the defense in any and all courts of the United States and States, of all actions in law and equity which might affect claims or rights to resources owned or claimed by Indians; the prosecution and defense of appeals in all courts of the United States and of the States; and the institution of and participation in actions in any Federal, State or local administrative proceeding in order to protect the natural resource rights of Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section: _Provided_, _however_, that in exercising its discretion in selecting the Indians and Indian tribes for whom legal services shall be rendered under this section, the Authority shall consider whether the Indian or tribe will be plaintiff, defendant, or intervenor; the nature of the right or rights, claim or claims, involved; the nature of the issue presented; the ability of the Indian or Indian tribe to afford or otherwise acquire legal representation; and whether the claim can best be brought in the name of the United States in the particular situation involved.

"Sec. 9 The legal services rendered pursuant to section 8, hereunder, shall in no way absolve the Department of the Interior and the

> Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe: Provided, that in any case in which the Authority has undertaken to perform legal services for an Indian or Indian tribe pursuant to section 8 hereof and the Authority is opposing the Department of Justice, or the Department of Justice is in a position of conflict, the Department of Justice shall be relieved of its responsibility to provide legal representation for any Indians or Indian tribes involved in said suit: Provided further, that in determining the litigating position of the Department of Justice on any matter affecting the rights of Indians or Indian tribes, the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe."

The suggested amendment is not as extensive as it appears at first blush. We have attempted to express more clearly the powers and duties of the Authority to fill the need we believe the bill attempts to fill. Based on the stated purposes of the bill and the transmittal letter from the Secretary of the Interior, the services to be performed by the Authority relate to the protection of natural resource rights of Indians. The Authority would have the power to influence governmental policy in its assigned area of responsibility, free from conflicts of interest. It would be free from pressures exerted on decisionmakers now in the area of Indian affairs. In the appropriate case, it could undertake legal representation.

We understand that the Authority is not designed to become the source for processing claims for money damages on behalf of Indians and Indian tribes. We do not interpret the bill as intending to set up an agency to perform free

legal services for all Indians and Indian tribes with respect to all of their legal problems. We interpret the bill as intending to fill the area which all seem to agree needs to be filled - the protection and preservation of Indian natural resource rights - both at the policymaking level and, if necessary, to represent the Indians in court.

There is an urgent need in that area. From a practical point of view, much of the litigation involved with Indian resource rights involves injunctions, declaratory judgments, and other nonrevenue-producing actions. Thus, a tribe without funds cannot retain legal assistance. Also, it is difficult or impossible for a law firm to take a case for injunctive relief on a contingent basis. Accordingly, in the past, Indians and Indian tribes without funds to hire counsel have been required to rely on the Departments of Interior and Justice to protect their claims to Indian natural resource rights, even though these Departments, who represent the interests of the government, often face conflicts with the interests of the Indians.

This is why there is an urgent need for an Indian Trust Counsel Authority or similar agency to represent strenuously and actively the Indian interests in these vitally important, but nonrevenue-producing, claims involving natural resources. The amendment would, we believe, help to assure that protection and preservation of Indian natural resource rights are the primary reasons for the existence of the Authority.

At this point we believe a caveat is in order. We believe that the worst course to follow to protect and preserve Indian natural resource rights would be to provide for the creation of a huge bureaucracy under the guise of "helping" the Indians. Our view of the Authority is that it would be an office of modest size staffed with capable men knowledgeable in the area of Indian law, not a new bureaucracy to carry the cross of Indian rights into courts all over the country. We do not believe that the Authority should be an institution to which all Indians may come to get legal representation on any and all grievances. The major role of the Authority should be to affect government policy and decisions on Indian resources by actively urging, free from conflict, the Indian point of view within the executive branch prior to any governmental action; failing that, litigation on a limited, selective and discretionary basis. If it is not made clear that the major role of the Authority is in the policy making and non-revenue producing litigation areas, then the demand on the Authority for its services will be overwhelming and its effectiveness will be limited because it will be spread too thinly.

As the President noted in his July 8, 1970, message the main function of the Authority would be to remove the conflict of interest with respect to Indians' resource rights out of the Departments of Interior and Justice and provide for the Indian an independent voice not influenced by other conflicting national considerations. We believe that this function can best be accomplished by making clear that the scope of power of the Authority, as far as litigation is concerned, shall emphasize

the preservation and protection of Indian natural resource rights and not undertake claims for money damages unless the claim is deemed important and private counsel is not forthcoming. Thus, we believe the Authority should exercise a great deal of discretion in choosing which cases to litigate, for the Authority will be unable to institute every action which it is requested to bring to protect and preserve Indian resource rights.

This brings up the question of guidelines or standards to indicate to the Authority the intent of Congress which actions relating to Indian resource rights should be given priority. We do not believe that the discretion of the Authority should be unlimited. Because we believe that the Authority is not designed to perform all legal services for all tribes and that it will be constrained somewhat by its budget, we believe that the statute itself should contain some specific standards. As we note below, the insertion of standards also clears up the question of whether and in what limited circumstances the Authority can or should bring actions for money damages.

We believe that the standard should balance the potential benefit to Indians or tribes of a particular action against the ability of the Indian or tribe to obtain its own counsel in that action. Thus, the major considerations in the Authority's decision to accept a case should be the nature of the issue and the ability of the tribe to obtain its own legal counsel. For example, where the case involves facts and questions affecting only one Indian or tribe, the ability of that Indian or tribe to afford counsel or to have counsel represent it on a contingent

basis, should be given great weight by the Authority in deciding whether to pursue the case. However, where the tribe can obtain its own counsel, but the issue involved may affect many tribes, such as an involved water rights question, then the Authority should be able to intervene to urge the position which is most beneficial for the Indians. The Authority should also be permitted to bring or intervene in suits for damages where a suit satisfies these criteria.

Another consideration is that often actions could only be brought under section 9 because the statute of limitations may have run against the Indians or tribe. When that situation exists, the Authority should be able to authorize a suit in the name of the United States and represent the Indian or tribe either alone or in conjunction with the tribe's counsel. The ability of the Authority to avoid the bar of the statute of limitations should, when relevant, be a consideration in deciding whether to accept a case.

The suggested amendment to section 9, also attempts to clarify the roles of the Departments of Interior and Justice. It exempts the Department of Justice from the trust responsibility in only those cases where it actually opposes the Authority or where it faces a conflict. We do not see a need to exempt either department from any trust responsibility merely because the Authority is acting as the arm of the government representing Indians in one suit.

The suggested amendment to the bill would authorize the Authority to act in the name of the United States in all

instances, i.e. as intervenor or in agency proceedings, not merely as a plaintiff. In addition, the amendment permits the Authority to act in its own name or in the name of the Indian or Indian tribe.

Our proposed amendment also omits the language providing that any suit against the United States should be tried before a judge without a jury. When a jury trial is available and permitted under law, we believe the Authority should be permitted to choose whether to seek a jury trial.

Our last comment relating to our proposed amendment to sections 8 and 9 is that under section 9 as the bill is drafted, the Authority cannot initiate but may only intervene in "any Federal, State or local administrative proceeding in order to protect the rights of the Indians." Our amendment gives the Authority power to initiate such administrative proceedings. We believe the Authority should have this power.

Section 10 - Claims under the Indian Claims Commission Act

The second major area which we feel needs amendment is to clarify the meaning of section 10. Section 10 provides that the Authority may not file, prosecute or intervene in any action, claim or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act or any other special statute authorizing claims by Indians against the United States. However, as now drafted, it also provides that, "the Authority may assist any Indian tribe requesting such assistance

in its claim pending before the Indian Claims Commission." (Emphasis supplied.) Confusion could arise because of the apparent inconsistency in prohibiting the Authority from "the filing or prosecuting of or intervention in any action" before the Indian Claims Commission, but permitting it to assist a tribe requesting assistance in its claim.

We will explain. All of the claims filed before the Indian Claims Commission do not relate specifically to the protection and preservation of Indian natural resource rights, but rather to money damages for past wrongs. Thus, such claims are really outside the Authority's bailiwick. However, experience has taught us that investigation of a present day dispute often reveals facts helpful in an "historical" Indian case. Thus, we suggest that the language following "Provided, however," in section 10, be deleted and the following language substituted:

> "Provided, however, that the Authority may work in conjunction with attorneys for tribes with claims pending which were filed pursuant to section 2 of the Indian Claims Commission Act or any other special statute authorizing a claims suit to be brought by Indians against the United States and may freely exchange information with such attorneys, at the request of the tribe and attorneys."

Section 5 - Outside Counsel and Experts

The third major area we feel should be changed to help in carrying out the purposes of the bill is an amendment to subsection (b) of section 5 to authorize the Authority to hire outside counsel and experts whenever it sees fit, not merely when there is a conflict in the interests sought to be represented. This will assure that the Authority will be able to provide effective representation. This is especially true in the beginning years of the Authority. Thus, we suggest that section 5(b) be amended to read:

> "(b) The Board of Directors may, at the request of the Trust Counsel, hire special counsel and experts which

it deems necessary to assist the Authority in performing its duties. The Board of Directors shall appoint and fix the compensation of such special counsel and experts as it deems necessary."

Section 2 - Board of Directors

Another amendment which we feel would strengthen the bill is the expansion of the Board of Directors to nine members, rather than three. This would reduce the possibility that political pressures would influence the operation of the Authority. For example, if two of the three members of the Board happen to be from the southwest, the Indians located in other parts of the country might feel deprived of adequate representation. We believe the Authority will more quickly capture the confidence of the Indians if the Board of Directors represents a more representative cross-section of the American Indian community. This suggestion would amend section 2(b).

Section 11 - Documents

Our suggested amendment relates to the Authority's ability to demand rather than request certain information, personnel, services or material it deems necessary to carry out its functions. As now drafted, section 11 (2) merely authorizes the Authority to request services, etc. from other agencies. We suggest the following addition to section 11 (2):

"Provided, that in any suit initiated or defended by the Authority, any letter, paper, document, map, or record in the possession of any office or department of the United States (or certified copies thereof) may be used in evidence, and the departments of the Government of the United States shall give full and free access to the attorney or attorneys of the Authority to such letters, papers, documents, maps, or records as may be useful to said attorney or attorneys in the preparation for trial or trials of such suit or suits."

This language is familiar to most attorneys dealing in the field of Indian law, for it appears in many jurisdictional acts. For example, see the Act of July 30, 1946, 60 Stat. 715, sec. 5.

We have one final comment regarding section 11 (2). We believe the legislative history should make clear (or the bill amended, which we feel would be unnecessary) that under section 11 (2) the services of the Department of Justice would be made available to the Authority in those cases where the Authority is taking the place of the Department, i.e., in all cases other than where the Authority is opposing the Justice Department. Some specific services are: (1) help from the United States attorneys in filing papers and pleadings; (2) detailing of Justice Department attorneys to assist the Authority on particular cases; and (3) assuring that the files of the Department of Justice are readily available to attorneys for the Authority.

Pre-notification Procedure

Another suggestion relates to the addition of a section providing that the Authority be informed on any proposed action by any executive department or agency which might affect Indian natural resource rights. It is our experience that many problems which have resulted in long litigation could have been solved easily had all parties been informed of the proposed actions initially. Thus, to assure that the Authority is notified of proposed actions of executive departments and agencies, we suggest the following amendment:

"SEC. 12. Any executive department or agency of the United States shall, with respect to any proposed action which may affect or impair the rights or claims of any Indian, Indian tribe, band or other identifiable group of Indians to natural resource rights to land, timber and minerals; rights to the use of water; and the rights to hunt and fish within the United States' trust responsibility owing to the Indians:

(1) give notice to the Authority and to any and all affected Indians or Indian tribes, bands and groups of the proposed action; and

(2) afford the Authority and all affected Indians or Indian tribes, bands and groups a reasonable opportunity to submit comments upon the proposed action and, where an oral hearing is required by law, or where the department or 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 or agency of the United States involved shall give notice to the Authority and all affected Indians or Indian tribes, bands and groups of the final action taken."

The addition of this amendment would necessitate changing the present section "12" to section "13".

This pre-notification section would permit the Authority to urge independently the position most beneficial to the Indians at the policy-making stages of the decision making process and in our opinion go a long way to solving the conflict of interest problem without any litigation at all by the Authority.

Finally, we believe that adequate funding of the Authority is vital to the proper functioning of the Authority. As noted, in the dual-role of the Authority, the key to the effective representation of natural resource rights of Indians will be the funds authorized and appropriated by Congress to support the Authority.

ATTACHMENT A

To Testimony of Glen A. Wilkinson, Esquire
On Behalf of Wilkinson, Cragun & Barker -
Minor Suggested Amendments to S.2035

Amendment to § 2(b)

2. In Sec. 2(b), change "three" to "nine" so the section reads:

> "The Authority shall be governed by a Board of Directors composed of nine members to be appointed by the President by and with the advice and consent of the Senate."

Reason

We believe that this amendment will aid the Authority in more quickly gaining the confidence of the Indians across the country by permitting a greater cross-section of representatives to be on the Board. The increase in number will also help insulate the Board from political pressures. This change requires a few other technical amendments. First, in § 2(c), change "At least two" to "A majority" and second, in § 2(d), change "three" in line 10, p. 2, to "nine", "one" in line 11, p. 2, to "three", and both times "one" appears in line 12, p. 2, change to "three".

Amendment to § 2(e)

2. In Sec. 2(e), add the words "Indian members of the Board of" between "the" and "Directors" on line 21, p. 2, so the section would read:

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

Reason

We believe that this amendment will also make the Board more responsive to the needs of the Indians.

Amendment to § 5(d)

Change Sec. 5(d) to read:

"(d) The Board of Directors shall, in the event of the possibility of a conflict of interest within the Authority in its activities under this Act, hire special counsel and experts, if necessary, pursuant to paragraph (b) of this section to assist or represent one or all of such potentially conflicting interests."

Reason

As the bill is now drafted, it seems that the Board "may" hire special counsel when there is a conflict between parties "requesting" assistance under § 8 or § 9. We believe that there should be no discretion and that where a potential conflict of interest appears, the Authority should immediately hire special counsel. If the Board has discretion not to hire special counsel where a potential conflict appears, the problem sought to be cured, will be perpetuated.

Second, the mandatory language requires the other change in language so that the Board is not required to appoint special counsel whenever there is a conflict between requesting parties. The Board should not be required to appoint special counsel when it is requested to perform services, but decides

not to undertake performance of them for some reason.

Amendment to § 10

Section 10 should be amended by adding sections 1362 and 1505 of Title 28 of the U.S. Code, so lines 23 and 24, p. 6, would read:

> ". . . could be brought under the provisions of section 1346(a)(2), 1362, 1491 and 1505 of title 28, United States Code . . . ."

Reason

These additions merely make complete the sections of title 28 pursuant to which tribes may bring suit against the United States. Section 1505, specifically identifies any tribe, band or other identifiable group of American Indians (including Alaska Natives) as proper plaintiffs. It is more or less a subsection under § 1491 and should be mentioned in the bill so that the bill is not interpreted as not authorizing the Authority to sue under that provision.

Section 1362 provides:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Under that section tribes may seek declaratory and injunctive relief in the district courts. This section should be included again so as not to permit the inference that the Authority may not sue under this section.

The underscored materials are suggested additions to S.2035

A BILL

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

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

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

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

(c) A majority of the Board of Directors shall be Indians.

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

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

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

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

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

Sec.4. The Board of Directors shall, without regard to the provisions of title 5, United States Code, governing ap-

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

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

(b) The Board of Directors may, at the request of the Trust Counsel, hire special counsel and experts which it deems necessary to assist the Authority in performing its duties. The Board of Directors shall appoint and fix the compensation of such special counsel and experts as it deems necessary.

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

(d) The Board of Directors shall, in the event of the possibility of a conflict of interest within the Authority in its activities under this Act, hire special counsel and experts, if necessary, pursuant to paragraph (b) of this section to assist or represent one or all of such potentially conflicting interests.

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

as it deems necessary in exercising its powers and duties.

Sec.7. The Authority, in the exercise of its functions, shall be free from control by any executive department.

[We have combined sections 8 and 9 of S.2035 and drafted one section to define the powers of the Authority and the other to clarify the roles of the Departments of Interior and Justice. We have underscored only additions to S.2035, not the portions which we have merely reorganized.]

Sec.8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band, or other identifiable group of Indians, acting either in the name of the United States, <u>in the name of the Indian or tribe, or in its own name</u>, is authorized to render all legal services, <u>now authorized to be rendered</u> by the Department of Interior or the Department of Justice, <u>necessary to preserve and protect natural resource rights of Indians, including, but not limited to</u> rights or claims of the Indians to natural resources, such as rights to land, minerals and timber; rights to the use of water; and rights to hunt and fish. The legal services authorized to be performed pursuant to this section include but shall not be limited to, the investigation and inventorying of Indians' land and water rights; <u>the advocacy of the policy favorable to Indians within the executive branch</u>; the initiation and prosecution to <u>final</u> judgment, in all courts of the United States, and of the States, against the United States, its departments, agencies, officers and employees, or against any of the States, their subdivisions, departments and agencies, or against persons and corporations public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication,

or administration of natural resources of interests therein had or claimed by the Indians, including but not limited to, rights to land, timber and minerals; rights to the use of water; and rights to hunt and fish; the defense in any and all courts of the United States and States, of all actions in law and equity which might affect claims or rights to resources owned or claimed by Indians; the prosecution and defense of appeals in all courts of the United States and of the States; and the institution of and participation in actions in any Federal, State or local administrative proceeding in order to protect the natural resource rights of Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section: Provided, however, that in exercising its discretion in selecting the Indians and Indian tribes for whom legal services shall be rendered under this section, the Authority shall consider whether the Indian or tribe will be plaintiff, defendant, or intervenor; the nature of the right or rights, claim or claims, involved; the nature of the issue presented; the ability of the Indian or Indian tribe to afford or otherwise acquire legal representation; and whether the claim can best be brought in the name of the United States in the particular situation involved.

Sec.9. The legal services rendered pursuant to section 8, hereunder, shall in no way absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship

and any treaties between the United States and any Indian or Indian tribe: Provided, that in any case in which the Authority has undertaken to perform legal services for an Indian or Indian tribe pursuant to section 8 hereof and the Authority is opposing the Department of Justice, or the Department of Justice is in a position of conflict, the Department of Justice shall be relieved of its responsibility to provide legal representation for any Indians or Indian tribes involved in said suit: Provided further, that in determining the litigating position of the Department of Justice on any matter affecting the rights of Indians or Indian tribes, the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe.

Sec.10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of or intervention in any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other special statute authorizing a claims suit to be brought by Indians against the United States but shall not include suits that could be brought under the provisions of section 1346(a)(2), 1362, 1491 and 1505 of title 28, United States Code: Provided, however, that the Authority may work in conjunction with attorneys for tribes with claims pending which were filed pursuant to section 2 of the

Indian Claims Commission Act or any other special statute authorizing a claims suit to be brought by Indians against the United States and may freely exchange information with such attorneys, at the request of the tribe and attorneys.

Sec.11. The Authority is authorized to--

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

(2) request from any department, agency, or independent instrumentality of the Government any information, personnel, services or materials it deems necessary to carry out its functions under this Act; and each such department, agency or instrumentality is authorized to cooperate with the Authority and to comply with a request to the extent permitted by law, on a reimbursable or nonreimbursable basis; Provided, that in any suit initiated or defended by the Authority, any letter, paper, document, map, or record in the possession of any office or department of the United States (or certified copies thereof) may be used in evidence, and the departments of the Government of the United States shall give full and free access to the attorney or attorneys of the Authority to such letters, papers, documents, maps, or records as may be useful to said attorney or attorneys in the preparation for trial or trials of such suit or suits;

(3) receive and use funds or services donated by others; and

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

Sec.12. Any executive department or agency of the United States shall, with respect to any proposed action which may affect or impair the rights or claims of any Indian, Indian tribe, band or other identifiable group of Indians to natural resource rights to land, timber and minerals; rights to the use of water; and the rights to hunt and fish within the United States' trust responsibility owing to the Indians:

(1) give notice to the Authority and to any and all affected Indians or Indian tribes, bands and groups of the proposed action; and

(2) afford the Authority and all affected Indians or Indian tribes, bands and groups a reasonable opportunity to submit comments upon the proposed action and, where an oral hearing is required by law, or where the department or 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 or agency of the United States involved shall give notice to the Authority and all affected Indians or Indian tribes, bands and groups of the final action taken.

Sec.13. There are authorized to be appropriated to the Authority created herein such sums as may be necessary to carry out the provisions of this Act.

Senator ANDERSON. The next witness is Paul Bloom.

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

Mr. BLOOM. Thank you, Mr. Chairman. I am Paul Bloom, special assistant attorney general for the State of New Mexico, and I am general counsel for two New Mexico State agencies, the State engineering office and the New Mexico Stream Commission. Those agencies have authority over the intrastate and interstate water concern of the State of New Mexico.

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

Senator ANDERSON. Without objection that will be done.

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

The reason for that opposition is set out in detail in the statement of the New Mexico Stream Commission which I already referred to. By way of background, perhaps I should explain that I have been personally and the State of New Mexico has been deeply involved in questions of determination of Indian rights. In this case, Indian water rights, for the last 6 years of my tenure as counsel for the State engineering and interstate stream commission.

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

Now, it is common knowledge, Mr. Chairman, that a great public concern has been manufactured, and I use that word advisedly, in the Nation in the last 2 or 3 years concerning allegations of conflict of interest within the United States and how these conflicts have grievously sacrificed the interest of the Indians in regard to their natural resource claim.

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

I believe I have some personal experience of the manner in which the Justice Department makes these decisions. I don't agree with every

one of those decisions, as a matter of fact, many of their claims the State of New Mexico is earnestly resisting, but we believe the appropriate forum for settling these things is in the courts.

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

I believe, Mr. Chairman, that a careful reading of the record will demonstrate beyond a shadow of doubt that these allegations of a conflict of interest, and I speak particularly as they relate to the New Mexico litigation now pending on water rights, have been grossly and deliberately exaggerated and I believe I can demonstrate to the committee's satisfaction that that is the case and that, in fact, the Justice Department has within the limitations of the budget and within the limitations of ethical legal practice has striven manfully and honestly and devotedly to represent Indians of the United States, to discharge its trust functions in regard to Indian natural resources, honorably and as I say on individual matters of judgment as far as claims go, I cannot say I agree with the Justice Department case by case, but I shouldn't have to.

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

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

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

Let me attempt to give a couple of examples. In New Mexico when we brought the first of the series of water rights adjudication suits which arose off of the San Juan-Chama project which you had so much to do with initiating, when we did this in order to provide lawful administration of these projects, we were aware that among the principal beneficiaries of these projects are the Indian people of New Mexico, I could and I stress that because I want to demonstrate the good faith of the State of New Mexico in taking the position that it does today.

This should not be understood—the San Juan-Chama project and the Navajo Indian irrigation project jointly approved by Congress in 1952 are now and will be when completed of immense effect to the Indians and non-Indian people of New Mexico. Therefore, I am not

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speaking out of any partisan interest on the part of State agencies to take advantage of Indian tribes or deprive them of any resource. As a matter of fact, a quick summary of what is happening in these projects I think will refute that.

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

Incidentally, that project which benefits the people of Albuquerque, the middle Rio Grande, and half of the people of New Mexico live in that valley, that cost less than $100 million and involves only 100 acre-feet a year diversion. At the time that was approved a project was authorized for the exclusive benefit of the Navajo Tribe. That involves 550,000 acre-feet of water, new water with land leveled and canals dug to bring the water right to the land. I cite this in order to document that the State of New Mexico, far from opposing the vindication and exercise of Indian water rights, has supported this fully.

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

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

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

The statement is very frequently made that the Bureau of Reclamation is the greatest enemy of the Indians. In fact, this statement was made to Senator Kennedy's subcommittee investigating conflicts of interest and Indian water rights last month. It was also said that the San Juan-Chama project is causing a genocide, or has caused a genocide of the Pueblos in New Mexico. The State of New Mexico deplores very strongly the use of this emotional and unreliable vocabulary. Almost hysterical references to things like genocide and statements like the Bureau of Reclamation is the greatest enemy of the American Indians.

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

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

At the cost of being repetitive, let me point out in some more detail what I am talking about. In a committee print of the Committee on the Judiciary of the United States, put out this year, a certain study was made and allegations were made concerning inherent conflicts of interest. Now, I dwell on this point, Mr. Chairman, because it is generally known that this is the reason why the administration in its present statements has supported this bill and, of course, needless to say, it is because the President has endorsed it, that the representatives of the Justice and Interior Departments who must be obdient to the White House have been here today. I think their own testimony has documented the lack of enthusiasm in these departments, the lack of genuine enthusiasm for it.

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

Now, I ask, has that very seriously been used by the Congress as a basis for a fundamental change in law. The feeling of some Federal people in response to a White House commitment that there is some possibility of future conflict and in consequence of that we should abandon the practice of 120 years of settled legal practice, settled tradition in which the Justice Department and the Indians clearly understood their role? Yet, this morning we hear high Government officers come here and seriously argue that although they cannot document a single case of sacrifice of Indian interest, nevertheless because of the contingent possibility a radical departure in the law should be made.

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

There are two illustrations of conflict of interest seriously offered here. The first one is that we have brought suits on tributaries of the Rio Grande and not on the main stream of the Rio Grande. Therefore, they say we have left several pueblos on a tributary in a position where they cannot maintain water rights on the main stream of the Rio Grande. As a matter of geology, this is true. But I ask you to recall the recent *Eagle County* decision of the U.S. Supreme Court and the commonsense situation that would result if it were necessary in order to get an adjudication of water rights on any part of the Rio

Grande to determine any water rights of the Rio Grande. Even if we cut off the river between the northern and southern boundary of New Mexico. In my section the State and virtually half of the population we have is related to the Rio Grande system.

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

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

Yet this statement expressly says that the failure to join the mainstream claims is a conflict of interest. The other is even shabbier. They say because the Government simultaneously represents the natural forest claim and the Indian claim there is an apparent conflict of interest. We submit, Your Honor, and I document this in my statement, the conflict of interest, if there is one, has worked to the detriment not of the Indians but of the natural forests. Because, in fact, under the Winters doctrine, the same document that man asked about earlier, the Government claims 1898 and 1909 on rights by it has claimed prehistoric rights, paramount rights of all of the tributaries for the Rio Grande for the Indians. Does that sound like genocide or betrayal of interest?

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

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

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

Senator HANSEN. Thank you.

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

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

Mr. BLOOM. Fine, I will do that.

Senator ANDERSON. We will file any questions later on.

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

(Mr. Bloom's complete statement follows:)

Statement of Paul L. Bloom, General Counsel, New Mexico Interstate Stream Commission

The asserted need for the referenced legislation has been founded upon the argument that the federal government now faces "conflicts of interest" in respect to its trust responsibility for Indian interests in natural resources. These conflicts are said to arise out of the government's position as a proprietor of public lands and user of natural resources in its own right. While the potential for such conflicts is indisputable, it is doubtful this can justify the termination of the historical responsibility of the Justice and Interior Departments for the protection of Indian property, as proposed in this bill.

In those situations where an Indian interest in land or water is or may be threatened, and the United States has no proprietary interest in the same subject matter, the relation of the United States to the Indians is very simple and sraightforward. As guardian of dependent Indian tribes, the United States has a clear fiduciary obligation either to bring suit for the vindication of the Indian right or to defend the Indian right at government expense. This rule is rooted in statutory and case law and may, in the event of dereliction, be enforced by legal action initiated by a tribe so situated, either to compel the government to discharge its duty as guardian, or for damages for failure to act.

In a case where an Indian claim in natural resources requires vindication or defense and the United States also has a proprietary interest in the subject matter, the United States has available, under present law, two alternatives. If, in its judgment, the United States' proprietary interest requires a claim inconsistent with that required by the fiduciary obligation to the Indians, the government must either subordinate its claim to the Indian claim or authorize the tribe to secure private counsel for the prosecution or defense of the Indian claim.

In the four Rio Grande tributary water right adjudication suits in which the United States has appeared as a plaintiff, making claims for National Forest lands and on behalf of six Indian pueblos, the government has in each case claimed and aggressively sought to prove immemorial rights to waters necessary to supply the present and future needs of the Indians, while claiming reserved rights for National Forest lands with priorities no better than 1896. If the United States succeeds in legally establishing the rights it claims for the Indians, then, of course, it simultaneously reduces or even destroys the usefulness and value of its Forest reservation rights. If this is a conflict of interest, it is one of which the Forest Service has more reason to complain than do the Indians. Likewise, in the Taos River Stream System, the United States Bureau of Reclamation has been authorized by Congress to construct, and has found feasible, a tributary unit of the San Juan-Chama Project, which requires adjudication of water rights.

Despite the Congressional mandate and the desire of an Interior Department agency to build this project, that same Interior Department recommended dismissal of the adjudication suit, and the Justice Department has so moved, purely and simply because the Pueblo of Taos does not wish to have its rights adjudicated. In this case, also, it would appear that the United States resolved a potential conflict of interest by preferring the position of its Indian ward to the will of Congress and the interest of an Interior agency. These water right cases give an example of the superficiality of the "conflict of interest" charge leveled against the government in respect to competition between Indian claims and federal proprietary claims. As far as is known, the United States has acted in like manner outside New Mexico in similar problems.

The simplest illustration of separate representation is that arising out of the case for condemnation of an interest in Indian lands by the United States. In such a case, the United States must and does authorize the tribe to employ counsel of its choice, as the nature of the action is such that the Indian interest in increasing compensation is inconsistent with the government interest in minimizing compensation.

The same rule apples in any situation where the Indian interest may be inconsistent with that of the guardian, and it should be remembered that the United States, in deciding when separate counsel for Indians is necessary, must act subject to the very high standard imposed upon a guardian charged with a fiduciary duty toward its wards, and, further, subject to judicial review of an alleged abuse of this discretion.

Another avenue for the litigation of Indian claims in natural resources under present law is that of a suit brought directly by a tribe through counsel of its

choice. Congress and the courts have recognized the right of tribes to initiate litigation generally and control its progress unless and until the United States intervenes in or is brought into the same action. Under presently existing law, the United States has been held, in a recent case, to lack legal authority to pay or reimburse the Indians for cost of counsel in suits brought by a tribe or in which a tribe is authorized by the United States to appear separately.

It is hard to see how the present situation imposes any hardship or unfairness upon the Indian tribes, except to the extent that in certain circumstances they are required to pay the legal fees arising out of prosecution of their claims. It would, of course, be a very simple matter for Congress to solve this problem, by enacting legislation authorizing the Secretary of the Interior, at his discretion or in specific cases, to reimburse tribes for the reasonable expenses involved in the prosecution or defense of Indian claims through private counsel.

Another aspect of the "conflict of interest" problem seems to have been overlooked by the proponents of the Trust Counsel Authority. A frequent and significant "conflict" encountered in the representation of Indian claims is the conflict between tribes with competing or conflicting interests. This is certainly true in regard to land claims and, by the nature of things, very often true in respect to water rights. The protracted legal battles between Acoma and Laguna Pueblos over their boundaries will serve as an example, as well as the longstanding land title controversies between the Hopis and Navajos and the Zunis and Navajos.

Because of the transient nature of water, the field of water right claims produces even more spectacular division and disputes between Indian tribes. New Mexico's water rights adjudication program covering the Rio Grande tributaries involved in the San Juan-Chama Project has given rise to the following alignment among the Pueblos. Six northern pueblos have endorsed adjudication of their rights in tributary adjudication suits. One northern pueblo (Taos) has refused to consent to adjudication of its water rights and claims sovereign immunity from suit. Two Middle Rio Grande pueblos have attempted to intervene in the tributary suits seeking either to enlarge or dismiss them; two other Middle Rio Grande pueblos have appeared as friends of the court resisting the attempted intervention.

This illustration of the complexity of Indian claims and positions in the water rights area will serve to demonstrate the futility of attempting to solve conflict of interest problems merely by shifting representation from Justice and Interior to a new agency. The underlying problem of the impossibility of choosing between irreconcilable Indian positions (and claims) will remain untouched after any such transfer is accomplished, as the Trust Counsel will be no more able than the Justice Department has been to represent inconsistent Indian positions. The straightforward, practical and ethical solution to this very real conflict problem is action by the Interior and Justice Departments to authorize each tribe which has a claim adverse to the United States or to another tribe represented by the Justice Department to be separately represented by private counsel, whose fees will be paid or reimbursed by the United States where necessary.

It is clear on its face that the Indian Trust Counsel Authority Act would represent a radical departure in the exercise by Congress of its trust responsibility over dependent Indians. The termination of all responsibility of the Justice and Interior Departments for the representation of Indian interests in natural resources would appear to be inimical to the interests of the Indians. Congress is being asked to turn its back upon the settled practice of many decades during which Congress has delegated its constitutional power over Indian affairs to the Interior Secretary and the Attorney General. The proposed act would transfer a significant portion of that authority and responsibility to an entirely new and independent agency, totally without executive or legal experience or precedent to guide it. It would also free the Department of Justice to more aggressively represent the Federal proprietary interests *against* Indian claims. Apparently, the proposed Act would leave the Indians without anyone authorized to *defend* actions brought against them. This bill would strip the Justice Department of *all* legal responsibility to represent Indian interests in natural resources, while vesting in the Trust Counsel Authority the power only to initiate or intervene in legal proceedings. If this is an oversight, it should be corrected. If it is intentional, then it is probably intended to support future arguments that Congress intended that the Indian tribes be immune from suit. This could lead to the wholly unsatisfactory situation that, in regard to natural resources claims, Indians could sue anyone at federal expense, but no one could sue Indians.

The principal features of the proposed Trust Counsel Authority raise questions as to the nature and extent of its powers. Thus, the extremely broad grant of authority to initiate or intervene in litigation involving the natural resources claims of any "aggrieved Indian, Indian tribe, band, or other identifiable group of Indian," against any person, corporation, political entity, state or the federal government, would appear to be intended to facilitate and even stimulate the filing of a vast array of lawsuits over lands, waters, timber, fishing rights, etc., in a sufficient volume to overwhelm the federal and state courts in many parts of the country for many years to come. Suits to enjoin Bureau of Reclamation, Corps of Engineers and other water supply and water management projects could be expected to be brought on behalf of Indian individuals or tribes claiming a potential injury.

In addition to the far-reaching claims for prior and paramount water rights which may be expected to be filed on behalf of Indians claiming rights in such stream systems as the Missouri-Mississippi, Columbia, Colorado, Rio Grande, as well as streams in the eastern United States, it is probable that a considerable impact of this legislation will be felt in the area of land claims. The bill, at several points, includes within the responsibility of the Authority the claims of any Indian tribe, etc., in lands or rights to lands, and also contains a section prohibiting the revival or relitigation of claims that could have been filed under the Indian Claims Commission Act. It should be remembered, however, that, in respect to lands, the Claims Commisison Act restritced Indian claims to judgments for money damages after proving of aboriginal title and taking by the United States. A new generation of Indian claims against the United States for land, instead of money damages, like that of Taos Pueblo for the Blue Lake area, would be encouraged.

Furthermore, the Act covered only Indian claims *against the United States.* Therefore, it would seem to follow that any individual or tribal Indian claims in or to lands anywhere in the United States, which seek to *quiet title* in the claimant and against the United States or anyone else would be clearly within the scope of this statute and that Indian claims for money damages for taking of land against anyone other than the United States would be authorized. The broad waiver of immunity by the United States also suggests the probability that, whether or not its sponsors so intended, the Act could be used to secure a broad right of judicial review over executive actions of the Bureau of Indian Affairs and the Secretary. Certainly, a large proportion of actions or failures to act by the Bureau of Indian Affairs and the Interior Secretary arguably affect the claims of an Indian or an Indian tribe to rights in land, water, timber, fishing and hunting, etc. By granting a blanket consent to sue the United States, Congress will authorize a constant judicial scrutiny and supervision of Interior Department actions wherever an Indian feels himself aggrieved. Up to now, the courts have been extremely reluctant to interject themselves into the relationship of the United States as guardian to its Indian wards and have generally declined to review such executive actions. It should be noted here that the review of executive action made possible by this bill is much greater than that possible under present law. As discussed above, Indian tribes may now sue the Secretary of the Interior or his subordinates only upon a claim that he had acted *ultra vires*, i.e., outside his constitutional or statutory powers, or in one of the few and narrow areas such as tort claims where Congress has consented to suit. Under the proposed Trust Counsel Authority any individual Indian or tribe could secure review by the courts of any action or refusal to act by the guardian in the area of natural resources.

CONCLUSION

The proposed legislation carries greater risks than benefits to the Indian peoples. It would set them again on the road toward termination of federal responsibility without solving any truly important Indian problem now existing.

The simple, direct and effective solution to the only documented and demonstrated problem in the legal relations between the guardian and ward, that of the United States representing Indians when it has an inconsistent proprietary interest or when two or more tribes have conflicting claims in the same subject matter, is to authorize federal reimbursement of the costs of private legal counsel to the tribes in such positions. This action will leave the historical responsibility of the government to the Indians unimpaired and still permit adequate representation for Indian claims without imposing unfair financial burdens on the tribes.

I certify that the New Mexico Interstate Stream Commission adopted the foregoing statement on the 14th day of November, 1970.

S. E. Reynolds,
Secretary, Interstate Stream Commission.

(Subsequent to the hearing, Mr. Bloom submitted additional comment as suggested by Senator Anderson, which follows:)

STATE OF NEW MEXICO,
STATE ENGINEER OFFICE,
Sante Fe, N. Mex., December 28, 1971.

Hon. CLINTON P. ANDERSON,
U.S. Senate, New Senate Office Building,
Washington, D.C.

DEAR SENATOR ANDERSON: This is in response to your invitation to submit additional comment on points made by the Secretary of the Interior and the Assistant Attorney General for Lands and Natural Resources in their testimony on November 22, 1971 before the Indian Affairs Sub-committee of the Committee on Interior and Insular Affairs.

One of the points made by Secretary Morton was that the transfer to the proposed Trust Counsel Authority of the present role of the Interior and Justice Departments in regard to Indian natural resource claims would merely clarify the function of both departments by eliminating the possibility of conflict of interest between Indian claims and inconsistent federal proprietary claims. You will recall that the Justice Department witnesses, in answer to your questions to Attorney General Kashiwa, were unable to document any past or pending case in which an Indian claim has been sacrificed or impaired. Moreover, the corollary of Secretary Morton's point is that freeing the Justice Department from its traditional concern with the defense of Indian natural resource claims will actually force Justice to single-mindedly represent federal proprietary interests such as those of the Bureau of Reclamation, National Forest Service, National Park Service, Bureau of Sport Fisheries & Wildlife *against the Indians*. Thus, the expertise and prestige of the Justice Department will be thrown onto the scales in opposition to Indian claims where Justice heretofore has been compelled to subordinate federal proprietary interests to Indian claims. It is hard to see how this can result in anything but serious detriment to the Indians, particularly as the Trust Counsel will be an unknown quantity in respect to legal experience, expertise in Indian Law, and appropriations for many years to come. The result would be a partial termination of federal trust responsibility to Indians, whether or not this is intended.

Assistant Secretary Loesch testified in substance that the only difference resulting from the transfer of this responsibility would be that Interior would request the Trust Authority instead of the Justice Department to represent Indian natural resource claims in cases where there is a potential conflict between such claims and those of a federal agency. This is a gross understatement of the scope of the proposed legislation. Sections 8 and 9 authorize the Trust Counsel Authority "with the consent of an aggrieved Indian, Indian Tribe, Band or other identifiable group of Indians" to initiate "all actions in law and equity for the protection, preservation, utilization, conservation, adjudication, or administration of natural resources or interests therein had or claimed by the Indians. . . ." The bill nowhere limits the responsibility of the Trust Counsel to cases in which the Interior Department requests the filing of suits, and it expressly deprives the Justice Department of all responsibility for representation of Indian resource claims. It seems clear, therefore, that the Trust Counsel would have a vastly larger mandate to initiate litigation than that indicated by Assistant Secretary Loesch's statement. In substance, the bill would authorize the Trust Counsel to bring any suits or administrative actions against any person, corporations, state or federal governmental agency, wherever it deemed such a suit advisable, provided only that it had the consent of an aggrieved Indian. It is very probable in fact that, far from acting on the request of the Interior Department, the Trust Counsel would frequently oppose that Department. If the jurisdiction of the Trust Counsel Authority were limited to cases brought at the request of the Interior Department as client agency, objection to the bill would be substantially reduced.

Sincerely,

PAUL L. BLOOM,
General Counsel.

INDIAN TRUST COUNSEL

TUESDAY, NOVEMBER 23, 1971

U.S. SENATE,
SUBCOMMITTEE ON INDIAN AFFAIRS
OF THE COMMITTEE ON INTERIOR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 3110, New Senate Office Building, Senator Lee Metcalf, presiding.

Present: Senators Metcalf, Fannin and Hansen.

Also present: Forrest Gerard, professional staff member; and Thomas Nelson, assistant minority counsel.

Senator METCALF. The subcommittee will be in order.

This is a continuation of the public hearing before the Subcommittee on Indian Affairs on S. 2035 to provide for the creation of the Indian Trust Counsel Authority and for other purposes.

At yesterday's hearing the subcommittee heard testimony from the Department of the Interior and the Department of Justice. The two governmental agencies charged with fulfilling the trust responsibility with regard to Indians. Also testifying at yesterday's hearing were a private attorney representing several tribes and the general counsel to the New Mexico Interstate Stream Commission.

The provisions of S. 2035 are designed to give greater protection to the land and other natural resources of American Indian tribes. The subcommittee is anxious to hear the views and recommendations of the Indian leadership with respect to the proposed legislation. Therefore, our witnesses for today have been confined primarily to the Indians and their attorneys.

The first witness on the list for today, two witnesses representing the National Congress of American Indians, Leo Vocu, executive director, and Franklin Ducheneaux, legislative consultant.

If you will come forward, we are delighted to see you.

STATEMENT OF LEO VOCU AS READ BY FRANKLIN DUCHENEAUX, LEGISLATIVE CONSULTANT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. DUCHENEAUX. Mr. Vocu, Mr. Chairman, will not be here. We just finished up our annual convention in Reno and he had to tie up some loose ends.

Senator METCALF. You reckon he had to recoup his losses? [Laughter.]

Mr. DUCHENEAUX. I will present his statement, if it is all right.

Senator METCALF. Go right ahead.

Mr. DUCHENEAUX. Mr. Chairman, I appreciate this opportunity to appear before the subcommittee to present the position of the National Congress of American Indians on S. 2035. In its recently concluded annual convention in Reno, Nev., NCAI passed a resolution supporting the enactment of legislation embodying the concept of S. 2035, and directing its staff to take such action as is necessary to secure the passage of such legislation in a form satisfactory to the Indian people. We will submit a copy of that resolution as soon as it is available.

Senator METCALF. It will be incorporated into the record.

(The resolution referred to was not received in time for inclusion in the record.)

Mr. DUCHENEAUX. The time is long past due that legislation such as this be considered and that the Congress squarely face and examine the sensitive, but critical problems involved in protecting the trust estate of the American Indian.

There is no need to go into the nature of the trust responsibility of the United States for Indian tribes. It was and is an obligation freely assumed by the United States and was in almost every case a quid pro quo transaction. In fact, in some cases, the United States assumed this burden for its own benefit and against the wishes of the tribe involved. So, it cannot be denied. It has been laid out by the courts, the Congress, and the Executive. It has been defined and interpreted by cases, congressional enactment, and executive regulation.

Before going on, we would like to make this point. The Congress is not the trustee nor are the courts, nor is the President or any of the departments or agencies of the executive branch. The United States of America is the trustee. When the Department of the Interior and the BIA act upon Indian trust property, they do so as agents of the trustee. The same is true of the Department of Justice.

The trust exists. The only remaining question is if it is fully met and implemented. The Indian people have, down through the years, said, "No." The Indians and the NCAI today say "No." And despite the protestations of Mr. Bloom yesterday in his testimony, high officials of the United States, including the President of the United States, have very emphatically said "No."

Yesterday, the subcommittee requested witnesses for the Justice Department to comment on instances when their Department had been in default, consciously or otherwise, on their trust responsibility. Quite understandably, they advised the subcommittee that they could bring to mind no such instance. They were then requested to review their records and files and report to the subcommittee on any such instances. Quite obviously, they are going to report the same answer. It is beyond belief that they would do otherwise.

The Justice Department is not going to write a letter acknowledging that in case X, employee Y failed to take into consideration a certain known factor resulting in a known damage to an Indian tribe or individual. Nor are they going to admit in public that any part of the Department or any of its employees, now or in the past, knowingly colluded with public or private officials under political or other pressure in such a fashion as to result in damage or loss of trust property or rights.

If this must be proven, it must be proven by some outside body such as this subcommittee or the parent committee through the expenditure of time and money and the use of expertise. The Indian people do not have the resources and authority.

But even with such limited resources and ability, we can present enough evidence to at least raise some doubts.

A most glaring example is the action of the Department of Justice in their intervention in the landmark case of Arizona versus California. As you may know, this case involved the adjudication of the relative rights to the use of water in the Lower Colorado River between Arizona and California and some private users in California.

The United States intervened to protect its own rights, including those held in trust for the several Indian tribes in the area. The petition filed with the clerk of the Supreme Court of the United States was a forceful one, written by an obscure, but talented lawyer in the Department, William Veeder. The petition asserted the superior and paramount right of the Indians to the use of waters not only from the Lower Colorado River drainage, but from the entire Colorado River Basin under the Winters Doctrine.

Four days later, under extreme pressure from high officials in four Western States, the Justice Department, in a highly unusual action, withdrew the brief physically from the Office of the Clerk and resubmitted it with guts ripped out.

The Indians lost, the western water users gained, and the Justice Department was a party. And, Mr. Chairman, I would like to submit, if I may, for the record a copy of the material on this point, including a brief filed by some of the Indian attorneys, a New York Times article pointing out the pressure brought to bear, if I may.

Senator METCALF. Do you want them at this point in the record or at the conclusion?

Mr. DUCHENEAUX. If they are to be included in the record, I would like them at this point, sir.

Senator METCALF. At this point in the record, all right.

(The document referred to follows:)

No. 10, Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener

MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT McDOWELL RESERVATION, ARIZONA.

The petitioners herein move for leave to file the accompanying representation of interest. In support of this motion petitioners show as follows:

1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the

right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin.

4. Justice and fair play require that a determination be made as to whether the Attorney General of the United States is representing conflicting interests in this case, and if so, whether the interests of petitioners are adequately and properly represented.

5. There is doubt as to whether petitioners may file as amicus curiae since they are real parties in interest as beneficial owners of an undetermined portion of the water rights at stake.

6. There is doubt as to whether petitioners may intervene as separate parties since their interests are committed to adjudication by the intervention of the United States and in any event petitioners are without available funds or means for preparing and participating in this case.

7. Under Rule 9 of this Court, the Federal Rules of Civil Procedure are applicable as a guide in original actions. The procedure here followed by petitioners would be the

procedure utilized to apprise a district court of a comparable situation.

Respectfully submitted,

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GEORGE W. BOTSFORD,
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Attorney for the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona.

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STATE OF ARIZONA,

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener

REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT MCDOWELL RESERVATION, ARIZONA.

1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights

of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin. The Indian rights in the water stem from treaties with Indian tribes, executive action, the creation of Indian reservations and various Acts of Congress. *Winters* v. *United States,* 207 U. S. 564, 576-577; *United States v. Walker River Irr. Dist.,* 104 F. 2d 334, 336 (C.A. 9, 1939); *Cohen, Felix S., Handbook of Federal Indian Law,* pp. 316-319 (1945).

4. The United States has intervened in this case and has placed the rights of petitioners in issue. As a result petitioners are precluded from asserting their rights in their own names and on their own behalf. They have no control over the course of the suit, no voice in its direction and no right or opportunity to participate in the formation or trial of the issues. The United States controls their interests in issue. It can waive or compromise their rights, fail to prosecute them in full or in part, allow them to go by default, or fail to assert essential contentions. *Heckman* v. *United States,* 224 U. S. 413, 445-446; *Pueblo of Picuris in State of New Mexico* v. *Abeyta,* 50 F. 2d 12, 13-14 (C.A. 10, 1931).

5. The petitioners present to the Court the question of whether their interests can be properly or adequately represented by the Attorney General of the United States if the interests of the United States, as a sovereign proprietor and contractor are in direct conflict with the interests of the petitioners. Thus the United States has numerous contractual obligations to deliver Colorado River water to various water and irrigation districts and projects, and to the States of Nevada and Arizona. It has contracted to sell electricity (Petition of Intervention, Pars. XII-XXIV). In addition it has an international treaty obligation to de-

liver annually 1,500,000 acre feet of Colorado River water to Mexico (*Ibid.*, Par. XIII).

The proprietary rights and contract commitments of the United States on the one hand and the beneficial rights of the Indians on the other are in competition with each other for the same water. Since there is not sufficient water to meet the demands of all parties, priorities and allocations will be adjudicated. The Attorney General has undertaken to represent both antagonistic interests of the United States and these petitioners, competitors for the same water, and his obligations force him to sit on both sides of the counsel table at the same time.

6. The dual and conflicting nature of the Attorney General's position in this case is emphasized by his obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by Indian tribes seeking compensation for loss of water rights. The law established in this case may provide a clear basis for recovery or a complete defense in such claims cases of Indian tribes. Proper advocacy in this case would compel the Attorney General to vigorously prosecute the full rights of petitioners. But if he does so, the Attorney General may be providing the basis for recovery in Indian claims cases in which he is obliged to defend the United States. The conflict seems evident.

7. Petitioners' concern motivating this representation has not been lessened by the proceedings and actions in this case. The following is illustrative:

(a) On December 31, 1952 the United States moved this Court for leave to intervene and in support of its motion advanced the interests of petitioners as a major ground for intervention. The United States referred to the Colorado River Compact, a document basic to the rights of the par-

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ties and advised this Court as follows (Motion for leave to intervene, Par. XII):

> * * * Thus there is excluded from the operation of the compact the rights of the United States to divert or to have diverted water from the Colorado River and its tributaries on behalf of the Indians. There is annually diverted for or by the Indians from the Colorado River and its tributaries in the Lower Basin in excess of 750,000 acre-feet and there are asserted, in the ultimate, claims to a greater amount.

In its brief in support of the motion for leave to intervene the United States stated (p. 32) "* * * large claims are asserted on behalf of the Indians whose rights are excluded from the operation of the Colorado River Compact; * * *".

(b) On November 2, 1953 pursuant to the Court's order of January 19, 1953, the United States filed its petition of intervention with the Clerk of this Court. The petition in unmistakable terms asserted the "prior and superior" rights of the Indians. It declared (Par. XXVII, p. 23):

> The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.

Four days later, apparently following heated protests by parties-litigant opposing the Attorney General's assertion of the Indians' claims, the Attorney General, without order of this Court and by means unknown to us, physically withdrew the Government's petition of intervention from the Clerk's office. On December 8, 1953, without order of

this Court authorizing amendment, the Attorney General substituted a revised petition of intervention as if it were the initial filing. This extraordinary procedural lapse supplied the means for omitting the critical language quoted above pleading the "prior and superior" rights of the Indians. It permitted the United States to make a radical shift in position without the embarrassment of setting forth the reasons for the change as part of an application for leave to amend. A copy of an article written by Luther A. Huston and published in the *New York Times* of November 16, 1953, describing this unusual procedure is printed in the Appendix, *infra*.

(c) At the pre-trial conference before the Special Master on April 10-13, 1956, almost two and one-half years after the Government's petition of intervention was filed, the United States declared that it still was not ready to define its position on Indian claims either from the standpoint of law or facts. (Transcript, pre-trial proceedings, April 10, 1956, pp. 18, 23-26, 34-35). The Government's attitude was akin to that of a passive bystander, with the clear inference that it desired an inactive role in this case. Thus the Assistant Attorney General in charge urged (*Ibid*, p. 39):

> The United States would like to be last, and we will only ask the questions we feel the States have not covered, if that will be permitted.

It seems to petitioners that such an attitude cannot be reconciled with an intent to present and protect the Indians' full rights. An advocate for the Indians would have no difficulty in unequivocally asserting the prior and superior rights justified by law, set out in the petition of intervention initially filed with this Court and withdrawn and

amended without permission. (See paragraph No. 7a, *supra.*)

(e) The transcript of the pre-trial proceedings reveals a complete failure on the part of the United States to state affirmatively any intention to present and advocate the petitioners' full rights. The Master's efforts to ascertain the Government's position were met with avoidance and pleas of lack of understanding (e.g. *passim,* Tr. 173-204). The failure of the Attorney General to assert petitioners' full rights raises serious doubt as to whether those rights will be effectively prosecuted by the Attorney General.

8. Petitioners probably have no standing separately to sue and in any event are without available funds to prepare a project case of this magnitude. The United States has committed petitioners' rights to adjudication but all decisions concerning the prosecution or abandonment of their rights are made by the Attorney General without reference to or consultation with petitioners. The ultimate responsibility for rendering a just and correct decree rests with this Court. Justice and fair dealing require that petitioners' rights should not be subordinated to conflicting interests through lack of independent advocacy.

Wherefore, petitioners pray as follows:

1. That cognizance be taken of this representation in view of the helpless position in which these petitioners find themselves;

2. That the Attorney General be called upon to explain his unauthorized amendment of the petition of intervention;

3. That the Special Master be instructed as follows:

a. To determine whether a conflict exists between the Indian interests and the interests of the United States apart from those of the Indians;

b. To determine whether the Indian interests are, or can be adequately represented by the Attorney General of the United States; and

c. To recommend whether the interests of justice and fair dealing require separate and independent counsel for the Indians.

Respectfully submitted,

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[From the New York Times, Nov. 16, 1953]

West Beset Again by Indian Trouble—Gets Government To Withdraw Colorado River Brief Putting Tribes' Water Rights First

(By Luther A. Huston)

Washington, November 15.—Indian trouble has developed again in the West and this time it was not the Indians but the Great White Father who started it.

Pow-wows are under way in some of Washington's most impressive wigwams in an effort to settle it and the pipe of peace eventually may be smoked in the Supreme Court.

It is a complicated situation that involves the fight between Arizona and California over the use of the waters of the Colorado River, a controversy that has been raging for more than three decades. The Department of Justice brought the Indians into it.

Despite a disinclination on the part of the Justice Department to talk about it, officials revealed today that pressures from Governors of some Western states induced the department to withdraw a brief it had filed in the Supreme Court, a step rarely taken, and agree to re-examine an issue it had put forward as a major ground for intervening in a suit now pending in the high court.

On Nov. 2 the Justice Department filed a brief with the clerk of the Supreme Court as an intervenor in a suit brought by the State of Arizona against the State of California and other defendants. Quietly, late in the afternoon of Friday, Nov. 6, the brief was withdrawn.

At that time, it is understood, it had not been distributed to any of the Supreme Court Justices.

STATES' RIGHTS HELD SUBORDINATE

The controversial part of the brief asserted that the rights of the Indians and Indian tribes in the Colorado River basin to the use of the waters of the river and its tributaries "are prior and superior" to the rights of Arizona, California or the other states in the basin. This was a position never before taken, attorneys said, in all the long history of the development of the prevailing system of distribution of the waters of the river among the states.

Eleven Governors of Western states were in conference at Albuquerque, N.M., where the Department was upheld by the courts. He asked his fellow Governors to join in a protest to Washington.

As a result Jean Breitenstein, a Denver lawyer who represents Arizona and Colorado in litigation over water problems, was sent to Washington. Mr. Breitenstein conferred with J. Lee Rankin, Assistant Attorney General in charge of the executive adjudications division, and other high officials of the department. On the basis of the protests of the Western Governors as conveyed by Mr. Breitenstein, the brief was withdrawn.

COMMITMENT IS DENIED

Mr. Rankin has told attorneys representing Arizona and California that the Justice Department was under no commitment to amend the brief. He is said to have agreed, however, to re-examine the question with an eye to a possible stipulation that would clarify the extent of Indian rights as against those of the states involved.

A Justice Department spokesman said that a new brief would be filed. Conferences at the legal level were going on, he said. Whether or not there would be later conferences between Herbert Brownell Jr., the Attorney General, and some of the Governors who joined in the protest had not been determined.

Northcutt Ely, an Assistant Attorney General of California, who maintains offices here and handles the interests of that state in the Colorado River water controversy, said that what the Federal Government was doing was asserting a first mortgage on behalf of the Indians on water that already had been apportioned between the states under the Colorado River Compact to which Congress had given approval.

If the position taken by the Government should be maintained, and sustained by court decrees, Mr. Ely said, the interstate compact under which California had spent more than a billion dollars to develop water projects would "be busted."

Arizona filed its suit on Aug. 28 against California and seven municipal or public corporations that have participated, under the laws of California, in the development of reclamation, electric power and other projects undertaken under the Colorado River Compact. In substance, Arizona asks the Supreme Court to declare it entitled to 3,280,000 acre feet of water and limit California to 4,400,000 acre feet. This would add 500,000 acre feet to what Arizona gets now and take away 500,000 acre feet from California. The river rises in Colorado, near the crest of the Continental Divide, 9,000 feet above sea level. It flows 1,293 miles, draining, with its tributaries, parts of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.

The river traverses a semi-arid region containing about 240,000 square miles. It finds the sea in the Gulf of California, seventy-five miles below the border between the United States and Mexico.

CANYON SEPARATES LANDS

The lands to which water of the river may be beneficially applied are separated by nearly 1,000 miles of canyon, and the states above this canyon are in what is known as the upper basin; those below it in the lower basin. The dividing line is at Lee Ferry, twenty-three miles below the Utah-Arizona border.

More than fifty years ago it was discovered that the claims of rights to use water in the lower basin exceeded the amount of water available. So there might be an equitable distribution of the available water, the Colorado River Compact was signed in November, 1922, by California, Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming.

The compact became effective June 25, 1929, by act of Congress and by Presidential proclamation, although Arizona had not ratified it at the time. Although water was allotted to Arizona under the compact, the state did not ratify the agreement until 1944.

The compact appointed in perpetuity to the states of the upper basin 7,500,000 acre feet of water and to the states of the lower basin an equal amount. It was provided, however, that the lower basin had the right to increase its beneficial consumptive use of water by 1,000,000 acre feet annually.

RIGHT TO WATER LIMITED

When Congress passed the Boulder Canyon Project Act, it required California to adopt a state law limiting its right to water delivery from the Colorado to the number of acre feet specified in the compact, Arizona contends that this means the 4,400,000 acre feet that constituted the basic allottment made under the lower basin compact and does not apply to the 1,000,000 additional acre feet the lower basin received the right to use annually.

Arizona, which is the only other state in the lower basin, declares that all of the 1,000,000 acre feet should be given to her.

The Indians come into the picture under a clause in the Colorado Compact that says:

"Nothing in this compact shall be constituted as affecting the obligations of the United States of America to Indian tribes."

The various Indian reservations and projects in Arizona and California are at present using, according to the Justice Department brief, 747,170 acre feet of water from the Colorado River system. The Government asserted that this use ultimately will increase to 1,747,000 acre feet.

This presents a two-fold problem, according to Mr. Ely. The first is whether the Indians have a priority to take whatever water they want whether they feel like it. The second is whether the water claim by the Indians is to come out of the amounts allotted to the lower basin or whether the Indians can just take their share in as they want it and let Arizona and California divide what is left.

CALIFORNIA POSITION OUTLINED

The position taken by the Justice Department in its brief is that the Indians have priority to take what water they want when they want it, regardless of the share of the states.

California contends that the Indians must share, the same as white citizens, in the total allotment of the lower basin. Under this interpretation, Arizona, which has more Indians and more reservations than California, would have to give up more water to Indian uses than would its sister state.

California, according to Mr. Ely, does not join in the protest against the claim asserted by the Department of Justice on behalf of the Indians to "prior and superior" water delivery rights. Mr. Ely said that his state would like to have the matter litigated before the Supreme Court. He contends that the question cannot be settled by stipulation, as Arizona has proposed in the conferences now going on.

The United States should be a party in interest to the Arizona-California litigation, Mr. Ely asserts, because of its responsibility to the Indians, its vast expenditures in constructing Boulder Dam, which impounds the waters allotted to the states, and other works necessary to the operation of the project.

The Supreme Court was correct, Mr. Ely asserted, in allowing the Justice Department to intervene in the Arizona-California suit, but the Justice Department was wrong in asserting that the rights of the Indians were "prior and superior" to the water-delivery rights of other citizens under the Colorado compact.

Phoenix, Ariz.

Re: Indian representation, Arizona vs. California.

Enclosed is a copy of a letter which we sent the Attorney General of the United States.

From our observations and information, we are of the opinion that Indian claims of rights and interests in the present and future use of waters of the Colorado River System will not be fully and vigorously presented to the United States Supreme Court. We feel that conflicting interests of the United States as represented within the Department of Justice will minimize or tend to minimize presentation of claims of Indian water rights.

The impression seems to continue that Indian rights will either be presented at some other time (probably after they have been lost) in other actions, or the Indians will have to be compensated with money for any water that may be lost.

It is easier to be comfortable and passive by decrying the past injustices to the Indians than to take present action in protecting those rights which remain. This seems particularly true when present rights run contra to non-Indian economic and political interests.

Your attention is particularly called to the fact that the ONLY man within the Department of Justice (so far as we can ascertain) who is prepared on the law and facts of the present proceeding, and who has had experience before the courts in water litigation has been removed from the case and assigned to new work.

We feel frustrated on this matter and are frankly seeking advice and assistance. We shall appreciate both from you.

Very truly yours,

COX AND COX
Z. SIMPSON COX.

COX AND COX,
Phoenix, Ariz., April 26, 1956.

Hon. HERBERT BROWNELL, Jr.,
Attorney General of the United States,
Department of Justice, Washington, D.C.

SIR: The United States of America has intervened in that certain proceeding in the Supreme Court of the United States entitled *State of Arizona, Complainor* vs. *State of California, et al, Defendants, United States of America, Intervener*, which bears Number 10. It appears from the Petition in Intervention that the United States recognizes that it has certain obligations to the Indians and Indian Tribes.

Paragraph XII of the Petition of Intervention summarizes the interests of the United States, and reads:

"There follows, in paragraphs XIII through XXX of this pleading, a description of the specific interests of the United States of America in the Colorado River System and in the resolution of the controversy between the plaintiff and the defendants. These interests fall into the following main categories:

"A. The Treaty with Mexico (paragraph XIII).

"B. Contracts for the delivery of impounded water which depend for their proper performance on the meaning of the Colorado River Compact and the Boulder Canyon Project Act (paragraph XV through XX).

"C. The structures and projects constructed under or pursuant to the Reclamation Act of 1902, or comparable statutory authority or international obligations, and in which the United States has a present, direct interest which will be affected by the resolution of the controversy between the parties. These are the Boulder Canyon Project, Davis Dam and appurtenant structures, Parker Dam and appurtenant structures, the Yuma Project, including Laguna Dam, the Gila Project, the Yuma Auxiliary Project, and the Salt River Project (paragraphs XIV, XXII, XXIII, XXIV).

"D. *The claims of the Indians and the Indians Tribes (paragraphs XXV through XXVII).*

"E. Other federal interests, including the generation of electricity, flood control and navigation interests and projects, fish and wildlife projects, and the public lands in that area (paragraphs XXI, XXVII, and XXIX).

"Because of the adverse character of the claims asserted by the parties to this cause and their divergent construction of the fundamental laws upon which each predicates its respective claims, the *United States of America is in grave doubt in regard to its rights and obligations with respect to the waters of the Colorado River System and cannot safely exercise its rights, fulfill its responsibilities, or perform its duties, without great hazard to itself and to the parties themselves, in connection with the foregoing five categories of interests.* For these reasons, it is important to the United States that the conflicts between the parties be resolved and that the rights and interests of the United States be protected in the course of that resolution."

It is apparent from the foregoing paragraph and more apparent from a full reading of the petition that the United States of America itself has conflicts of interests. The United States has a further conflict of interest in that claims of Indians and Indian Tribes are pending against the United States which might be favorably affected if the United States fully and adequately represented Indian interests in this case.

Where a conflict arises between the rights (interests) of a beneficiary and other interests represented by the fiduciary or a conflict arises between the rights of the beneficiary and those of the fiduciary, the fiduciary has no alternative but to see that each beneficiary's interest is independently and fully represented so that the beneficiary's rights of claim of rights in their best light will be adequately presented to the Court. We feel that the United States of America can do no less in the present Supreme Court Proceeding, especially as to the claims of Indians and Indian Tribes.

Questions arising from the Treaty with Mexico appear to be questions of law. The beneficiaries and ultimate real parties in interest to the obligations plead under B and C and the "generation of electricity" in E, are certainly each fully, adequately and most vigorously represented by and through other parties to the cause. As to each of these, the United States stands somewhat in the position of a stakeholder. Examination of the remaining interests summarized in E might disclose no conflict or possibility of conflict with claims of Indians and Indian Tribes. If conflict or possibility of conflict was found to exist, independent counsel could be designated for these other interests. This would allow the office of the Attorney General to represent claims of Indians and Indian Tribes, free of any possible conflict. The possibility that liability of the United States might indirectly result should not deter full presentation of Indian claims in this present cause.

Other parties to this cause, *except the United States of America*, have expended hundreds of thousands of dollars in the preparation of each of their cases in order that the rights and interests of each might be fully and adequately presented to the Court. At the pre-trial hearings before the Master, the United States was not prepared and admitted it was not prepared to present any facts on behalf of any of the conflicting interests which it represents. It was not prepared and admitted it was not prepared even to state the position that it would take as to any of these interests, including Indian claims.

The Department of Justice for many years has had one man working on legal questions involving water and use of water within the Colorado River System and the necessary facts pertaining thereto. This man has been transferred from this work and relieved of any responsibility or right in connection with this Supreme Court cause on the eve of trial, with no one prepared to take his place. Each of the parties in this cause, *except the United States*, is represented by well recognized water attorneys. The attorneys for each of the parties, engi-

neers, other experts and private attorneys representing subordinate interests under each of the parties, *except the United States*, are working as a team with full and complete consultations and disclosures within the team.

All private attorneys for Indian groups within the Colorado River Basin are agreed that the Indians' claims of rights and interests should be vigorously, fully and adequately presented to the Supreme Court in this cause. These Indian groups have consistently requested and recommended consultations including Department of Justice, Department of the Interior, and private attorneys representing Indian Tribes or groups.

With the advice and consent of attorneys representing the Indians, you, as Attorney General of the United States, should employ or designate attorneys whose sole duties would be to represent claims of rights of Indians and Indian Tribes in this cause. The one man in the Department of Justice who is prepared on the facts and the law should be included as one of these attorneys. Others designated or employed should have recognized stature before the Supreme Court. Congress should be urged to appropriate immediately sufficient funds to make such representation effective. Such representation should not be subject to political or economic pressure from non-Indian interests.

The United States of America is several years late in preparing to represent adequately claims of Indians in this proceeding, and each additional day's delay adversely affects Indians within the Colorado River Basin.

The United States Supreme Court always has and always will continue to protect human and property rights. Yet, even the United States Supreme Court cannot protect rights unless the facts are presented to the Court.

Monetary damages for breach of trust, even if recoverable, will not compensate for loss of Indian water rights.

We are not here representing whether or not Indians and Indian Tribes within the Colorado River Basin actually do have substantial rights to the use of any waters of the Colorado System. We do say that their claims of rights should be fully presented to the Court for its decision. In the United States, Indians, no less than other Americans, should be entitled to their "day in Court".

Very truly yours,

Cox & Cox,
Z. Simpson Cox.

(Other letters submitted by Mr. Ducheneaux were illegible and could not be reproduced.)

Senator Metcalf. I want to add Mr. William Veeder was in law school in Montana at the same time I was, and while you might regard him as an obscure attorney, he is a very competent and able attorney.

Mr. Ducheneaux. Yes, sir; I agree with that. At that time, he was obscure to the Indians.

We can go a little further back in history to an erroneous survey of the boundaries of the Flathead Reservation in the late 1800's by the United States under obligation under treaty establishing the reservation. The survey was made. A few years later, adjoining lands were placed in a national forest. A few more years later, Agriculture made a new survey and discovered that an error had been made which resulted in the inclusion of around 12,000 acres of Indian land in the national forest.

In 1968, legislation was introduced in the Senate to restore this land to the Flathead Reservation. During preparation for hearings before this subcommittee on that legislation, we were advised of the existence of a letter in the National Archives from the Attorney General of that date advising the Secretary of the Interior of the error with the admonishment that the Indians not be told of the error. We attempted to secure the letter and were advised by the Archives that the file containing it was in the possession of the Department of the Interior's Solicitor's Office. Even a letter from Senator Metcalf could not obtain the file or letter.

Again, the Indians lost, the United States gained, and both the Justice Department and Interior were parties.

We can talk about the rechanneling of the Lower Colorado River by the Corps of Engineers, and the advice they gave to the tribes that this would be a benefit to them. Now, the Indians of Fort Mojave, Chemehuevi, Colorado River, and Fort Yuma find they may have lost an extremely valuable right of access to the river. Where was our trustee?

Or, we can discuss the Pyramid Lake on the Pyramid Lake Paiute Reservation where the lake had dropped 80 feet, the Lahontan trout seriously endangered, the beauty of one of the most beautiful lakes in the world destroyed, and the life of a people dangerously compromised. Why? Because Winters doctrine water of the Indians is being diverted away from the lake to irrigate non-Indian farms, with the residue wasted into a game refuge for the enjoyment of the many hunters. Where is the trustee?

The list is endless. The proof is lacking only because of the inability of the Indians to secure it themselves and the unwillingness of those responsible to do so.

We must comment on Mr. Bloom's testimony of yesterday. First, Mr. Bloom represents the State of New Mexico, and the State's interests regarding water often are in conflict with the United States and the Indians. In fact, Mr. Bloom narrates the progress of their suit against the United States and the Indian tribes as a basis for his argument. Yet, strangely enough, Mr. Bloom praises the efforts of his adversary, the Justice Department, on behalf of the Indians and opposes enactment of this bill. We must conclude that Mr. Bloom either loves Indians too well and the cause of his employer not enough, or that he is fearful that enactment of this bill will strengthen the cause of Indians.

Second, Mr. Bloom either naively or unashamedly asserts that the United States has a high level and moral obligation as trustee to use every means to protect and defend Indian trust assets, and that they have sufficient means to do so. We don't need Mr. Bloom to tell us this. We know it. We have been saying this for years.

Unfortunately for us, the Indian, the trustee, whether acting through the Justice Department or the Interior Department, all too often fails to carry out this high legal and moral obligation because of political or other pressures.

And then, the means of enforcing our rights become the means of suppressing them and compromising them. Example? Mr. Bloom asserts that the tribes have a right to bring an action to protect their rights with their own counsel until the United States intervenes, at which time the tribe is in essence evicted from the suit because the United States is protecting them.

That is true, but then the Indian case seems to languish, and everybody wins but the Indians. Witness, the *Arizona* v. *California* or the *Eagle River* case.

We support the concept of this legislation. It will not solve all the problems of the protection of the trust, let alone all the problems of the Indians. But it will be a giant step forward. As long as the Department of the Interior and the Department of Justice are not relieved of their basic and primary obligation to administer and protect the trust, and as long as the trust counsel can provide, in effect, an over-

sight function, the serious debilitating conflicts of interest can be eliminated.

NCAI supports, in general, the amendments recommended by Mr. Wilkinson in his testimony of yesterday. In addition, NCAI has already provided the committee counsel with suggested amendments of a tentative nature. We request that we be permitted to file a supplementary statement with a more firm position on these amendments.

Mr. Chairman, we urge that this legislation be given the most serious consideration, and the amendments suggested by NCAI and the other Indian witnesses be examined and considered in light of our fears and future. We further urge that a bill, with at least our major objections or recommendations met, be reported favorably to the Senate and passed.

Mr. Chairman, that completes our statement.

Senator METCALF. Thank you very much for a very important and significant statement, and for describing some of the specific instances in which the Bureau of Indian Affairs and the Department of Justice have been derelict.

I call your attention to page 5 of the bill. Do you have a copy of the bill before you?

Mr. DUCHENEAUX. No, I don't, sir.

Senator METCALF. Page 5, beginning with line 6, where it says the Department of Justice as of the effective date of this act or as soon thereafter as practicable is relieved of its responsibility to represent Indians or Indian tribes with regard to their rights or claims to natural resources.

Are you in accord with that provision?

Mr. DUCHENEAUX. I am not quite sure anybody who has read the bill really understands what that means. Mr. Wilkinson was here yesterday and indicated to him it was very ambiguous; to me it is. The Justice Department has a whole range of responsibility with regard to Indian affairs. In some cases on behalf of Indian affairs and in some cases as a prosecutor of criminal acts or in some cases as an opponent of the Indian.

I am really not sure what the Justice Department is being relieved of, and what they are being charged with under this bill.

The United States can represent the Indians in two ways, as I understand it. They can either act as attorneys for the Indians under, I think, 25 U.S.C. 175, or they can act on behalf of the trustee of the United States. So, I am not sure what that means.

Senator METCALF. I am not either, but it would seem to me it would be a rather unusual situation where, as you point out, it is not the Congress or it is not the Bureau of Indian Affairs or the Department of Justice or the President of the United States that is the trustee, it is the U.S. Government. It would seem to me to be an unusual situation to say that the trustee would abdicate all of his power and authority.

I would think it would be important for the trustee to continue to exercise as much authority over the trust to protect it as possible.

Mr. DUCHENEAUX. I believe I would be in accord with Mr. Wilkinson's statement yesterday, that we don't want the trustee to be crowded with bureaucracies. We want somebody whose authority is independ-

ent, be it from Justice or Interior, who can provide an oversight function and yet have the Justice Department and the Interior Department maintain their responsibilties as a trustee to administer on a day-to-day basis the drawing up of leases, the letting of contracts, and all of the other things that go into making up the trustee group.

It is not just filing a case which is their duty and responsibility. It is administering the trust on a day-to-day basis, and we don't want either Interior or Justice to be relieved of that responsibility.

Senator METCALF. Well, I am inclined to concur.

Mr. Fannin?

Senator FANNIN. Thank you, Mr. Chairman.

I think that was one of the problems we have in considering this legislation. You say in your statement, "At the annual convention the NCAI passed legislation supporting the legislation embodying the concept" and then you are going to furnish the resolution as soon as it is available.

Mr. DUCHENEAUX. We should have that back this week. We will begin duplicating and sending it out to our members and we will get a copy up here as soon as possible. I can summarize it for you.

Senator FANNIN. I would appreciate it if you could, because in considering this legislation, naturally the hearings will be closed at the same time the information will be available to us, but if you object to different stipulations, I think that should be a consideration.

I know you said you wanted the trustee to continue. Then the Justice Department said the bill should be amended to retain its natural resource duties. In other words, the Justice Department agrees evidently with the bill from that standpoint, that they would not retain the position that they have always had of protecting the natural resources of the Indian tribe.

Are you in agreement with that? As I understand it, you are not, from the conversation. Is that your position? You are not in agreement with that?

Mr. DUCHENEAUX. No; I don't think the Indians are in general agreement with that. The Justice Department in the Lands Division can bring to bear on a trustee problem, in the absence of any conflict which might exist. In other words, if they were representing only the Indians as trustees, as a lawyer for the trustee and there was no other Federal interest or there was no pressure being brought to bear on them from the outside to compromise, then they can bring to bear on that case years of experience, a whole raft of lawyers and other backup personnel which I am quite certain in my own mind that the trust counsel, if enacted, would never be funded for.

Yet, at the same time the Justice Department is in conflict situations in many cases where they are representing, in the same division—the Lands Division—they are representing the Bureau of Reclamations cause or the Bureau's cause, or the national forest and the Indians or all three of them. We just don't see how they can do it and this would provide an independent lawyer for the Indians.

In this case, the Indians' cause would be separated out and given independent representation.

Senator FANNIN. Do you support provisions of this bill which waive the sovereign immunity of Indians with law suits processed through

the counsel, but not those cases filed by the tribes' own attorneys? In other words, if the counsel authority is handling it, the sovereign immunity for Indians in law suits is waived? But it is not waived if it is filed by the tribe's own attorney, in accordance with this legislation. Do you support that position?

Mr. DUCHENEAUX. We are talking about the sovereign immunity of the United States?

Senator FANNIN. That is right.

Mr. DUCHENEAUX. I think most tribal attorneys would like to have the sovereign immunity waived when they bring a suit on their own behalf. I think I would, too, but I would be satisfied if the trust counsel could bring an action against the United States with a waiver of immunity to the extent necessary to come within the authority we have.

Senator FANNIN. Well, maybe that is something we have to go into, in support of the provisions of S. 2035. Would you support the provision to permit the trust counsel to decide which outside counsel should represent a tribe or individual in a natural resource case where it has conflict as where there is a dispute between tribes. That is in section 5(d) of the bill.

Mr. DUCHENEAUX. I think authority would be provided in the act to permit the trust counsel authority—I think we are talking about the board now, to permit the board to hire outside counsel in conflict cases. But I believe the tribe ought to have a right to select the counsel they want, not the board.

What I am saying is that I don't think the board should have the right to go out and say, "Attorney X will represent you in this conflict situation." The tribe can say, "OK, the authority is going to hire an attorney for us because it is in conflict itself, an outside attorney. We will select the attorney and that will give the board the right to pass on anyone we select, but we will do the selecting."

Senator FANNIN. Another provision in this regard, the bill does not permit the trustee of Indian natural resources to call on either the authority or the Justice Department for legal duties in the event it sees legal action required. That is in section 7(e). Do you agree with that?

Mr. DUCHENEAUX. I don't understand the question.

Senator FANNIN. It does not permit the trustee of the Indian natural resource, Interior, to call on the authority or the Justice Department for legal duties in the event a conflict in interest or legal act is required.

In other words, Interior couldn't call on the authority or the Justice Department for legal duties in the event it sees an instance where legal action is required.

Mr. DUCHENEAUX. I think if Interior sees an action taking place which is damaging the trust estate, they would have an obligation to notify either the trust authority or the Justice Department, depending on who had the responsibility under this act, and to call for some legal action, as they do now.

Senator FANNIN. Well, Justice would be removed in sections 7 and 8, that authority.

Mr. DUCHENEAUX. Well, I am fairly confused about that section.

Senator FANNIN. Well, if you would chack that, you would probably want to comment on it later, on sections 7 and 8. In other words, do you support the provisions of S. 2035 which do not permit the trustee of the Indian natural resources, the Interior, to call on either the authority or the Justice Department for legal duties in the event it sees an instance where legal action is required?

Mr. DUCHENEAUX. Reading those two sections, I don't see that restriction in there. Section 7 provides that the authority shall be free from any interference or control by another executive department. We talked about this and everybody agreed that you can't get away from that monster OMB, but what they are really talking about here is the Department of Justice controlling the authority.

Senator FANNIN. Well, they called their attention but they can't require it.

Mr. DUCHENEAUX. As I understand it, the Bureau of Indian Affairs, the Department of the Interior, through the Solicitor's Office, see a wrong taking place to the trust estate by any one, they have an obligation and a right to request the Justice Department to take certain legal action. The Justice Department can turn them down, but they have that right now.

Senator FANNIN. That is right. They have the right to request, that is true. But they can't insist upon it. It is not mandatory.

Mr. DUCHENEAUX. I can't see anything in section 8 that would prohibit the Solicitor's Office to take some action.

Senator FANNIN. Well, "provides the Department of Justice as of the effective date of this act or as soon thereafter as practicable is relieved of his responsibility to represent Indians or Indian tribes with regard to their rights and claims for natural resources." So, it does remove them in this page 5, starting with line 6 with the word "provides."

Mr. DUCHENEAUX. Under title 25, United States Code, section 175, the law provides that the United States shall represent Indians in any suit with respect to their land, et cetera. That seems to say that the United States will act as an attorney for the tribe or Indian. Now, the United States has another obligation to represent itself as trustee.

So, you can interpret that proviso to say that the Justice Department's responsibility for representing the Indians as an attorney is relieved, but they still have the obligation to represent the United States as trustee.

Senator FANNIN. Well, I think it should be clarified.

Mr. DUCHENEAUX. I do, too.

Senator FANNIN. Do you support provisions of S. 2035 which permit the authority to refuse to pay sufficient fees to an attorney representing a tribe in a dispute between tribes and thereby stop his representation of the tribe?

Mr. DUCHENEAUX. I think in a conflict situation where the trust cousel is being called upon to represent two or more tribes in the same suit, they ought to be required to pay a reasonable fee to the attorney selected by the Indians and approved by the board. And I think this could be determined by the court, what a reasonable fee is, or perhaps by the board.

Senator FANNIN. Well, the question was about stopping the representation of the tribe.

Mr. DUCHENEAUX. Section 5(b) says the board of directors shall appoint and fix compensation for such special counsel as is deemed necessary.

Senator FANNIN. Well, what we are talking about is the wording which seems to stop his representation of the tribe under these stipulations. That is the problem that I think we face. If they are going to fix the compensation, then they would certainly have control.

Mr. DUCHENEAUX. You interpret that to mean that the trust counsel can fix the compensation of the current tribal attorneys?

Senator FANNIN. That is right.

Mr. DUCHENEAUX. No, I don't read that as saying that at all. All I read that as saying is in the event that—

Senator FANNIN. I just call your attention to the bottom of page 3, the board of directors shall appoint and fix the compensation of such special counsel, and then "hire special counsel or experts to represent one or all of the parties."

Now, the first statement was taken from the bottom of page 3, the last paragraph, and the top of page 4, and then on page 4, line 10——

Mr. DUCHENEAUX. I don't see anything in this bill which takes away the right of the tribe at its own expense and under the laws, I don't know what section it is, which gives the Department or Secretary the right to approve their counsel, I don't see where this takes away any of that right. All I read section 5(b) as saying is that the board can hire, say, as consultant or for an interim period a special attorney to do special work for them and experts.

I read 5(d) as saying that the board is also empowered to hire counsel to represent an Indian tribe in a conflict situation where it would otherwise itself have the obligation to represent that tribe.

Senator FANNIN. If the tribe hires its own counsel, that is something different. But I am talking about provisions here where the special counsel is hired by a board of directors.

Mr. DUCHENEAUX. I think section 5(d) is the authority that the Indians wanted to permit—if the trust counsel determined that it had an obligation under the act to represent two tribes in an adversary proceeding against each other and it knows it can't do it, it would be in conflict itself, that would provide the authority whereby it could pay a special attorney or counsel for one or both of the tribes and get itself out of the conflict situation.

Senator FANNIN. Well, I think if the tribe is going to hire the counsel, it would remove that problem. But that isn't what is stipulated in the bill.

Mr. DUCHENEAUX. Oh, you mean that the board is being given the right to hire the counsel. I would object to that. I think the tribe should have the right to select the counsel they want.

Senator FANNIN. That is the position I thought you would take.

Now, you mentioned about the power of OMB and even with the stipulations in the bill, are you willing to have OMB exercise control of the authority?

Mr. DUCHENEAUX. I don't think you can get away from the fact that OMB is going to exercise the normal budgetary and management control it exercises over all Federal agencies.

Senator FANNIN. Do you believe the trust counsel authority would be filing law suits for the parts of present public domain such as parts of the national forests, national parks, wilderness areas and so on?

Mr. DUCHENEAUX. If that law suit was somehow tied to the trust responsibility of the United States, I would say yes. But I couldn't see the trust counsel going out to any national forest and picking out a section of land and saying, we are going to sue them and try to get that back. But if it is tied to the failure of the trust responsibility of the United States or to the trust property of the United States, I can't see how they could perhaps avoid it.

Senator FANNIN. Thank you very much.

Senator METCALF. Senator Hansen?

Senator HANSEN. Do you support the provisions of the bill which provide free attorneys to individual members of a tribe including law suits by one or more individuals against their tribe for a division of its natural resources or better use of them?

Mr. DUCHENEAUX. Can I have that again, please?

Senator HANSEN. Do you support the provisions of the bill which provide free attorneys to individual members of a tribe, including law suits by one or more individuals against their tribe for a division of its natural resources, or better use of them? That is what I am trying to say.

Do you support the provision in the bill which, as I understand and interpret it, would permit the providing of attorneys to individual members between one member and the tribe, if in the opinion of one or more members of the tribe the use that the tribe as a unit is making of the natural resources are not in the best interest?

Mr. DUCHENEAUX. I would support the trust counsel authority representing an individual Indian against the tribe if the individual Indian had a legally enforceable right in the trust property. For instance, trust allotment or exchange, something of that nature.

To my knowledge, no member of an Indian tribe has a legally enforceable right in tribal property. He has an inchoate right which will only be determined when the Congress terminates that tribe.

I will not support the use of the authority to bring general actions against the tribe by its members to enforce a better use of the property in the mind of that individual, because the tribal government itself is a beneficiary of the trust and has a right to determine the use of its property.

Senator HANSEN. Do you believe the authority should exercise discretion as to which law suits it would agree to be responsible for?

Mr. DUCHENEAUX. I think it would absolutely have to have that right. It couldn't just take every case that comes along.

Senator HANSEN. The provision in section 9, subsection 5, permitting a tribe to be charged a fee based upon ability to pay which was in last year's trust counsel authority bill, has been deleted from the bill which came up this year. In view of the testimony indicating that the trust counsel authority might not have sufficient funds and staff, wouldn't that provision make it possible for it to provide more legal services by charging those for whom it produces valuable judgments?

Mr. DUCHENEAUX. If the trust counsel is going to bring an action in the name of the tribe and the tribe had sufficient funds to hire its

own counsel, as many do, then those tribes would and probably should initiate the suit themselves on their own behalf. If the suit is going to be brought in the name of the tribe by trust counsel, and that tribe does not have sufficient funds to hire its own counsel and many do not, I think the trust counsel should initiate the suit in the name of the tribe and pay the cost. Otherwise, the trust counsel will be bringing suit in the name of the United States as trustee and quite obviously should be paying the entire cost of the suit.

Senator HANSEN. Do you agree that the limited resources of this trust counsel should be drained by the amendment that appears in this year's version of the bill, section 10, which now includes appearances before the Indian Claims Commission?

Mr. DUCHENEAUX. I don't read section 10 to authorize and permit the trust counsel to appear before the Indian Claims Commission. I read this to say that an Indian tribe may come to the trust counsel authority, with its own attorney, and ask for assistance in preparing its case, if it needs that kind of assistance. But I don't believe section 10, and I may be wrong, has authorized the trust counsel to appear before the Indian Claims Commission.

Senator HANSEN. Let me just zero in on the point that I read that gives me some concern and see if you would make the same interpretation I do. I refer to page 6 of the bill, section 10, beginning with line 24, "providing, however, that the authority may assist any Indian tribe requesting such assistance in its claim pending before the Indian Claims Commission."

It would seem to me that proviso would indeed accomplish the result that I have suggested in this question. Do you share that feeling?

Mr. DUCHENEAUX. It is a very ambiguous statement, but if you read that proviso as saying the authority may appear and prosecute a claim before the Indian Claims Commission, then it negates the whole foregoing portion of that section which would then make it insanity. So, I would say section 10, before the proviso says the authority cannot file or prosecute or intervene in any action or claim against the United States before the Claims Commission or any other special statute authorizing suits, provided that the counsel can render any assistance short of that to a tribe.

Senator HANSEN. Well, it seems to me we are drawing a rather unclear line there between what it can do and what it should not do. I am just trying to call attention to what I think are some ambiguities in the language, some inconsistencies which seem to be properly our concern before it gets written into law.

Mr. DUCHENEAUX. I agree there is a lot of confusion and ambiguity. My understanding was that the administration did not intend the way that proviso may be interpreted.

Senator HANSEN. I would like to say parenthetically, Mr. Chairman, I think some of these questions ought to go to the departmental representatives.

Senator METCALF. I was going to comment that most of these questions which are searching should probably have been directed to the departmental representatives, but it is appropriate that some of them ought to be directed to some of the lawyers that are going to appear for the tribes.

Senator HANSEN. I recognize the expertise of the present witness and I want to take advantage of that wisdom in order to get his feeling. I would say in my defense, I am sorry I couldn't have been here yesterday. As the chairman knows, I am a member of the Finance Committee and we had a few things going over on the floor yesterday that kept me over there most of the time, and as a consequence I didn't get an opportunity.

Do you believe the tribes and individual Indians realize that the independent status of this trust counsel authority will prevent them from asking the executive branch or Congress to get the authority to do certain specific things in which they want?

Mr. DUCHENEAUX. Yes, I think they do understand that. I think they understand it is going to be an independent board. It is—if enacted, it will be a five-member board, most of whom will be Indian. I think if they don't, they should understand it will not be able to bring pressure to bear through Justice or Interior. But at the same time I think if enacted as we see it being enacted, it will still be able to go to the Bureau or Department and say, we want an accounting on our relative rights.

Senator HANSEN. I don't mean to be impertinent by the next question. Were the Indians consulted on this legislation when it was formulated and do you know how it came to be formulated? Did this come from the Indians or what are the facts?

Mr. DUCHENEAUX. The thrust for the fuller protection of the Indian trust rights obviously came from the Indians. As I said in my statement, the Indians have been crying for this for years and recognized for years they were in a weak position. Oftentimes Justice failed to act, and oftentimes the Solicitor seemed to be on the other side. They recognized that.

The concept for this legislation, that is to say the independent trust authority, was not initiated by the Indian tribes, as I recall. It was brought about by the recent controversy beginning about 1968 revolving around water rights and other critical problems. It was drafted within the administration, the Bureau, the Department, and the White House.

The Indians were later consulted about this and there was a series of meetings throughout Indian country carried on by the National Council for Indian Opportunity. It wasn't a very good job, but at least there was some effort made to consult them.

Senator HANSEN. What other sources of free legal services are available to Indians such as OSO-California, Indian Legal Services, Ford Foundation, ongoing programs, et cetera?

Mr. DUCHENEAUX. There are a number of OEO legal aid programs operating on reservations across the country. In my own State I think there are two which take into consideration about four or five reservations. Other States have legal aid. OEO legal aid is not properly equipped to deal with the trust problems of Indian tribes and individuals. It really doesn't have the kind of authority to come in as the trust counsel would have here.

There are indeed the native American rights fund funded by Ford. There is the California rural legal aid arm, but these are not properly equipped to deal with the trust problems that this authority has.

Senator HANSEN. One final question, Mr. Chairman. I appreciate your indulgence.

Senator METCALF. I am delighted that you are clarifying some of the matters in this bill.

Senator HANSEN. Congress has received requests or suggestions for various independent agencies like this one to sue the Government, to protect consumers, protect the poor, protect welfare recipients, to protect citizens who rely on the Government to regulate the power industry, to protect workers and the environment, to name a few. All of these requests or suggestions are based on the premise that the present governmental departments are violating their duty.

Do you support these other proposals in general?

Mr. DUCHENEAUX. Well, I neither support nor necessarily oppose them. If you want to know the difference we see, it is this: The Indian tribe and individuals and this property, through the long history of our relationship with the United States, is a beneficiary of the trust. As we say, the trust freely assumed by the United States, in some cases for the benefit of the United States rather than the Indians.

The United States holds the title of this land for us and we want that because if not we are going to be destroyed as a tribe.

So, we have a special unique relationship with the United States and a relationship which puts us at a very weak disadvantageous position. We feel we need this in order to bolster that position.

Senator HANSEN. Thank you very much.

Senator METCALF. Would the Senator yield on that?

Senator HANSEN. Yes, indeed.

Senator METCALF. I can't quite let this statement as a question go by without some objection. I am the author of a bill, for example, which would suggest that we have a consumer counsel like this in utilities. I have cosponsored legislation that we have a counsel in consumer fields. The charge isn't that the regulatory agencies, for example have violated their responsibility. The charge today is that by a process of change from original concept of regulatory agencies or agencies of Government we have come from a procedure which by the regulatory agency represented the consumer or the utility users to an adversary proceeding. I think this is what the Indians are concerned about also.

We have a quasi-judicial proceeding and we don't have the machinery any more to handle this adversary proceeding of the consumer or the Indian tribe involved, or some of the others. They aren't properly represented before this court or agency involved.

It isn't a matter of not doing your duty. It is a matter of not having an adequate presentation of the matter concerned. This is why the bill would propose a utility counsel, to present the users side and the customers side before the Federal Power Commission, without any allegation that the Federal Power Commission is not doing its job.

Senator HANSEN. Let me say, Mr. Chairman, in response to that, I think you state the case very well. I gather here from the response made by the witness that, without necessarily trying to associate the interest of the various Indian groups with these other identifiable groups, he has said, as I understood him, that in this instance he believes that there is a trust relationship between the Federal Government and the Indians and growing out of that deeply long held con-

viction, he thinks this legislation would best effectuate successfully the sort of continual concern that the Federal Government holds to the Indians.

Have I said essentially what you meant?

Mr. DUCHENEAUX. Yes, sir.

Senator HANSEN. Thank you very much.

Senator METCALF. I want to ask one question. You mentioned a resolution from the National Congress of American Indians, and it is not available now. I understand the National Congress of American Indians are in convention?

Mr. DUCHENEAUX. No. We just finished, Mr. Chairman, Saturday or Sunday.

Senator METCALF. Does that resolution have to be referred back to the Indian tribe?

Mr. DUCHENEAUX. No, sir; this represents the position of the National Congress of American Indians. Not all Indian tribes are members of the national congress and therefore we can't presume to say this is their position, nor can we presume to say it is the position of all of the tribes of our members. All we can say is that it was a resolution enacted by a majority of the members present.

Senator METCALF. The only problem you have now in presenting it is a matter of duplication and getting it before us?

Mr. DUCHENEAUX. Yes, sir.

Senator METCALF. And it doesn't have to be referred back to the tribal members for ratification?

Mr. DUCHENEAUX. No, sir.

Senator METCALF. Who is the new president of the congress.

Mr. DUCHENEAUX. Mr. Leon Cook.

Senator METCALF. Well, thank you very much for your helpful and informative testimony.

(Subsequent to the hearing the following communication was received:)

NATIONAL CONGRESS OF AMERICAN INDIANS,
Washington, D.C., November 23, 1971.

HON. LEE METCALF,
U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: We would like to take this opportunity to express the appreciation of the National Congress of American Indians and the Indians generally for your time and patience in chairing the hearings of the Subcommittee on Indian Affairs on S. 2305.

We do not know your position on the bill, the concept, or even the many complaints we presented, but we do appreciate very much your sitting through almost three hours of Indian testimony so that we might have our day in court. We also appreciate the presence and participation of Senators Allott, Anderson, Fannin, Gravel, and Hansen.

We hope that our testimony and our sincere concerns and fears as expressed at the hearing will have some beneficial effect on the future protection of our trust assets even if the bill itself does not move forward.

As we indicated in our testimony, we will be submitting supplementary testimony with suggested amendments or comments on amendments already in the record.

Sincerely yours,

FRANKLIN DUCHENEAUX,
for LEO VOCU,
Executor Director.

Senator Metcalf. The next witness is an old and personal friend of mine, one of the outstanding Indian leaders in America, Mr. William Youpee, chairman of the National Tribal Chairmen's Association.

Now, I would suggest that some of these legal questions involved could either be propounded as the Senator from Wyoming has propounded them to administration witnesses or to the following witness, Mr. Dellwo, Mr. Totus, or Arthur Lazarus, who has had a great deal of experience in testifying before the committee.

Senator Hansen. Let me say, Mr. Chairman, we are in the process of propounding a similar list of questions. In some instances that may be completely duplicative of those that were asked here. I think they should be asked of the Department's representatives, to give us the advantage of their observations. It was just because of the problems we had yesterday that I didn't get the time to do that. We are in that process now.

If I could, Mr. Chairman, let me ask unanimous consent on behalf of the distinguished chairman of the full committee, Senator Jackson, to have included in the record at this point—that is following this last witness—a statement from the Public Lands Council by Thomas J. Cavanaugh, who is general counsel for that organization and I would make note of the fact that this letter dated November 19, 1971, to the chairman of the full committee mentions in its next to last paragraph that the American National Cattlemen's Association supports the position of the Public Lands Council and requests that this letter serve as a statement of their feeling as well.

Senator Metcalf. I want to say to the Senator from Wyoming again, as I said about Mr. Veeder with the last witness, that Mr. Cavanaugh is also a very distinguished lawyer from the State of Montana.

Senator Hansen. I find people from Montana without fault, Mr. Chairman. I married a Montana girl, Mr. Chairman.

Senator Metcalf. That shows excellent taste.

(The document referred to follows:)

Public Lands Council,
Falls Church, Va., November 19, 1971.

Hon. Henry M. Jackson,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

Dear Senator Jackson: We have recently reviewed S. 2035, a bill to provide for the creation of the Indian Trust Counsel Authority, and wish to offer some comments on the bill for your consideration.

Our membership has an interest in this proposed legislation because many of the members have either acquired lands in the Western states from the Federal Government, or are users of public lands in the West. We expect that most of the claims which will be handled by the proposed Authority will be claims to land and water resources in the Western states which have been granted to third parties by the Government or which remain in Federal ownership as public lands.

We have no argument with the objectives of this legislation. We are, however, anxious that it not be used as a vehicle for constant and continued harassment of the Government and individuals through the prevention of non-meritorius claims.

As now written there are no limitations in time in the bill upon the existence of the Authority or upon the prosecution of claims by the Authority. The unfortunate tendency in Government is for such agencies to become self-perpetuating by whatever means may be available. In this instance, the means may well be the filing and prosecution of nonmeritorious claims.

Most of the claims which would be processed by the Authority created by S. 2035 are now known. The few claims which are not known, we feel, could be

detected within a reasonable time. We believe that a reasonable time limit should be placed upon the filing of claims with the Authority for processing.

We also believe that once a claim has been brought to the attention of the Authority and it is decided to prosecute the claim, prosecution of the claim ought to proceed with diligence. The time within which the claims can be prosecuted will not, of course, be entirely within the control of the Authority. However, a reasonable time limit placed upon the life of the Authority will assure that for its part prosecution of the claims filed with it will be carried on in a diligent manner.

We suggest that the Authority be prohibited from accepting any claims unless filed with it within five years after the effective date of the Act and that the Authority terminate ten years after the effective date of the Act. This would give the authority a minimum of five years to complete the prosecution of any claim filed with it. Not only would such limitations encourage diligence in the prosecution of claims, it would also help to assure that only claims of merit would be accepted for processing by the Authority.

As we have pointed out, undoubtedly many of the claims asserted by the Authority on behalf of Indians will be for pubic lands, or public land resources. We are most concerned about the position of other users in the event that the Government decides not to defend a claim to public lands asserted by the Authority. This is of particular concern to grazing permittees because of the nature of the permits they hold. We believe that it would be fair to other users to provide in the bill that, whenever the Authority asserts a claim on behalf of any Indian, Indian tribe or other Indian group to public lands, any person holding a permit, license or lease from the Government to the lands or resources claimed shall have standing to defend against such claim in any proceeding initiated by the Authority.

The American National Cattlemen's Association supports our position on this legislation and requests that this letter serve as a statement of their feeling.

We would appreciate it if this letter could be made a part of the record of the hearings to be held on S. 2035 on November 22nd and 23rd.

Sincerely,

THOMAS J. CAVANAUGH,
General Counsel.

Senator METCALF. All right, Bill, it is a pleasure to have you before us. Go right ahead.

STATEMENT OF WILLIAM YOUPEE, CHAIRMAN, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Mr. YOUPEE. Mr. Chairman and members of the committee, we come here today to urge enactment of S. 2035, a bill to provide for the creation of the Indian Trust Counsel Authority and for other purposes.

As you gentlemen well know, there exists between the American Indian and the Government of the United States a unique relationship, a relationship based upon treaties between the American Indian and the Government of the United States. That relationship was, to a large extent, created to help the American Indian preserve some of the land that he claimed by virtue of his aboriginal title. The land set aside or reserved for the American Indian is today what we call the reservations. Today, it is on these islands of land in this great country that the American Indians try to maintain their culture, their heritage, and, so to speak, their identity as Indians.

Over the years, we have found that the land base and its attendant rights have grown steadily smaller. To a large extent this diminishing of Indian land and attendant rights has come about because the Government of the United States has found itself faced with a conflict between its duty and responsibility to the people of this Nation and its duty and responsibility as a trustee for the land and natural re-

source rights of the American Indians. In most instances over the years, the Indians have come out on the losing end of each of the conflict situations.

We are here today supporting this legislation because it, for the first time, creates within the Federal Government an institution that will have as its only aim the preservation and protection of the land and natural resource rights of the American Indian people; that is, rights to land, to use of water, timber, minerals, and rights to hunt and fish.

It creates an institution that will be under the control of a board dominated by American Indians. It will have as its principal officer an official who will have the authority to go to court to protect the land and natural resource rights of the American Indians. This body will not have to be an advocate for the rights and interests of other groups, but can take action to let the courts of this land make a legal determination as to what the rights of any one group may be. The American Indian will not, because of conflicts built into the governmental system, be deprived of his day in court.

While strongly supporting this legislation and the office that it creates, we want to make it clear that we think that the bill can be improved. First, the definition of "Indian" should be made clear; that is, in relation to federally recognized tribes and communities.

We believe that the board of directors of the Indian trust counsel could be expanded to six or seven members to give that board broader representation. The broader representation would, in our opinion, give the board greater credibility. We would hope that this body could see its way clear to enlarging the membership of the board of directors.

We also would like to see the bill include some provision for assuring the Indians a voice in the selection of the membership of the board. We do not want to limit the President's power of appointment, but the bill might provide that the President must consider a list of potential appointees submitted to him from the various Indian organizations such as NTGA and others before making this appointment. Who but the Indian people would know who would best represent them on this board?

We would also like to see the Department of Justice still have some responsibility for the protection of the land and natural resource rights of the Indian people. We will look primarily to this new institution for such protection, but we know the vast legal expertise that the Department of Justice has built up over the Nation's life and we feel that this expertise should be available to the Indian people if they need it.

The Justice Department should in no way be put into the position, by relieving them of responsibilities toward Indian natural resource claims, whereby its only function will be to declare a full-scale attack against Indian claims.

We applaud the provision in this bill that has the United States waive its sovereign immunity to suits brought by the Indian Trust Counsel Authority, but feel that that authority should be broadened to include any suit brought to protect the land and natural resource rights of the American Indians. If the legislation were written to waive the immunity to suit of the United States in those cases where the courts found that the suit was justified and was in fact brought for the purpose of protecting the land and natural resource rights of the American

Indian, it would, in our judgment, be a fairer bill and would not create an avalanche of litigation.

It would also be our recommendation that the various agencies and departments of the Government be required to furnish information and documents requested by the Trust Counsel Authority rather than authorize them to cooperate as the legislation now does. Cooperation might include no information and documents.

In conclusion, let me say that this bill offers the American Indian the first real hope that his land and natural resource rights will be protected as they should be. It is for this reason that we strongly endorse the concept. We believe that the changes we have suggested will make it a stronger institution. We feel it absolutely essential that this institution be created if here is to be a strong and harmonious relationship between the American Indian and the Government.

In conclusion, I would like to say an organization such as the Trust Counsel Authority is an organization that has long been the desire of many Indian tribes. For example, up in the Fort Peck Reservation, we have cases pending and they have been pending for a number of years and have not been able to get the case into court. We feel an institution of this type would process the cases that are probably long overue.

I want to thank you very much for giving me the opportunity to come before the committee.

Senator METCALF. Thank you very much, Mr. Youpee, for an important statement, and thank you for itemizing some of the specific suggestions of improvement in the legislation.

The staff will certainly take them under consideration, and when we go into executive session the committee will analyze the work on every one of those amendments.

Mr. Hansen?

Senator HANSEN. No questions, Mr. Chairman. I just must say, since I have the floor, yours is a very honored name in Wyoming. We remember your beautiful and attractive daughter and the fact that she was Miss Indian American Princess—I have the name twisted around. She is a princess, whatever else may be said. Thank you for your excellent statement.

Senator METCALF. Thank you.

The next group is a panel of Affiliated Tribes of Northwest Indians. Will you identify yourself, please?

STATEMENT OF ROBERT DELLWO, LEGAL COUNSEL: AFFILIATED TRIBES OF NORTHWEST INDIANS; ACCOMPANIED BY: ED CLAPLANHOO, PRESIDENT; LUCY COVINGTON, FIRST VICE PRESIDENT; ROBERT JIM, CHAIRMAN, YAKIMA TRIBAL COUNCIL; WATSON TOTUS, MEMBER, YAKIMA TRIBAL COUNCIL; STANLEY SMARTLOWIT, MEMBER, YAKIMA TRIBAL COUNCIL; AND JAMES B. HOVIS, LEGAL COUNSEL FOR YAKIMA TRIBAL COUNCIL

Mr. DELLWO. Thank you, Senator Metcalf.

I am Robert Dellwo, attorney for three tribes on the reservation of which I was born and raised, as you well know. You knew my father who homesteaded that area.

Senator METCALF. His father is a former Speaker of the House of Representatives of the State of Montana.

Mr. DELLWO. We have spokesmen for the Pacific Northwest and their attorney on my right, Mr. Claplanhoo, who is attorney for the Northwest Council and Affiliated Tribes of Northwest Indians.

I might say we filed a statement prepared by our office for the Affiliated Tribes of Northwest Indians and this statement will not be read, since it hopefully will be a matter of record at this point.

Senator METCALF. It will be incorporated in the record as if read.

(The document referred to follows:)

STATEMENT OF AFFILIATED TRIBES OF NORTHWEST INDIANS

The Affiliated Tribes of Northwest Indians appreciate the fact that the Subcommittee is conducting these hearings apparently in response to the request of the Affiliated Tribes in its statement of September 8, 1971.

Individual tribal members of the Affiliated Tribes are filing statements which set out the sorry history of lack of performance by the Department of the Interior in doing anything substantial to protect Indian water rights in particular situations. Our statement will be more general.

That history was a history of complete neglect of and lack of performance by the Department of its trust responsibilities. It is a history of the Department allowing its inherent conflicts of interest to repeatedly cast it in a role of an adversary of the Indians. This latter concept is particularly repugnant to the Northwest Tribes. Often the Department, while pretending to be acting in the role of trustee and guardian of Indian water rights, was in reality participating in and encouraging the outright thefts of Indian waters.

BACKGROUND HISTORY—1908–1953

Most of the great river and irrigation development projects of the West occurred between 1908, the year of the famous Winters vs. U.S. decision, and 1953, the year when Congress enacted House Concurrent Resolution 108 declaring that termination was the policy of the United States Congress. One cannot review those years without seeing that the obvious thrust of the U.S. Government through the Department of the Interior was to decimate, reduce and eliminate the Indian tribes and assets to the greatest possible extent. It was a period of rapid alienation and loss of Indian lands and resources. Reservations that were supposed to be held forever as Indian land were thrown open to the homesteaders, the lumber interests, and the prospectors. The arbitrary and capricious granting of fee titles and authorization of negotiated sales of allotments took most of what was left to allotted Indian lands.

At the same time non-Indian economies and societies were moving fast to preempt and appropriate all the Indian water they could. The Federal Government through the Army Engineers, the Bureau of Reclamation, the Department of Agriculture and other departments was planning the great river basins for maximum development. Invariably the rights of Indians were being ignored. Irrigation districts sprang up on major Indian reservations such as the Yakima and the Flathead. While these districts were called "Indian Irrigation Districts", they were, in fact, non-Indian. The overwhelming majority of the water users were non-Indian, but the waters were Indian. For example, in the Flathead Irrigation District over 95% of the lands irrigated were non-Indian, but all of the water came from the Mission Range, owned by the Tribe.

This was also the period of the landmark Indian Water Rights cases, Winters, Conrad, Walker River, Ahtanum, and Arizona vs. California. Those cases were all qualified Indian victories. What must be recalled, however, is that each followed a scandalous taking of Indian waters, an outright theft of Indian waters, participated in and assisted by the Department of the Interior. Those cases won back some of the waters that were lost, but in no instance did they win back them all. Throughout the West were innumerable other takings of Indian water, unprotected, unlitigated and just let stand as fait accompli.

As some of the tribal statements emphasize on a local basis, it is difficult to find a single instance from 1908 to 1953 when the Department of the Interior

took a positive, aggressive action to protect Indian water rights against taking by non-Indian interests. On the other hand, there are countless examples of the Department participating and assisting in the taking.

1953 TO 1969

Why do we speak of the period from 1908 to 1953? We speak of it because it was not until about 1953 that most of the Indian tribes achieved effective, viable tribal governments. Except for the more sophisticated tribes, most tribes, until 1953, were at the mercy of the non-Indian. The Department of the Interior, a political department, was subverted and operated not for the benefit of Indians, but against the Indians.

The 1953 threat of Termination united the Indians. Their national and regional organizations, such as the Affiliated Tribes of the Northwest Indians, and the National Congress of American Indians became active. Tribes became better organized and more and more employed their own legal counsel.

As a result the Department and the Bureau of Indian Affairs gradually became more responsive to the Indian voices. Tribes began to fight for their rights within the Department and in the courts. The Department was being called upon to answer questions about how it had handled its trust responsibilities to protect Indian lands and water during the previous years.

1969 TO THE PRESENT

During the last two or three years the Indian Bureau became even more responsive to the need for protective action to safeguard Indian water rights. Under the leadership of William Veeder, an eminent Indian water rights legal expert and specialist, and Phil Corke, Mr. Veeder's immediate superior and a skilled engineer devoted to the protection of Indian water rights, the Bureau of Indian Affairs, and indirectly the Department of the Interior, began to face up to the sorry state of their stewardship. They found that not even preliminary steps had been taken. Water inventories were nonexistent. Boundaries were undefined. Land use analyses had not been started. Almost every reservation had the same problem. Neither the Indian Bureau, nor the Tribe could catalogue their water rights resources. They were known only in a general way.

Preliminary steps were taken. Tribes were evangelized by Mr. Veeder, Mr. Corke and their associates to move ahead in this field. Tribal lawyers became more aggressive in the area of water rights. Some tribes learned for the first time of the existence of the Winters Doctrine of Indian Water Rights. In some instances, such as in the cases of the Spokane, Yakima, Shoshone-Bannock and the Lummi Tribes, funds and assistance were made available to assist the tribes in the engineering and legal preparation for litigation in emergent situations where tribal water rights were in immediate jeopardy.

In a short period of time important beginnings were made. These were only beginnings however in the field of needed action, too great to catalogue in this statement.

THE PRESENT FIASCO

Perhaps because they were to effective, the Department of the Interior arranged for the reassignment and transfer of such men as William Veeder and Phil Corke. While giving lip service to the cause of Indian water rights, it sought to gut and immobilize the Bureau of Indian Affairs section most effective in fighting for them.

The Department of Interior has suggested such alternatives as an Indian Trust Counsel Authority, a separate Assistant Secretary for Indian Affairs or the transfer of the Bureau of Indian Affairs to operate directly under the President as a possible solution to the inherent conflict of interest within the Department. The Affiliated Tribes of Northwest Indians has gone on record as favoring a modified version of some of these proposals. It does not consider them to be solutions however. The solution is to so manage the administration of the Department's trust responsibility to Indians that Independent Counsel and an Independent Assistant Secretary or a transfer of the whole Bureau of Indian Affairs are not necessary. Litigation and legislation are not the answer. The answer must be found in the conscientious, honest, day to day administrative performance by the Bureau of Indian Affairs and the Department of their responsibilities to the Tribes and to their reservation resources.

Recent events concerning William Veeder and Phil Corke seem to demonstrate the likelihood that neither the Department, nor the White House will tolerate true Indian advocacy within itself or even within the Bureau of Indian Affairs. They attempt to control and subordinate the advocate, to limit the performance. They use terms like "lowering the profile" of such men as Mr. Veeder. They really do not want effective advocacy.

RECOMMENDATIONS

Let us list some of the things we recommend they do in fulfilling their responsibilities:

Inventory all the water resources on every reservation.

Complete land use surveys particularly to determine lands that are irrigable or which can use water for other beneficial uses.

Conduct adequate engineering studies of the Indian water resources necessary for litigation.

Complete boundary surveys so that the tribes actually know the limits of their lands.

As they are now doing in the case of a few tribes, making moneys available to individual tribes to conduct engineering and legal research re particular water resources and to proceed with litigation where necessary.

Make available to Tribes true advocates, such as William Veeder, who will fearlessly fight for Indian water rights without regard to the conflicting interests of the Bureau of Reclamation and other Federal interests.

We are filing herewith other resolutions that express our views at greater length on particular subjects. Most of all, we call upon the Department of the Interior to remember that as trustee and guardian of Indian resources, it is obligated to help and protect the Indians. It must not misuse its trust and fiduciary position to the detriment of the Indians.

RESOLUTION No. 1

Whereas, Indian Tribes have lost a large portion of their rights to the use of water and land and other natural resources through the inaction and negligence of those persons in government having the responsibility and fiduciary duties to insure and protect these rights, and

Whereas, a serious and detrimental conflict exists within the Department of Interior and the Justice Department which prevents those Departments from adequately considering Indian water rights and often, in fact, benefits other government institutions and agencies at the expense of and to the severe detriment of the interests and property rights of the Indian Tribes,

Whereas, President Nixon in his July 8, 1970, message clearly and dramatically outlined this conflict by stating "no self-respecting attorney will represent both clients in an adversary proceeding . . ." and then recommended that Congress establish a Trust Counsel at the national level to insure and protect Indian natural resources, specifically including Indian water rights,

Whereas, immediate study and action must be given to the creation of such an Authority, and said action requires substantial time in the legislative process,

Whereas, in the interim, until the Trust Authority is established, many events are occurring which may irrevocably imperil and prejudice these invaluable property rights, and

Whereas, Indian Tribes are very cognizant of this fact and expressed to the President and to the Secretary of the Interior the urgent need for immediate action to remedy these serious breaches of the trust, fiduciary relationship, and responsibility of the Federal Government; and

Whereas, the Secretary has responded to these urgent pleas by making available the sum of two million ($2,000,000.00) dollars for the purpose of establishing a special advocacy office called the Indian Water Rights Office, to protect Indian water rights, and

Whereas, the Affiliated Tribes applaud the Secretary's recognition of the existing conflicts within the agencies entrusted with the protection of these rights, and

Whereas, the National Tribal Chairmen's Association has been asked to name a Policy Advisory Board for the Indian Water Rights Office, and

Whereas, the Office of Indian Water Rights, as proposed, ". . . will include persons from the Bureau of Indian Affairs, the Geological Survey and the Solicitor's Office . . .", and

Whereas, the inclusion of the Bureau of Indian Affairs, Geological Survey, and the Solicitor's Office in said Special Advocacy Office will perpetuate the very conflicts which have in the past rendered these agencies incapable of fulfilling their governmental trust responsibility and fiduciary duty, and

Whereas, the Secretary's designation of the Bureau of Indian Affairs, Geological Survey and the Solicitor's Office to said Special Advocacy Office indicates an intention, at the outset, to divest the Office of any meaningful power to direct the activities of the Office and, in fact, creates the possibility that the Policy Advisory Board will merely legitimize the already existing conflicts, and

Whereas, delegation of the power to appoint the Policy Advisory Board for said Office to the National Tribal Chairmen's Association does not provide a broad based vehicle for Indian input for the selection of the Policy Advisory Board; now therefore, be it

Resolved, That the Affiliated Tribes of Northwest Indians, assembled for their annual meeting, in Portland, Oregon, on the 11th, 12th, 13th and 14th days of October, 1971, do hereby urge the Secretary of the Interior to:

1. Go forward to create the new Indian Water Rights Office.

2. Vest the power to select the Policy Advisory Board for said Office with representatives of the National Congress of American Indians and the National Tribal Chairmen's Association.

3. Direct the Policy Advisory Board to report directly to the Commissioner of Indian Affairs on all matters relating to Indian rights to the use of water.

4. Give the Policy Advisory Board itself a wide range of discretion to mobilize and gather expertise from both inside and outside governmental organization.

5. Give the Policy Advisory Board as wide latitude as possible to hire the Director and other personnel, as well as professional consultants, and authorities in the field, and in general, those best suited to accomplish the purposes and goals for which the Office is constituted.

6. Give the Policy Advisory Board full latitude to acquire information and investigate all matters related to the Indian and Indian Tribes' right to the use of water and make this information available to the Indian Tribes involved; to make recommendations to the Commissioner of the Bureau of Indian Affairs as to the course of action to be taken; these recommendations, if accepted by the Commissioner, shall go directly to the Secretary so, if needed, other agencies and the Solicitor can be involved or if court action is recommended the Justice Department can be notified.

7. That the composition of the proposed Indian Water Rights Office as set forth in attachment "A" of the letter from the Commissioner of Indian Affairs to William Youpee, President Chairman of the National Chairmen's Association, dated October 7, 1971, be revised to eliminate the Bureau of Indian Affairs representative. Solicitor's representative, and Geological Survey representative from the Water Rights Office as active participants.

8. Allow the Special Indian Advocacy Office to call upon the Solicitor's Office, the U.S. Geological Survey Office and the Bureau of Indian Affairs for technical assistance, but in no manner should those officers or personnel therefrom direct the activities of that office.

9. All those activities and funds used by said office should be in addition to those presently expended and this in no way should relieve or detract from the present trust responsibility and fiduciary relationship of any agency or department toward the Indian Tribes.

10. That within ten days after receipt of the names of nominees for the Policy Advisory Board from the Officers of the National Congress of American Indians and the National Chairmen's Association, the Secretary of Interior will confirm and publish to said organizations the names of the members of said Policy Advisory Board.

11. That said Policy Advisory Board be thereupon enfranchised, authorized and empowered to initiate forthwith any and all actions and efforts deemed reasonable and necessary, in the discretion of said Policy Advisory Board in the protection and advocacy of Indian rights, and that appropriate and necessary funding be afforded by the Secretary to said Policy Advisory Board upon tender

and approval of a preliminary six-month budget for said Policy Advisory Board.

12. That the Secretary of Interior through said Policy Advisory Board immediately take action to correct and ameliorate within the Department of Interior the intolerable conflict of interest which has resulted in the invasion, dissolution and appropriation of Indian rights generally among the Indian Tribes throughout the United States.

CERTIFICATE

The foregoing resolution has been duly adopted by the Annual Convention of the Affiliated Tribes of Northwest Indians in legal session on October 14, 1971 at Portland, Oregon.

ED CLAPLANHOO,
President.
Rev. WALTER MOFFETT,
Executive Director.

RESOLUTION NO. 2.

Whereas, the preservation of Indian Water Rights is vitally necessary to the continued existence of the Indian Reservation and the perpetuation of Indian culture, tradition, and way of life,

Whereas, to date, the systematic cataloging of existing Indian Water Rights has been sadly neglected by the Federal Government;

Whereas, comprehensive planning for the full and effective utilization of existing water resources is urgently needed by the Nation's Indian reservations; now therefore be it

Resolved, By the Affiliated Tribes of the Northwest in their annual meeting on the 12th, 13th and 14th days of October, 1971, at Portland, Oregon do hereby urge that the Congress of the United States immediately enact legislation specifically appropriating funds to the individual Indian tribes giving them full discretionary and administrative authority to survey their existing surface and subterranean ground water rights, and further to comprehensively plan and develop the full potential of their available surface and ground water resources.

CERTIFICATE

The foregoing resolution has been duly adopted by the Annual Convention of the Affiliated Tribes of Northwest Indians in legal session on October 12th, 13th and 14th, 1971 at Portland, Oregon.

ED CLAPLANHOO, *President,*
REV. WALTER MOFFETT,
Executive Director.

RESOLUTION NO. 3

Whereas, the Assistant to the President, Leonard Garmant, stated in his letter of August 5, 1971, that there are within the Interior and Justice Departments "Intolerable institutional conflicts of purpose and politics.;"

Whereas, the President on July 8th, 1970, in his message to Congress condemning the inherent institutional conflicts of interest within the Justice and Interior Departments as they relate to the water rights of the American Indian stated that "No self-respecting law firm" would permit itself to represent clients having conflicting interests" is true with regard the rights of the American Indians and the conflicting claims of federal agencies such as the Bureau of Reclamation and the Army Corps of Engineers;

Whereas, the Eagle River and Water Division #5 cases epitomize the conflict of interest within the Justice Department and the Solicitor's Office of the Department of the Interior; and

Whereas, the logical extension of the legal rationale of the Eagle River decisions poses a real and imminent danger that the doctrines set forth in the Winters case may be repudiated; now therefore be it

Resolved, That the Affiliated Tribes of the Northwest in their annual meeting held on the 13th, 14th and 15th days of October, 1971, at Portland, Oregon, do hereby urge that the Senate Subcommittee on Practices and Procedures:

1. Fully investigate the history, background, factors and conduct from the inception of the Eagle River and Water Division #5 cases to ultimately determine

their relationship to the preservation of the water rights and water resources of the Indian people;

2. Obtain from the Justice Department a full analysis and explanation of its mis-definition of reserved rights of the United States which may result in the inclusion of American Indian rights to the use of water under the Winters Doctrine and to fully explain to the committee whether the Justice Department distinguishes between Indian rights to the use of water, which are "private" in character and which are held in trust by the United States for the benefit of the Indian people and those of the United States which are "public" in nature;

3. Request that the Justice Department fully advise the committee as to whether it interprets, construes and applies the rationale of the Eagle River case as applicable to the American Indians' rights to the use of water under the Doctrine enuniciated in the Winters case;

4. Request the Solicitor's Office of the Department of Interior to fully advise the committee as to whether it interprets, construes, and applies the rationale of the Eagle River case as being applicable to the American Indians' rights to the use of water under the Doctrine enunciated in the Winters case.

5. Request that the Justice Department advise this committee forthwith as to the names of each and every case now pending in any of the states initiated pursuant to 43 U.S.C.A. 666; and as to the nature of the proceedings, the state-court in which they are pending, the watershed and the source of the water involved; and whether the cases are cases involving "cases and controversies" under the Constitution of the United States or whether they are strictly administrative in character and not within the purview of the jurisdiction of the Federal courts;

6. Request that the Justice Department, in fulfillment of its trust responsibilities, whenever the issue of the rights of Indian people and Indian tribes to the use of water arises, join the Indian people in denying the applicability of the Eagle River decision and Section 666 of Title 43 U.S.C.A., and request removal of said case from State court to the United States Federal District Court and immediately move the Court for its order dismissing the case based on the fact that there has been no waiver of sovereign immunity from suit involving Indian rights to the use of water.

CERTIFICATE

The foregoing resolution has been duly adopted by the Annual Convention of the Affiliated Tribes of Northwest Indians in legal session on October 14th, 1971 at Portland, Oregon.

Ed Claplanhoo, *President.*
Rev. Walter Moffett,
Executive Director.

Mr. Dellwo. This position of the Affiliated Tribes was adopted practically in toto almost word for word by the National Congress of American Indians at their convention, so this could be accepted as the position of the NCAI.

As we were alluding in our remarks, my origin in Indian affairs does date back to my birth in the Flathead Indian Reservation, and the fact my father homesteaded on the reservation from 1914 until the time of his death, this gives me a comparison between a tribe and other tribes in the Pacific Northwest.

As Senator Metcalf knows, the Flathead Indian Reservation district, approximately 95 percent of the lands that are irrigated are non-Indian lands using almost exclusively Indian waters.

Also, you might recall in the 1930's a transmission system was built in this district with power that originated at Kerr Dam, a damsite owned by the people of the Flathead Tribe in which the people of the Flathead had the lowest electric rates in the United States, lower than TVA. Again, the users of this electricity were 99 percent non-Indian, and it is only in recent years that some of the Indians received electric power.

Nevertheless, there was a bright spot in this particular tribe and that is in the case of Kerr Dam. For some reason fortuitously, it was the first damsite in history that I know of that a tribe received any compensation at all for the use of this damsite. As a result, the Flathead Indian Tribe has received hundreds of thousands and millions of dollars in royalties and rentals from the Kerr Dam since its completion in the 1930's.

I say this was unique in history. It was certainly not true of the Spokane Tribe, which because of the departmental conflict which this bill is designed to a certain extent to correct, lost damsites, plural, and particularly the Little Falls damsites without any compensation at all.

In the case of the Coeur D'Alene Tribe, the Post Falls damsite which it lost, a dam was eventually built by the Washington Power Co. at Little Falls without any compensation to the Coeur D'Alene Tribe.

Some questions were asked yesterday about instances in the Department of Justice and the Department of Interior in which there had been a breach based on the conflict of interest. I spent yesterday afternoon in the National Archives building and can relate the same experience that you always have, that this archive material is primarily a chronic calendar of the betrayal of Indian water rights and property rights.

But bridging the chasm of ages, we come up to 1941 in the building of the Grand Coulee Dam where vis-a-vis Kerr Dam of the Flathead Indian Tribe which is receiving some compensation for the use of the damsite, almost the entire basin of Roosevelt Lake was taken from the Kalispel Tribes and the Spokane Tribes for the backwaters of Grand Coulee Dam without a penny of compensation either then or since then.

As a matter of fact, the Spokane Tribe received no compensation whatever for the flooding of 35 miles of their riverbed which was owned by the tribe on the far banks of the river. It received but $4,700 for the flooded lands on the shore of the old river, 35 miles of flooded lands. So, the Kalispel Tribe had a similar experience behind Grand Coulee Dam and behind Chief Joseph Dam.

So, we can chronical dozens of instances of the loss of Indian rights by reason of the conflict of interest within the Department of Interior.

The tribes that I represent and the Affiliated Tribes of Northwest Indians conditionally support Senate bill 2035. I might say it supports the concept of an independent legal office within the Federal Government framework that can be an advocate, be in a position of advocacy of Indian rights on reservations. We do advocate a number of amendments, but rather than go into that in my statement, I want to more or less adopt by reference the very fine statement of my brother. Attorney General Wilkinson, who has represented many tribes in the Northwest who set out in a long statement a number of suggested amendments.

Mr. Hovis, to my right, in his written statement has set out a number of similar proposed amendments. I might call attention to two things which I think should be highlighted. One is the section of the bill which is section 8 as well as section 9, which in effect would extend legal services to any identifiable group of Indians.

I might point out the problem of Indians at the grassroots of organized tribes such as the Flathead that I am familiar with and the tribes that I represent and point out that within these tribes are dissident groups, some strong and some weak, and unless there is some precautionary provision that groups within a tribe must first receive clearance from the governing body of the tribe of which they are members, that the resources of this trust authority could literally be saturated with the call for legal services by dissident groups within organized tribes.

It may be that some of these groups would have identifiable and meritorious claims and yet to me the claims of the tribes themselves as entities would be sufficient to completely take up the abilities of the trust counsel authority.

Another area is how to get these services out to the tribes. Having represented Indian tribes for over 20 years and having walked the reservations that I represent from one end to the other, endwise and crosswise, I know the importance of the field work. Most of the water rights cases of which I have knowledge, the ones in the Coeur D'Alene Reservations and the Spokane Reservations, for example, have required the personal investigation of the lawyers and engineers on the field in the locality, even to know that there is a potential case.

Therefore, I would agree with the recommendation of Glen Wilkinson yesterday, that this not be a farflung government bureau, that to the large extent it be a clearinghouse of Indian claims, that as far as possible the funds that are available be contracted to the tribes themselves, to provide the technical field work and legal research necessary to even identify the fact that a water rights claim, for example, might exist on a given reservation.

Finally, of course, we join with the tribes in objecting to any inference of the eroding or the withdrawing of the trust responsibility from the Justice or the Department of Interior, point out, to this date, in most of the tribes that I know of, there has not been an inventory, even of the water resources, of any given tribe. The inventory itself being the basis, the basic facts of any beginning in the identification of the claims that a tribe may have.

Rather than eating into the time of the other speakers and holding myself available for any questions throughout the presentation of the Affiliated Tribes of the Northwest Indians, I do want to present Mr. Ed Claplanhoo, who is the newly elected president of the Affiliated Tribes of the Northwest Indians, roughly embracing all of the Northwest States and who is also the chairman of his tribe, the McCaw Tribe, on the west coast of the State of Washington.

Mr. CLAPLANHOO. Mr. Chairman, before I state my position I would like to say that as a board member of the National Chairman's Association, for which Mr. Bill Youpee just made his previous presentation, I would heartily endorse the position he has taken in representing the National Tribal Association.

On behalf of the Affiliated Tribes of the Northwest, we did construct this statement that was presented to you by Mr. Dellwo in our recent convention in Portland Oreg.

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As a chairman of a tribe of the Northwest and listening to other chairmen of the smaller tribes in western Washington, I know they are in wholehearted agreement that a trust counsel authority is needed for the Government to wholeheartedly carry out their obligations of the treaty that was drawn with the Indians of the Northwest.

My tribe, the McCaws, have spent a considerable amount of money over the last 35 years trying to protect the rights that we were granted in our treaty. We seemingly have never gotten support from the Government on our right as it was guaranteed. Some of our rights have been dwindled away to the other nations and treaties that our country has made without regard to our rights as granted in the treaty.

We are at the present time speaking as a McCaw, at the present time trying to get our rights recognized. We are negotiating through the International Salmon Commissions to try to get our rights recognized by the Canadians and other interested parties with whom the U.S. Government has written agreements regarding fishing rights on the high seas, in total disregard to the treaty rights as was granted.

I know there are many small tribes in western Washington that cannot afford legal counsel to fight the battles that are lining up right now in terms of water rights. Many reservations have problems with tidelands and rivers which were theirs according to the treaties. I don't think there is much more I can add at this time.

Senator METCALF. Thank you very much, Mr. Claplanhoo.

Mr. DELLWO. Lucy Covington was to be here representing the Caldwell Tribe. Were she here she would bring out some of the same points as the Spokane Tribe, the fact her reservation was surrounded on three sides by the Columbia River and the Okinogan River. It has two large dams on its borders, owned the riverbeds of the rivers that they filled, and she would point out to this date, of course, her tribe has never received any compensation as a result of the use of these great water resources by the Federal Government and, as a matter of fact, it has little, if any, identifiable interest in the free border area, above you might say the beach areas of the resulting lake.

She would point to this and the needs of the Caldwell Tribe with regard thereto.

The next speaker is Robert Jim of the Yakima Tribal Council. It was the Yakima Tribe that was the source of some of the great landmark cases in the history of water rights. I noted in the Archives way back in 1965 they were talking about irrigation in the Yakima Reservation. Robert Jim is the chairman of the Yakima Tribal Council.

Mr. JIM. Thank you.

My name is Robert B. Jim, chairman of the Yakima Tribal Council, and I appear with Mr. Stanley Smartlowit, Mr. Watson Totus, and Mr. Jim Hovis, our attorney, who probably tried more cases for and against the Department of Justice than any other attorney I know.

We are pleased that we could come here and present a statement in regard to the trust counsel authority. We would like to enter a resolution to that effect and in our joint statement, if you would please, Mr. Chairman.

Senator METCALF. Both will be entered in the record.

Mr. JIM. Now, one of the things that the Department of Justice and the Interior, accordingly with the tribe, have dwelt around is trust

counsel authority, and one of the biggest fears of the Yakima Tribe is losing the obligation of the United States of America to the treaties of the Indians such as ours. But if the bill retains its original clause which says that in reaffirming the trust and treaty relationship between the United States of America and American Indians and between the United States and Alaskan Natives, if we are to further this cause, then we will be in concert with the idea of the bill that you have before you. Because, as President Nixon says, every trustee has a legal obligation to advance the interest of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill.

These are the theories we thought we would try to bring to the attention of the committee when we submitted our brief. We submitted there are so many cases for and against, you take the *United States* v. *Moody Charley* in 1959; you take the *Interstate* case where they tried to condemn tribal land in both cases, the Justice Department was on the other side along with the State or the county or engineers, and the Yakima Tribe had to put up money to protect the treaty right in those cases. We won. Having the highest court in the land on the other side wasn't something to be envied. We had no less than——

Senator METCALF. You didn't have the highest court, you had the Department of the Interior. You won in the court?

Mr. JIM. Well, we won in both cases where they tried to condemn the tribal land. It was on the interstate highway and also condemned the lake lands.

I will not dwell too much on the *Ahtanum* case, Mr. Smartlowit will dwell on that. But it took us from 1950 to 1964 to get our water back in this case when the Department of Justice was on our side. We couldn't afford it at that time. We had a similar case, and this is one that might be the subject of many controversies.

We went through the highest court in the District Indian Claims Commission in 1968 after 30 years of cost to us and we won lands on an erroneous survey. Yet we once again have to face an administrative conspiracy by silence. We do not have any work on the land, the deadline runs out, they want to give us 50 cents and this is not justice.

Now, the point here, the attorney and the Department of Justice was on the Indian Claims Commission for justice on Claim 47–B with the Yakima's opposing attorney. When we won the case and they set the land aside for us to have it returned, then we appealed to the administration. It went through the channels, came up to the White House and now the man that is going to rule on the legalities of our having the land in their land department and Department of Justice is the same attorney that opposed us originally in the Claims Commission and lost.

Now, I don't know where the conflict comes in in something like this, but maybe they need a world court or something to settle treaty matters with the Indians and the United States. We always end up back with their attorneys to make the decisions on something like this.

We have had critical cases such as our hunting and fishing rights that we were obligated and without the Interior Department pushing these things and the Department of Justice, we would not have had a saving decision in 1969 to keep our treaty fishing rights alive.

Now, I think the fine line that you, as the committee who are part of the trustees of the Indians, must understand is that we are not only parties to the treaty on one side, that the justice must protect, but when they talk about the public, we are citizens, too. We have another part over there. This is something that I can't seem to get through my craw.

On the other hand, when they have the trust authority, to go with the bill, the Department of Justice must work with the trust counsel. As you heard the gentleman from the Department of Justice yesterday, this is not just natural resource matters, but it concerns wills and everyday living of them as citizens.

Now, this is something very complicated, but what in effect we would like to see, if it is created, they must have concrete appropriations in the law in order to protect the Yakimas or any other treaty Indians, because we are saying that if we are going to have something like this, then we must have something better than what is now or not at all.

So, that will be, in effect, our testimony.

Mr. Smartlowit?

Mr. SMARTLOWIT. Thank you, Mr. Jim.

Mr. Chairman, members of the committee, I know that time is limited here and I think that as a member of the Yakima Tribal Council and member of the delegation I would like to, you know, speak to the water rights that seem to be so important to Indians everywhere.

I had the good fortune or the good misfortune to happen to have been involved in this *Ahtanum* water case. My parents lived there as long as they could and I think that the ones on the north side, you know, of the Ahtanum water were stronger than what we had as Yakima Indians.

We were forced to leave Ahtanum to go down to the lower valley to try to make some kind of a living. I think the question came up here yesterday by somebody, would this bill hurt or help the Indians. I think they like to think that certainly somewhere there should be an improvement over what we have now. I would hate to think that we have to have people wait for half a century for somebody to make a decision to better the living conditions of the Indians. I think this is what happened in the *Ahtanum* water case. It took too long.

I take the position as a member of the Yakima Tribal Council that whatever we do within the 14-member body that it is for the betterment of our people. Certainly I would not want my constituents, my younger generation behind me, to go through the same problems that I have seen. I want them to have the better things in life.

I certainly hope when you have considered this bill and the recommendations made by the various speakers yesterday and today with their recommendations and amendments, that you will come up with something that will be beneficial to Indians everywhere. This will conclude my presentation, Mr. Chairman. I hope I would be able to answer any questions that you might have.

Thank you.

Mr. JIM. We have Mr. Watson Totus.

Senator METCALF. Go ahead, Mr. Totus.

Mr. TOTUS. Thank you.

I want to say this, that our land, our trust land is dissolving because of trespassers. The Yakimas are doing everything to protect their land for our younger generation that is coming so they can have something to live for because of our treaty.

Now, we should not release the Justice Department by this trust counsel. According to our treaty, when the treaty was made with my people, Indian matters on the trust lands or water rights or other resources, you must go to the Departments and ask for your protection. As long as the treaty stands, I still represent my people in accordance with why they have put me in the council. This trust counsel doesn't say how long it is going to run. It might not run longer than my treaty. The next administration might change. It might not set up money for them to operate. That is why my people tell me you represent me on this hearing to protect the treaty.

The Government never gave us the land. We don't want to give the land to the Government. So, I would like to see our land be protected as long as our treaty.

Thank you.

Senator METCALF. Thank you very much, Mr. Totus.

Mr. HOVIS. Mr. Chairman, gentlemen of the committee, we are in a little bit of a different situation, I think, than most of the tribes, inasmuch as we had reservations about this bill from the very beginning. We had considerable concern about releasing the Department of Justice from its responsibility.

The bill was amended from last hearings in September of 1970 when it was introduced and we were very hopeful that yesterday at the hearing that there would be definitive statements both by Interior and the Department of Justice as to what their role would be after the enactment of the trust authority bill that came.

I thought that the testimony from the Department was singly lacking in pointing it out. Therefore, at the end of yesterday's hearings we got together and we filed a statement here with some proposed amendments.

It looks to me, gentlemen, if this bill is to be at all effective and to handle what must be done that this committee and the committee print is going to have to make some substantial changes in regards to and be definitive about the authority of the Department of Justice and the Department of Interior, what it shall be after the enactment of the trust authority, because if we do not we are going to be there where everybody is passing the buck and it won't be a very effective bill.

Personally, it seems to me many times departments are coming up here on the Hill and asking Congress for legislation, the things that could very well be done in the executive branch of our Government. We have had hundreds of cases, particularly in the fishing cases, where the Department of Justice has been on our side, and we have been successful in each one of those cases. They stood with us in the water case and here again is a problem that comes up, in the Ahtanum water case for example, even though we were well satisfied with the trial attorney, when we got into the appellate they wanted to change the entire course of the case and finally we couldn't get the brief we wished to have pre-

sented on appeal so we had to go in as amicus, and the circuit court did rule on the grounds we set out in our amicus brief.

Basically, those grounds came from the trial attorney. Even though he was in the Department of Justice he couldn't put those principles forward. So, this is a problem that comes in that matter.

It concerns me, as Mr. Dellwo points out, as you read through these cases you find letters, correspondence, for example, the *Winters* case came down in 1908—there is a letter in the file saying "Hurry up" from the U.S. Department of Justice, saying to Interior, "Hurry up and make that agreement before the Indians find out what their rights are in the Winters doctrine."

That is sort of shocking back in 1908, but I want to tell you something, gentlemen, in the last 10 years, in the United States versus 10.69 acres of land, which is a well-known case, the Department of Justice chose to be on the side of the Department of Transportation and not to be on the side of the Indians. Even in that case the trial attorney who was assigned this case wrote a memorandum saying "you are wrong. You can't condemn the Indian lands in this situation," but he was overruled by the central office and condemnation was brought against the Yakima Tribe.

Both the trial court and the circuit court of appeals said they didn't have the power to do so, and it was denied by the Supreme Court. But we went through all of this expense and concern and bother during this time.

We don't want to, for a moment, say that everybody has been wrong with the Department of Justice. We have enjoyed the dedication of many fine men in the Department of Justice. We have enjoyed their representation. We have a fine solicitor's office in our region. In each and every case the Department of Interior has, in these matters, been with us. It is not all bad.

There needs to be some overview authority where we have these conflicts, but we should not and must not dismiss the Department of Justice or the Department of Interior from the same responsibility they have today. It would not be efficient, as well.

We are talking about saving a few dollars, we have district attorneys offices all over the United States. Does it make sense to relieve them to be able to make calendar calls and arguments and presentations instead of having to fly somebody out from a central authority in Washington, D.C.?

Gentlemen, I don't think that is good government, that we relieve these people when it can be meshed together. I think it is expensive for us and I don't think the cause of the Indian people will be served by dismissing the Department of Justice from their responsibility.

I have proposed some amendments particularly to sections 8 and 9 being more definitive about what the authority should do, also being more definitive that the Department of Justice is not released.

That is all, Mr. Chairman.

If there are any questions, I would be glad to be of any assistance I can.

Mr. Jim. This winds up our session. I will turn it back to Mr. Dellwo with the thought that as sacred as the Constitution is to Americans, that is how sacred our treaties are to the Indians.

Mr. Dellwo. That concludes our presentation, Mr. Chairman.

Senator METCALF. That was a excellent presentation.
Senator Anderson?
Senator ANDERSON. I have listened for 30 years and they cost what? What 30 years are you referring to?
Mr. HOVIS. The 30 years or more of litigation, particularly in the *Ahtanum Water* case. I think this is what the Senator is referring to. We have lost the water for over 30 years. It was almost half a century. After we got the water back through this litigation that had been signed away by the Secretary of the Interior, after we got it back, we made over $800,000 more in products produced on that land the first year after we got the water back than were produced the year before. Yet we lost the use of that land for over 30 years.
Loss of the use of that water for that long period of time, where we didn't even ever get any compensation for it, the claims situation, we were not able to prevail in the Court of Claims on this matter.
During this period, it is a terrible thing when these things are done, not only for the Indian people but for all the citizens, our neighbors as well. For example, the Indians sold many of their lands when they didn't have the water. It broke up families like Stanley was talking about. These people had to move. They couldn't live there.
On the other side of the river these people got the water with an agreement from the Secretary of Interior, they built up an economy, homes, people lived there for years. Then we come in and readjust this situation, the Indians get back the water they have lost, and in the meantime we have our neighbors mad at us because they created an economy on their lands and it is a dreadful thing. It is just a dreadful thing that these kinds of situations persist for everyone.
Senator ANDERSON. Do the Indians use the water?
Mr. HOVIS. We have now regained the water; yes, sir.
Senator ANDERSON. Who handled that?
Mr. HOVIS. The Department of Justice handled it. The trial attorney on that case was William Veeder.
Senator ANDERSON. Well, you can't complain since the work was done.
Mr. HOVIS. What we were complaining about was the fact that it was over 50 years getting it to trial. The Department of Justice would get ready to file it and then there would be a little political pressure and—as a mater of fact, it was even filed once and the local attorney was instructed by the central office to go in and pull the petition out. So, it wasn't the fact that once it got filed that it wasn't tried right, the question was getting it to trial. This was the question Mr. Dellwo was speaking about today and that I wish to speak about.
It is getting it filed and getting the things done. By the time you convince the Department of Justice to go on a lawsuit, you have to try it anyway. They are tougher than the courts are to convince them to file.
Senator ANDERSON. They waited 50 years?
Mr. HOVIS. They waited over 50 years, yes.
Senator ANDERSON. What was the time period?
Mr. HOVIS. The first request that was made for action on that treaty to the Department of Justice was in April of 1906. The case was finally completed, and I may be off a year or two, but I think the case was completed in 1967—I beg your pardon, it was 1964.

So, you see, it was over 50 years that the Indians were without the use of the water that was rightfully theirs.

Senator ANDERSON. We didn't have mine and water rights for a great many years.

Mr. HOVIS. Well, we have been a little more militant about our water rights, I think, than many people have. For example, on our reservation we have 40 percent of all the irrigated land, all of the irrigated land of the Indian people of the United States of America—40 percent of it is on our reservation. Sixty percent of the crops grown on all irrigated land on Indian Reservations are on our reservation.

So, gentlemen, we want to say to you that while we think we have had some difficulties, basically we feel this bill, if enacted, will be much more helpful to other tribes, smaller tribes, not either through resources or through leadership or for other reasons being as militant as the Yakima Tribes about their water rights.

We think it will be more help perhaps to the Yakima. We have been militant about it. We have decrees on at least two of our major streams and are working to get decrees on our other two streams and are working to get decrees on our other two streams and are working to get decrees on our ground water as well.

Senator ANDERSON. I think that is fine. I just wondered why you blame it on the Department of Justice? You got some pretty good results, didn't you?

Mr. HOVIS. Yes, we have. We have a record of never losing a case here. We always say, and only half facetiously, we never lost a case when the Department of Justice was on our side, and we never lost a case when they were against us. We would just like to have them with us more.

I would like to say in the fishing cases particularly, it is very important, when you are talking about the treaty, if you could have both parts of the treaty, the United States of America and the Indians sitting down at the same council table—particularly the juries and you are fighting with the State; they are in there trying to take things away from you. If you have two parties to the treaty sitting there saying what the treaty really meant, it is a very effective thing. It is more effective than having the tribal attorneys sitting there; to have Uncle Sam sitting there is a tremendous asset and one which we do not wish to forgo.

Senator ANDERSON. Yes.

Mr. HOVIS. I prefaced my remarks, Senator, that the Department of Justice and the executive branch and the Department of Interior can do, under existing legislation, many things that they do not do today. We are constantly, I think, asking this committee and other committees of the Congress to do things that if the various administrations and the executive department would just get with it, it wouldn't have to be done. But I think all of the examples we have here show us that it is not being done. We don't expect that perhaps they will be with it tomorrow.

Senator METCALF. Senator Hansen?

Senator HANSEN. Just two observations, Mr. Chairman.

Would I be correct in assuming that these hearings on this legislation are not necessarily concluded? I think it has been indicated that

there are other witnesses who may wish to be heard, other legal entities of the Government?

Senator METCALF. We are going to keep the record open, especially as a result of what took place this morning because of the questions that are going to be promulgated to the various administrative agencies.

Senator HANSEN. Yes.

I would like, then, further to ask unanimous consent that the hearings transcript be submitted to the Justice and Interior Departments in order to receive their answers to the changes or their observations to changes which have been made or suggested here, and to get the benefit of their thoughts as well.

Senator METCALF. Without objection, we will do that, and we will try to get from them their observations as to the various amendments being submitted.

Senator HANSEN. I might observe further, Mr. Chairman, that you people from the Yakima country, I know, will be interested in the fact that we have your excellent brochure "The Yakima Treaty Land, Not for Sale." This speaks about Mount Adams and it quotes several of you.

Mr. JIM. That is our other 30-year case.

Senator HANSEN. You made it very well.

Senator METCALF. Just a moment. We discussed this morning largely water rights. We have been concerned with water rights and certainly on the Flathead Reservation, but there are many other natural resources that are involved. Would some of you comment on what impact this would have on these?

For instance, right now on the Northern Cheyenne Reservation there is considerable coal and Mr. Youpee's own area there is oil. On the Flathead we have a controversy revolving around who owns certain natural forest land and timberland. What about that natural resource?

Mr. DELLWO. The reason water rights is such a militant issue is that it is an asset that can be stolen from the Indians before it gets there. In other words, the streams usually have their headwaters off the Indian reservation. But as in the case of the Flathead, again in the case of the Yakimas and also in the case of the Spokane with many issues such as the lack of lawyers in which there are non-Indians developing lands that actually belonged to Indians. I believe that situation exists on the Flathead Reservation, the number of thousands of acres that actually belong to the tribe—we have the situation in every case where we have the discovery of minerals, the urgency of the surveys and so forth to identify the Indian lands.

At one of the meetings the chairman of the Coeur d'Alenes brought out that a large tract of land had been cleared out by a logger who believed it was non-Indian land when, in fact, it was Indian land.

Also smilar to water rights, what are the rights of the tribes on the bed of lakes, such as the bed of Roosevelt Lake, which according to a recent decision it is determined that the tribes own these beds? What about the resources on these beds, minerals, oil in the case of Arkansas, things of that kind?

In other words, the whole field of natural resources and that is one of the reasons why all Indians are adamant that the Departments of Interior and Justice not be relieved from any spot because there is

such an overlapping of management responsibility and legal responsibility.

In many cases if you have the exercise of correct management responsibility, the legal actions never will need to take place.

I might say, speaking of the militancy of the Spokane Tribe, referring to the Flatheads, Spokanes, and so forth, I think most of the great theft of Indian resources have occurred to those tribes which, as Mr. Clapanaho pointed out, are without financial resources now, or in the past, to protect their rights.

The *Ahtanum* case may not have ever taken place if the Yakima Tribe didn't have the resources to crank up their case. The great thefts on the Spokane Reservation occurred before that tribe had financial resources at all with which to hire local counsel. This is still the case of many tribes throughout the United States and one of the reasons for the need for the trust counsel authority.

Senator METCALF. Senator Anderson?

Senator ANDERSON. I have been glad to have a few kind words with Indian attorneys, tribal or otherwise, because we have many contacts with them on this committee. I think it was an excellent presentation and I am very happy to have it.

Mr. DELLWO. Thank you, Senator.

Senator METCALF. Thank you for a most effective and informative presentation.

I call your attention to some of the questions promulgated by Senator Fannin and Senator Hansen and if as you read through the record you would like to make comments on those questions, the subcommittee would appreciate that.

Mr. DELLWO. Yes; I think we will file supplementary statements.

Senator METCALF. Please do. Thank you all.

(The prepared statements of Mr. Dellwo and Mr. Jim follow:)

STATEMENT OF ROBERT D. DELLWO, ATTORNEY FOR SPOKANE TRIBE, COEUR D'ALENE TRIBE, KALISPEL INDIAN COMMUNITY, AND REPRESENTATIVE FOR THE AFFILIATED TRIBES OF NORTHWEST INDIANS

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

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

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

It is obvious that tribal and individual Indian resources and property rights have been allowed to dwindle and be lost because the various agencies of the United States Government have either failed to act to protect those rights or have acted positively and aggressively to speed up or assist in their loss. There have been innumerable instances when United States Attorneys, Justice Depart-

ment lawyers or United States Solicitors have not acted or been allowed to act to protect the Indians' rights when to do so would appear to be in conflict with some other government program such as the acquisition of a reservoir site, the flooding of land or the preemption of water rights. The instances are rare when they acted in defense of the Indians.

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

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

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

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

SPOKANE TRIBE

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

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

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

COEUR D'ALENE TRIBE

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

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

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

KALISPEL INDIAN COMMUNITYY

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

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

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

Similar examples could be given for every tribe in the Northwest: The loss of the pure Nooksak River waters to the Lummi Tribe. The ignominious agree-

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

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

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

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

CRITICISM OF PORTIONS OF S. 2035

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

The following are proposed amendments:

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

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

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

FURTHER RECOMMENDATIONS

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

It is the belief of most tribes that if it is simply a large government law office charged with representing Indian interests, it could still be so subject to control

and influence from within the Administration that it really will not be in a position fully to correct the evils of the present situation of conflicts of interest within the Departments of Interior and of Justice. Additionally, it will be headquartered in Washington, D.C., so isolated from tribes that a small tribe, hundreds of miles away, may never come in contact with it.

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

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

CONCLUSION

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

(A supplemental statement by Mr. Dellwo was not received in time for inclusion in the record.)

Statement of Robert B. Jim, Watson Totus, Stanley Smartlowit and James B. Hovis on Behalf of the Yakima Indian Nation

My name is Robert B. Jim, I am Chairman of the Yakima Tribal Council and I appear here today to present the joint statement of the Yakima Delegation. In the interest of time we have prepared a joint statement after the close of yesterday's testimony. However, all members of the delegation are available to be of further service to the Committee. I present here at this juncture a resolution passed by the entire Yakima Council regarding S. 2305 and ask that it be made part of the record today.

We appeared before in hearings on a similar bill S–4115 in September, 1971. At that time, contrary to most of the testimony presented, we voiced some serious reservations about such legislation. Those reservations were presented in spite of our recognition of a definite need and in spite of our approval of the basic concept.

S–2305, as introduced, is an improvement on S. 4115, but again though we approve of the basic concept of S. 2305 we have some basic qualifications that we wish to discuss with you.

Perhaps many of our qualifications could have been removed by a more definitive statement from the administrative proponents, but it appeared yesterday that there was even conflict as to the effect of the bill between the Department of Interior and the Department of Justice. It would therefore appear to us that if the bill is going to be effective to assist the obvious need of the Indian people there will have to be definitive committee amendments. It would also appear to us that further justification is in order before this Committee will consider this bill for passage. We hope that the two departments will, in answer to this Committee's request, give examples of the many areas of conflict that have and do exist.

We would be most surprised if this Committee considers this legislation if proponents speak only in generalities and state that everything has been fine in the past, but that there could be problems. It has been our experience that this Committee with its many emergent problems is not prone to try to solve fears of what might happen or merely fanciful problems.

Let us give you a few specific examples:

In *U.S.* vs. *Moody Charley* (D. Ct. Eastern Washington 1959) and in *U.S.* vs. *10.69 Acres of Land* 425 F2d 317 (1970), the Department of Justice represented the Army Engineers and the Department of Transportation in suits to condemn Indian lands. In neither case were they successful. In both these cases the positions of the United States was found to be without foundation in law. It is disappointing to us to have the Department of Justice bring unfounded actions against parties they have the duty to protect. In both of these cases however, We had the support of the Solicitor's Office of the Department of Interior.

For example, we could not have been more pleased with the dedication of William Veeder in the case of *U.S.* vs. *Ahtanum Water District*. However, there were many problems that existed before the case ever got to trial. Few cases are better documented than this one. The Ahtanum Creek is often considered as the cradle of irrigation in the State of Washington as the Indians were irrigating from this Creek in the early 1800's. In 1855 we entered into the Treaty of 1855 with the United States and this Creek constituted the northern boundary of our Reservation. In the early 1860's lands north of the Creek were occupied by settlers. The water was needed by parties on both sides of the creek to successfully cultivate adjoining lands. Serious conflicts regarding the use of this water between non-Indians and Indians developed shortly after 1900. The first record of a request to the Justice Department to protect our rights was August 23, 1906. It was almost a half century later before any action was taken. This period is replete with evasions of responsibilities stemming from conflicts within the Federal Government and with politically powerful non-Indian land owners. A moderate review of these conflicts can be found in the opinion of the Ninth Circuit Court of Appeals at 236 F. 2d 321, 328 et seq. A less moderate view could be obtained from the Indian people who had their living severely hampered due to the diversion of Indian water by non-Indians. In our statement we err in favor of the more moderate documented statement.

In 1907 the Supreme Court enunciated the *Winters Doctrine* 207 U.S. 564. In 1908, the Ninth Circuit Court in *Conrad Investment Company* vs. *U.S.* in applying the *Winters Doctrine*, declared that the Indians' rights to the use of water could be exercised." . . . not only for present uses, but for future requirements" on the Reservations for future economic development. Consternation flowed from the pronouncement of the *Winters Doctrine* and its application in *Conrad*. Oddly enough the biggest concern came from those who were supposed to be protecting the Indians. The U.S. Attorney on instructions from Washington postponed any litigation to protect the Indian water now that it looked like the law was on our side, and the then Chief Engineer of the Indian Service guided the Secretary of Interior into a 1908 agreement that gave 75% of the Indian water to the non-Indians on the north side of the Creek. Because of this agreement, agriculture on the south side of the Creek became almost impossible after July of each year. When our leaders realized what had been done and that they had rights under the *Winters Doctrine* they almost immediately began to petition for legal action. In spite of the fact that at times there were almost open hostilities over the water between the Indians and non-Indians, Justice refused to act. When some Indians directly involved brought action against the United States to protect their rights, Justice successfully moved to have the case dismissed for want of jurisdiction. After over 40 years of delay and no water, Justice finally instituted an action to quit our title to these waters. In excess of 55 years after the agreement the Circuit Court held that the 1908 Agreement was improper and that the Indians were entitled to a much greater share of the water. However, even during the final stages of litigation there were repeated pressures to settle the case and it was necessary for us to appear *Amicus* in order to present the issues our Tribal Attorney and the Trial Attorney felt important to the appeal. Now all this later action regarding the appeal and settlement may have been in our best interests but it is difficult for us to be without doubt when the very person who is resisting our claim for the improper agreement is privy to Justice discussions and is in the same division of Justice.

Again we see the conflict problems that exist in an "erroneous survey" matter. After thirty years of litigation, we were successful in having the Indian Claims Commission determine that the boundaries of the Yakima Indian Reservation were erroneously surveyed. Lands within this area, erroneously surveyed by the U.S., that were occupied by the Department of Interior have been returned to us by this Department. The lands that were occupied by the Forest

Service have not been restored. This matter was referred to the Department of Justice by the White House, on August 16, of this year. We are anxious to determine the opinion of the Department of Justice in this question where the Department of Agriculture says we are wrong and the Department of Interior says we are right.

The picture is not all bad. We have appreciated the help of Justice in *U.S. vs. Oregon* 302 F. Supp 899 (1969) and other fishing cases. In spite of built-in conflicts and extreme political pressure, the dedication of the many individuals in the Department of Justice and Department of Interior cannot go unmentioned. We want more of their help. While they have never been on the winning side when they have filed a suit against us, they have never been on the losing side when they have been with us. It is only half facetiously, that we say that the simple answer to our need is to have them in their legal wisdom to be with us and never against us.

While we feel it is fair to state that in some cases Justice has been less than zealous in the exercise of their statutory responsibility to represent Indians, we do object to that portion of the bill that in Section 8 relieves Justice of this responsibility. While the Trust Authority may have primary responsibility we wish Justice to be required in the bill to assist the Authority to the extent practicable. Not only will this afford better protection to the Indian people, but because of the location of United States attorneys throughout the country, will save a great deal of expense as well. These District offices can handle appearances, calender calls, etc., from their local offices at much less cost than having attorneys from the Trust Authority travel many miles for this purpose. In yesterday's questioning it was brought out that Justice would still be a "referee" between departments, that there would still be conflicts that exist even in the Trust Authority, and that the Trust Authority would still be subject to pressure and budget limitations. We would be serving no purpose to sideline an existing aid to the Indian cause only to find that this new Trust Authority also had conflicts and that the Authority did not have adequate appropriations to handle these Indian cases as well as Justice can? Also, since we feel that there is conflict in the legislative history as to where the authority would operate that the bill itself must be definitive in its direction towards correcting these problems, we propose the following amendments to Sections 8 and 9 of the bill:

"SEC. 8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band, or other identifiable group of Indians, acting either in the name of the United States, in the name of the Indian or tribe, or in its own name, is authorized to render all legal services, now authorized to be rendered by the Department of Interior of the Department of Justice, necessary to preserve and protect natural rsource rights of Indians, including, but not limited to rights or claims of the Indians to natural resources, such as rights to land, minerals and timber; rights to the use of water; and rights to hunt and fish. The legal services authorized to be performed pursuant to this section include but shall not be limited to, the investigation and inventorying of Indians' land and water rights; the advocacy of the policy favorable to Indians within the executive branch; the initiation and prosecution to final judgment, in all courts of the United States, and of the States, against the United States, its department, agencies, officers and employees, or against any of the States, their subdivisions, departments and agencies, or against persons and corporations public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication, or administration of natural resources or interests therein had or claimed by the Indians, including but not limited to, rights to land, timber and minerals; rights to the use of water; and rights to hunt and fish; the defense in any and all courts of the United States and States, of all actions in law and equity which might affect claims or rights to resources owned or claimed by Indians; the prosecution and defense of appeals in all courts of the United States and of the States; and the institution of and participation in actions in any Federal, State or local administrative proceeding in order to protect the natural resource rights of Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section."

SEC. 9. The legal services rendered pursuant to section 8, hereunder, shall in no way absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, including those which derive from the trust relationship and any treaties between the United States and any Indian or Indian tribe: *Provided*: That in determining the litigating position of the Department of Justice on any matter affecting the rights of Indians or Indian tribes,

the Department of Justice shall consider and give due deference to the obligations of the United States deriving from the trust relationship and any treaties between the United States and any Indian or Indian tribe."

Finally, we would suggest that the provision of Section 11 that suggests that the Authority may charge fees is improper. This, as brought out by questioning by the Committee yesterday, causes ethical questions of improper solicitation or improper law practice by the Government. Even more importantly, it may tend to lead the Authority to be more interested in bringing suits for the more affluent tribes rather than for those that are in greater need of the assistance.

Adequate funding of the Authority is vital to its proper functioning. If the Authority is not to be properly funded, then let us not enact this legislation. It would be a cruel hoax to again raise the hopes of the Indian people only to find that they have the name but not the game.

It is therefore submitted that section 11(3) be amended by the addition of the following proviso:

"*Provided*, that nothing herein shall authorize the Authority to charge fees for its services."

RESOLUTION—YAKIMA INDIAN NATION

Whereas, the Yakima Indian Nation in a unique legal position with the Federal Government in relation to treaties, statutes, and executive orders; and

Whereas, the President's speech of July 8, 1970, emphasized the creation of a Trust Council Authority to better defend these rights; and

Whereas, the Federal Government is responsible to protect the rights under various treaties and statutes and executive orders; and

Whereas, conflict of interest within the Department of Justice does hamper the Federal Government's responsibility to protect certain rights under the existing laws and mandates mentioned; and

Whereas, the rights have been protected in many instances by the Government with the use of the Department of Justice legal staff for the Yakima Indian Nation, e.g. Ahtanum Water case, and various hunting and fishing cases; and

Whereas, creation of the Authority having sole responsibility for Indian legal matters would relieve other departments of the Federal Government of their responsibility under the treaties, statutes, and executive orders; and

Whereas, the Department of Justice has hundreds of attorneys located throughout the United States that the proposed Authority could not replace; and

Whereas, the provisions of the proposed legislation calls for the payment of fees by some tribes may cause misdirection of litigation and certain ethical problems; and

Whereas, the Federal Government's first responsibility is to the Indian treaties and unique trust relationship as set by 6th Article of the Constitution and as recognized by the highest court of the land as being the supreme law of the land; now therefore be it

Resolved, The Yakima Indian Nation through its elected representatives of the Tribal Council does oppose the bill in its concept to relieve any department of the Federal Government of the responsibility to protect the Indians treaty rights or to charge for services rendered; and be it further

Resolved, That the Tribal Council delegates to the Trust Council Authority hearing present this decision to the members of Congress.

Senator METCALF. The next witness is Mr. Arthur Lazarus, who is legal counsel for several tribal groups. Mr. Lazarus has been a frequent witness before this committee and you are most welcome.

STATEMENT OF ARTHUR LAZARUS, LEGAL COUNSEL FOR SEVERAL TRIBAL GROUPS

Mr. LAZARUS. Thank you, Mr. Chairman, Senator Anderson.

I noted several tribes because our firm actually represents 10 or 12 in varying capacities.

I am appearing here today for the Navajo Tribe, three other Arizona tribes, the San Carlos Apache Tribe, the Wellapy Tribe, and the

Salt River Indian Community, and also the Seneca Nation of New York.

For identification, my name is Arthur Lazarus, and I am a member of the New York and District of Columbia firm of Fried, Frank, Harris, Shriver, and Kampelman.

The purpose of the bill before the subcommittee today is to provide independent legal counsel and representation for the preservation and protection of the natural resource rights of Indians. My clients generally endorse this legislation in much the same way as the witnesses who have preceded me. The principle is good.

The legislation as now drafted has some serious defects, but there is a need for an institution such as the Indian Trust Counsel Authority. An adequate job is not being done by existing institutions of Government. I think the record has been well made with respect to that point.

This is, of course, particularly true where the Government finds itself in a conflict of interest position. But there are many cases where a conflict of interest does not exist and still the Federal Government is not performing its responsibility.

Many cases have been cited before this committee. I would just add one more specific case for the record. We are familiar with the water rights cases generally, and there has been a tremendous emphasis upon those cases in the testimony before the committee.

I think there are two reasons why water rights are so emphasized. One is that is the area where the Federal Government has done the worst job from the Indians' point of view. Second, water rights litigation is so lengthy, so costly, and so time consuming that it is the area where the Indians can least help themselves.

So, you have the combination of Government falling down on the job, most Indian tribes being unable to do the job themselves, that creates what is really a crisis situation with respect to Indian water rights.

Senator METCALF. Pardon the interruption. This is the area, too, where there is the greatest conflict of interest, is it not? For instance, Interior might be concerned with reclamation on the one hand and acquiring and defending its trust position on the other, or the Corps of Engineers might be?

Mr. LAZARUS. That is correct. It is the area of the greatest conflict of interest, and also the area of the greatest political and economic pressure.

Because the Government has fallen down on the job and has failed to protect the Winters doctrine rights of the Indians, the use of water has been made by non-Indian interests. Some of the streams, I fear, that exist in use, if all honored, would not leave enough water in the stream to permit the Winters right use by Indian tribes.

Turning it around the other way, for Indian tribes to be recognized some existing non-Indian use may have to cease.

Now, the one additional example I wish to cite to the committee is one that is familiar to it from testimony I gave 7 years ago. That is the Consumer Dam situation. The taking of land within the Seneca Reservation for the Allegheny River project. But we had an interesting sidelight to that controversy which did not come before the committee except parenthetically.

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In the course of constructing the dam, it was necessary to relocate a State highway. That was a two-lane highway. The Corps of Engineers, under existing law, was required to replace it with another two-lane highway. The State of New York, however, wished to convert this highway into a four-lane limited-access freeway. That was a betterment. In other words, something the State was requesting that the Federal Government was under no legal or moral obligation to furnish.

The law had been made clear in previous litigation which I handled that the State could not acquire land within an Indian reservation in New York under State law. So, what happened in this case, the Corps of Engineers volunteered to give the State the four-lane limited-access highway easement that it was seeking, even though the State could not get it under its own power. That is exactly what happened, and, in addition to the dam cutting the reservation into pieces, we now have a limited-access highway that runs across it into another direction.

This was a perfect example of where the Federal Government volunteered to help the State as against the Indian interest. When we litigated over the matters, of course, the U.S. attorney was on the other side.

Senator METCALF. Was that raised on appeal?

Mr. LAZARUS. Yes; we took that one to the U.S. Court of Appeals for the Second Circuit Court and lost 2 to 1, basically on the argument made that it was within the discretion of the Secretary of the Army to determine the scope of the project, and if he determined the scope of the project should include a four-lane limited-access highway easement, it was not for the court to go behind this determination.

I might add at this point, jumping ahead to say what I had intended to give in my testimony, that one of the amendments I would suggest to the pending bill is that the Indian Trust Counsel be given the power to appear before congressional committees. I note in the legislation that in section 5(c) that attorneys or special counsel are authorized to appear for or represent the authority in any case in any court, before any commission, or in any administrative proceeding.

I suggest to the committee that one of the important places trust counsel might appear is right here in Congress, because in many of our Indian resource cases, if Congress authorizes the project, the Indians are already out of court. They may collect money, but they will never be able to preserve their land. This has been the line of cases.

So, I think that sort of prophylactic or preventive legal service being entrusted to legal counsel and particularly the right to appear before legislative committees is quite important.

We must recognize, I think, as we look at the Indian Trust Counsel legislation, that even if enacted it can do only part of the job. What we have to do is frame the legislation in such fashion that the authority can do as much of the job as is available, not to hamstring it; and yet, at the same time, not to give it so much to do that its energies and its funds are dissipated.

I think the testimony before the committee, as I have listened to it, has shown that the Indian Trust Counsel can perform a unique and valuable function, one that is not being filled, but that the areas in which the authority and trust counsel should operate should be clearly defined by the committee.

I would now like to turn to some specific comments on the proposed legislation which I will take up in order that they occur as you read the bill, and not necessarily in order of importance of the proposal.

The first thought that occurs to me and has occurred to my clients is that the authority itself, the membership of the board of directors, should be expanded. The bill says that the authority is to act independently of any executive agency and yet the authority as set up in the legislation is dependent upon the highest executive. The power of the President to appoint the members and the fact that there are only three members serving 4-year terms which makes the authority very much dependent upon the administration then in office.

I would like to suggest, therefore, that the size of the board of directors be expanded and that the majority be required to be Indian, with the understanding that there will be a broad spectrum of Indian views on the authority.

In this way I think we can reduce the political influence that can be brought to bear upon the activities of the agency.

I would further suggest that the board itself, rather than the President, should be able to pick its own chairman.

Senator ANDERSON. Why?

Mr. LAZARUS. Again, that gives the authority an independence to pick its own chief executive officer, that it will not have if, as under the existing legislation, the chairman is designated at will by the President.

The second section of the bill which I feel requires some further analysis and improvement is the section 5(c), dealing with the functions of attorneys operating under the direction of the authority.

I have already commented that I think such attorneys should be given the power to appear before legislative committees. I believe, also, that the attorneys should be given the power to represent Indians and Indian tribes. In other words, their clients.

In addition to the authority itself, it is unclear to me from the bill what independent powers the authority would have to act in its own name. It is my understanding that the authority is basically to provide lawyers for Indians and Indian tribal groups and that there are very few occasions when the authority will be going into court as the authority.

So, I would suggest that it is appropriate to amend section 5(c) to make clear that when the authority goes into court, it is going in as lawyers for an individual Indian or tribal plaintiff or defendant.

Again, not having the form of the prepared statement in front of me, if I could cover another parenthetical thought, it is that the authority have the power to represent Indians and Indian tribes as defendants as well as plaintiffs.

The bill as now drafted is geared to the prosecuting or plaintiff position and there are times when Indian tribes and individual Indians will need help in court and legal advice as potential defendants.

Section 5(d) takes up the question of what the authority should do when it is asked to represent more than one party to a lawsuit. I suggest to the committee that we should not transfer the Federal Government's conflict of interest to the trust counsel authority, that the trust counsel should represent either one side or the other, but not both.

We just recently here in the District of Columbia had some interesting litigation where a public service law firm, or OEO-funded law agency was representing the plaintiff in a divorce, and the judge appointed an attorney from the same agency to represent the defendant in that divorce. The attorney refused the assignment and the judge held him in contempt. The court of appeals reversed it and reversed it on the proper ground that even though this was a public service organization and designed both to represent defendants and plaintiffs, it couldn't do a proper job representing both at the same time.

I think this is true of the trust counsel also. No matter how we camouflage it or build barriers up, if trust counsel is representing one side on a suit, I do not think he should represent the other side, either directly or indirectly. Whether it is subsidizing another lawyer or putting it in a different department, it is not enough. You can only serve one client at a time.

This, of course, is not true where there is a community of interest between different parties. This obviously can represent clients with a community of interests.

Turning now to section 8, section 8 says that the authority may act for an aggrieved Indian or Indian tribe with its consent. I think the obligation should be a little stronger on the tribe to indicate its desire for the services of the authority.

I would suggest that that language be changed to "at the request of" the Indian tribe or individual Indian. I don't think the authority should even be giving the appearance of going around and looking for business. I think it should be in the position of the traditional law firm that is available to the tribe, that will act at the request of the tribe but not be in the position of, according to the legislation, being able to initiate lawsuits on its own and then seeking the consent of the tribe to the finding of the suit.

There is quite obviously an information function that the authority can perform. It can make its availability known to tribes. It can make known to tribes what it is doing and therefore the general run of legal rights that the agency is capable of protecting. But I think with the limited resources that the authority is going to have, that the idea of its acting in response to a request by a tribe is going to be a significant way of controlling its calendar and its workload.

The second question I raise with respect to section 8 is the term "legal services." Legal services in regard to rights or claims. I am unclear from the language of the legislation, and I think clarity is necessary, as to what is intended by legal services.

The thrust of the bill is towards litigation, but as we lawyers know, the object of legal service is to try to keep your client out of court. Ninety-five percent of the lawyers' work is done outside of court. So, the question arises as to whether legal services is intended to cover services beyond litigation and advice directly related to litigation, or potential litigation.

I think it has to be broader than just litigation, yet we do need some definition as to whether it includes economic matters. Would the trust counsel be able to advise a tribe or an individual Indian as to the terms of an oil and gas lease? Would trust counsel be able to handle a tax case involving income from natural resources? These functions should

be spelled out and we should know whether trust counsel can handle them or cannot handle them.

The third part of section 8 which I believe requires special attention from the committee is the proviso which relieves the Department of Justice of responsibility to represent Indians and Indian tribes with respect to their rights or claims to natural resources. This waiver is, as the previous testimony has shown, much too broad.

The Department of Justice has a great many functions to perform in the representation of Indians and Indian tribes and those functions cannot possibly be taken over in their entirety by the trust counsel.

So, I would suggest that at the very minimum this language of waiver is limited to cases where the United States is a defendant in the law suit. In other words, where the United States is being sued by a tribe or an individual Indian, then it is quite proper that the Department of Justice should be relieved of responsibility for handling the case for that tribe. But I do not think this is true in the other cases where this is not the direct conflict between the interest that the Department of Justice will be representing on behalf of the United States and the tribal justice.

Senator METCALF. But there is a conflict when the United States is plaintiff at times? The one where you described with respect to the road or condemnation of a road, for instance, on a Federal highway.

Mr. LAZARUS. That is correct. Where there is a direct conflict between the two, then I think the United States—the Department of Justice can be relieved of responsibility for representing the tribe, the responsibility that it now has by statute. But in all other cases, I think the Department of Justice must be held to retain its responsibility because, given the realities of the situation, the funds that we can be sure will be going to the Indian trust counsel, there will be a large gap of work undone if the Department of Justice and the Department of Interior are not still in the picture.

I would like to make one other remark at this point about the role of the Department of Justice and the way Indian land rights are viewed. This approach seems to permeate all writings and discussions of the subject and it is one which I think starts from a false premise.

The President's message sending this legislation to Congress spoke about the conflict between the National interest and the Indian interest. That, I think, has been the history of this country, that we have always talked about the Indian interest as being a private interest as contrasted with some public interest.

The Federal Government has given assistance to farmers, to railroads, to miners, to utilities and even to the Lockheed Aircraft Corp. That has been held to be in the public interest.

I have never understood why the protection of an Indian reservation or the upholding of a treaty isn't also in the public interest. So, I have always had difficulty with this distinction between Indian and public interest.

So, I think Indian rights are in the public interest. They are in the National interest. It has always been difficult for me to understand the position taken in the Department of Justice and the position taken by other Federal agencies that somehow what they are doing is the public interest, but the United States' role as trustee for Indian is not public, that is private.

My final comment deals with section 10 and the exclusion from the powers granted the authority of the right to bring proceedings under the Indian Claims Commission Act of 1946. I think that exclusion is too broad and probably unintentionally too broad, because the Indian Claims Commission Act not only authorizes suits before the Commission on wrongs that occurred before 1946, but it also authorized suits in the Court of Claims on wrongs that arose after 1946.

That is codified as 28 U.S.C. 1505. That is a grant of general jurisdiction to the Court of Claims to entertain suits by Indian tribes for wrongs committed by the Federal Government after August 13, 1946.

Now, I do not think it was the intention to exclude from the powers of the authority the right to bring suit on current wrongs. So, I would suggest that the exclusion of claims filed under the Indian Claims Commission Act should itself be limited by saying it applies to ancient claims and not those under 28 U.S.C. 1505.

I thank you very much, Mr. Chairman and Senator Anderson, for your attention. I would be happy to answer any questions you might have.

Senator METCALF. Senator Anderson?

Senator ANDERSON. No questions.

Senator METCALF. Well, I think you have made an excellent group of suggestions, Mr. Lazarus. You did address yourself to some of the things that arose both yesterday and today.

I would hope, however, when you correct your testimony that you go over the whole transcript and if you desire file a supplemental statement in response to some of the questions that were asked this morning by both Mr. Fannin and Mr. Hansen.

Mr. LAZARUS. I would be happy to.

(The supplemental statement was not received in time for inclusion in the record.)

Senator METCALF. It would be helpful to us in analyzing this legislation.

I am somewhat encouraged this morning to see that the counsel for the various Indian tribes who have so effectively and persuasively represented those tribes in the courts and before the commissions are in here suggesting that there be a Federal agency that will take your place.

Mr. LAZARUS. I don't view this Federal agency as taking my place. I think this agency is and should be designed, one, to help tribes and groups that cannot afford counsel and, two, to undertake the kind of legislation—excuse me—the kind of litigation which tribes that have counsel on general matters are unable to finance, such as water rights.

In the first memordandum I ever wrote to my clients, when the Indian trust counsel bill was first proposed, I said if trust counsel did nothing other than handle water rights litigation, they would be performing a function that the Government is not now performing and which most tribes cannot perform for themselves, because that litigation is so expensive and so time-consuming that it is a rare tribe that can finance it on its own.

I really feel that if the bill did nothing else but provide for the handling of water rights litigation, that we would have taken a giant step forward in the protection of Indian rights.

Senator METCALF. But you will agree it is necessary for protection of many of these other natural resources and rights for the various Indian tribes?

Mr. LAZARUS. Certainly, there are many types of cases where a tribe which has a perfectly legitimate right does not have the resources to protect that right.

Now, we always think of Indian claims in terms of money recovered. If a tribe has a legitimate claim, it usually doesn't have difficulty in obtaining counsel. Sometimes it has difficulty over the percentage of the contingent fee because the Interior Department has heretofore stuck to a rather rigid 10 percent, which is not a meaningful figure on a small claim and prevents tribes from getting representation on small claims. But I understand there may be some flexibility in the Department on that.

But, there are other types of cases in which the object is to prevent the taking of Indian land or to prevent the waste of Indian land, where there is no money recovered, where in normal circumstances an attorney would have to be paid a fee for his services and the tribe does not have it.

Again, I will go back up to the State of New York, because I just filed suit against the State of New York again last week on this same Southern Tier Expressway. They are now moving to expand the four lanes on the other side of town and cut through the reservation in another place. This time they don't have big brother, the Corps of Engineers, behind them.

So, I have gone up into court and filed suit to vacate the appropriation of Indian land under State law. Fortunately, the Seneca Nation has enough money to pay and retain our firm to cover these services. But if they didn't have those funds and they were faced with the same problem, how could they get a lawyer to take that case? Because if he wins the case, the land is saved and there is no money. This is the kind of case also where trust counsel would provide a very useful function.

Senator METCALF. Well, I think you have been helpful in our understanding of the bills with those explanations. Thank you very much.

We have one more witness. Are Mr. Simpson and Mr. Fisher going to appear together?

STATEMENT OF RAYMOND SIMPSON, ATTORNEY OF RECORD FOR THE INDIANS IN EAGLE RIVER CASE, AND ATTORNEY FOR CONFEDERATION OF LOWER COLORADO INDIAN TRIBES; ACCOMPANIED BY ADRIAN FISHER, CHAIRMAN, COLORADO RIVER TRIBAL COUNCIL; AND MRS. STILLMAN, CHAIRMAN, TRIBAL COUNCIL

Mr. SIMPSON. There are three of us, Mr. Chairman, but we will try to be as brief as possible. Mrs. Stillman, who is chairman of the tribal council, and Mr. Adrian Fisher, on my left, who is the president of the Colorado tribes.

My name is Raymond Simpson. I represent both of these tribes, the Agua Caliente tribes in Palm Springs, and the Federation of Lower Colorado Indian tribes.

Senator METCALF. The bells have been ringing and we are going to have to get over to the floor rather quickly. May we put your statement in the record as if read and you address yourself to some of the material that you feel hasn't been adequately covered today?

Mr. SIMPSON. You are addressing me?

Senator METCALF. All three of you.

Mr. SIMPSON. Mr. Fisher has a prepared statement.

Senator METCALF. Yes; he has some suggestions for amendments.

Mr. FISHER. I appreciate the opportunity to appear before this committee to testify concerning the need for S. 2035.

Indian tribes across the country and particularly those in the West that are involved in a virtual life and death struggle for protection of their water rights have identified a very grave shortcoming in the method present law provides for carrying out the Government's trust responsibility to Indians in the protection of their natural resources. In many of the disputes over water rights and land boundary and title matters, the Indians find that the adverse claimant is the trustee—the Government, whose duty it is to protect the beneficiary tribes.

When these matters come up for litigation or even administrative action, the legal staffs which are available to represent the trustee and the Indians are also duty bound to represent the broader, national interest. This conflict of interest literally precludes Indians from having adequate representation in these types of controversies. S. 2035 is directed at this problem.

Before I comment on the specific provisions of the bill I would like to make some observations:

It is good that we have identified this conflict of interest problem and it is good that we are together seeking to alleviate it. I am sure that the concept of an Indian Trust Counsel Authority will help us deal with the conflict of interest problem in a manner that is better than what the law now provides. It is very important, though, that those of you on this committee and those in the executive branch not offer this concept as a means for completely abolishing the conflict of interest problem.

I would also urge my fellow Indian leaders not to look upon the enactment of this, or a similar bill, as a complete solution to the conflict of interest problem.

The body of law regarding Federal-Indian relationships is but a reflection of history and this history is made up of a series of conflicts of interests—the interests of a predominant society in conflict with the interests of the Indians.

If either the Indians or the Government look to the enactment of this bill as a cure-all for the conflict of interest problem, then the Indian Trust Counsel Authority is doomed to failure.

We must look at it as a cooperative effort to provide a means whereby the conflict of interest can be minimized to the extent this is possible within the Federal-Indian relationship.

My reason for saying this is that I fear that many of us—those in Government and many Indian leaderships across the country—have come to look for the easy solution to extremely complex problems in Indian affairs.

Last week an NCAI convention heard for the third year in a row about the Commission of Indian Affairs' plans to reorganize the BIA

executive staff. I fear that the Commission sees reorganization as the easy solution to complex problems. I want the record to show that while we expect this legislation to be extremely helpful, we do not regard it is a final solution to the conflict of interest problem.

Now, to the provision of the bill:

Sections 1, 2, 3, and 4 of the bill deal with the purpose and the structuring of the Trust Counsel Authority. I have no comment in these sections.

Subsection (d) of section 5, in my view, points up a situation where agencies of Government should not take sides. The subsection provides that where there is a conflict between Indians who are requesting the assistance of the Authority, the Board of Directors may hire a separate counsel or experts to assist or represent one or all of the parties. In this type of situation the Authority would be placed in the same position the Indian Bureau and Interior Department are in now.

I do not believe this type of situation, where there is a difference between Indian tribes, or a difference between individual Indians and their tribal government, should be dealt with in this particular bill. If the Trust Counsel Authority is able to function where a tribe's position is adverse to the position of the United States, I think it will have done all we should ask of it.

I have no comment on sections 6 and 7.

Section 8 causes me the same concern discussed above. While I do not have any clarifying language, I believe it would be possible and desirable to assure that the legal services rendered do not pertain to instances where there is a conflict between individual Indians and their tribes or between two or more Indian tribes.

Also, in section 8 there seems to be an unresolved question of whether the Justice Department does or does not have a continued responsibility. One part of section 8 says that the Justice Department is not absolved of its responsibilities and another part says it is relieved of its responsibilities. The responsibilities should remain with other agencies of Government where they are now until they are assured by the trust counsel authority.

Section 9 gives the trust counsel authority the right to sue the United States on behalf of Indians. This, and the waiver of the sovereign immunity of the United States, is essential.

I have no comment with regard to section 10 except to express satisfaction with the provisions that would permit the authority to assist Indian tribes in claims before the Claims Commission.

Section 11, subsection (2) needs to be strengthened to compel departments of the Government to comply with a request for information or materials. Many of the cases which would be brought under this authority have long histories which are often buried in the files or personal knowledge of personnel in the various departments. It will be vital that the trust counsel authority be able to obtain this information and material.

Again, I want to thank the committee for the opportunity to appear.

Mr. SIMPSON. Yesterday we had testimony here, Senator, which unfortunately we were unable to be present to hear which for the most part indicated support of the bill, particularly from the Department of Interior and the Department of Justice.

At the very tail end, the last witness was a Mr. Bloom, who was an assistant attorney general for the State of New Mexico, who appeared and made a strong attack on those who supported the bill by pointing out among other things that there really was no need for the bill.

The people who had been present and testified, including the Secretary of Interior and Mr. Kashiwa, when asked the question: "Gentlemen, can you recite instances to us where the Department of Justice and the Department of Interior had conflicts of interest which have led to damage to the Indians" in each instance, of course, refusing to confess to the sins they might have committed. They smiled and said, of our own knowledge we have no such list. We will try to compile such a list.

I feel it is very important in addressing this committee to make clear that the need has become a very graphic one to me as a tribal attorney for a little over 20 years. I appeared 3 weeks ago in Los Angeles in a case not involving water, Senator, but involving condemnation of land for the construction of a debris basin involving the Agua Caliente Indians.

At that particular time the U.S. attorney appeared under section 135 of the title 25 and said, I am representing certain Indians who requested I appear here. Judge Burns, who was the judge on the bench, turned around and said, "Mr. Stoddard, as U.S. attorney, what is the position on this motion for immediate possession by the United States?"

Mr. Stoddard replied by saying:

> Your Honor, I must confess that I am extremely embarrassed because I am wearing at least two hats here. The Attorney General told me unequivocably I am not to oppose the motion for immediate possession to permit the construction of this project to proceed, because he has conferred with the Corps of Engineers who don't want it stopped. On the other hand, the Congress told the Indians under section 175 they may have the U.S. attorney appear to represent them. They have told me definitely I am to oppose.

The judge said, "What are you going to do?" He said, "What can I do, I must obey my boss, the U.S. attorney, but I do have one consolation, Mr. Simpson is here appearing on behalf of certain allottees and I know he is going to object."

I pose the question, what would have happened had there been no independent counsel? I further pose the question, damage that these lands now have been under an order of this type for a little over 9 months—they could have generated income in various ways. They perhaps could even have been sold. But nobody is particularly interested in purchasing land which is existing in the shadow of a condemnation proceeding. There is a conflict.

I go further, Senator, to something Mrs. Stillman is well acquainted with. When I first became the attorney for the Fort Mojave Tribe, the United States became involved in what we call the "Goat Island" case in the Colorado River.

You had many parties involved, not Indians, claiming they owned certain lands. The United States, acting as trustee came into the picture and said, "We wish to intervene on behalf of the Indians who definitely own the lands that are being taken, but who own accretions thereto worth clearly in excess of $1 million."

They intervened and fought and the trial took about 3½ weeks. In the middle of the trial the U.S. attorney suddenly decided that

somehow or another the interest of the United States became a very big issue. The Indian witnesses appeared to testify regarding their own situation. Suddenly he saw this as an island rather than a case involving lucretia.

Consequently, the United States would have a different interest if it happens to be an island. The interest of the Indians was dropped immediately.

Now, I only give this background for one very significant reason. The people who lost then went to California, filed in the U.S. District Court of Los Angeles, starting fighting, the Indians turned to the Departments of Justice and Interior and said, "Help, you told us this was our land, you fought and you didn't win. What are you going to do now?" They said, "We are not sure we have enough facts to get into the lawsuit."

So, as tribal attorney I was instructed to get into it. We looked the picture over and a rather crazy departmental letter about the compact regarding the border of Arizona and California had been approved. This compact put the land in question back in California, which would divest the court in California of jurisdiction.

We filed an action then to protect the Indians' rights in the U.S. District Court of Phoenix. The Indians wanted the United States to help. They requested their assistance and as of this date they still haven't got the assistance. A meeting is scheduled next January.

In the meantime, we are writing briefs, having meetings, moving on while the United States, I submit, is dragging its feet.

I add something more to this that is very basic and effects all Indians in the United States. I refer to the case of the *Agua Caliente Band of Mission Indians* v. *County of Riverside*. The Indian tax exempt land is something which if developed is going to generate income. That is what the Congress wants.

When that income is generated, the local agencies immediately reach out to try to take what they can. Despite the tax exemption to the land and the income, this happened with Agua Caliente.

You remember, you participated in the bill. After that was enacted in 1959, development started on that reservation. Less than 5 percent of it has been developed by leases, but it did start and the county of Riverside decided we want some of that income and they started taxing the leasees of Indian land as though they were the owners, calling it a possessory interest.

We tried to obtain the assistance on behalf of the Indians in this particular case. We have had people in the Solicitor's department say you are right—in fact, in the first case, Senator, ever filed on possessory interest was in 1949 involving the Senecas by the Department of Justice asserting our position which they lost. I don't know whether it is the embarrassment of that loss since they never appealed it or what, but we have taken the case to the doors of the U.S. Supreme Court.

We filed a petition asking that the Indians be heard. We had over 40 different tribes filing an amicus brief, joining us in that. We urged the Federal Government to get into the act to do something about it.

At least, we think it is important enough to have our day in court. We thought we had this. I have a letter before me which went from the Office of the Solicitor in which they stated the Agua Caliente

Band petitioned the U.S. Supreme Court to grant certiorari. The Solicitor's office is strongly urging the Solicitor General's Office of the Department of Justice to also petition the court urging it hear the case.

On the 11th hour we were informed that was not going to happen. There would be no stand by the Solicitor General with respect to this. They wouldn't even file an amicus brief saying hear the Indians.

A bit of poetic justice occurred. The Honorable James Haley, feeling this is one of the most important questions confronting Indians authorized me to file a brief on his behalf with the Supreme Court requesting that it be heard. The Supreme Court, upon receipt of that brief, indicated they were sufficiently shocked that the trustee hadn't even seen fit to make an appearance that they turned around and ordered such an appearance by the United States. That position has not been expressed.

My only fear at this stage is that their appearance might hurt us. But we know one thing, we know that the appearance of the trustee, just as some of the attorneys previously stated, seated at the same counsel asking that you be heard can help Indians. Even if they keep their mouth shut and say we are here as trustee—this is something that is critical.

Something else that came up yesterday, and I would like to offer this in evidence, if I might, the question was raised about title. Again, I am referring to water and title. I hold before me a map which has been called "bloody mary" because every red spot you see there is Indian land where the title is in question, where you have trespassers located on it or where you have accretion problems or actual access problems. This is up and down the reach of the river here involving Fort Mojave and other Indians.

If there is a need for this bill, this is certainly part of the evidence in support thereof. This I would like to offer. I am trying to keep this very brief. It would take a few hours to explain it, but may I offer it for the consideration of the committee?

Senator METCALF. I am not sure we can reproduce it properly in the printed record, but it will be received for the file and the staff will look at it and attempt to develop material there.

Mr. SIMPSON. We deeply appreciate that, and as I move to asking the Indian leaders with me to add some comments, I would add the last two points, very important on flood gates.

One is the swamp land clearing which Senator Metcalf and this committee might not have heard of. But approximately 4 years ago by accident Mr. William Veeder learned that the Bureau of Land Management rendered a decision giving approximately 1,500 acres of land to the State of California pursuant to an application filed under the 1850 Swamp Land Act.

The interesting thing of that is that the Secretary of the Interior had several years before, in approving the constitution and bylaws of the Fort Mojave Tribe, described the very land.

In addition to that, the U.S. Geological Survey, in setting up the official quad map for the area, drew the western boundary which included this 1,500 acres. In addition, that the 1870 general order of the Army setting up the Hay and Wood Reserve which was the description for this, included the same 1,500 acres.

The Mojave Indians who believed they owned this from time immemorial had claimed this under their aboriginal claim were not even consulted. We learned that the award had been made.

It took us 2 years, with the help of many able Congressmen and Senators, just to get permission to intervene. Then it took us 2 years after we tried the matter to finally, Senator Metcalf, win it.

Now, it isn't absolutely final, because there is an appellate period. But after thousands of dollars of expense by the Bureau of Indian Affairs, who were not permitted to intervene, they were told they could not represent the Indians, their tribal attorney could. Mr. William Veeder was told he, although an attorney, could not be at the counsel table and act as counsel with me. We were told this a few days before the trial.

Fortunately we did, as I repeat, win. But we still have the unresolved problem because somebody wants that land. They want it very badly. Because under the doctrine of accretion, if that 1,500 acres were considered to be the land of California, it would vest title in California on September 28, 1950, the date of the act.

The river has moved so far to the east since that time that under accretion the Mojaves would lose approximately 7,000 more acres. This is the kinds of problems we face.

I feel I should go into great detail on the Eagle River matter, which I won't because of the time here. I will only add that the Eagle River, where we prepared this large volume that I hold, trying to be heard, was a situation where we knew what was going on.

We determined the Indians had a valuable right. We talked about the United States here under the bill, the Indians had this.

Second, they not only had the sovereign immunity, but these were their private lands held in trust by the United States.

Under the *Eagle River* case we could see how the Indians could be subjected to a rash of lawsuits in many States without the financial backup to defend against them. We could see other hazards that would come.

I would like to offer this particular motion which was filed with the U.S. Supreme Court requesting that the Indian position be clarified, be made part of the record, and I would particularly, Senator Metcalf, emphasize that the Department of Justice and the Solicitor General were asked before they filed their briefs to make that position known.

They filed a simple footnote saying they didn't believe there were any Indian interests directly involved. After they received a letter from me pursuant to their request, which was approximately 12 pages in length detailing how the Indian interest was involved, we were given this assurance. They then offered their brief. They were then asked, "Would you kindly file a petition for rehearing just to attach this so the Court will be able to say we understood that the Indians might be involved and would clarify it."

This was not done and has not been done in any way whatsoever.

I offer only one other thing to you at this time. The Agua Calientes did pass a resolution dealing specifically, Senator, with one, urging the passage of the bill, and two, particular amendments thereto which might be helpful.

Senator METCALF. The resolution will be made part of the record.

As to the motion, it is rather bulky for the record, but it will be made part of the file and if you have another one or so, we would appreciate having them.

Mr. SIMPSON. I will see that you are supplied with that.

Also on Mr. Bloom's comments yesterday, I would like to offer a copy of the testimony of William Veeder dated July 22, 1971, regarding the particular case which in my judgment is an honest entity of the claims made by Mr. Bloom and shows that the use of genocide with respect to Indians is perhaps an apt description regarding the present demeanor of the Department of Justice and as a last item I would like to offer a letter dated October 27, 1970, to the Secretary of the Interior from the chairman of the Fort Mojave Tribal Council listing some eight areas where conflict of interest for denying them land, water, and the dignity of being independent.

Senator METCALF. Those will be received for the record.

(The documents referred to follow:)

AGUA CALIENTE BAND OF MISSION INDIANS

RESOLUTION NO. 71-55

Whereas, the Indians of America have been the victims of intolerable conflicts of interest within the Department of Interior and the Department of Justice; and

Whereas, the President of the United States acknowledged and highlighted this deplorable condition on July 8, 1970, in his message to Congress relating to American Indians; and

Whereas, the Interior and Insular Affairs Committee of the Senate has scheduled hearings on S-2035 introduced by Mr. Byrd at the request of Mr. Jackson, which would establish an independent Indian Trust Counsel Authority; and

Whereas, the Tribal Council for the Agua Caliente Band of Mission Indians did call a tribal meeting for the purpose of discussing said proposed bill; and

Whereas, the apparent consensus prevailing among those members present led to the conclusion that said bill should be enacted into law as a step forward in the protection and conservation of Indian rights,

Now, therefore, be it resolved, that the Tribal Council for the Agua Caliente Band of Mission Indians does hereby go on record as supporting the passage of Senate Bill 2035, but in addition thereto respectfully suggests the following additions and amendments:

(1) That Section 2(b) should be enlarged to require a periodic report from the Authority to the Senate and President on an annual basis with all Indians being entitled to the right of comment on said report as to additional trust violations perceived by them or to submit comment respecting the deficiency in performance by the Authority.

(2) Language should be added to Section 9 making it patently clear that in any appearance before a state court the Authority would not be submitting to state law, and the appearance of the Authority would not in any way constitute a waiver to the rights to which Indians are entitled to under Indian law.

(3) A new subsection should be added to Section 11 which would confer the right to subpoena records and personnel by the Authority in the implementation of their function under subparagraph (2) of said section.

(4) Section 12 should be amended to set forth a definite sum of money, thereby permitting the Authority to commence functioning without delay.

Dated: November 17, 1971

LARRY N. OLINGER, *Chairman.*

I, the undersigned, the Secretary of the Agua Caliente Band of Mission Indians, hereby certify that the Tribal Council is composed of five members of whom 3 constituting a quorum were present at a special meeting thereof, duly called, notice waived, convened and held this 17th day of November, 1971; that the foregoing resolution was duly adopted at such meeting by the affirmative roll call vote of 3 members; and that said resolution has not been rescinded or amended in any way.

RAY LEONARD PATENCIO, *Secretary.*

FORT MOJAVE TRIBAL COUNCIL,
Needles, Calif., October 27, 1970.

Hon. WALTER J. HICKEL,
Secretary of the Interior,
Washington, D.C.

DEAR MR. SECRETARY: You have repeatedly said that Indians have suffered greatly because of inordinate delays and inadequate representation, a truism which is graphically exemplified by the suffering of the Fort Mojave Tribe.

Nearly six weeks ago, we sent a telegram to you urgently requesting your help, as trustee for our lands, to secure a dismissal of certain litigation presently threatening the title to our privately owned lands held in trust by the United States. To date, there has been no reply; and, because of this delay, we are now in a position of acute jeopardy.

Your failure to act has resulted in a judgment in the second *Sherrill* v. *McShan* case in favor of the respective parties thereto and with utter disregard of our Indian claim to title; and the same kind of result seems certain in *River Farms* v. *Fountain.* This latter case has already proceeded to trial and is illustrative of the magnitude of the damage due to the abandonment of the Mojaves in the first *Sherrill* v. *McShan* case since the Findings of Fact, Conclusions of Law, and Judgment therein are now being used again with irreparable damage to the Fort Mojave Indians.

In other words, it is now too late for the essence of our plea to become meaningful; so we must ask you—WHY?

BETRAYAL BY TRUSTEE OF THE FORT MOJAVE INDIANS

Our people have asked me if this is merely another betrayal akin to the one we experienced in 1962 as Intervenors in the first *Sherrill* v. *McShan* case when the United States entered the case purportedly acting on our behalf. Thereafter, the U.S. Attorney, confronted with a conflict of interest between the United States and our Indian people, abandoned our cause and argued against us.

Of course, the shocking part of this betrayal is that it came after pleadings were at issue and after our Indian people had appeared as witnesses. In regard to this betrayal by the Justice Department, it has two primary aspects: (1) The actual loss of possession of lands which must of course, be recovered; and (2) The legal barrier now being interposed in opposition to the claim of the Fort Mojave Indian Tribe in *Mojave* v. *LaFollette* when it seeks to obtain legal redress on the grounds that the judgment entered against the United States in the first *Sherrill* v. *McShan* case is res judicata as to the Tribe thus depriving it of its day in Court.

With all the above in mind, I can only repeat—WHY have you ignored the telegraphic request from my people?

It would appear that you are also ignoring the mandate of the President or that we have misunderstood his concern about Indian people. We believed him in July of this year when he declared his support for Indians, but we certainly cannot continue to do nothing and wait for new legislation when the passage of any more time can only spell further tragedy for my people.

For instance, other current and critical challenges confronting us due to conflicts of interests within Interior and Justice Departments which will not wait include:

1. Violating of fiduciary duty by trustee further compounded through acts and omissions

Our Tribe has been truly impressed by what the Supreme Court said in *Squire* v. *Capoeman* when the Court mphasized that the United States has a positive duty to protect and conserve our Indian trust so long as title to the Indian land is held in trust, and that the quantity and quality thereof must not be disturbed.

In addition, we have also been extremely pleased over the President's recent statement that the United States has a duty to exercise the highest degree of care and diligence in dealing with the Indian trust. With this in mind, we cannot understand how there can be so many violations of that duty by our trustee.

a. Seizure of Mojave Indian property rights in disregard of their future economic Development

Seizure by the United States, trustee of Fort Mojave Indian Property, has transpired throughout the entire reach of the Colorado River as it traverses or borders upon the Fort Mojave Indian Reservation. That seizure stems in part from acquisitions by the Bureau of Reclamation in the name of the United

States which have cut off entirely or gravely impeded the Mojaves' access to the Colorado River to which they are legally entitled. Loss of access is tantamount to imperiling for all time the full economic potential of the Mojave lands.

There are at least seven substantial areas in which the right to access of the Mojaves to the Colorado River has been seized in its entirety or gravely impeded, all as stated above. In all, there are approximately 12 miles of land lying on both sides of the Colorado River where the irreparable damage to the Indians as described above has taken place.

It is my view and the view of my people that you, Mr. Secretary, as the principal agent for the United States, trustee, must take speedy and adequate steps fully to assert on behalf of the Mojave Indians their rights of access to the Colorado River which have been seized from them without authority.

b. Trustee denies Mojave Indians "benefit and use" of trust lands

When Congress authorized the construction of Parker Dam by the act of August 30, 1935, and implemented this by the passage of the act of July 8, 1940, they merely granted the right to take specific Mojave lands up to the 455-foot contour line as would be needed for such construction. At no time did they intend or authorize a taking for any other purpose.

Nevertheless, when the trustee later issued an Order designating the Mojave lands needed for the authorized purpose, no mention was made of the 455-foot contour limitation. Instead, the specified lands were erroneously described by metes and bounds, thereby resulting in an unauthorized seizure of several thousands of acres of Mojave land.

Very recently, the Indian Claims Commission declared that title still resides in the Fort Mojave Tribe in regard to the several thousand acres of land to which reference has been made.

There are two categories of Mojave land included in the several thousand acres thus seized without authority:

i. Indian lands occupied and fenced by the Fish and Wildlife Bureau of your Department far exceeding the area flooded by Parker Dam and in no manner required for that purpose;

ii. Lands which have been flooded for which no compensation has been paid in over thirty years, far above the contour line of the lands which were legally taken and for which some compensation was paid.

c. Slander of title under the guise of alleged servitude

Following the flooding of our Indian trust lands for the construction of Parker Dam, we were told that a great benefit was going to be conferred upon us by channelization of the Colorado River. We therefore agreed to a right-of-way for a portion of the river in the belief that benefits would be realized in both recovered land and a controlled river; but, as it turned out, we were wronged. We didn't receive recovered land and we also experienced a great reduction in the value of our remaining land because the Bureau of Reclamation then said that they have jurisdiction over the river frontage from the water's edge back to about 600 feet on each side.

The reduction in value is directly due to no water frontage plus the height of the levee, which has drastically depressed the land values behind the levee. As a result, our lessees are gravely concerned and some of the prospective ones are no longer interested or are too apprehensive about the permitted uses. As a consequence, our Tribe is experiencing great loss and frustration due to this deterrent to economic development.

Reclamation says that this is a reasonable and necessary servitude since they must maintain the integrity of the channel. We cannot agree. We feel that this is a classic case of slander of title under the guise of an alleged servitude. We would further point out that Reclamation has so little respect for our title that they have done further channel work without even securing proper rights-of-way from us. This amounts to a diabolical and willful trespass plus a violation of due process. Where has our trustee been while this gross conflict of interest has developed, and what does he intend doing about it?

d. Trespass by Federal agencies upon Mojave land through canal construction; barrier to access to the Mojave lands; and inundation of them

In total disregard of the Mojave title and without the Tribe's agreement, these continuing trespasses upon Mojave land have been committed by agencies of the Interior Department:

i. The Topock Marsh Inlet Channel—A diversion canal, 40 feet wide at the top and four miles long has been constructed by the Bureau of Reclamation across

lands in total disregard to the fact that title thereto is vested in the Mojaves, all to their irreparable damage;

ii. Diversion of large quantities of Colorado River water through Topock Marsh Inlet Channel are delivered into the Topock Marsh, thereby increasing the inundation of Mojave lands described in paragraph 1 b above;

iii. Increasing the inundation of Mojave lands, in total disregard of present and future economic development of these lands, a dam has been constructed which impounds the waters diverted into Topock Marsh by the above-described Inlet Channel. That impoundment of Colorado River water has caused immeasurable damage to the Mojaves through the further and continued inundation of their lands which were seized without authority by your Bureau of Fish and Wildlife.

These trespasses, though independently described, are inextricably interrelated with the unauthorized seizure, inundation, and fencing of Mojave land without authority and in contravention of the Mojave title, all as described above.

2. Shocking conflict of interest violates Mojaves' title and deprives them of their lands

Unconscionable violation of the Nation's trust responsibility is the hallmark of its failure to protect and preserve the Mojave Core Homeland. For upwards of three-quarters century there has been a wanton disposal of those lands within an area set aside by an Executive Order dating back to 1870.

History of those unauthorized seizures warrants brief summary. Although the lands constituting the Mojave Hay and Wood Reserve have since time immemorial been occupied by the Mojaves, the Department of the Interior, acting in concert with the State of California issued so-called Swamp and Overflow patents to non-Indians.

These patented lands are located up to a mile and a half east of the western boundaries of the Mojave Hay and Wood Reserve. Subsequent to the patenting of Mojave lands to non-Indians, it was found expedient by your Department to mask that intrusion upon the Mojave Reservation. That masking of the trust violation was accomplished by a "resurvey" of the western boundary of the Mojave Hay and Wood Reserve in clear violation of the 1870 Executive Order.

As a consequence of that "resurvey," approximately 3,500 acres of Mojave Core Homeland were seized by the Department of the Interior and have been held by it, denying without legal basis, the Mojave title to those lands for approximately 40 years.

Denying the Mojaves notice of a hearing and a right to be heard, a Bureau of Land Management Officer in the year, 1967, awarded to California approximately 1,500 acres of 3,500 acres which were seized by the Department of the Interior, all as described above. For almost three years, the Mojaves were forced to fight the inherent and reprehensible conflict of interest within the Interior Department's Solicitor's Office before they could have their day in Court. to challenge the "giveaway" to California of their 1,500 acres of land.

Outraged by the conduct of the Solicitor's Office, Congressman Jerry Pettis, within whose district the Mojaves' lands are situated, has taken a most active part in attempting to force the trustee to relinquish back to the Mojaves the lands which it had seized.

Congressman Pettis' chronicle of the activities of the Solicitor's Office as set forth in the December 4, 1969, Congressional Record demonstrated for the world to see the amorality of the conflicts of interests which pervade the Solicitor's Office. Outcome of the struggle by the Mojaves to protect their immemorial Core Homeland remains in doubt. It is not too early, however, for the Mojaves to make this assessment to you, Mr. Secretary: They have been deprived of their lands and the use of them through an unconscionable course of conduct by the officials of the trustee charged with the responsibility of protecting and preserving the Mojave immemorial Core Homeland.

Secretary shirks duty as trustee and affirmatively acts in support of a conflict of interest

As trustee for the Indians, the Secretary of the Interior cannot equate the Bureau of Indian Affairs with other bureaus such as Land Management and Reclamation. They are concerned with public lands as contrasted to the private lands held in trust for the Indians.

The Secretary, therefore, must, as the President stated, recognize that he has a duty to exercise the highest degree of care and diligence in administering this trust. The record shows that he has failed to perform his duty in the manner required.

73-736 O—72——11

If this were not so, he would never have allowed the Bureau of Land Management to even consider California's application under the Swampland Act for land included in our Mojave Reservation. Furthermore, he would never have permitted hearings as stated above to take place without notice to either the Indians or to the Bureau of Indian Affairs with a resultant decision granting the applied-for land to California. Then, when our Indians belatedly learned of this and asked to be heard, he should have immediately initiated action to guarantee and protect our rights instead of making us pound on the doors of Congress for almost three years just to be heard.

Furthermore, he certainly should never have taken affirmative action to deny the Bureau of Indian Affairs the right to intervene on our behalf. And tell me why he shirked his duty as trustee to fight for us and allowed the Bureau of Land Management to act as both judge and adversary over our trust lands, particularly in view of the obvious conflict of interest between the Bureau of Land Management and our Indians?

The hearings are over now. What will the result be? Will our lands continue to be seized or can we count upon you to commence acting like our trustee in accordance with the mandate of the President?

In light of what I have said above, it must be quite clear that my Mojave people are in need of your immediate consultation and assistance. We believe that we are entitled to this much from you as trustee. Hence, we wish to let you know that we are presently planning to send a delegation to see you during the latter part of November to determine through consultation with you just how you can assist us. May we, therefore, respectfully ask that you let us know a date convenient for your calendar for the meeting with you.

Sincerely yours,

JEANNETTE OTERO,
Secretary, Fort Mojave Tribal Council.
HARWOOD JENKINS,
Council Member.
MINERVA JENKINS,
Chairman, Fort Mojave Tribal Council.
JERRY EVANSTON, Sr.,
Council Member.
FRANCES STILLMAN,
Council Member.

RESOLUTION NO. 73–70—FORT MOJAVE TRIBE OF THE FORT MOJAVE RESERVATION, CALIFORNIA, ARIZONA AND NEVADA

Whereas, the Fort Mojave Tribe has been the victim of various conflict of interests involving the Secretary of the Interior in his capacity as trustee for their privately owned lands held in trust for them by the United States, and

Whereas, both the President and the Congress have become acutely aware of the need for constructive action to eliminate situations involving conflicts of interests whenever Indians are involved, and

Whereas, the Fort Mojave Tribal Council believes that the problems confronting them due to said conflicts compels confrontation with the trustee

Now therefore be it resolved that the Fort Mojave Tribal Council, having deliberated for two days and having participated as a result thereof in the drafting of a letter to their trustee, does hereby approve said letter dated October 27, 1970, to the Honorable Walter J. Hickel, Secretary of the Interior, and does hereby further authorize the execution and mailing of said letter as a true and correct expression of both the facts and our sincere convictions.

CERTIFICATION

We, the undersigned, as the chairman and the secretary, hereby certify that the Fort Mojave Tribal Council is composed of 6 members, of whom 5 constituting a quorum, were present at a special meeting on the 27th day of October, 1970 and that the foregoing resolution was adopted by 5 affirmative votes.

MINERVA JENKINS, *Chairman.*
JEANNETTE OTERO, *Secretary.*
Fort Mojave Tribal Council.

Mr. SIMPSON. I know Mrs. Stillman has a few comments she would like to add for the record.

Senator METCALF. Yes, Mrs. Stillman.

Mrs. STILLMAN. Thank you, Mr. Chairman.

I testified before the committee a month ago at which time Senator Kennedy was chairman. I mentioned the things Mr. Simpson has just told you, but I didn't mention at that testimony of mine about the Topas Swamp. You know, we have a swampland below the southern end of our reservation, just now. It wasn't all swampy years ago before the Parker Dam was built, but before this dam was built the Metropolitan Water District of Southern California came to the tribe—I understand this. Of course, I wasn't on the council then, but we have records to that effect, that they wanted to buy some few acres which they knew the backwaters from the dam would inundate.

Well, the leader of my tribe at that time got together with the neighboring tribe and they consented to sell a few acres to the Metropolitan Water District.

Well, in time the tribe was paid, but when the actual inundation took place, it went beyond the amount specified. The contour line was supposed to be 455, but the water covered more than this. So, we haven't been paid that difference to this day and that will be in our water damage suit.

I don't know when it will take effect, but Mr. Simpson is going to work on that. But more than that, along came sport fish and wildlife, under the Department of the Interior. They, without our knowledge, turned this into a wildlife refuge and fenced off some of our land. Now we can't—because the Mojave Valley is checkerbordered, every other section is non-Indian, but they didn't look to see where the lines were and they fenced it, cutting us off from valuable water ponds.

That is all I will say on that.

Senator METCALF. Again, that is a specific instance that maybe Mr. Bloom or some of the people yesterday would be delighted to add to the compilation they are going to present to us.

Mr. Fisher?

Mr. FISHER. Thank you, Senator. I appreciate the opportunity to appear before this committee to testify concerning the need for S. 2035.

I hope the Indian leaders don't look to this bill as a cure-all for the conflict of interest, because if they look for it to solve all of their problems, I don't think they will. If we do think that way, I think the Indian Trust Counsel is going to fail.

I had an incident about 3 years ago, when they held their convention, Commissioner Bruce will come up each year and present to the convention, this is my change, I am going to reorganize the staff. He does it every year because he thinks it is a solution to get to the conflict of interest problems within his Department.

So, I hope we don't look to this bill to cure everything for the Indian interest. That is all I have to say, Senator.

Senator METCALF. Your complete statement will be incorporated into the record, and the recommendations for amendments will be included and examined both by the staff and the committee in executive session. Thank you.

(Mr. Fisher's prepared statement follows:)

Statement of Adrian Fisher, Chairman, Colorado River Indian Tribes, Parker, Arizona; Vice President, Arizona Intertribal Council

I appreciate the opportunity to appear before this committee to testify concerning the need for S. 2035.

Indian tribes across the country and particularly those in the West that are involved in a virtual life and death struggle for protection of their water rights have identified a very grave shortcoming in the method present law provides for carrying out the Government's trust responsibility to Indians in the protection of their natural resources. In many of the disputes over water rights and land boundary and title matters, the Indians find that the adverse claimant is the trustee—the Government whose duty it is to protect the beneficiary tribes.

When these matters come up for litigation or even administrative action, the legal staffs which are available to represent the trustee and the Indians are also duty bound to represent the trustee and the Indians are also duty bound to represent the broader, national interest. This conflict of interest literally precludes Indians from having adequate representation in these types of controversies. S. 2035 is directed at this problem.

Before I comment on the specific provisions of the bill, I would like to make some observations:

It is good that we have identified this conflict of interest problem and it is good that we are together seeking to alleviate it. I am sure that the concept of an Indian Trust Counsel Authority will help us deal with the conflict of intreest problem in a manner that is better than what the law now provides. It is very important, though, that those of you on this committee and those in the Executive Branch not offer this concept as a means for completely abolishing the conflict of interest problem.

I would also urge my fellow Indian leaders not to look upon the enactment of this, or a similar, bill as a complete solution to the conflict of interest problem.

The body of law regarding Federal Indian relationships is but a reflection of history and this history is made up of a series of conflicts of interests—the interests of a predominant society in conflict with the interests of the Indians.

If either the Indians or the Government look to the enactment of this bill as a cure-all for the conflict of interest problem, then the Indian Trust Counsel Authority is doomed to failure.

We must look at it as a cooperative effort to provide a means whereby the conflict of interest can be minimized to the extent this is possible within the Federal Indian relationship.

My reason for saying this is that I fear that many of us—those in Government and many Indian leaderships across the country—have come to look for the easy solution to extremely complex problems in Indian affairs.

Last week an NCAI convention heard for the third year in a row about the Commissioner of Indian Affairs' plans to reorganize the BIA Executive Staff. I fear that the Commissioner sees reorganization as the easy solution to complex problems. I want the record to show that while we expect this legislation to be extremely helpful we do not regard it as a final solution to the conflict of interest problem.

Now to the provisions of the Bill:

Sections 1, 2, 3 and 4 of the Bill deal with the purpose and the structuring of the Trust Counsel Authority. I have no comment in these sections.

Subsection (d) of section 5 in my view points up a situation where agencies of Government should not take sides. The subsection provides that where there is a conflict between Indians who are requesting the assistance of the Authority, the Board of Directors may hire separate counsel or experts to assist or represent one or all of the parties. In this type of situation the Authority would be placed in the same position the Indian Bureau and Interior Department are in now.

I do not believe this type of situation, where there is a difference between Indian Tribes, or a difference between individual Indians and their tribal Government, should be dealt with in this particular Bill. If the Trust Counsel Authority is able to function where a tribe's position is adverse to the position of the United States I think it will have done all we should ask of it.

I have no comment on sections 6 and 7. Section 8 causes me the same concern discussed above. While I do not have any clarifying language I believe it would

be possible and desirable to assure that the legal services rendered do not pertain to instances where there is a conflict between individual Indians and their tribes or between two or more Indian tribes.

Also, in section 8 there seems to be an unresolved question of whether the Justice Department does or does not have a continued responsibility. One part of section 8 says that the Justice Department is not absolved of its responsibilities and another part says it is relieved of its responsibilities. The responsibilities should remain with other agencies of Government where they are now until they are assumed by the Trust Counsel Authority.

Section 9 gives the Trust Counsel Authority the right to sue the United States on behalf of Indians. This, and the waiver of the sovereign immunity of the United States, is essential.

I have no comment with regard to section 10 except to express satisfaction with the provisions that would permit the Authority to assist Indian tribes in claims before the Claims Commission.

Section 11, subsection (2) needs to be strengthened to compel departments of the Government to comply with a request for information or materials. Many of the cases which would be brought under this Authority have long histories which are often buried in the files or personal knowledge of personnel in the various departments. It will be vital that the Trust Counsel Authority be able to obtain this information and material.

Again, I want to thank the Committee for the opportunity to appear.

Mr. SIMPSON. I would make one suggestion regarding the amendments. Several tribes that I talked to emphasized that, and it ties in with what Mr. Fisher just said, when the authority is set up and the board is appointed by the President with the advice and consent of the Senate, various tribes I have talked to said they feel this all too frequently would be the end of the thing. It is a nice piece of legislation and it reads well.

It is like NEPA, it creates the aura of accomplishing something, but it doesn't. They suggest there be an additional paragraph in this legislation providing for a periodic report to the Senate with an opportunity for hearings in the event that the proper committee in the Senate would consider this. It is sort of a progress report on are you doing your job or not.

Senator METCALF. Thank you very much.

Mr. SIMPSON. Thank you.

Senator METCALF. I have been asked by Mr. Marvin Sonosky, who is counsel for the Fort Peck Indians, which just happens to be in the State of Montana, to appear and make a very brief, and may I emphasize, a very brief statement. You can expand it as far as you want by a supplemental statement.

(A supplemental statement by Mr. Sonosky is in the appendix.)

STATEMENT OF MARVIN J. SONOSKY, ON BEHALF OF THE FORT PECK INDIAN RESERVATION, MONT.

Mr. SONOSKY. I understand, and I won't take advantage.

I am Marvin Sonosky, attorney for several Indian tribes at Fort Peck and I appear this morning just to bring to the attention of the committee a pending situation with the Department of Justice affecting the tribes on the Fort Peck Reservation.

This is a situation where the tribes instituted a suit on their own behalf on July 24, 1963, in the U.S. District Court for the District of Montana to reacquire title to a portion of the bed of the Missouri River that forms a part of the reservation boundary.

Before the suit was filed we enlisted the aid of the Department of Interior to urge Justice to file for us because it is one of those project cases involving hundreds of defendants. That failed, so we filed the suit.

After the suit was filed, the question was whether title was in the tribe or in the individual owners of the upriver.

The Department of the Interior took the position that it was in the individual owners and requested that the Department of Justice represent the individual owners against the tribe. Most of the individual owners by that time were fee owners, not Indians.

Thereafter, in my effort to persuade the Department that the tribe's position was correct, in 1964 the Department of Interior reversed itself and asked the Department of Justice to appear on behalf of the tribe. In 1964—let me withdraw that. In 1964 the Department of Justice was asked to file suit and in 1964 I received a letter from the U.S. attorney for the District of Montana stating that he had been requested by the Department to file suit on behalf of the individuals against the tribe, would I be willing to have the tribe's case held in abeyance. I answered the question yes, because we wanted the question tested and we preferred to have the United States bring suit.

Now, I will shorten the whole story up by saying in the interim the Supreme Court came down with the decision in the Choctaw case sustaining the tribe's position, the position I took whereupon Interior requested Justice to bring suit for the tribe and whereupon Interior issued instructions on February 28, 1968, to the U.S. attorney to file suit for the tribes.

Now, mind you the first instructions were issued in 1964 to file suit for the individuals. That suit was never filed. In 1968 instructions were issued to file suit for the tribe. That suit was never filed.

So, we have been in court from July 24, 1963—Judge Jamison sat on the bench and wrote letters saying this is the oldest case I have in my docket, what about it? Now we have a new judge writing letters saying the same thing. We had two U.S. attorneys. We had several assistant attorney generals and we have not been able to get this case moved.

Now, I don't know why we haven't been able to get it moved. I do know there were some occasions of oil and gas activity in the bed of the river and all of that has been suspended since this litigation has been in the courts. Now, whether there is any external evidence of this or not, I don't know.

With the chairman's permission, I would like to submit for the record copies of the letters I have referred to which will give the correct sequence of timing.

Senator METCALF. That will be received.

Mr. SONOSKY. With the chairman's permission, there are other instances, if the chairman so desires, I can include in the same letter.

Senator METCALF. Please feel free to file any supplemental report of any material of these instances that you know of. It will be incorporated in the record, and also the record can show that while Mr. Sonosky is counsel for the tribe, Mr. Huben is a member of the tribe and former chairman of the council.

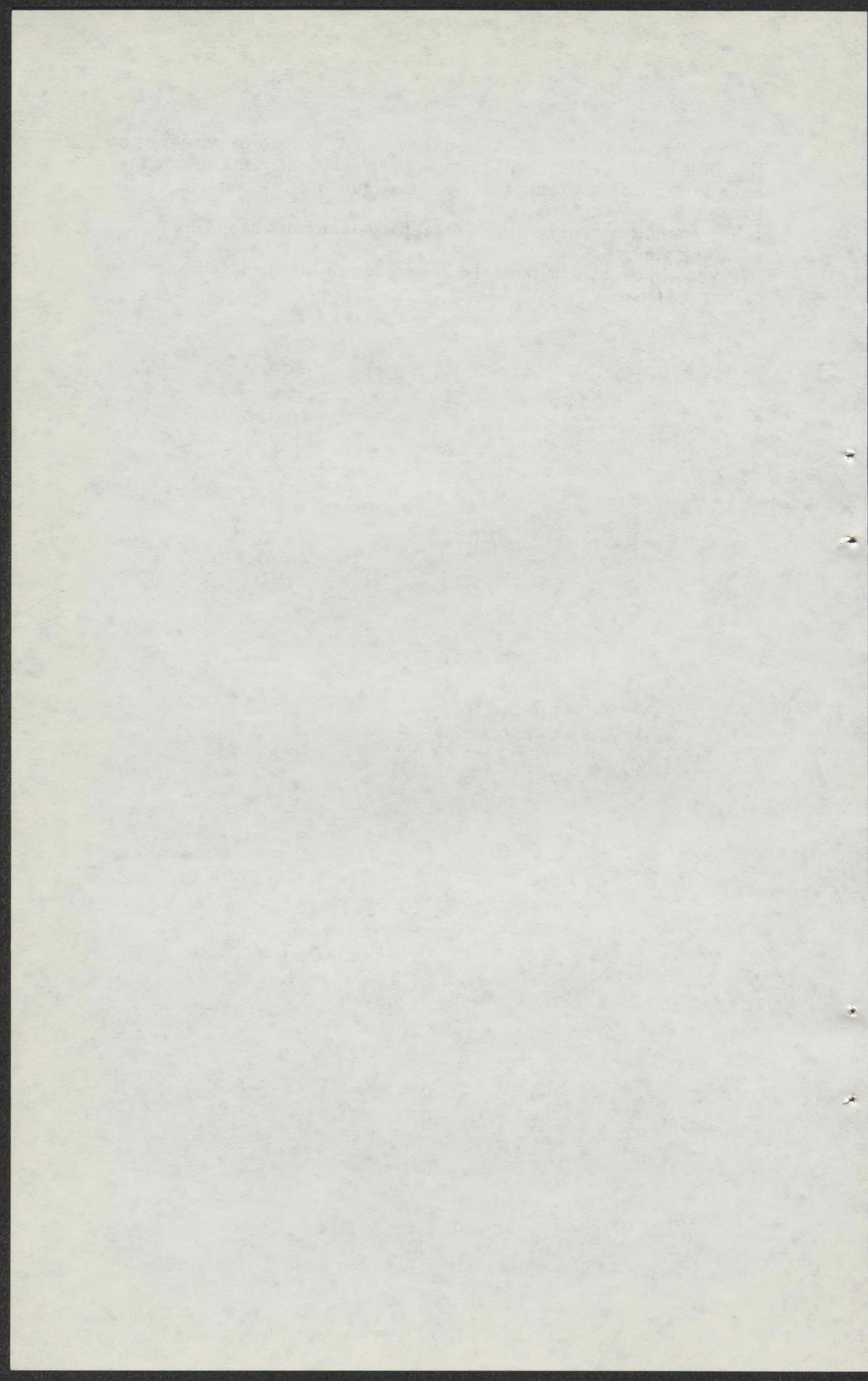
Thank you.

I understand this is the end of the formal hearing of witnesses on this bill, but the record will be kept open sufficiently so that we may have additional material that we need for the information of the committee.

The committee will be in recess subject to the call of the Chair.

Thank you all.

(Whereupon, at 1:05 p.m., the hearing was adjourned, subject to the call of the Chair.)



APPENDIX

(Under authority previously granted, the following statements and communications were ordered printed:)

Supplemental Statement of Marvin J. Sonosky, In Relation to S. 2035, A Bill to Establish an Indian Trust Counsel Authority

I bring to the attention of the Committee an example relating to the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, that confirms the need of Indian tribes for counsel independent of the Department of the Interior and the Department of Justice.

The Missouri River forms one boundary of the Fort Peck Reservation. In 1916 by avulsive action a portion of the bed was abandoned and became fast land. In 1952–53, when potential oil and gas values stimulated interest in the bed of the river, the question arose as to whether the United States held title to the bed in trust for the Tribes or whether title passed to the upland riparian owner. Most of the upland had been allotted and most of the allotments had passed out of trust status.

In response to inquiry from the oil and gas industry, the Commissioner of Indian Affairs in 1953 ruled that title passed to the riparian owner and industry was so informed. (See Exhibit No. 1.) The Tribes were not informed of this action. This was an example of the administrative disposition of tribal rights without notice to the Tribes and without affording them an opportunity to be heard.

After I was retained by the Tribes, I learned of this action and brought the matter to the attention of the Commissioner of Indian Affairs.[1] The Solicitor for the Department of the Interior issued an opinion dated December 11, 1962 holding that the bed of the river went to the upland owner, not the Tribes.[2] Thereafter, on July 24, 1963 at the direction of the Tribes, I instituted suit to establish tribal title to the former riverbed. The case is styled *Assiniboine and Sioux Tribes* v. *Budak*, Civil No. 2516 in the United States District Court for the District of Montana.

The suit is a "project" case involving dozens of separate ownerships along the river front. It is expensive litigation. The Tribes have expended substantial sums for abstracts of title and in serving process, and large expenses loom. After suit was filed, I continued informal efforts to have Interior recommend to the Department of Justice that the United States bring an action to settle the issue.

In July 1964 the United States Attorney for Montana informed me that the Departments of Interior and Justice had decided that the United States Attorney should defend the individual Indian owners against the Tribes. The United States Attorney suggested that the Tribes' case be held in abeyance pending institution of suit by the United States against the Tribes to quiet title in the United States as trustee for the individual Indian allottees.[3] While ostensibly for individual Indians, if the United States prevailed, the benefits would fall on the non-Indian owners who had acquired most of the allotments by purchase. Nevertheless, with the permission of the Tribes, I agreed since such a suit would

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[1] Exhibit No. 1—letter dated February 13, 1962 from Marvin J. Sonosky to Commissioner of Indian Affairs.

[2] Exhibit No. 2—Solicitor's opinion dated December 11, 1962.

[3] Exhibit No. 3—letter dated July 8, 1964 from United States Attorney to Marvin J. Sonosky.

permit a definitive determination of the issue and at the same time place the burden of proof and expense on the United States. I so advised the United States Attorney on August 7, 1946.[4]

In the more than seven years that have since elapsed, the Department of Justice has not filed suit. During that period I made inquiries at both the Department of the Interior and the Department of Justice. In August 1966 the Department of Justice advised the United States Attorney that: [5]

"We have been actively reviewing this case, and conferring with the Department of the Interior with respect to the appropriate course of action to follow, but have not yet arrived at any conclusion."

A year later, in response to my inquiries, the Department of Justice advised that it was reviewing the question of whether it should act for the individual Indians as first announced, or act for the Tribes. In February 1968, the Department of Justice reversed its position and instructed the United States Attorney to prepare a complaint to quiet title in the Tribes.[6]

In 1970 the Supreme Court of the United States handed down a decision that supported the Tribes' position that they were the owners. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

In February 1971 I again called on the Department of Justice to tell me whether the United States really intended to go forward on the case, at the same time calling attention to the decision of the Supreme Court.[7] The Department answered that it was waiting for Interior to furnish information.[8] In September 1971 I was informally told that Interior had furnished the information and that the United States Attorney had been instructed to file suit. So far as I know, nothing has happened since.

Thus, even when Interior asks Justice to file suit, and Justice instructs its United States Attorney to file suit, nothing happens. This underscores the need for trust counsel or its equivalent. So far as the Tribes are concerned this example outlines a situation (a) where administrative officers undertook to dispose of tribal property without notice or an opportunity to the Tribes to present their position; (b) where the Department of the Interior chose the position of "allottees" versus the Tribes knowing full well that the major acreage had passed out of allottee ownership and that the benefit of the Government's position would accrue to nonIndian owners; and (c) where the Department of Justice for no valid reason has stalled for over seven years and is still stalling so far as we know.

EXHIBIT 1

FEBRUARY 13, 1962.

Re Tribal title to north half of abandoned riverbed of the Missouri River forming the southern boundary of the Fort Peck Reservation

Hon. PHILLEO NASH,
Commissioner of Indian Affairs, Bureau of Indian Affairs, Department of the Interior, Washington, D.C.

DEAR COMMISSIONER NASH: At the conference held in Assistant Commissioner Fryer's office on Friday, February 2, 1962, it was suggested that I write a letter setting forth the position of the Fort Peck Tribes with respect to the Missouri River avulsion problem on their reservation.

The Fort Peck Reservation was established by the Act of May 1, 1888, c. 213, 25 Stat. 113, 1 Kappler 261. Article IX of the agreement ratified by the 1888 Act fixed the southern boundary of the reservation as "Beginning at a point in the middle of the main channel of the Missouri River, opposite the mouth of Big Muddy Creek; thence up the Missouri River, in the middle of the main channel

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[4] Exhibit No. 4—letter dated August 7, 1964 from Marvin J. Sonosky to United States Attorney.

[5] Exhibit No. 5—letter dated August 25, 1966 from Department of Justice to United States Attorney.

[6] Exhibit No. 6—letter dated February 28, 1968 from Department of Justice to United States Attorney.

[7] Exhibit No. 7—letter dated February 18, 1971 from Marvin J. Sonosky to Department of Justice.

[8] Exhibit No. 8—letter dated February 23, 1971 from Department of Justice to Marvin J. Sonosky.

hereof, to a point opposite the mouth of Milk River; * * *. By the Act of May 30, 1908, c. 237, sec. 2, 35 Stat. 958, 3 Kappler 377, provision was made for three kinds of allotments. Each Indian was to receive an allotment of 320 acres of grazing land, heads of families and single adult members over eighteen years were to receive not less than two and one-half nor more than twenty acres of timberland as an additional allotment, and any irrigable land on the reservation was to be allotted prorata among the members of the tribe in addition to the other two allotments.

Original surveys of the townships bordering on the Missouri River were made at various times commencing with 1905. In 1916, the bed of the river was abandoned by avulsive action of the Missouri River. Around 1952–53, prospective oil and gas values stimulated interest in the abandoned riverbed. In instances where the upland had been allotted, questions were raised as to whether the abandoned riverbed fronting the allotment went with the allotment or whether it remained with the Tribes.

By letter of September 10, 1963, (Land-Minerals, 7453–53) Acting Commissioner W. Barton Greenwood furnished Area Director Fickinger with the principles controlling ownership. He stated:

"* * * Where there was a substantial amount of accretion formed between the time of the approval of the plat of survey and the time of the making of the allotment, the allottee would take only to the meander line as shown on such plat, whether the stream was navigable or non-navigable. In the absence of such substantial accretion and in the absence of anything to show an intention to the contrary, the allottee would take to the middle of the main channel. Solicitor's Opinion M. 27796, May 14, 1935, copy enclosed".

Acting Commissioner Greenwood went on to direct that in each case an investigation would have to be made to determine whether "substantial accretion was formed before or after the allotment was selected, in order to determine the owner of the oil and gas rights in the accreted land * * *". He stated that the rule he was following with respect to accretion was the one discussed in *Madison* v. *Basart*, 59 I.D. 415.

The Solicitor's Opinion M. 27796 referred to by the Acting Commissioner holds that title to a *non-navigable* riverbed passed with the allotment of the upland. The Solicitor there relied on court decisions based on the principle that whether the bed of a *non-navigable* river goes to an allottee depends on the intent of the parties as reflected by the deeds or patents to the allottees and the provisions of the allotment act. The significant point is that the Solicitor and the cases on which he relied dealt only with *non-navigable* streams.

By letter of November 3, 1953, Area Director Fickinger advised the oil companies of the *Greenwood* decision transmitting copies of Acting Commissioner Greenwood's letter dated September 10, 1953, the Solicitor's Opinion of May 14, 1935, and the syllabus of *Madison* v. *Basart*, *supra*, (see letter dated December 22, 1953, from Area Director Fickinger to William R. Bandy, Regional Chief of Engineering, BLM, Region III, advising of the foregoing transmittal). There is no evidence that this information was communicated to the Tribes. Area Director Fickinger concluded that it has been decided "that the north half of the riverbed will in all cases be assigned to the riparian ownership." (Letter of November 3, 1953, p. 3.)

Following the *Greenwood* letter, the BLA transmitted the matter to the BLM with the request that a survey be made of "all Indian trust lands adjacent to the Missouri River" in designated sections. The survey was to be paid for by the Tribes. In November 1953, BLM made an investigation and determined that the avulsion had taken place in the spring of 1916 and that there was no evidence "that any substantial amounts of accretion had occurred in front of the old meander lines by the time the avulsive change took place". Memorandum dated November 30, 1953, from Allan E. Arnold, Cadastral Engineer to William R. Bandy, Regional Chief of Engineering, BLM Region III (Group 473 Montana). This eliminated consideration of the rule in *Madison* v. *Basart*, 59 I.D. 415.

Instructions were issued by the BLM for the special survey (Special Instructions dated April 5, 1954, Group 473 Montana, issued by the Billings Office of BLM, Region III). The instructions made plain that "the rules governing the ownership of accretion lands and lands in the abandoned riverbed will be determined by the Bureau of Indian Affairs", that the letter of September 10, 1953, from Acting Commissioner Greenwood controlled and that under that letter "all

of the land of the abandoned channel lying on the left or reservation side of the medial line of the abandoned channel, will be assigned to the riparian owner". The surveyors were directed to mark on the gorund the line of the abandoned channel as it existed at the time the avulsive change took place in 1916. After this was marked on the ground, the land between the line and the riparian lands on the left side of the river were to be divided into tracts appurtenant to each legal subdivision or lot of riparian land, by running the side lines.

It is the Tribes' view that the opinion of Acting Commissioner Greenwood was considered and based on inapplicable authority. The decision rested on the 1935 Solicitor's opinion which applies the common law principle and the decisions of the Supreme Court holding that a grant of land bounded by a *non-navigable* river carries title to the center of the stream unless the terms of the grant denote a contrary intention. This principle has no application where the river is navigable.

The Missouri River is navigable, *United States* v. *Eldridge*, 33 F. Supp. 337, 339 (D. C. Mont. (1940)). In this case, the reservation was created prior to Montana's admission into the Union. For that reason, title to the north half of the bed of the Missouri River forming the reservation boundary, did not pass to Montana, but remained in the United States in trust for the Tribes. *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (C.A. 9, 1942); *United States* v. *Stotts*, 49 F.2d 619, 620–621 (W. D. Wash. 1930); *Taylor* v. *United States*, 44 F.2d 531 (C. A. 9, 1930); 55 I. D. 475, 476 (1936).

The question here is whether the United States continues to hold title to the riverbed in trust for the Tribes or whether, with the allotment of riparian land, title to the bed passed from the United States in trust for the Tribes to the United States in trust for the allotee. In the case of *non-navigable* waters, the rule is that the bed passes to the riparian owner unless a different intent is expressed. In the case of navigable waters the rule is that title to the bed remains in the "sovereign in trust for the general weal". *Montana Power Commission* v. *Rochester*, 127 F. 2d 189, 191, (C. A. 9, 1942). This rule controls here. The Tribes stand in the place that the State would occupy if the reservation had not been created before a statehood.

Public land patents to lands bordering navigable streams convey only to ordinary high water mark. To obtain title to the bed of navigable waters, there must be a grant from the State. As noted by the court in the Montana Power Commission case *ubi supra*, there is no reason for applying a different rule as between a tribe and allottees.

The riverbed belonged to all the people of the Tribes. It was for the common enjoyment of all members and as stated in the *Stotts* case (p. 620) * * * "* * * the allotment of a part of a reservation [riparian allotments] to some of the Indians does not destroy the common right to the enjoyment of the unallotted portion [bed of navigable river] for any use to which it was adopted." The *Montana Power Commission* case makes special note that "The Indian society is communal in character rather than individualistic and that this was true especially of the hunting and fishing rights." (127 F. 2d 192.) Fishing rights, of course, are related to the waters.

Unfortunately, what has happened here is that the Bureau of Indian Affairs has treated the Missouri River as non-navigable and on that premise has undertaken to dispose of tribal property to the riparian owners.

Prior to my entry in the matter, everything indicated an adamant contention that the riverbed went to the riparian owner. There are recent indications that the Area Office has shifted from this positive position to the view that the issue "appears to be a question for determination by a competent court under the laws of the State of Montana". See memorandum dated February 9, 1961, Field Solicitor to Area Director, re Tract No. 41, BLM Survey Group No. 473. The Area Office advised the Superintendent that the Field Solicitor's opinion was "conclusive as to the action which he considers will be required in the case * * *" A number of the riparian lots have been sold at supervised sale or gone to fee patent. In some instances the purchaser of the riparian lot from the Indian, has applied to the Bureau of Land Management and received a patent to the riverbed section. In my conference in Assistant Commissioner Fryer's office, I stated that I had asked that the Bureau of Land Management issue no further fee patents to land embraced within the northern half of the bed of the Missouri River fronting the Fort Peck Reservation. I find that I was mistaken in my statement. I have not made such a formal request but do now make it.

There is now before the Solicitor for consideration a proposed mineral claims attorney's contract which would provide the investigation necessary to develop the information needed to take appropriate action to clear the title.

May I suggest that the matter be considered by the Bureau in conjunction with the Solicitor's office as follows:

1. Request the BLM to issue no further patents to the north half of the riverbed of the Missouri fronting the Fort Peck Reservation and direct the Area Office and the agency to suspend the sale of any river sections.
2. The Solicitor to approve the attorney's mineral contract so that the investigative work may proceed.
3. Consider and reverse the Greenwood-Fickinger opinion.

Kind personal regards.

Sincerely,

MARVIN J. SONOSKY.

EXHIBIT 2

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., December 11, 1962.

MEMORANDUM

To: Commissioner of Indian Affairs.
From: Acting Assistant Solicitor, Indian Legal Activities.
Subject: Proposed letter to Area Director, Billings, Montana, regarding ownership of the abandoned channel of the Missouri River fronting allotted lands along a portion of the southern boundary of Fort Peck Reservation.

In connection with oil and gas leasing in and near the Chelsea Slough area on Fort Peck Reservation, a question has been raised as to whether the Fort Peck tribes have an interest in the abandoned bed of the Missouri River fronting individual allotments along a portion of the southern boundary of the reservation. Specifically, the question to be answered is who owns the 15.05 acres of such river bed fronting lot 6, section 2, T. 27 N., R. 49 E., M.P.M., Montana.

The southern boundary of the Fort Peck Reservation, as established by agreement ratified and confirmed by the act of May 1, 1888 (25 Stat. 113), is the middle of the main channel of the Missouri River, extending for approximately 80 miles between Big Muddy Creek and a point opposite the mouth of Milk River. In 1913, the river formed an oxbow along the portion of the reservation boundary here involved, including the part of section 2 on which lot 6 is located. Lot 6 comprised part of an individual allotment approved April 18, 1913, for which trust patent #322210, dated December 17, 1913, issued to the allottee. In 1913, lot 6, containing approximately 41.58 acres of upland, was bounded on the east (because of the bend of the river in this area) by the Missouri River. By avulsive action in 1916, the river abandoned its channel which had formed the oxbow or loop along a number of sections and established a new channel some distance to the south, leaving dry land in most of its former bed. The 15.05-acre tract fronting lot 6 here under consideration was surveyed in 1954 along with other portions of the abandoned river bed and accretions to riparian tracts and is delineated on a plat of survey approved December 13, 1954.

It is former riverbed land lying between the middle of the old main channel of the Missouri River and the upland as it existed in 1913. If the allotment of reservation lands under trust patent on lot 6 and similarly situated lots bounded by the Missouri River granted land out to the reservation boundary (to the middle of the main channel of the river), then title to the reservation half (left half) of the river bed fronting the allotments vested in the allottees. But if the United States reserved the strip of land comprising the shore and the reservation half of the river bed between the high water line on the left bank and mid-channel, the Government holds this strip of land, including the 15.05-acre tract fronting lot 6, in trust for the Fort Peck tribes.

The proposed letter to the Area Director, Billings, concludes that the tract fronting lot 6 and similarly situated tracts in the abandoned river channel fronting patented upland allotments belong to the owners of the upland. We believe that this conclusion is correct but we are sending these additional com-

ments to supplement some of the statements in the proposed letter and to explain our reasons for concluding that counsel for the Fort Peck Tribes is incorrect in his contention that the navigability of the Missouri River is a basis for holding that the 15.05-acre tract fronting lot 6 was not included in the allotment of lot 6.

At the outset it is emphasized that the question here under consideration in no way involves ownership of the waters of the river, the discussion being confined to the question of ownership of the left half of the abandoned river bed fronting lot 6 out to the boundary line of the reservation, i.e. to the middle of the main channel of the Missouri River as it existed before the 1916 avulsion. We are assuming for purposes of this discussion that there was no substantial change in the river channel at Chelsea Loop between the time the reservation was created in 1888 and the 1916 avulsion, there being no available information to the contrary, and we are assuming also that in 1913 the river was navigable in this area. Where a stream which is a boundary suddenly abandons its old channel by avulsion (rapid or violent and visible change) no change in the boundary results, but the boundary remains in the center of the old channel. *Missouri* v. *Nebraska*, 196 U.S. 23 (1904). Accordingly, the abandonment of the river channel in 1916 in the area of Chelsea Loop did not change the reservation boundary.

In a Solicitor's Memorandum of May 14, 1935, M–27996, which is referred to in your letter, the question raised here, whether title to river bed land passed with the allotment of the upland, was considered and answered affirmatively with respect to upland allotments along the western boundary of the Kaw Indian Reservation in Oklahoma. Deeds for the lands bordering the Arkansas River boundary of the Kaw Reservation contained no express inclusion or exclusion of rights in the river bed. The Department found that in carrying out the allotment acts there was no attempt to dispose of the river bed separately from the upland of the Kaw Reservation and held that under Oklahoma law, conveyance of the riparian tracts along a nonnavigable river granted land to the middle of the stream. The conclusion was based on the principles set forth in *Oklahoma* v. *Texas*, 258 U.S. 574, 594–597 (1922), that where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it may dispose of or retain all or part of the river bed in disposing of the upland. By statute, treaty, or the terms of a patent, the United States may restrict the conveyance to the upland or to a part only of the river bed, but if its intention is not otherwise shown, the conveyance will be construed and given effect in this particular according to the law of the State in which the land lies. For reasons discussed below, we believe that where, as here, the United States reserved a portion of the bed of a navigable river and the abutting upland in trust as part of an Indian Reservation established in the Territory of Montana before Statehood, and later patented the uplands bordering the river, the intent of the United States as grantor of the uplands determines whether title to the river bed land was conveyed along with the allotment of the upland. The patent to the upland and the terms of the governing statute may show intent. Before discussing these, however, the relationship of navigability of the river to ownership of the river bed will be considered.

Except as previously granted, title to and dominion over the navigable waters and the beds and shores thereof vests in each of the States upon its admission to the Union, subject to the paramount power of the Federal Government over navigation. *Shively* v. *Bowlby*, 152 U.S. 1 (1894). This general rule is consistent with the rule that the boundary line of a Federal grant of public domain along navigable waters in the various States is the high water mark. Consequently, if a grantee from the United States of public domain upland bordering navigable water in one of the States obtains any rights in the shores (the shore being the land between the lines of high and low water) and the beds of the stream, this is by operation of State law, not by Federal law. *Scott* v. *Lattig*, 227 U.S. 229, 231 (1913). The high water mark limit of upland grants of public domain bordering navigable waters permits each State to adopt its own rules regarding ownership of such waters and of their beds and shores. None of these legal consequences of the navigability of waters is applicable here. Montana was not admitted into the Union until a year after the north half of the Missouri River bordering Fort Peck Reservation was included in the Reservation. Consequently, that portion of the Missouri River within Fort Peck's boundaries did not vest in the State upon its admission into the Union, the State acquired no sovereignty over

it by reason of Statehood, and the rules of Montana as to ownership of the shore and beds of navigable rivers are not relevant in determining ownership of the reservation half of the Missouri River unless the United States directs or consents to that result. *United States* v. *Moore*, 62 F. Supp. 660 (D. Wash. 1945).

The significance of navigability of a river in determining ownership of the river bed is that under the laws of some States the rules governing ownership of the beds of navigable waters differ from the rules as to ownership of the shores and beds of nonnavigable waters. But the navigability of a stream, in itself, does not preclude private ownership of its bed. In fact, the common law rules that title to the bed of nontidal though navigable rivers out to the thread of the stream vests in the owners of the uplands, subject to the public right in navigation, has been adopted in many states. *Shively* v. *Bowlby*, *supra*, p. 31; *Johnson* v. *Johnson*, 95 Pac. 499 (Idaho 1908). Thus, navigability of a river affects ownership of riverbeds only to the extent that State laws so provide, as is evidenced, by way of example, by varying kinds of ownership of the bed of the Mississippi. Under Illinois law, the title of owners of upland granted by the United States along the Mississippi River includes the bed of the Mississippi out to the center or thread of the stream. *Hardin* v. *Jordan*, 140 U.S. 371, 383 (1891). In Iowa, title of owners of upland granted by the United States along the Mississippi extends only to the high water mark and title to the bed of the river is in the State. *Hardin* v. *Jordan*, supra, p. 382–383. It has already been pointed out that the reservation half of the Missouri River along the southern boundary of Fort Peck Reservation did not vest in Montana. Consequently, Montana law as to ownership of the beds of navigable rivers does not affect title to the river bed fronting lot 6 in the absence of some intent to adopt Montana law expressed in the patent from the United States or in the statutory provisions governing this allotment. See *Taylor et al.* v. *United States*, 44 F. 2d 531 (1930). We have found no such intent.

In this connection it is noted that where a patent conveying upland contains no express or implied intent to grant or withhold the portion of the river bed fronting the upland, and no such intent appears in the circumstances under which the patent was issued, including the relevant statutory provisions, the common law rule of ownership of the shores and beds of nontidal, navigable waters determines title to the river bed fronting the upland grant. *United States* v. *Elliott et al.*, 131 F. 2d 720 (10th Cir. 1942). It was pointed out earlier that, at common law, title to the bed of navigable nontidal rivers vests in abutting landowners who are deemed to be owners to the middle of the stream, subject to the public easement of navigation. *Grand Rapids & Indiana R'd. Co.* v. *Butler*, 159 U.S. 87, 92–93 (1895); *Whitaker* v. *McBride*, 197 U.S. 510–512, 516 (1905); 8 *Am. Juris.*, "Boundaries", sec. 32. Consequently, at common law, ownership of the reservation half of the river bed would have been in the owners of the upland whether or not the river was navigable. (See *Oklahoma* v. *Texas* (*supra*); *Grand Rapids & Indiana R'd. Co.* v. *Butler* (*supra*).) Before determining whether the common law rule governs ownership of the 15.05-acre tract here involved, the terms of the patent and the governing statuory provisions must be considered.

The trust patent to lot 6 indicates only that the lot was conveyed in accordance with the plat of survey of T. 27 N., R. 49 E., M.P.M., Montana, dated May 13, 1908. The plat of survey of this township shows lot 6 bounded on the east by the meanders of the left band of the Missouri River. With exceptions not here relevant, a meander line on a plat of survey is not a boundary line, but is run to show sinuosities of a stream and to determine the quantity of upland in grants bordering water. *Railroad Co.* v. *Schurmeir*, 74 U.S. (7 Wall.) 272 (1868).

Although a designated amount of agricultural, timber, grazing, and irrigable land was to be allotted to each eligible Indian under the statutory provisions here material (Act of May 30, 1908; 35 Stat. 558), the acreage shown in the patent on lot 6 does not establish whether the river bed fronting the lot was included in the patent because land under water was not ordinarily counted in computing acreage included in patents on uplands. (*Grand Rapids & Indiana R'd. Co.* v. *Butler* (*supra*).) Not only was land under water useless for agriculture or grazing, but there was only a small amount of land in the reservation half of the river bed fronting the lot, and it seems doubtful that in 1913 anyone considered that the river bed land had a separate value apart from the upland.

These and related considerations discussed in the Solicitor's memorandum, M–27996 (*supra*), indicate that the upland acreage shown in an allotment patent is not evidence of an intent to include or exclude the river bed land fronting the allotment. (In this connection, it is noted parenthetically that a departmental memorandum relating to a public land oil and gas lease offer for land near that here involved states that the Department allowed Fort Peck Reservation allotments for lands "north of the center of the present channel of the Missouri River" (Opinion of the Associate Solicitor, Public Lands, November 19, 1958, M–26539). If similar language is used in any of the papers which your office may have on file relating to the patent to lot 6, it would, of course, give strong support to the conclusion that the river bed land fronting lot 6 was included in the patent. Information available to us about the patent to lot 6 shows no intent either to include or exclude the river bed fronting the lot.

The Act of May 30, 1908 (35 Stat. 558), authorizing the allotment of Fort Peck lands is entitled "An act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment." The provisions of the Act, like its title, indicate an intent to allot, sell, or otherwise dispose of all of the Fort Peck Reservation lands except such lands as may be reserved under the Act.

Section 3 of the Act specifically authorizes the Secretary to reserve lands for a number of purposes, including agency purposes, and lands so reserved are to remain reserved as long as needed for the benefit of the Indians. Under Section 14 of the Act, lands could be reserved for townsite purposes. If the strip of land between the high water line of the left bank and mid-channel constituting the reservation half of the Missouri River had been reserved under either of these provisions from the allotment or other disposal provisions of the Act, there presumably would be some record evidence of such a reservation and, according to our information, there is none in the patent on lot 6 or otherwise.

Section 2 of the Act provides that all appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana. Since a special express provision is made for reservation waters as distinguished from reservation land, presumably the beds and shores of reservation waters would have been mentioned along with the waters if it had been intended to make them also subject to Montana law. Or if the beds and shores of reservation waters were to be disposed of in a way which differed from the disposition of other reservation lands, they would have been mentioned separately just as separate provision was made for reservation waters. The provision governing the appropriation of reservation waters, in its context, does not include disposition of the reservation half of the Missouri River bed, but indicates an intent that the waters of the reservation shall be separated from the allotment or other disposal of reservation lands, including river bed lands, under the Act. See *Oklahoma* v. *Texas*, 258 U.S. 574, 596 (1922).

In summary, the Act of May 30, 1908, *supra*, contemplates that all of the lands of the reservation were to be disposed of or reserved under one or another of its provisions. There is nothing to indicate that the reservation half of the bed of the Missouri, a narrow strip of land along the southern boundary, was reserved under any of the provisions of the Act or was to be reserved when the adjoining uplands were allotted. Consideration of all of the provisions of the Act strongly supports the conclusion that the beds and shores of reservation rivers, like other reservation lands, were not to be governed by the same statutory provision as that controlling waters of the reservation. Where, under the circumstances here prevailing, the governing statute indicates an intent regarding disposition of river bed land, the statutory intent is controlling. *Oklahoma* v. *Texas*, *supra*, pp. 594–595; see *Taylor et al.* v. *United States*, *supra*. Moreover, the conclusion that there is substantial evidence of a statutory intent to dispose of the strip of land constituting the reservation half of the river bed as part of the abutting upland allotments amounts to a determination that the statute did not depart from the common law rule of ownership of the river bed, discussed herein, which rule would control the outcome here if the patent on the upland or the governing statute showed no intent regarding title to the reservation half of the river bed. Accordingly, we believe that your conclusion is correct that the 15.05-acre tract of river bed fronting lot 6 here involved was not separated and

reserved from the grant of the uplands but was conveyed to the allottee along with lot 6, the conclusion being in agreement with the intent of the controlling statutory provisions. It is noted also that this conclusion is consistent with the determination made by the Acting Commissioner of the Bureau of Indian Affairs in connection with the 1954 surveys and resurveys of accretions of the abandoned channel of the Missouri River in Ts. 27 and 28 N., Rs. 49 and 50 E., M.P.M., Fort Peck Indian Reservation. The Special Instructions dated April 5, 1954, for the surveys and resurveys of this land (Group No. 473 Montana) show that the Acting Commissioner had determined in connection with executing the surveys and resurveys that all accretions along the water's edge formed after the lands were allotted and all of the land to the middle of the channel of the abandoned river bed located on the reservation side of the old main channel were owned by the individual allottees of the upland.

CHARLES M. SOLLER,
Acting Assistant Solicitor,
Indian Legal Activities.

EXHIBIT 3

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY FOR MONTANA,
Billings, Mont. July 8, 1971.

Re Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana v. Mateiu Budak, et al., Civil No. 2416 (Havre-Glasgow Division)

Mr. MARVIN J. SONOSKY,
Attorney at Law,
Washington, D.C.

Mr. JOHN M. SCHILTZ,
Attorney at Law,
Billings, Mont.

GENTLEMEN: The Departments of Justice and Interior have determined that the United States Attorney's office should represent the individual Indian allottees named as defendants in the above-entitled case.

In accord with the position taken administratively by the Department of Interior, the United States will contend that title to the river tracts is in the owners of the contiguous uplands. In the case of the Indian owners this means in effect that the United States will take the position that title to the river tracts is in the United States as trustee for the individual allottees. Whether title to the river tracts is ultimately determined to be in the tribe or in the individual allottees of the contiguous uplands, the legal title is, of course, in the United States as trustee for the tribe or the individual Indians.

It is therefore the position of the United States that it is an indispensable party to any suit to determine title to these lands. It is also immune from suit without its consent; however, the Department of Interior is anxious to have the question of title to these lands determined. The Department of Justice has suggested that you be contacted to ascertain whether you will agree to hold this action in abeyance pending the institution by the United States of an action to quiet the title of the lands in the United States as trustee for the individual Indian allottees.

If you will agree to hold your suit in abeyance, we will institute such an action in the near future. Otherwise, we are instructed to file a suggestion of interest in the United States in the present case and move to dismiss it on the ground that it constitutes an unconsented suit against the sovereign.

We will appreciate hearing from you whether or not you will agree to holding this suit in abeyance pending the institution and disposition of a quiet title action to be brought by the United States.

Thanking you for your attention, I am,

Very truly yours,

MOODY BRICKETT,
U.S. Attorney.
RICHMOND F. ALLAN,
Assistant U.S. Attorney.

73-736 O—72——12

EXHIBIT 4

AUGUST 7, 1964.

Re Assiniboine and Sioux Tribes v. Budak, et al
Civil No. 2416 Havre-Glasgow Division

MOODY BRICKETT, *Esquire*
United States Attorney
Department of Justice
Billings, Montana

DEAR MR. BRICKETT: The Executive Board of the Assiniboine and Sioux Tribes has authorized me to advise you that the Tribes agree to hold this action in abeyance ending the institution and prosecuton of the suit by the United States to quiet the title of the United States as trusee for individual Indian allottees

Kind personal regards.

Sincerely,

MARVIN J. SONOSKY

EXHIBIT 5

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., August 25, 1966.

Re Assiniboine and Sioux Tribes v. Budak, Civil No. 2416.

MOODY BRICKETT, *Esquire,*
U.S. Attorney, Billings, Mont.

Attention: Arthur W. Ayers, Jr., Esquire, Assistant United States Attorney

DEAR MR. BRICKETT: This replies to your letter of July 29, 1966, in which you inquire whether the Department still intends to institute actions on behalf of the individual Indians affected by the above-designated litigation. We have been actively reviewing this case, and conferring with the Department of the Interior with respect to the appropriate course of action to follow, but have not yet arrived at any conclusion. We expect to be able to advise you by the end of September as to our decision. Please do not take any action in this matter until so advised.

Sincerely,

EDWIN L. WEISL, JR.,
Assistant Attorney General,
Land and Natural Resources Division.
By DAVID R. WARNER,
Chief, General Litigation Section.

EXHIBIT 6

FEBRUARY 28, 1968.

Re Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana v. Matieu Budak, et al., Civil No. 2416.

MOODY BRICKETT, Esquire,
U.S. Attorney,
Billings, Mont.

Attention: Arthur W. Ayers, Jr., Esquire, Assistant United States Attorney.

DEAR MR. BRICKETT: The above action was initiated several years ago by counsel for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation for the purpose of quieting in the tribes title to certain lands which are more fully described hereafter. In a letter dated April 7, 1964, we advised you that "it is the position of the Department of the Interior that the beneficial interest in * * * [the lands involved] is in the Fort Peck allottees and their successors in interest and not in the tribes as alleged by the complaint." Accordingly, we requested that you prepare a draft complaint to quiet title in the United States on behalf of the individual Indians to the lands in controversy, and that you arrange with the attorney for the tribes to hold in abeyance the action initiated by the tribes pending the outcome of the suit to be initiated by the United States.

Proceedings in the tribes' action were thereafter suspended, but no complaint was ever prepared pursuant to the instructions in the letter of April 7, 1964, because as the matter continued to be studied, the conclusion that the lands belonged to the individual Indian allottees and their successors in interest appeared to some attorneys here and in the Department of the Interior to be incorrect. Correspondence has been exchanged between the two Departments, and several conferences have been held, and now it is the conclusion of the Department of the interior that appropriate action should be taken to quiet title to the lands involved in the Fort Peck Tribes rather than in the individual Indian allottees and their successors in interest. We concur in this last conclusion.

The facts of this case, and the applicable law, are as follows:

The Fort Peck Indian Reservation in Montana was established by an agreement with various Indian Tribes ratified and confirmed by the Act of May 1, 1888, 25 Stat. 113. Article IX of the agreement established the middle of the main channel of the Missouri River, between Big Muddy Creek and Milk River, as the southern boundary of the reservation. Montana was admitted into the Union on November 8, 1889.

On May 30, 1908, was passed "An Act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment." 35 Stat. 558. The Act provided for the allotment to individual Indians of 320 acres of grazing land and from 2½ to 20 acres of timber land, and the reservation of such land as the Secretary of the Interior may deem necessary for agency, school and religious purposes. The Act directed the President, upon the completion of the allotments, to appoint a commission to "appraise, and value all of said lands that shall not have been allotted in severally to said Indians or reserved by the Secretary of the Interior," after which the lands "shall be disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States" at their appraised value. The net proceeds from these sales were directed to be paid into the Treasury to the credit of the Indian Tribe.

Among the Reservation lands allotted pursuant to this statute were many tracts bordering the Missouri River. In accordance with the usual surveying practice, the riparian boundaries of such tracts were depicted by meander lines, which were used to "close" the tracts themselves, being less than full legal subdivisions, were designated by lot numbers.

In 1916, the Missouri River avulsively changed its flow, leaving dry its bed in a certain area. In November 1953, the Director of the Billings Area Office of the Bureau of Indian Affairs issued a decision, which was mailed to various oil companies, holding that the individual Indian allottees whose tracts border the Missouri River on to the middle of the main channel of the river. In 1954, at the request of the Bureau of Indian Affairs, the Bureau of Land Management surveyed that portion of the abandoned river bed which was north of its former main channel, and the results of this survey are incorporated in official plats which were approved on December 13, 1954.

It was upon this state affairs that the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation filed their action to quiet in them title to the abandoned river bed, and that the Department of the Interior, stating that its position was that the individual allottees and their successors in interest, rather than the tribes, were the beneficial owners of the uncovered river bed, requested this department to represent those defendants who were holders of restricted Indian patents.

The Interior Department's original conclusion that the bed of the Missouri River to the middle of the main channel passed into the ownership of the individual riparian allottees was based primarily upon the conclusion that the intent of the Act of 1908 was to transfer to individual Indian and non-Indian ownership *all* of the land comprising the Fort Peck Reservation (except for such lands as might be expressly set aside for special purposes), and that to suppose that the strips of land underneath the Missouri River were excepted from the purview of the Act would be inconsistent with, and would do violence to, this legislative intention. In support of this position may be cited *United States* v. *Hayes*, 20 F.2d 873 (C.A. 8, 1927), cert. den., 270 U.S. 552. This case held that the title of Indian riparian allottees, in a situation similar to the instant one, extended to the thread of the Arkansas River, so that no interest or title in the land was reserved in or retained by the Creek Nation, in view of the government's policy

to transfer *all* of the land in the reservation into private Indian and non-Indian ownership. The decision specifically noted that the Arkansas River is nonnavigable.

However, as we have already indicated, this first conclusion has been carefully reviewed, and both the Department of the Interior and this Department have now reached a different conclusion, on the basis of *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (C.A. 9, 1942), which held, in another situation similar to the instant one, that the title of the Indian allottees whose lands bordered Flathead Lake in the Flathead Indian Reservation extended only to the high watermark of the lake and that title to land below that mark and beneath the lake is in the United States in trust for the tribes. The decision pointed out that Flathead Lake is navigable, and applied the general rule that patents of the United States to lands bordering navigable waters convey only to the high water mark. The court acknowledged that special circumstances could exist which might warrant the application of a different rule, but stated that such circumstances had not been brought to its attention.

It could be argued, of course, that the *Hayes* case rather than the *Rochester* case controls in the present situation, on the ground that the question is not the *power* of the Government to convey the river-bed, but the *intent* of the Government to convey the river bed. Be that as it may, we have concluded that, since the tribes assert that they own the river bed, since the Department of the Interior concurs in this contention, and since the *Rochester* case appears to support the claim, an action should be initiated to quiet title to these lands in the tribes. We therefore request that you prepare a complaint to quiet title of the river bed lands in the United States on behalf of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and submit two copies of the complaint to us for our approval before filing. After the filing of the complaint, the action is to be handled primarily by your office.

We would appreciate it if you would also respond to Judge Jameson's letter to you of January 30, 1968, by advising him of our decision to file a complaint in this matter.

Sincerely,

CLYDE O. MARTZ,
Assistant Attorney General,
Land and Natural Resources Division.
By DAVID R. WARNER,
Chief, General Litigation Section.

EXHIBIT 7

FEBRUARY 18, 1971.

Re Assiniboine and Sioux Tribes v. Budak, Civil No. 2416.

Hon. SHIRO KASHIWA,
Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D.C.

DEAR MR. KASHIWA: The Assiniboine and Sioux Tribes brought suit to establish tribal title to the bed of the Missouri River to the middle of the main channel to the extent that the river forms the southern boundary of the Fort Peck Indian Reservation.

The United States has an interest in the case since, if the Tribes are correct, title is vested in the United States in trust for the Tribes. My files disclose that by letter of February 28, 1968, your Department instructed the United States Attorney to prepare a complaint to quiet title and to submit copies for approval before filing. By letter of February 12, 1969, the United States Attorney advised me that he had been instructed to institute suit to quiet title on behalf of the Tribes.

The Supreme Court of the United States handed down its decision in *Choctaw Nation* v. *Oklahoma*, U.S., 25 L. Ed. 615 (April 27, 1970). The decision of the Supreme Court bears out the position taken by the Tribes. I should appreciate it very much if you will advise me whether the United States intends to go forward with this matter since the Tribes' case has been placed in suspense, apparently pending appropriate instructions from your Department to the United States Attorney.

Kind personal regards.

Sincerely,

MARVIN J. SONOSKY.

Exhibit 8

U.S. Department of Justice,
Washington, D.C., February 23, 1971.

Re Action to quiet title to portions of the bed of the Missouri River in the Assiniboine and Sioux Tribes.

Marvin J. Sonosky, Esquire,
Washington, D.C.

Dear Mr. Sonosky: This is in response to your letter of February 18, 1971, requesting whether we intend to go forward with an action in the above-identified matter.

On November 9, 1970, we requested the Department of the Interior to identify the parties to be named as defendants in this action, and on January 29, 1971, we inquired as to when its reply was expected. To date we have received no reply.

As soon as this information is received from the Department of the Interior we expect to initiate an action on behalf of the tribes.

Sincerely,

Clyde O. Martz,
Assistant Attorney General,
Land and Natural Resources Division.
By John E. Tindsbold, *Attorney.*

Public Lands Council,
Falls Church, Va., November 19, 1971.

Hon. Henry M. Jackson,
Chairman, Committee on Interior and Insular Affairs, U.S. Senate,
Washington, D.C.

Dear Senator Jackson: We have recently reviewed S. 2035, a bill to provide for the creation of the Indian Trust Counsel Authority, and wish to offer some comments on the bill for your consideration.

Our membership has an interest in this proposed legislation because many of the members have either acquired lands in the Western states from the Federal Government, or are users of public lands in the West. We expect that most of the claims which will be handled by the proposed Authority will be claims to land and water resources in the Western states which have been granted to third parties by the Government or which remain in Federal ownership as public lands.

We have no argument with the objectives of this legislation. We are, however, anxious that it not be used as a vehicle for constant and continued harassment of the Government and individuals through the prevention of non-meritorius claims.

As now written there are no limitations in time in the bill upon the existence of the Authority or upon the prosecution of claims by the Authority. The unfortunate tendency in Government is for such agencies to become self-perpetuating by whatever means may be available. In this instance, the means may well be the filing and prosecution of non-meritorious claims.

Most of the claims which would be processed by the Authority created by S. 2035 are now known. The few claims which are not known, we feel, could be detected within a reasonable time. We believe that a reasonable time limit should be placed upon the filing of claims with the Authority for processing.

We also believe that, once a claim has been brought to the attention of the Authority and it is decided to prosecute the claim, prosecution of the claim ought to proceed with diligence. The time within which the claims can be prosecuted will not, of course, be entirely within the control of the Authority. However, a reasonable time limit placed upon the life of the Authority will assure that for its part prosecution of the claims filed with it will be carried on in a diligent manner.

We suggest that the Authority be prohibited from accepting any claims unless filed with it within five years after the effective date of the Act and that the Authority terminate ten years after the effective date of the Act. This would give the authority a minimum of five years to complete the prosecution of any claim filed with it. Not only would such limitations encourage diligence in the prosecution of claims, it would also help to assure that only claims of merit would be accepted for processing by the Authority.

As we have pointed out, undoubtedly many of the claims asserted by the Authority on behalf of Indians will be for public lands, or public land resources. We are most concerned about the position of other users in the event that the Government decides not to defend a claim to public lands asserted by the Authority. This is of particular concern to grazing permittees because of the nature of the permits they hold. We believe that it would be fair to other users to provide in the bill that, whenever the Authority asserts a claim on behalf of any Indian, Indian tribe or other Indian group to public lands, any person holding a permit, license or lease from the Government to the lands or resources claimed shall have standing to defend against such claim in any proceeding initiated by the Authority.

The American National Cattlemen's Association supports our position on this legislation and requests that this letter serve as a statement of their feeling.

We would appreciate it if this letter could be made a part of the record of the hearings to be held on S. 2035 on November 22nd and 23rd.

Sincerely,

THOMAS J. CAVANAUGH,
General Counsel.

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

STATEMENT

By

ROGER C. CRAMTON
CHAIRMAN

SUBCOMMITTEE ON INDIAN AFFAIRS
of the
SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

ON

S. 2035
A BILL TO CREATE AN INDIAN TRUST COUNSEL AUTHORITY

November 23, 1971

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to express support for the Indian Trust Counsel Authority proposed in S. 2035. 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. To the Committee's support, I wish to add my own, and to comment on the need for this measure, the role of the Authority, and its relationship to other federal agencies.

The Administrative Conference of the United States -- a permanent, independent federal agency which began functioning in early 1968 -- is engaged in the improvement of the procedures of all federal departments and agencies.[1/] The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers. The Conference has a special expertise on questions of administrative law and procedure.

The full Conference -- made up of about 90 public officials and private citizens -- meets twice yearly to consider and adopt official recommendations for procedural improvements. The work of developing Conference recommendations is primarily done through committees of Conference members. One of these, the Committee on Claims Adjudications, has studied this conflict-of-interest matter and has adopted a statement of position urging the establishment of an Indian Trust Counsel Authority.[2/] The Committee plans to forward this statement to the June 1972 meeting of the Conference for adoption as an official Conference recommendation.

1/ A brief description of the Administrative Conference and some of its current activities is attached as Appendix A.

2/ A copy is attached as Appendix B.

A report prepared by a consultant to the Administrative Conference, Professor Reid P. Chambers of the UCLA Law School, 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.[3/]

The conflict 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. An Interior project, such as a new reclamation project, may affect the water, fishing or other rights of Indians. The Department must decide whether a project that it is sponsoring interferes with Indian interests. The dispute may be mediated by the Solicitor's office, which also functions as an attorney, both for Indian interests and for the Bureau which wants to build the project If the departmental decision is adverse to the Indians, the Government is unlikely to seek judicial review on behalf of the Indians, though an independent advocate might well do so,

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3/ Professor Chamber's report, entitled "Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest," is appended to his memorandum to the Committee on Claims Adjudications, which is attached as Appendix C.

since the legal questions are often far from clear in these cases. Furthermore, an independent advocate would have the leverage in agency negotiations that comes 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 Indian interest in pursuing its 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 conflict 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 both in terms of concepts of administrative procedure and fiduciary responsibilities, and as a matter of fairness to the agency officials assigned inconsistent roles.

What is needed is to provide Indians with an independent, effective voice to speak for their land and resource claims. This will 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 Indian Trust Counsel Authority will be such a spokesman, and the Committee on Claims Adjudications endorses its establishment.

Role of the Indian Trust Counsel Authority

The present bill grants the Authority powers which have been singled out by the Committee as critical. The United States rightfully waives its sovereign immunity in lawsuits brought by the Authority, since a chief reason for establishing the Authority is to create an independent advocate in disputes with the Federal Government. The Authority should be authorized, with the consent of the affected tribes, to initiate, intervene in and participate in actions in federal or state agencies and courts, against government or private interests, in order to protect the land and resources of Indians for which the United States has a trust responsibility.

The Indian tribes, of course, should continue to be able to bring their own administrative and court actions. The bill does not explicitly mention this point, and it may be advisable to clarify it in the legislation or legislative history. Since Indian tribes may have conflicting interests among themselves, the bill appropriately authorizes the Authority to use special counsel. As I read the bill, the Authority may retain special counsel in other situations as well, such as when its staff attorneys are busy, and it may either employ special counsel or accept volunteer services.

The Indian Trust Counsel Authority, as a federal agency, should be entitled to the benefits and rights the United States has as a litigant. For instance, the Government need not post a bond to bring certain injunction suits, and the Trust Counsel, as a responsible government agency, should not have to either. This is another point that deserves explicit statement in the bill or its history.

The funding and resources of the Authority must be commensurate with its given role of being the vehicle for the Federal Government to fulfill its trust 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.

Relationship with Other Federal Agencies

Notification Requirements - Indian tribes in the past have oftentimes been unaware that a federal agency is 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 -- a concern which I deeply share. Agencies are already subject to new and pervasive notice requirements, such as the environmental impact statements, 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 requirement would apply to all federal agencies but its principal impact would be on the three agencies whose projects most frequently affect Indians: Interior, Agriculture, and the Army Corps of Engineers. It is possible that 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.

The desideratum is that the Authority be able to inform federal agencies of the classes and kinds of proceedings which it believes will have a significant impact on Indians and for which notice should be provided. 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.

As an additional point, I suggest that, if a notice provision is included, only the Authority or the affected tribe should be able to enforce any notice provision. Private parties, such as an environmental group or landowner, should not be able to invalidate a federal proceeding in approving a dam or other matter 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 alone should be able to insist upon its benefits.

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 Indian natural resource claims, but it would not end the federal

trust responsibility toward the Indians. 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 bill recognizes this distinction in section 8.

The elimination of the representational responsibilities of the Department of Justice is a policy question of considerable importance. The Department has acted on behalf of Indians pursuant to this obligation and the continuance of the obligation could lead to even more requests in the future. The importance of providing Indians with residual representation led some members of the Committee on Claims Adjudications to favor the continuance of Justice's representational obligation in situations in which the Authority was not acting in that capacity. There is a concern that an inadequately funded Authority would not be able to do the full job of representing Indian resource claims.

On the other hand, it is incumbent upon Congress to fund the Authority at a level that will enable it to carry out the trust obligation. The Department of Justice feels that it 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. Whether

the representational responsibility of the Department of Justice should be continued is a policy question that rests upon a balancing of these opposing views.

I wish to call to your attention an ambiguity in section 10 of the bill. That section makes reference to suits under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, but it is not clear whether the Authority is granted or denied the power to prosecute litigation under that statute.

A number of other comments concerning the form and language of S. 2035 are contained in Professor Chambers' memorandum to the Committee on Claims Adjudications, a copy of which is attached as Appendix C.

I thank the Subcommittee for the opportunity to submit these views on behalf of the Conference's Committee on Claims Adjudications. You may be assured of my willingness to assist the Subcommittee and its staff if that is desired.

# # #

APPENDIX A

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

October 1971

INFORMATION CONCERNING
THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The Administrative Conference of the United States, a permanent, independent Federal agency, is engaged in the improvement of the procedures of Federal departments and agencies. The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers.

The Administrative Conference Act, 5 U.S.C. §§ 571-76, provides that the Administrative Conference shall consist of not more than 91 nor less than 75 members, of whom not more than 36 may be appointed from the private sector. The Chairman is appointed by the President for a five-year term, with Senate confirmation; he is the only member who serves on a full-time, compensated basis. All other members, including the members of the Council of the Conference, the governing board appointed by the President, contribute their services without compensation. In addition, the Conference is authorized to employ experts and consultants to research and report on particular subjects.

Since its activation in January 1968, the Administrative Conference has adopted 26 formal recommendations for improved procedures, some calling for legislation and the remainder calling for action on the part of the affected agencies. A number of additional recommendations will be considered at a forthcoming plenary session in December 1971. Many of the present recommendations have been implemented, and others are in the process of implementation. In addition, the Conference study of an issue has led in several instances to immediate acceptance of procedural improvements by affected agencies, without the necessity of a formal recommendation.

Ten standing committees of the Conference and the staff of the Chairman's Office, with the assistance of approximately 30 highly qualified academic consultants, are engaged in a wide variety of studies at the present time.

Current studies are concerned with the following subjects:

** FCC procedures for comparative broadcast licensing.

** The administration of the Federal Tort Claims Act.

** Devices for improved handling of citizen complaints against Federal administrative action.

** Pre-induction judicial review of selective service system determinations.

** Public participation in administrative hearings.

** Commitment and release procedures for psychiatric ward patients in Veterans Administration hospitals.

** Veterans Administration procedures in the handling of disability benefit claims.

** Department of Interior procedures for the resolution of problems involving the use of natural resources on Indian reservations.

** Procedures for expediting complex and protracted administrative cases.

** The handling of disability benefit claims by the Social Security Administration.

** Summary administrative action pending formal administrative adjudication.

** Prosecutorial discretion in the enforcement of Federal regulatory crimes.

** Rulemaking procedures of the Food and Drug Administration involving a determination on the basis of a record.

** The use of trial-type hearings in the formulation of legislative rules.

** The use of trial-type hearings in atomic energy licensing and regulation.

** Parole procedures applicable to Federal correctional institutions.

** Informal handling of timber rights by the Department of the Interior and of grazing rights by the Department of Agriculture.

** Uniform procedures for the award of discretionary grants-in-aid by granting agencies.

** Administration of the ADC welfare program by State and Federal authorities.

** Handling of environmental issues in the licensing of power plants.

** Loan of hearing examiners.

** Exercise of discretion by the Immigration and Naturalization Service in change-of-status cases.

** Procedures available to losing bidders for Government contracts.

** Public participation in the negotiation, settlement and suspension of rate filings.

** Procedures for the development and use of statutorily-required statements of environmental effect.

** Methods for enforcing compliance by State and local officials with conditions included in Federal grants-in-aid.

** Pre-enforcement judicial review of definitive agency positions (especially rules).

** Discipline of attorneys practicing before Federal administrative agencies.

** "Adverse action" procedures for the discipline or removal of Federal employees. And

** Remedies for the resolution of property disputes between the United States and private persons.

The offices of the Administrative Conference of the United States are located at 726 Jackson Place, N.W., Washington, D.C. 20506. The Chairman is Roger C. Cramton, formerly, Professor of Law, University of Michigan.

# # #

APPENDIX B

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

COMMITTEE ON CLAIMS ADJUDICATIONS

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

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

RECOMMENDATION

A. Creation of Indian Trust Counsel Authority

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

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* This recommendation was approved by the Committee on Claims Adjudications on November 8, 1971, but has not been adopted or approved by the Administrative Conference of the United States. It may be considered at a plenary session of the Conference scheduled for June 1972.

The Indian Trust Counsel Authority should be empowered to:

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

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

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

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

3. Agencies of the United States (especially the Departments of Agriculture, Defense and the Interior) should give notice to the Indian Trust Counsel Authority and any affected tribe of any proposed action which may significantly affect or impair the rights or claims of Indians. The Authority and Tribe should have

a reasonable opportunity to participate, in the manner appropriate to the nature of the proceeding, in the agency process resulting in any such action.

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

B. Administrative Solutions

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

APPENDIX C

CONFLICTS OF INTEREST IN THE ADMINISTRATION OF THE FEDERAL TRUST RESPONSIBILITY

by

Reid Peyton Chambers

January 3, 1972

A Report to the Committee on Claims Adjudications of the Administrative Conference of the United States

Introduction

It has often been said that the United States serves as guardian or trustee for the property rights of Indian tribes and reservation Indians.[1] Such a trust relationship can most readily be recognized in terms of real property - reservation land is usually held by the United States in trust for the tribe or individual beneficial owner. This raises significant questions, such as: (1) whether the United States owes legal, as distinguished from moral,[2] duties to Indians with respect to that land and, perhaps, other natural resources owned or claimed by the Indians? (2) if legally enforceable duties do exist, what is their scope?[3]

These questions are of singular importance to reservation Indians. As a presently impoverished, rural minority, their ability to function as cultural groups separate from the rest of American society depends very largely on their share of scarce natural resources in the western states where they live - chiefly land, water and rights to hunt and fish. If assured a

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1. E.g., United States v. Kagama, 118 U.S. 375 (1886); Message of President Nixon to Congress on Indian Affairs, July 8, 1970.
2. In some cases, dicta has suggested that the trust responsibility may merely be a "moral duty." For example, in Seminole Nation v. United States, 316 U.S. 286, 297 (1942), the Court stated that the United States "has charged itself with moral obligations of the highest responsibility and trust."
3. The trust relationship, as discussed in this Report, pertains only to property rights in land and natural resources. This Report does not discuss whether its fiduciary duties to Indians require the government to provide adequate health or educational services on reservations. Such a claim was rejected in Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790 (1970).

sufficient portion of these vital resources, Indian reservations can attain a level of economic development which permits their culture to sustain itself. But as the population of western states grows, these assets are in increasingly short supply relative to demand. Reservation Indians frequently find themselves in competition, in their claims for land and water, with burgeoning cities, industries, ranching and farming interests in the western states.

In this rivalry, the Indians are generally weaker in terms of political and economic power than their adversaries. But to the extent that the federal government is obligated to be their "trustee," Indians may have a very significant ally. In general law, for example, a trustee or guardian has a legal duty to protect and preserve the trust property and enforce reasonable legal claims by the beneficiary or ward to property included in the trust _res_.[1] Such duties, if required of the federal government on behalf of Indians, would be of immense importance. Clearly, participation by the government in the process of resource allocation as the champion of the Indians would do much to even this unequal battle. Furthermore, a federal duty to enforce the Indians' legal claims to property is of special value because the "claims" of reservation Indians to land and natural resources are often exceedingly imprecise. The land boundaries of the reservation may be a now-dry river bed, the channel of which needs surveying, or a meandering stream which has changed its course since the reservation was

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1. A. Scott, _Trusts_, §176-77.

established. Just as a survey or an action to quiet title may be necessary to determine Indian claims to reservation land, the inventorying of water rights is often required to fix the precise extent of Indian water claims. Without such inventories to measure these claims, Indian water rights are undefined and imprecise. More practically, these rights - if not asserted - are lost as non-Indian users appropriate the water. The basic organic law of Indian water rights is the Supreme Court's decision in Winters v. United States, 207 U.S. 564 (1908). Simply stated, the doctrine of that case holds that when the Indians ceded lands to the federal government, they impliedly retained rights to sufficient water to serve the present and future needs[1] of those lands which they retained.[2] There are a number of unresolved general issues concerning Winters doctrine rights. While it seems that the Indians can use their water for any purpose for which their reservation was created,[3] it is not

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1. United States v. Ahtanum Irrigation District, 236 F.2d 321, 326 (9th Cir. 1956); Conrad Investment Company v. United States, 161 Fed. 829 (9th Cir. 1908).
2. See generally Veeder, Winters Doctrine Rights; Keystone of National Programs for Western Land and Water Conservation and Utilization, 26 Montana L. Rev. 149 (1965).
3. "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest." Arizona v. California 373 U.S. 546, 601 (1963).

clear how far they may depart from the initial agricultural use served by irrigation.[1] Can, for example, the Crow Tribe claim water under the Winters Doctrine for the mining of coal?[2] Moreover, the measure of the Winters doctrine right is exceedingly complex and time-consuming, involving a present estimate of future beneficial needs.

The value of the trust relationship in terms of confirming and protecting Indian property rights is at present greatly diminished because the federal trustee is tarnished, in many cases, with conflicting interests. The federal government is the proprietor of vast landholdings and water resources in the western United States. Public programs, moreover, designed to spur economic growth of the non-Indian society may result in the taking of land and water claimed by Indians. As the case studies which follow illustrate, these "conflicts of interest" have resulted repeatedly in failures to protect Indian natural resources.

Institutionally, the conflict of interest centers in the Department of the Interior, which is responsible both for management of Indian affairs[3] and for management and utilization of public land and water resources in the western United States.[4] The Department's Solicitor, the agency's general

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1. In United States v. Walker River Irrigation District, 104 F.2d 334, 340 (1939), the Court of Appeals for the Ninth Circuit held that a Winters doctrine right could be used for irrigation, power, and domestic and stock-watering purposes.
2. See pp. 23-28, infra.
3. 25 U.S.C. §§1, 2, 9; 43 U.S.C. §1457 (10).
4. Pursuant to 43 U.S.C. § 1457, the Department of the Interior is charged with the administration of public lands, mines, fish and wildlife, reclamation projects, national parks and petroleum conservation.

counsel, functions as attorney both to the trustee for Indians - the Bureau of Indian Affairs (BIA) - and to agencies which conflict with Indian property claims - chiefly the Bureau of Reclamation and the Bureau of Land Management (BLM). Similarly, the Department of Justice, which manages all federal litigation, serves as counsel to these conflicting public bureaus; in addition to its public duties to advise and represent the trustee, Justice also appears obligated to provide legal representation to the Indian beneficiaries.[1] As a final complication, moreover, the Department of Justice defends Indian Claims Commission proceedings for the United States.[2]

This Report examines the conflict of interest between the federal trustee's duty to protect Indian property rights and public goals such as non-Indian economic development and ownership and conservation of the public domain. Toward this end, the Report first discusses the sources and historical development of the federal trust responsibility to determine its nature and extent. Secondly, it analyzes several instances in the past five years in which a conflict-of-interest has prevented vigorous protection and advancement of Indian claims to natural resources. In conclusion, the Report evaluates various institutional rearrangements which would diminish the conflict-of-interest and further protection of Indian property rights.

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1. 25 U.S.C. §175. See discussion, pp. 64-65, and note 1, p. 64.
2. See pp. 39-43.

I. Origins and Nature of the Federal Trust Responsibility.

A. Chief Justice Marshall: The Trust Responsibility as a Protection Against State Regulation

In his Handbook of Federal Indian Law, Felix S. Cohen observed that "the term 'ward' has been applied to Indians in many different senses and the failure to distinguish among these different senses is responsible for a considerable amount of confusion."[1] These different senses reflect the historical evolution of judicial and political perceptions of the government's trust responsibility. The nature of a fiduciary duty developed as a judicial and administrative doctrine during the nineteenth century; its birth was occasioned largely by the need to assert and later to justify various extensions of federal regulatory power into Indian country.

The trust responsibility was the stepchild of Chief Justice John Marshall, whose decisions regarding Indians are expressive of his expansive concept of the role of the federal government vis-a-vis the states. Two decisions by Chief Justice Marshall are singular in their importance for the development of federal Indian law. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831), holding that Indian tribes are not "foreign states" entitled to invoke the original jurisdiction of the Supreme Court, Chief Justice Marshall stated that the relationship between the Indians and the United States "is perhaps unlike that of any other two people in existence."[2] He explained that Indian tribes, while in some sense possessing attributes

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1. Felix S. Cohen, Handbook of Federal Indian Law, (hereafter "Cohen") p. 169.
2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 at 17.

of national sovereignty, are "domestic dependent nations," dependent on the United States for protection. Marshall concluded that "their relation to the United States resembles that of a ward to his guardian."[1] In Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832), Marshall held that a comprehensive state regulatory scheme, adopted by Georgia for the Cherokee Reservation, was unlawful because the federal government's power over reservations was exclusive.

B. Kagama: The Trust Responsibility as a Justification for Federal Power

The Marshallian concept of wardship did not directly result in the extension of federal regulatory power over Indians. Later in the nineteenth century, however, Chief Justice Marshall's fiduciary concept came to be employed for an entirely different purpose - as a justification for the imposition of positive federal regulations over Indian reservations. United States v. Kagama, 118 U.S. 375 (1886), involved the constitutionality of a Major Crimes Act, enacted by Congress to apply to Indian country. The Court held that Article I, Section 3, clause 8 - the "power to regulate commerce . . . with the Indian Tribes" - did not authorize enforcement of a federal criminal code on reservations. But the Court sustained the constitutionality of the act, relying principally on the government's fiduciary duty to protect its Indian wards. The Court expanded the Marshallian notion:

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1. Id. at 18, (emphasis supplied).

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> "These Indian tribes <u>are</u> the wards of the nation. They are communities <u>dependent</u> on the United States . . . "[1]

It then went on to state that:

> "From their very weakness and helplessness . . . <u>there arises the duty of protection</u>, and with it the power."[2]

The principal teaching of *Kagama* is that a "duty of protection" creates congressional power; legislation which would be unconstitutional if enacted for non-Indians is authorized by a federal <u>duty</u> to protect Indians. Thus, vast federal administrative powers with respect to Indian trust property are constitutional. Indian property cannot be sold,[3] leased[4] or even disposed of by will[5] except with federal approval. Contracts may not be executed[6] nor tribal attorneys hired[7] without consent of the federal executive.

C. <u>The Trust Responsibility as a Limitation on Federal Executive Power</u>

Notably, *Kagama* shifts from the notion that the federal relationship to the Indians is <u>similar</u> to a guardianship. It

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1. 118 U.S. at 383-84, (emphasis in original). Accord *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913).
   "[L]ong continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders."
2. *Id.* at 384 (emphasis supplied).
3. 25 U.S.C. §177.
4. *E.g.*, 25 U.S.C. §415.
5. 25 U.S.C. §373.
6. 25 U.S.C. §§81, 85.
7. 25 U.S.C. §§81a *et seq.*

holds rather that a guardianship actually exists. As Felix S. Cohen has pointed out, it is preposterous to suggest that all elements of a common law guardianship are present.[1] Some aspects of the common law guardianship, such as the power to determine where the ward shall reside and a direct and continuing responsibility to file accountings in court, have no parallel in this federal guardianship.[2]

But the courts seemingly have held the guardian is empowered to manage the Indian ward's property for the ward's benefit, and precluded from profiting at the expense of the ward's estate or acquiring an interest therein.[3] Since these duties appear, under the case law to be reviewed, to be legal

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1. Cohen, p. 169.
2. Compare Cohen, p. 169.
3. Id. This portion of the Report, which considers limitations on federal power imposed by the trust responsibility, discusses only the limitations on executive power. Congress, as distinguished from the executive, has a more plenary power over Indians and may modify, or even terminate, the federal wardship over Indian tribes. However, congressional power over Indian trust property is not absolute and is, of course, subject to constitutional limitations. E.g., Choate v. Trapp, 224 U.S. 665, 677-78 (1913). While the eminent domain power extends to Indian trust lands if their taking is authorized by Congress, Seneca Nation v. Brucker, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959), Congress must make a good faith effort to compensate the Indians. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cls. 1968). The "good faith" standard appears similar to a fiduciary's duties. But whatever the power of Congress in this area, the federal executive is more strictly bound by general law to adhere to ordinary fiduciary duties.

rather than moral obligations of the sovereign,[1] conflicting interests and purposes do involve a conflict-of-interest in a sense similar to the conflict-of-interest of an ordinary fiduciary.

Twentieth century cases concerning the legal duties of the United States under the trust responsibility have most often arisen under the Indian Claims Commission Act[2] and earlier special jurisdictional statutes authorizing suits against the United States for money damages for all claims at law or equity which constituted violations of Indian property rights.[3]

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1. If the United States were only <u>morally</u> obligated to protect Indian property rights, the value of such protection might be more easily subordinated to conflicting public purposes, such as dams, reclamation projects and other non-Indian projects. In a sense, the political art involves choice between conflicting values, even between moral imperatives.

   A legal constraint is at least functionally different. If it is legally obligated to act as a fiduciary, the United States may for example become liable in damages for a breach of duty. And a legal duty requires subordination of political concerns to the contrary.
2. 25 U.S.C. §§70 <u>et seq</u>.
3. The Indian Claims Commission Act includes "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or <u>equity</u>." 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,[1] the same principles of law should apply to federal executive officials, when dealing with Indian trust

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1. It is assumed throughout this Report that, at the present time, the federal government is trustee to all tribes, bands and identifiable groups of Indians, except where the trust relationship has been expressly terminated by Congress with respect to a particular tribe. In a number of cases, the Court of Claims has suggested that the existence of a fiduciary relationship may depend "upon the express provisions of [a]. . . particular treaty, agreement, executive order or statute," and that absent such a treaty, agreement, executive order or statute, the relationship only _resembles_ a trust responsibility in the _Cherokee Nation_ sense rather than being equivalent to it in the _Kagama_ sense. _Gila River Pima-Maricopa Indian Community_ v. _United States_, 140 F. Supp. 776, 780 (Ct. Cls. 1956). See also _Oneida Tribe_ v. _United States_, 165 Ct. Cls. 487, _cert. denied_, 379 U.S. 946 (1964); _Sioux Tribe_ v. _United States_, 146 F. Supp. 229, 237-38 (Ct. Cls. 1956).
   Considering these cases together, they appear to hold that whether a fiduciary relationship existed between the government and a particular tribe _at a particular time in the nineteenth century_ should be determined by considering the course of dealings between them at that time. Thus, a tribe which was frequently at war with the United States, which had never signed a treaty nor accepted a reservation, might not be a "ward" of the government at the time certain acts took place; thus, a claim against the United States for breach of its fiduciary duties _at that time_ should be denied. Compare _Oneida Tribe_, _supra_ with _Sioux Tribe_, _supra_.
   The situation in the twentieth century is, of course, far different, and it would seem incontestable that a general fiduciary relationship now exists between the government and all tribes, unless terminated by Congress. The Court of Claims has recognized that the course of executive dealings and applicability of congressional enactments to prevent the sale of lands may create a trust relationship. _Oneida_, _supra_; _Seneca Nation_ v. _United States_, 173 Ct. Cls. 917 (1965). The exact terms of that relationship might vary depending on the specific provisions of a treaty or statute, See _Gila River Pima-Maricopa Indian Community_ v. _United States_, 190 Ct. Cl. 790 (1970), but the general fiduciary duties of loyalty and care would seem present.

property, "as would be applied to an ordinary fiduciary,"[1] Menominee Tribe v. United States, 101 Ct. Cls. 10, (1944), and that "the most exacting fiduciary standards" should be applied to scrutinize federal management of Indian property. Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Navajo Tribe v. United States, 364 F.2d 320, 324 (Ct. Cls. 1966).

The fiduciary duties seem to involve (a) a duty of reasonable care in protection and preservation of the trust res, (b) a duty of loyalty, with an attendant prohibition against self-dealing or misappropriating the trust res.

In Oneida Tribe v. United States, 165 Ct. Cls. 487, cert. denied, 379 U.S. 946 (1964), a tribal timber resource was cut by certain tribal members and sold by them. The tribe filed a claim before the Indian Claims Commission for damages; its theory of recovery was that the United States was liable for the taking since its officials knew of the practice. The Court of Claims, denying recovery, analyzed the factual situation and determined that the federal government had done everything reasonable under the circumstances to protect the tribal assets, and had thus satisfied the fiduciary's duty of exercising reasonable care.

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1. Section 2 of the Indian Claims Commission Act, 25 U.S.C. §702, originally contained a proviso that the Commission should "apply with respect to the United States the same principles of law as would be applied to an ordinary fiduciary." This was omitted in conference committee "because it seemed that the Commission should be permitted to determine according to the usual principles of law whether the government was a fiduciary in the particular case involved, and if so what fiduciary duties were imposed upon it." S. Rep. No. 1751, 79th Cong. 2d Sess., p. 6.

Conversely, in Seminole Nation v. United States, 316 U.S. 286 (1942), the Supreme Court sustained, against a motion to dismiss, a claim that the federal government was liable to tribal members for paying to the tribal council sums it was obligated by treaty to pay per capita to individual members. The plaintiffs had alleged that federal officials knew that the council was corrupt and would divert the funds paid to it to its own use.

In Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cls. 1966), tribal lands were leased by the Navajos in 1942 to a private oil company. Upon discovery of a helium deposit, which the lessee did not wish to exploit, the lands were returned to the United States. The U.S. Bureau of Mines extracted the helium. The tribe argued, and the Court held, that the proceeds should have been credited to it.

The Court in Navajo Tribe could simply have held that the lands in question were the property of the tribe, and sub-surface minerals could not lawfully be confiscated, even given the grave public need for helium during World War II, without compensation. Instead, the Court applied trust doctrine. It stated that "the case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." 364 F.2d 324.

Navajo Tribe suggests, then, that the United States owes a "duty of loyalty" to Indian tribes. This duty, and its corollary prohibition against self-dealing, has been called by Austin Scott the "most fundamental duty" owed by a fiduciary.[1] While the

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1. A. Scott, Trusts, p. 1297 and Sections 170-171.

cases do not hold that the government is barred from self-dealing in trust property in each and every instance, they do require close judicial scrutiny of all such transactions. In Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944), the Court of Claims - while not holding the practice to be per se unlawful - questioned the depositing of tribal funds into the federal treasury as a possible breach of trust. The Court also held that the government was clearly "under a duty to see to it that the property of the Indians was productive of a return to them somewhat comparable to the return which they would have received on trust funds." In a related case, Menominee Tribe v. United States, 102 Ct. Cls. 555 (1945), the Court held the United States liable for breach of trust where it made withdrawals for tribal expenditures from a trust fund bearing five percent interest rather than from a fund bearing four percent interest. Both funds were invested in federal securities.

These cases suggest that the federal trustee possesses a legally enforceable trust responsibility that is in important respects analogous to the duties of a private fiduciary. None of the cases state an explicit fiduciary duty to enforce legal claims of the trust beneficiary, but in the Indian context, some duty in this regard appears necessary if the extent of the trust res is to be defined. One difficulty, however, arises in that the ordinary trustee charges the trust estate when he performs legal services in its behalf. Indian wards are frequently without monetary estates - the nature of the trust responsibility is such that most assets are specific types of property. Assessment of a fee for legal assistance in protecting the trust property,

however, seems inappropriate at least in those situations where the federal trustee is itself misappropriating or using trust property. A trustee should not, by its own actions, be empowered to compel the ward to expend its resources in resisting the self-dealing.

Within the ambit of these duties, the federal trustee has been accorded wide-ranging discretion to manage trust property — so long as he does not appropriate it. For example, in Fort Peck Indians v. United States, 132 F. Supp. 222 (Ct. Cls. 1955), it was held that federal officials might extend the time for payments, and even excuse the payment of certain sums owed, by purchasers of Indian trust lands. Similarly, where an executive official is authorized by statute to dispose of trust lands, the precise manner of his doing so will not be reviewed by courts. Morrison v. Work, 266 U.S. 481 (1924).[1] But in United States v. Creek Nation, 295 U.S. 103 (1935) federal officials had conveyed to others lands actually belonging to the Creek Indians, which had been excluded from their reservation by an erroneous governmental land survey. The Supreme Court established that the trustee's discretion is not absolute and sketched its outer limits:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were

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1. In a related vein, the Court of Claims has held that Congress may take Indian lands so long as it makes a good faith effort to pay the full value of the land. This "merely transmutes the property from land to money . . . and is a traditional function of the trustee." Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cls. 1968).

> subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to other, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that would not be an exercise of guardianship, but an action of confiscation. [Emphasis added] 295 U.S. 109-110.

The trustee's discretion does not, then, appear to include a political authority to balance private Indian property rights against public purposes, and to decide upon appropriating the Indian property for the public use without compensation. Navajo Tribe is instructive in this regard, since the case involved a mineral resource in scarce supply needed for military purposes during World War II. The Court of Claims, in sustaining the tribe's claim for damages, held squarely that the United States may not misappropriate Indian trust property. Cases like Ft. Peck Indians and Morrison v. Work are distinguishable, and hold that the trustee has broad managerial discretion so long as he does not convert the property to his own use, or, presumably, violate other fiduciary duties of care to protect the property

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,[1] cases where a conflict of interest has arisen in the discharge of the federal trust responsibility.

Neither extreme appears desirable. One way by which this institutional conflict of interest can be resolved is by legislation. In his Message on Indian Affairs, President Nixon proposed creation of a new entity, independent of the executive branch, to provide legal representation to Indians. Legislation to establish this entity - the Indian Trust Counsel Authority - was sent to Congress on July 31, 1970. As proposed, the Trust Counsel Authority would be controlled by a three member Board of Directors, appointed by the President, with the advice and consent of the Senate. The Board of Directors, in turn, would appoint the Indian Trust Counsel as the chief legal officer. The Indian Trust Counsel bill is now pending before Congress, as S. 2035 and H.R. 8797.[2]

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1. While the case studies described below are ones where the Indian interests appear to have been compromised, this is, of course, not always the resolution when conflicts arise. For example, in January 1969, the Solicitor determined that the south boundary of the Salt River Indian Reservation in Arizona had been erroneously determined by the Bureau of Land Management to be the north, rather than the south, channel of the Salt River. Memorandum Solicitor Edward Weinberg to Secretary of the Interior, M-36770, January 17, 1969. Similarly, the Solicitor determined in 1966 that the boundaries of the Yakima Indian Reservation had been erroneously surveyed and portions of the land should have been included in the reservation administered by the BLM, should be returned to the Tribe. Memorandum Associate Solicitor for Indian Affairs to Assistant Secretary for Public Land Management, June 21, 1967, "Restoration to Yakima Tribe of Lands Omitted from Survey."
2. On September 20, 1971, Assistant Secretary of the Interior Harrison Loesch sent a letter to Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, stating that the Indian Trust Counsel measure was "most important" and urging its "early enactment."

Additionally, various administrative measures may ameliorate the conflict between public goals and Indian property rights. These measures, and the Trust Counsel legislation, steer a middle course between the extreme of holding that public projects which conflict with Indian claimed property rights are per se unlawful, and the extreme of requiring that Indian interests should invariably yield to public purposes and - in effect - be unprotected. The legislative and administrative proposals represent institutional rearrangements whereby Indian property right may be advocated and protected without the present divided loyalty. The legislation, moreover, advances the goal of impartial advocacy and resolution of conflicts by its waiver of sovereign immunity of the United States in connection with actions commenced by the Trust Counsel. Thus, the bill favors the resolution of conflict-of-interests by the judicial branch rather than by executive fiat.

II. CASE STUDIES OF CONFLICTS OF INTEREST

A. The "Multiple Client" Problem

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

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

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

for an airport and park facilities.[1] These lands, which border the Colorado River, were claimed by the Quechan Tribe to be part of their Fort Yuma Reservation.

The conflicting claims of the tribe and the BLM were presented to the Department of Interior's Solicitor for his "opinion." The Solicitor reasoned that the Quechans possess a beneficial interest only in the irrigable lands within the reservation, but that Indian title to non-irrigable reservation lands had been ceded by an agreement of December 3, 1893, ratified by an act of Congress in 1894.[2] The Solicitor then determined that the proposed lease was legally unobjectionable so long as one irrigable parcel of land was excluded from it.[3]

In rendering this "opinion", the Solicitor was in reality arbitrating a dispute among various of his "clients." The

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1. Memorandum, "Lease of Lands to Yuma County," Acting Director Program Support Staff to Secretary of the Interior, April 20, 1967.
2. Act of August 15, 1894, 28 Stat. 332 (1894).
3. Opinion of June 12, 1968, Status of Land in T.16 SR. 22 and 23 R., SBM Proposal for Lease to Yuma County, Arizona.

BIA, on the one hand, resisted the lease; other Bureaus within the Department supported it. Clearly, the Solicitor could not provide complete legal representation to the competing interests. Rather than acting as an advocate, he functioned as an umpire and fashioned a "compromise" solution. Moreover, the critical technical determination as to which lands were irrigable and which were nonirrigable was made by the Bureau of Reclamation, one of the Bureaus which favored the lease.[1]

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

In 1893 Congress granted a right-of-way to an irrigation company to construct a canal over lands on the Yuma Indian Reservation.[2] Three commissioners were appointed to negotiate with the Indians and obtain their consent to the right-of-way. The tribal members could not read, write, or understand English, and an Indian interpreter who was not a member of the tribe was engaged by the commissioners. An "agreement" was concluded, by which the Quechans granted not only the canal right-of-way, but also forfeited all reservation lands in return for allotments

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1. Id. at p. 2.
2. Act of February 15, 1893. 27 Stat. 456 (1893).

once the canal was constructed. Evidence introduced before the Indian Claims Commission[1] indicates that the interpreter and commissioners forced some Indians to sign document, forged other signatures, and failed to explain that the agreement would have the effect of ceding the entirety of the reservation.[2] Moreover, eight tribal members opposed to the agreement were imprisoned in Los Angeles at the time it was signed; some of these dissidents were whipped and one died in prison.[3]

The agreement was ratified by an Act of Congress in 1894, but significant portions of the act were never carried out. The Act specifically provided that unless the company began construction of the canal "within three years from the date of the passage of this Act, . . . the rights granted by the Act aforesaid shall be forfeited."[4] The canal was not constructed within that time period. Instead, an irrigation project over reservation lands was finally constructed over a decade later pursuant to the Reclamation Act of 1902 then in effect and an appropriation bill enacted in 1904.[5] This legislation was far less advantagous

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1. Prior to the leasing dispute discussed above, the Quechans filed a claim against the United States asserting the liability of the government for the loss of use of a considerable amount of their land. The Quechan Tribe of the Ft. Yuma Reservation v. United States. Ind. Cl. Com. Docket No. 320.
2. Indeed, the agreement and congressional enactment following it have never been interpreted as extinguishing the Quechans beneficial interest in irrigable lands which have not been disposed of under the reclamation laws of the United States.
3. Memorandum, William H. Veeder to W. Wade Head, Area Director, Phoenix, Arizona, April 15, 1970, "Title of the Quechan Tribe in the Yuma Indian Reservation."
4. 28 Stat. 286, 336 et. seq.
5. 33 Stat. 189 at 224 (1904).

to the Quechans than the 1893 agreement, for the entire cost of the irrigation project was to be borne by them, and the land was to be sold at its value prior to reclamation, rather than by auction at market value as provided in the 1894 act. Allotments were not made until 1912, nearly twenty years after the 1893 agreement.[1]

Clearly, an argument can be made--and would be advanced by an uncompromised advocate of the Quechans--that the 1893 agreement was void ab initio, and that even if the agreement were valid, the cession of Quechan lands contained in it and in the 1894 Act was never effectuated because of the company's failure to commence construction of the canal within three years. The area continued to be administered as an Indian reservation after the 1894 Act,[2] and the 1904 Act recognized that the Indians maintained a beneficial interest in irrigable lands (the only lands the 1904 Act covered) not sold to settlers. If the 1893 Agreement and 1894 Act had really ceded all reservation land, no such beneficial interest could have continued. The issue, of course, is not whether these arguments would ultimately be sustained: the crucial point is that they were never articulated by the Solicitor.

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

The Bureau of Reclamation is the other agency within the Interior Department which most often has claims which conflict with Indian trust property rights. The federal reclamation

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1. Veeder memorandum, supra, p. 22, n. 3, at pp. 23-24.
2. This was recognized in an earlier opinion by the Solicitor, January 8, 1936. M-28198, pp. 10-11.

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program, originally limited to the construction of irrigation works for both public and private users, has expanded over the past seventy years to provide water for power, municipal, commercial, and industrial users.[1] Reclamation projects may store and sell surplus waters, and may advance such objectives and navigation flood control.[2]

Frequently, these projects seek to use water to which Indians and Indian tribes have a claim under the "Winters Doctrine." While the _Winters_ doctrine extends to water needed for present and _future_ use, the Bureau of Reclamation seems to plan projects where water sufficient to sustain the project is not _currently_ being appropriated, irrespective of whether an Indian claim of future beneficial need might be asserted. (This problem appears in the Rio Grande and Kennewick Dam case studies, _infra_.) In a number of instances, the Interior and Justice Departments have desisted from pressing Indian "Winters Rights" claims, in large measure because of the conflicting policy of the Bureau of Reclamation to appropriate as much water as possible for the reclamation projects. Reclamation projects, in fact, cannot be authorized under present procedures unless found feasible from a financial standpoint. A finding of feasibility

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1. Irrigation is the paramount use for reclamation waters. 43 U.S.C. §§485h, 521-522. It was not until 1920 that Congress generally authorized the disposition of project water for uses other than irrigation. Act of February 25, 1920, ch. 86, 41 Stat. 451, 43 U.S.C. §521. But as early as 1906 the Secretary was authorized to supply water and power to "towns or cities on or in the immediate vicinity of irrigation projects." Act of April 16, 1906, ch. 1631, 34 Stat. 116-17 43 U.S.C. §§522, 567.
2. J. Sax, "Federal Reclamation Law." _Water and Water Rights_, p. 121.

requires that the estimated cost of proposed construction which can properly be allocated to irrigation, power, municipal, and miscellaneous purposes be repaid to the United States from the sale of water and power to private users.[1] The Bureau of Reclamation constructed Yellowtail Dam on the Big Horn River in the late 1950's on the Crow Indian Reservation in Montana. Lands belonging to the Crow Tribe and the right to use water owned by the tribe for power generation were condemned for this purpose.[2] Without legal opposition from within the government, the Bureau of Reclamation is currently selling waters from the Big Horn River to industrial users. These sales may be in violation of the tribe's _Winters_ rights,[3] which have never been inventoried or established.

In November 1967, the Field Solicitor's Office in Billings, Montana, issued a memorandum sustaining the legality of the Reclamation diversions.[4] The Field Solicitor proposed a restrictive interpretation of the _Winters_ case, which would limit the rights conferred by the doctrine to uses in agricultural production. Since the Crow Tribe is primarily desirous of developing coal deposits on the reservation--estimated at up to one billion tons--the Field Solicitor's opinion would deny them the right to use

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1. Compare Act of August 4, 1939, ch. 418, §9(a), 53 Stat. 1.93, 43 U.S.C. § 485h(a).
2. _United States_ v. _5677.94 Acres of Land,_ 162 F.Supp. 108 (D. Mont. 1958).
3. _United States_ v. _Powers,_ 93 F.2d 783, 785 (9th Cir. 1939) _aff'd_ 305 U.S. 527 (1939).
4. Memorandum from Field Solicitor to Regional Director, Reclamation, "Diversion of water of Bighorn River under terms of Yellowstone River Compact," November 16, 1967.

Big Horn water in preference to Reclamation for this purpose. The Field Solicitor adopted this position while admitting that "it has not been decided whether the use of Winter's [sic] Decree water may be changed from irrigation to industrial use."[1] Moreover, the Field Solicitor argued that since the Bureau had condemned the power site for Yellowtail Dam, it could urge that it had condemned the entire Winters doctrine rights of the tribe to the river, since the value of the power site would be diminished by tribal diversions. No opinion could be more damaging to the interests of the Solicitor's Indian clients. Surely, any committed advocate would be expected to urge on their behalf that, since the condemnation case explicitly compensated the tribe for the use of water for power generation, all other water rights remained intact and the power site value was merely paid for the taking of land. In this instance, the Field Solicitor chose solely to serve one of his "clients," to the inevitable detriment of the interests of the Indians.

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

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

contained in a study that this was all the water which could be made available to the Indians.[1] A year later, at the 1969 Reclamation Conference, the Commissioner of the Bureau of Reclamation and the Billings Regional Director reportedly indicated that about 750,000 acre feet of water would be available from Yellowtail Reservoir for industrial purposes--two-and-one-half times the amount projected in the study preceding the 1968 agreement. It was stated that much of this water had been contracted for and that the sale of industrial water alone would repay the cost of constructing Yellowtail Reservoir earlier than planned. A persuasive argument can be made that the tribe is entitled to sufficient water to meet all of its beneficial needs, including industrial uses, or that it is entitled to compensation for the loss of water rights not covered by the condemnation of the Yellowtail power site. But since this would

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

obviously involve a payment by the government, this claim has not been pressed by the Indians' trustee.[1]

3. Pyramid Lake

Pyramid Lake has often been cited as the prime example of a long-continuing conflict-of-interest between an Indian tribe and the Bureau of Reclamation.[2] The Pyramid Lake Paiute reservation was established in 1859; it essentially forms a circle around the lake, which is the terminus of the Truckee River in Nevada. Historically, the Paiute tribe, for whom the reservation was established, had been a fishing people, and the lake's fishery was the chief source of sustenance for the reservation.[3]

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1. Conflicts between the Bureau of Reclamation and Interior's Indian wards in the Missouri River Basin are by no means limited to the Big Horn River. In a memorandum of March 14, 1967, to the BIA's Aberdeen Area Director, the Director of the BIA's Missouri River Basin investigation claimed that upstream developments of the Agnostura, Rapid City and (projected) Belle Fourche projects by the Bureau of Reclamation had depleted the flow of the Cheyenne River, leaving a barren several thousand acres of potentially irrigable bottom land and higher benches on the Cheyenne Indian Reservation. The Director quoted the Bureau of Reclamation's own Cheyenne Diversion Report to substantiate his charge: "A reconnaissance-grade reappraisal of the Cheyenne Pumping Units was made in 1958, with the conclusion that further consideration was unwarranted mainly because of the doubtful water supply.... No appreciable further development of either land or water resources may be expected in the Cheyenne River Basin. Five Bureau of Reclamation reservoirs, taking advantage of all the more attractive sites, effectively control most of the runoff."
2. The principal study of the federal conflict of interest, William H. Veeder "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in "Toward Economic Development for Native American Communities," Subcommittee on Economy in Government of the Joint Economic Committee, Congress, 91st Congress, 1st Sess. (Comm. Print 1969) (hereafter cited as "Veeder Committee Print") devotes major attention to Pyramid Lake.
3. United States v. Sturgeon, 27 Fed. Cas. 1357 (No. 16,413) (D.Nev. 1879), aff'd, 27 Fed. Cas. 1358; Veeder Committee Print, pp. 498-99.

Reclamation's incursions into the water used to supply the lake began shortly after the passage of the Reclamation Act of 1902. In 1906, the Newlands Irrigation Project was established on the nearby Carson River which constructed a dam and canal to divert water from the Truckee.[1] The canal steadily depleted the water supply of Pyramid Lake, reducing its level and utlimately destroying its natural fishery.

After the canal was constructed, the United States initiated quiet title actions to adjudicate the rights of water users along the Carson and Truckee Rivers. A temporary decree was entered in 1950 in United States v. Alpine Land and Reservoir Co., Equity No. D-183 (D. Nev.) adjudicating the respective rights of the Newlands project and private users to Carson River water. A final decree along the Truckee, the Orr Water Ditch decree, was entered in 1944.[2] Although the Winters doctrine was established when these cases were brought, the Indians' federal fiduciary did not assert their Winters doctrine rights for water to stock Pyramid Lake and protect the dying fishery.[3] The United States did, however, assert and secure a water right for the

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1. Veeder Committee Print, pp. 499-500. The Carson River runs south of, and generally parallel to, the Truckee.
2. United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.).
3. After the case was begun, but long before a final decree was entered in it, the Supreme Court conclusively established the right of an executive-order reservation to protect and conserve its fishing rights. Alaska Pacific Fisheries v. United States, 218 U.S. 78 (1918).

Newlands Project to divert Truckee water.[1] Between 1917 and 1967 the average annual diversion of Truckee River water for the Newlands project has been 250,000 acre feet--half the average annual flow of the Truckee River.

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

(a) The Orr Water Ditch decree did rule that the Indians were entitled to 30,000 acre feet per annum for irrigation purposes. When the tribe sought instead to use this water to raise the lake's level, thereby improving the fishery resource, the Solicitor of the Interior Department in 1955 issued an opinion that this was unlawful[2] --hardly an act of zealous advocacy on behalf of the Indians. The tribe then sought to have the government modify the decree to permit such a use. In 1964 the Interior Department requested Justice to petition the court to amend the decree, but no action was ever taken.

(b) In 1957 Congress authorized construction of the Washoe Project by the Bureau of Reclamation.[3] This project has two principal components: (1) Stampede Dam on the upper Truckee River, and (2) Watasheamu Dam and Reservoir on the Carson River,

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1. A 1963 report by Clyde-Criddle-Woodward Inc. of Salt Lake City, "Report of Lower Truckee-Carson River Hydrology Studies" concludes that there is substantial waste in this water use and that only half the diverted amount is beneficially used by the project. Such waste is a violation of the reclamation laws which limit water to beneficial uses. 43 U.S.C. § 372.
2. Memorandum, Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs, May 5, 1955, M36282.
3. Act of August 1, 1957, ch. 809, §2(a) 70 Stat. 775, 43 U.S.C. §614a (a) et. seq.

upstream from the canal and Newlands Project. The major threat posed by this project to Pyramid Lake is the construction and authorization of Watasheamu Dam and Reservoir. If operated for the benefit of upstream Carson users, it would have the certain affect of depriving the downstream Newlands Project of Carson River water and increasing its demand upon Truckee River water.

Of course, Congress could have condemned the tribe's water rights when authorizing the Washoe Project. But when it enacted this legislation, Congress manifested a contrary intention, and specifically directed that "Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit . . . restoration of the Pyramid Lake fishery."[1] Nonetheless, subsequent administrative action by Interior and Justice appeared to the tribe to imperil this congressional indication of purpose.

The possibility that Watasheamu Dam and Reservoir might be constructed impelled upstream Carson water users to press for a settlement in the Alpine case (Carson River) more favorable to them than the 1950 temporary decree. Their hope was, in part, that enough water could be reserved for upstream users to make the construction of Watasheamu Dam feasible. Negotiations by Justice Department attorneys looking toward a more lenient settlement than the temporary decree aroused suspicions by the Indians that the Bureau of Reclamation was influencing the Justice Department negotiations. In addition, enforcement of

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1. 43 U.S.C. §614c.

the temporary decree by a court-appointed water master has in many respects permitted use of water by private parties not sanctioned by the decree. The Indians, therefore, sought to intervene in the Alpine case to require strict enforcement of the decree and to participate in any settlement so as to protect their existing use of Truckee water, which could otherwise be diverted to serve the Newlands Project if the project's rights to use of Carson water were curtailed. The tribe charged that the Department of Justice had not adequately represented their interests.[1] The motion to intervene was opposed by Justice and denied by the District Court and the Court of Appeals for the Ninth Circuit.[2]

(c) In April 1969, the Interior Department recommended that the Department of Justice institute a quiet title action on the Truckee River on behalf of the tribe, limited to waters not already adjudicated in the Orr Water Ditch case. No such action has been commenced since that request was made. Unable to receive a response from the government, the tribe finally filed suit in the Federal District Court for the District of Columbia against the Secretary of the Interior.[3] The relief sought includes an injunction compelling the Secretary to recognize the prior and paramount right of the tribe to Truckee River water to maintain the lake's fishery, and to cease wasteful diversions of Truckee River water for the Newlands Project.

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1. Veeder Committee Print, pp. 507-508.
2. United States v. Alpine Land and Reservoir Co., No. 24, 156 (9th Cir. Aug. 24, 1970).
3. Pyramid Lake Paiute Tribe v. Hickel, Civil No. 2506-70 (D.D.C. filed August 21, 1970).

The Secretary is charged, inter alia, with violating the provisions of the Reclamation Act which permit only diversion of water for "beneficial use," 43 U.S.C. §372, and with diverting water in excess of that allowed by the Orr Water Ditch decree and his own regulations. A claim requesting that the Attorney General, also originally a defendant, be ordered to initiate litigation to protect the tribe's rights has been dismissed by the Court.

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

While the American Bar Association's Code of Professional Responsibility permits representation of potentially conflicting clients where litigation is not involved, it clearly enjoins an attorney from any representation of clients with differing interests in litigation.[1] The wisdom of this absolute prohibition is demonstrated by the difficulties in which the Department of Justice has become enmeshed while conducting water rights litigation on behalf of Indian pueblos in New Mexico. In a real, albeit indirect, sense, the government may be said to be representing "both the plaintiff and defendants in an adversary action."[2]

The State of New Mexico has commenced five suits seeking to administer water to be diverted into the Rio Grande from the Colorado River system by the San Juan-Chama Reclamation Project.[3]

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1. Ethical Consideration 5-15.
2. Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 906 (1958).
3. The San Juan Chama Project was authorized in 1962. 76 Stat. 96.

The State Engineer of New Mexico is authorized to administer the Bureau of Reclamation's project in certain respects. Accordingly, the State Engineer has instituted these suits to determine all water rights to certain tributaries of the Rio Grande so as to aid in this administration.

One of the five pending cases[1] names as among the defendants four Indian pueblos--Nambe, Pojoaque, Tesuque and San Ildefonso. This case seeks to adjudicate water rights to the Nambe and Pojoaque Creeks. San Ildefonso Pueblo, and a number of other pueblos not named defendants, border on the Rio Grande and claim water in the Rio Grande by virtue of the Winters doctrine. Representatives of the Solicitor's Office in Albuquerque have even expressed the view that assertion of the Indians' full claim to Rio Grande water would exhaust the present flow.[2] Thus the federal attorney for the pueblos is aware of an Indian property claim which, if asserted, might destroy the feasibility of a reclamation project which seeks to supply principally municipal and industrial users in Albuquerque that already use some Rio Grande water.

The Department of Justice intervened to defend the litigation on behalf of the pueblos and filed a complaint claiming "quantities of water sufficient to satisfy the maximum needs and purposes of said Pueblos. . . ."[3] But, although one pueblo, San Ildefonso, has claims to water on the Rio Grande as well as Pojoaque Creek, the United States elected to accept the limitations on the case framed by the State and not to assert

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1. New Mexico v. Aamodt, No. 6639, U.S. District Court, D. New Mexico.
2. Meeting, October 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.
3. Complaint, paragraph VI(a).

any claims to the Rio Grande itself. Consequently, San Ildefonso must "compete" with the three other pueblos for water in the Pojoaque and Nambe creeks which, in fact, are almost dry.[1] Some of the Indian pueblos are concerned that the government's decision to limit the water rights adjudication to tributaries of the Rio Grande, and not to assert claims to the main river itself, is influenced by a desire not to delay the completion and operation of the federal San Juan Chama Reclamation Project.[2] The first clear conflict of interest in New Mexico, then, is that the United States Department of Justice and the Solicitor's office of the Department of Interior (the regular attorneys for the Bureau of Reclamation) are representing Indian interests which may not be compatible with the multimillion-dollar project of another important government "client."

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

These conflicts are not theoretical; they appear to have resulted in a serious failure to protect Indian rights. For example, the government has failed to contest a "settlement" arrived at between the State and non-Indian users following

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1. Rosenfelt Report, p. 28.
2. See also Memorandum, William H. Veeder to Commissioner of Indian Affairs. "Memorandum respecting rights to the use of water of the Pueblo Indians of New Mexico in the Rio Grande and its tributaries," October 31, 1969.

administrative procedures under New Mexico State law, notwithstanding the federal nature of Indian water rights.[1] When it filed its complaint, the State prepared an elaborate hydrolographic survey showing its determination of all lands which have been irrigated within the Nambe-Pojoaque watershed. The State then made "offers of judgment" to the non-Indian defendants based on the survey. If accepted, these offers were signed as court orders. The federal attorneys in an instance of non-adversary representation of the Indians, failed to require any non-Indian landowner to prove the source and character of his title, or the measure of rights to the use of water, or history of water use.[2] Indeed, these non-Indian defendants are not even required by the United States to answer its complaint and to plead--let alone prove--title to their land or use of water.[3]

5. Private Trespass Over Tlingit and Haida Lands

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

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1. Affidavit of Daniel M. Rosenfelt, April 23, 1970, Case #6639 District of New Mexico.
2. Rosenfelt Report, p. 39.
3. *Id.* at 43.

The builder initially sought a permit to construct the road from Bureau of Land Management in Alaska. Since the road would pass over, and use timber situated on, land determined by the Court of Claims[1] to be held in aboriginal "Indian title"[2] by the Tlingit and Haida Indians, the BLM told the firm to secure the Indians' consent. The BLM specifically stated that "no cutting of right-of-way timber or road construction is to take place until the right-of-way and timber permits are issued."[3] Nonetheless, when consent was refused by the Tribal Council, the firm constructed the road without the permission of either the Indians or the BLM.[4]

In January 1969, the Tlingits and Haidas requested the Solicitor for the Interior Department to take action against the builder for its trespass.[5] In April, 1969, a decision was reached to institute suit seeking money damages and injunctive relief. After suit was filed, the BLM was asked to "investigate" the facts of the situation. This investigation revealed that the road had indeed been constructed in August 1968 and a report

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1. Tlingit and Haida Indian v. United States, 147 Ct. Cl. 130 (1968).
2. Indian title is a right to exclusive possession of land, based upon occupancy since "time immemorial." Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Choteau v. Molony, 57 U.S. (16 How.) 203 (1853); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872); Buttz v. Northern Pacific R., 119 U.S. 55 (1886); Cramer v. United States, 261 U.S. 219 (1923); United States v. Shoshone Tribe, 304 US 111 (1938).
3. Letter, James W. Scott, Manager, Anchorage District Office, BLM, to Moore & Roeser, Inc., May 21, 1968.
4. Letter, I.S. Weissbrodt to Edward Weinberg, Solicitor, Department of the Interior.
5. Ibid.

described in some detail the factual results of the investigation.[1] No action was taken to prosecute the claim. In the view of the Indians' Washington counsel this was because the theory of recovery was resisted by the Public Lands Division of the Solicitor's Office.[2] Ultimately, the action was dismissed by the United States.

The Solicitor's Office, evidently, did not wish to claim that aboriginal "Indian title" gives the Indians enforceable rights to the land--despite the fact that the Tlingit and Haidas' title had been recognized by the Court of Claims, and Indian title has been held by the Supreme Court to furnish a basis for the recovery of money damages.[3] This is not surprising in view of Interior's history of dealing with Indian title in Alaska. Between the time of Alaskan Statehood Act of 1958 and promulgation of the land freeze in January 1968,[4] the BLM patented six million acres in Alaska--mostly to the State. Half of this land was claimed by Alaskan native by virtue of aboriginal possession,[5] a claim ignored by the Bureau. To some degree, in addition, the Solicitor's reluctance to assert the enforceability of Indian title as a property right may have been due to the fact that the Interior Department was, in the latter part of 1969, considering the issuance of right-of-way permits for construction of a trans-Alaskan pipeline,

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1. Report from Natural Resources Specialist, Juneau, to District Manager, BLM, Anchorage, "Moore and Roeser, Inc. Timber and Road." May 19, 1969.
2. Letter, I.S. Weissbrodt to Mitchell Melich, Solicitor, Department of the Interior, November 5, 1969.
3. United States v. Sante Fe Pacific R. Co., 314 U.S. 339 (1941).
4. PLO 4582, 34 Fed. Reg. 1025 (1967).
5. Federal Field Committee for Development Planning in Alaska, Alaskan Natives and the Land 453 (1968).

which would pass over lands claimed by Alaska natives by virtue of Indian title.[1]

B. OTHER CONFLICTING RESPONSIBILITIES OF THE UNITED STATES:

DEFENSE OF INDIAN CLAIMS COMMISSION PROCEEDINGS

The Department of Justice's statutory duty[2] to defend proceedings commenced by Indian tribes or bands in the Indian Claims Commission results in a conflict which has, on occasion, prevented it from fulfilling its trust responsibility to protect and conserve Indian property rights.

In October 1968, the Rincon and La Jolla Bands of Mission Indians requested the government to commence an action on their behalf against the Escondido Mutual Water Company for an injunction and damages for unlawful appropriation of San Luis Rey River water claimed by the Indians.[3] Despite repeated requests, and a growing urgency as negotiations progressed concerning the terms under which the water company would sell all its assets to the City of Escondido and liquidate, the government refused

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1. In April 1970, a preliminary injunction was issued against the Secretary of the Interior barring issuance of right-of-way permits to traverse some lands claimed by Alaskan native villages. Native Village of Allakaket v. Hickel, Civil No. 706-70 (D.D.C. filed March 9, 1970).
2. 25 U.S.C. §70n.
3. Letter, Robert S. Pelcyger, California Indian Legal Services, to Mr. William F. Finale, Bureau of Indian Affairs, October 31, 1968.

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to make any decision.[1] Finally three days before the water company's shareholders were scheduled to meet to vote formally on the city's offer to purchase the company's assets and on the liquidation plan, the Rincon and La Jolla Bands filed suit, represented by private counsel, in the federal district court in San Diego against the Escondido Mutual Water Company and the City of Escondido. The Secretary of the Interior and the Attorney General of the United States were named as defendants because of their failure to represent the Indians.[2]

The government's reluctance to commence litigation proceeded in part from a desire not to embark upon general riverwide

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1. During the course of discussions between the Indians and their attorneys with California Indian Legal Services, on the one hand, and the Department of Justice and the Interior, on the other hand, a report together with recommendations was submitted to the Department of the Interior by the Sacramento Regional Solicitor's Office. Although the Indians' attorney requested an opportunity to review this report and discuss it with the individual preparing it, the Regional Solicitor's Office refused to make the report available. After its submission, it was classified as "confidential." The withholding of this report from the Indian wards seems in violation of the trustee's duty to disclose opinions of counsel dealing with his own management of the trust property. Scott, Trusts 1407. This disclosure must be made even if it reveals the trustee's own negligence. American Bar Association, Informal Opinion No. 1010. The government's defense of its action--that the document constituted an attorney's "work product"--constitutes an admission that the Department of Justice and the Interior have interests adverse to those of their Indian beneficiaries.
2. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal., filed July 25, 1969).

water rights adjudications.[1] Another reason given by the Department of Justice for its failure to represent the Mission Indians was the fact that the Department was currently defending an Indian Claims Commission proceeding in which the Indian Bands claimed that the government had been derelict in its preservation of their water rights in the river.[2] This institutional conflict-of-interest is particularly troubling since, when the government filed its proposed findings of fact and brief in the San Luis Rey case before the Commission, it had urged that the Indians' best course was to seek redress from the water company rather than the government, and even that receiving damages from the government could preclude the Indians and the government from later asserting their water rights.[3] If such an adjudication is a desirable means to protect the trust property, the government as trustee should have brought it. Similarly, if the statutory requirement that the Department of Justice defend Indian Claims Commission actions

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1. In a letter to Representative James B. Utt, August 15, 1969, Assistant Attorney General Kashiwa pointed out that such adjudications require several years and entail great expense both for the United States and all water users in the area. It is far from clear that a general stream adjudication would have been required in the San Luis Rey case, since only the water company's appropriation was complained of, not that of other water users.
2. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal., filed July 25, 1969). Response of Attorney General and Secretary of the Interior to Court Order dated November 26, 1969.
3. Memorandum, Robert S. Pelcyger to Thomas M. Susman, Staff, Subcommittee on Administrative Practice and Procedure, U.S. Senate, November 14, 1969, "San Luis Rey Water Case," p. 14.

makes that agency less vigorous in protecting Indian trust property, new institutional arrangements should be created to fulfill that vital function.

Indeed, the Department of Justice has acknowledged that the pendency of the claims proceeding and concern that the United States could be liable for its sanctioning of the water company's diversion (the Secretary of the Interior had entered into a 1914 contract with the water company without the Indians' consent, limiting their use of the river's water) influenced the Department's attitude toward representation of the Mission Indians. Assistant Attorney General Kashiwa, justifying the Justice Department's ten month delay in deciding whether to assist the Indians, stated that:

> "The La Jolla, Rincon, Pauma and Pala Bands of Mission Indians are not only wards of the United States but must be considered as potential adversaries in litigation against the United States."[1]

The Department of Justice's defense of Indian Claims Commission cases on behalf of the government adversely affects its representation of Indians in those situations within the Interior Department where the Solicitor or another official "arbitrates" an Indian claim. For example, the Quechans also had a claim pending before the Indian Claims Commission at the time the Yuma County lease was signed.[2] The government's

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1. Letter to Representative James Utt, August 15, 1969, p. 4.
2. The Quechan Tribe of the Ft. Yuma Reservation, California v. United States, Ind. Cl. Com. Docket No. 320.

determination that the riverfron lands were non-irrigable may have been motivated by a desire to minimize their value before the Claims Commission.[1]

C. CONFLICT OF INTEREST BETWEEN THE ATTORNEY'S DUTY TO REPRESENT INDIAN TRUST PROPERTY RIGHTS AND POLITICAL INFLUENCES WITHIN THE EXECUTIVE DEPARTMENT

In addition to his representation of conflicting Interior Department bureaus, the Solicitor's zeal in representing Indian trust beneficiaries is further strained by his position as the legal advisor to the Secretary of the Interior. The Solicitor is thus clearly responsive to the Secretary's desires. There is evidence in the Quechan lease case that Secretary Udall was influenced to favor the lease by political pressures from his home state of Arizona. Prior to the Solicitor's opinion, a meeting was held in March, 1968, between the Yuma County River Parks Advisory Committee and representatives of the Solicitor and the Secretary. In a letter to "Dear Stu," the Chairman of this Yuma County Committee reported on this meeting and expressed disappointment with the sympathy shown by Deputy Solicitor Weinberg for the Indians' claim.[2] Secretary Udall responded to "Dear Roy" on March 22 and expressed the hope that the lawyers could promptly overcome the obstacles involved. The same day, the Secretary urged the Commissioner of the Bureau of Reclamation to make his determination as to the irrigability of the lands "as rapidly as possible," and indicated that, "I

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1. See Letter, Roy R. Young, to Honorable Stewart L. Udall, March 13, 1968.
2. Ibid.

consider this matter of great priority."[1]

The exertion of political influence which intercedes between the attorney and his clients is barred by the Code of Professional Responsibility.[2] Ethical Consideration 5-23 declares that:

> Since a lawyer must always be free to exercise his professional judgment with regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

A conflict may thereby be created by the political considerations between the attorney's duty to his client and his dependence on the third person--here, chiefly higher officials in the Department of Justice and Interior and members of Congress. Political considerations which may quite properly determine the government's litigating position on questions entrusted to political discretion seem inappropriate where the government has a legal duty to serve as the fiduciary for private property rights.

D. TECHNICAL DETERMINATION BY INTERIOR AGENCIES WITH AN INTEREST ADVERSE TO THE INDIANS: THE KENNEWICK DAM EXTENSION

One problem illuminated in the Quechan lease case was the unquestioning reliance which Interior Department decision-makers

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1. Memorandum, Secretary of the Interior, to Commissioner, Bureau of Reclamation, March 22, 1968.
2. Ethical Consideration 5-21 reads in part: "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer."

placed upon the technical determinations made by the Bureau of Reclamation as to the irrigability of the land in controversy. Similarly, the Tlingit and Haidas were required to rely on an investigation of the trespass to their lands by The Bureau of Land Management.

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

On July 16, 1969, a meeting was convened by the Assistant Secretary for Public Land Management, attended by representatives from the tribe, the National Congress of American Indians, the Bureau of Reclamation, Interior's Legislative Counsel, and members of the Solicitor's Office representing 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.[1] This assurance however, was directly contradictory to a prior House Report, wherein Reclamation had stated that, in order to establish project feasibility, it did rely on the inflows from these

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

tributaries during certain times of the year.[1]

The Bureau of Reclamation's July disclaimer[2] is also inconsistent with a memorandum less than one month earlier, which

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1. H. Rept. No. 296, 88th Cong.2d Sess., states in part:

AVAILABLE WATER

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

INFLOW, SUNNYSIDE TO PROSSER DAM

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

2. Jim Letter, p. 3

stated that the extension would utilize only "return flow from upstream irrigation and uncontrolled spills past the point of diversion."[1]

Despite these plain inconsistencies in Reclamation's reports, the Assistant Secretary stated that his study confirmed Reclamation's disclaimer,[2] and on August 12, Secretary Hickel reaffirmed his support for the Kennewick Dam Extension.[3]

E. PRIOR NOTIFICATION TO INDIAN TRIBES OF PROJECTS WHICH MAY AFFECT THEIR INTERESTS: THE "RETURN" OF LANDS CLAIMED BY FORT MOJAVE INDIANS TO THE STATE OF CALIFORNIA

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

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1. Memorandum, Commissioner of Reclamation to Legislative Counsel, Office of the Under Secretary, "Water Supply and Water Rights for the Kennewick Dam Extension, Washington," June 17, 1969, p. 5. The proposal to use uncontrolled spills is inconsistent with a portion of the 1945 decree, which allocated spills over Sunnyside Dam (the project directly upriver from the Kennewick Division), relied upon by Reclamation, to existing users (as of 1945) "in accordance with its practice prior to the entry of this judgment." William H. Veeder, Memorandum, "Yakima Indian Nation's Rights to the Use of Water Imperiled by Bills: To Provide for the Construction, Operation and Maintenance of the Kennewick Division Extension, Yakima Project, Washington," July 7, 1969, p. 15.
2. Jim Letter, p. 3.
3. Letter to Senator Jackson, August 12, 1969.

On March 15, 1967, a BLM hearing examiner issued a proposed decision to award to the State of California a substantial portion of the lands claimed by the Mohave Indians to be included within their reservation. The basis for this decision was a determination that the land in question was public land on September 28, 1950, the date the Swamp and Overflow Land Act[1] was passed, and was hence "returnable" to the State by the United States. At no time did the Mohave Tribe have notice of the proceeding. By accident, in June 1967, the BIA learned of the decision. Shortly thereafter, both the BIA and the Mohave Tribal Council petitioned to intervene.[2] The grounds for the petitions were that the Indian Claims Commission had determined the lands in question to be held by the Mohaves by "Indian title" in 1850.[3]

These petitions were referred to the Office of the Solicitor--the Indians' trust attorney. Earlier in 1967, the Solicitor had rejected the BIA's request to resurvey the Ft. Mohave reservation boundaries, and a member of the Solicitor's staff who had written that decision also participated in the decision concerning the

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1. 43 U.S.C. §981 et. seq.
2. Speech, Representative Pettis of California, December 4, 1969 (H.11816, Cong. Rec. Daily ed.)(hereafter referred to as Pettis speech).
3. 7 Ind. Cl. Com. 219. The Supreme Court has declared the Swamp and Overflow Land Act to be inapplicable to lands which the Indians held in 1850. United States v. O'Donnell, 303, U.S. 501, 509 (1937); United States v. Minnesota, 270 U.S. 181, 206 (1925). Also, the act applies only to lands made unfit for cultivation , see Keeran v. Allen, 33 Cal. 542 (Cal. Sup. Ct.), and the Mohaves rely on the Colorado River to irrigate and fertilize their fields, 7 Ind. Cl. Com'n 219, 252 (App.).

decision concerning the petitions to intervene. At first, the Solicitor denied the BIA's petition (on the ground that since a government attorney had participated in the hearing, the BIA had been adequately represented) and granted the Mohaves a limited right to intervene which was conditioned upon the Solicitor and the Secretary making certain determinations. Then, in October 1969, the Solicitor broadened his decision and granted the tribe a de novo hearing with the right to cross-examine witnesses who had testified earlier.[1] Although the tribe requested that a government attorney represent them in this costly proceeding the Department of Justice refused to provide one and the Mohaves were ultimately required to secure private counsel.

F. CONFLICTING INTERESTS AMONG INDIAN CLIENTS: INTERVENTION INTO RIO GRANDE LITIGATION BY PEUBLOS OF SANTO DOMINGO AND SAN FELIPE

As discussed earlier (Part IIA(4)) certain Indian pueblos believed that their interests to water on the Rio Grande should be asserted in the New Mexico litigation which was limited by the state and the United States to tributaries of the river. On April 23, 1970, the pueblos of Santo Domingo and San Felipe moved to intervene in all five cases commenced by the state and to assert their claims to the Rio Grande. This motion was resisted by the Departments of Justice and Interior on the ground that the interests of the intervening pueblos were adequately represented by government counsel.

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1. Pettis speech.

The Commissioner of the Bureau of Indian Affairs sought to assign a highly experienced water rights lawyer in the Bureau's employ, Mr. William H. Veeder, to represent these pueblos. The Justice Department resisted Mr. Veeder's being assigned as a co-counsel to them, so the Commissioner assigned him to the pueblos themselves,[1] and the pueblos directed that he appear in court. After Mr. Veeder had made one court appearance, a dispute arose as to whether Mr. Veeder's assignment was to act as counsel or as an expert witness. The Commissioner then took the position that Mr. Veeder was only to be an expert witness.

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1. The Commissioner relied on 25 U.S.C. §48 which provides: "Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe."

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 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 Quechân 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.[1] The Authority would be managed by a three-member Board of Directors, at least two of whom would be Indians, appointed by the President with the advice and consent of the Senate.[2] The Board would, in turn, appoint an "Indian Trust Counsel" to be the Authority's chief legal officer.[3]

1. Waiver of Sovereign Immunity.

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

1. S. 2035 and H.R. 8797.
2. S. 2035, sec. 2(b).
3. *Id*, sec. 4.
4. *Id*, sec. 8.
5. *Id*, sec. 9.
6. *Ibid*.

substantial advance in the protection of Indian property and claims to natural resources. Although the doctrine of sovereign immunity has been severely criticized by scholars[1] and the Administrative Conference has proposed that the defense be abolished[2], it has been reaffirmed several times by the Supreme Court in the past decade.[3] Sovereign immunity has a particular tenacity in Indian law,[4] and is asserted as a defense in virtually all suits by Indians against the federal government or executive officials, because it is urged that the "sovereign property" would be affected. The government, so the argument goes, is the owner of reservation land in trust for the Indians. It also "owns" the public land and water resources which the Indians are claiming in the cases studies. And since Indians can recover money damages for takings of their property in the Indian Claims Commission[5] or, in the case of takings since 1946, in the Court of Claims,[6] it is sometimes thought by courts that equitable relief is precluded.

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1. E.g., K. Davis, Administrative Law Treatise, §§ 27.00-27.00-8 (Supp. 1970); Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 29-37 (1963); Byse, Proposed Reforms in Federal "Non-statutory" Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479, 1485-93 (1962); Davis, Sovereign Immunity in Suits Against Officers For Relief Other Than Damages, 40 Corn L.Q. 3, 18-30, 37 (1954).
2. Recommendations and Reports of the Administrative Conference of the United States, Vol. 1, p. 23
3. State of Hawaii v. Gordon, 373 U.S. 57 (1963); Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962).
4. E.g., Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970).
5. 25 U.S.C. § 70 et seq.
6. 28 U.S.C. § 1505

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Thus, decisions like Larson v. Domestic and Foreign Commerce Corp, 337 U.S. 682 (1949) where a federal agency was the holder of property claimed by two private parties, and Malone v. Bowdoin, 369 U.S. 643 (1962), where the plaintiff urged that a forest service official was unlawfully in possession of land owned by him, have been held applicable to many conflict-of-interest type suits.

2. Suits in the Name of the United States.

A suit by the Authority in the name of the United States as trustee against the United States would be a justiciable controversy, for there are two separate interests involved.[1] The Authority would be suing to vindicate private property rights for which the government is the trustee, and the Department of Justice would be defending the United States in its general governmental capacity.[2] Thus, the policy of the rule that the same person cannot be both plaintiff and defendant - the barring of collusive lawsuits - would be inapplicable here.[3]

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1. Of course, much litigation commenced by the Authority challenging the lawfulness of federal actions will seek injunctive and other equitable relief, and hence the United States would not be named as a defendant.
2. In United States v. I.C.C., 337 U.S. 426 (1949) the United States as a shipper was permitted to challenge an I.C.C., order sustaining railroad charges against it. The case was held to be justiciable despite the fact that Justice Department attorneys represented both sides. 337 U.S. at 431.
3. See generally, Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 Harv. L. Rev. 1050, 1055-56 (1949).

Government counsel has occasionally appeared on both sides of a controversy, where agencies are in disagreement,[1] or where one side--as here--represents the government's interests in a non-governmental capacity.[2]

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1. For example, the Secretary of Agriculture is authorized by statute to appear in Interstate Commerce Commission proceedings concerned with the rates for farm products, 7 U.S.C. §1291, and appeal determinations to the courts. Secretary of Agriculture v. United States, 350 U.S. 162 (1956). The Office of Price Administration intervened in suits against the I.C.C. North Carolina v. United States, 56 F.Supp. 606 (E.D. N.C. 1944), rev'd. on other grounds 325 U.S. 507 (1945). See also United States v. FPC, 345 U.S. 153 (1953), where the court held that the United States, representing the Secretary of the Interior, had standing to appeal the grant of a license by the FPC for a private power plant. The Secretary urged that the dam should be constructed by the Government and the dam site had been set aside for public development by Congress.

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

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.

In two of the four above situations - the Kennewick Dam and the Mohave land - the tribes were not even apprised of the prospective threat to their property rights. To be effective administratively, the Authority and its Indian clients must be notified of contemplated actions which may affect Indian property rights. The bill should contain a provision requiring federal agencies contemplating actions which may infringe upon Indian rights to land, water and other natural resources, to notify the Authority and its potential clients - the Indians or tribes which may be affected. Prior notification to other agencies is commonly required in reclamation enactments. Under the Flood Control Act, the Secretary of the Interior is required to give affected states and the Secretary of the Army information about the contemplated reclamation projects and an opportunity to submit adverse comments to Congress along with the Secretary's Report.[1/] The Secretary must also notify water quality control officials in each state and include all state agency reports in his submission to Congress.[2/] State fish and wildlife officials must similarly be consulted and their views considered and submitted. The Secretary is

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1/ 33 U.S.C. § 701-1(c). Similarly, in proposing navigation and flood control projects, the Army Corps of Engineers is required to consult with affected states and with the Secretary of the Interior, and transmit their views to Congress. Sax, Federal Reclamation Law, supra, p. 24, n. 2, p. 156.

2/ 33 U.S.C. § 466a (b) (1).

under a statutory duty to include in his reclamation project plans "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." [1/]

The prior notification provision should read as follows:

> The Department of the Interior, the Department of Agriculture and the Department of the Army, shall with respect to any proposed action which may affect or impair the rights or claims of any Indian tribe, band or other identifiable group of Indians to natural resources, including but not limited to rights to land, rights to the use of water, timber and minerals, and rights to hunt and fish within the United States' trust responsibility owing to the Indians:
>
> (1) give notice to the Authority and to affected Indian tribes, bands and groups of the proposed action;
>
> (2) afford the Authority and the affected Indian tribes, bands and groups a reasonable opportunity to submit written comments upon the proposed action, and, where agency action is required by statute to be determined on a record following an agency hearing, or where the agency deems it appropriate to hold a hearing, an opportunity to participate therein.
>
> Upon taking final action with respect to such proposed action, the Department of the Interior, the Department of Agriculture and the Department of the Army shall give notice to the Authority and the affected Indian tribes, bands, and groups of the final action taken.

Additionally, the Authority should have an unambiguous mandate to initiate and commence administrative proceedings. The bill as presently written may be construed to preclude the Authority from initiating administrative proceedings;

1/ 16 U.S.C. § 662 (b).

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[1/] and allows it to hire "such . . . [independent] experts as it deems necessary."[2/]

5. Appointment of Special Counsel

The bill also permits the hiring of "special counsel" in two places. Section 5 (b) authorizes the Board of Directors to "appoint and fix the compensation of such special counsel . . . as it deems necessary." And Section 5 (d) provides for the hiring of special counsel "in the event of a conflict between parties requesting the assistance of or the representation of the Authority." Frequently, as in the Rio Grande litigation, two or more Indian groups may have conflicting claims to natural resources. However, since the Authority can appoint special counsel under Section 5 (b), it would seem authorized to hire outside counsel even when a conflicting Indian claimant was not involved, but - for example - Authority attorneys were fully committed. This provision appears desirable, but the Authority should unambiguously be able to authorize volunteer attorneys to act in its behalf. In order to make it clear that the Trust Counsel Authority may contract with private attorneys with or without compensation, Section 11.4 should be amended to read:

> Make such expenditures or grants, either directly or indirectly, with or without compensation, as may be necessary to carry out its responsibilities under this Act.

1/ S. 2035, sec. 11 (2).
2/ Id., sec. 5 (b).

The bill should also provide that such "special counsel" may act for the Authority, so long as supervised by its Board of Directors, and that the waiver of sovereign immunity shall attach to suits brought by them. In addition, Section 5 (b) should provide that special counsel and experts shall be appointed ", without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service."

Finally, a provision should be included to make it clear that Indian tribes may sue in their own names (without, of course, the waiver of sovereign immunity contained in the Bill). The section should read:

> Nothing in this Act shall be construed to repeal Section 1362 of Title 28, United States Code, or any other provision authorizing Indian tribes, bands, or other identifiable Indian groups to bring suit against the United States, its departments, agencies, officers, and employees, any of the States, their subdivisions, divisions, departments or any private person or corporation.[1/]

6. Responsibilities of the Department of Justice.

Section 8 of the bill as presently drafted would relieve the Department of Justice of all responsibility to represent Indians with respect to claims to natural resources. This provision is undesirably broad. First, it may repeal for the natural resources area a mandatory duty by the

1/ Such a provision is not intended to suggest that Section 1362, which authorizes tribes to sue under the federal question jurisdiction without regard to jurisdictional amount, constitutes a waiver of sovereign immunity.

Department to represent owners of Indian trust property contained in 25 U.S.C. § 175. That section provides:

> "In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."[1]

1/ In Siniscal v. United States, 208 F.2d 406 (9th Cir. 1953), cert denied, 348 U.S. 818 (1954), the Court of Appeals for the Ninth Circuit held that the U.S. Attorney need not represent Indian defendants where the Department of Justice is prosecuting the very claim that is the subject matter of the suit. In the San Luis Rey case discussed above, the district court judge ordered the Attorney General to take action within 45 days either to represent the plaintiff Indians or to file a separate suit on their behalf, and if he should decide to do neither, to explain to the court why it would not be in the best interests of the Indians to do one or the other. An attorney from the Justice Department reported back to the court that the Attorney General elected to do nothing because in his discretion, he found that it would not be in the best interests of the Indians for the Department of Justice to represent them. The Department indicated that its defense of an Indian Claims Commission proceeding brought by the tribe made its representation of the Indians impossible. Without finding that a conflict of interest existed, as in the Siniscal case, the court found that, since the duty to represent Indians is not mandatory (citing Siniscal), the Attorney General had exercised his discretion and it is not within the power of the court to dictate the manner in which that discretion may be exercised. This determination is now being appealed to the Court of Appeals.

The interpretation of § 175 as mandatory finds support in the most prominent text on Indians, itself a product of the Department of the Interior, in which it is stated that § 175 insures that "federal legal services . . . are available to the Indians in cases involving the protection of property . . . [held] in trust for the Indians by the United States. Department of the Interior, Federal Indian Law, 252 (1958).

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

Moreover, it appears undesirable to relieve an agency of the United States government of legal responsibility for considering Indian property rights prior to formulating its actions. For example, in bringing water rights adjudications, such as on the Truckee and Carson Rivers, the government should not be legally free to ignore Indian

claims.[1/] If it does so, as in the Orr Water Ditch case, it should at least be answerable in damages. It is one thing to create an uncompromised advocate to enforce Indian claims to property against the federal government and private parties. It is quite another thing to terminate a federal agency's obligation to serve as trustee. The Authority should, in analogous future situations, for example, be able successfully to prosecute a suit for money damages for breach of trust arising by virtue of Justice's failure to represent the Pyramid Lake Tribe in the Orr Water Ditch case.[2/] The bill in its present form would seem to preclude recovery in such a case by relieving the Justice Department of all trust obligations in the area of Indian natural resources. At the very least, Justice should be bound as trustee to consider the impact of its litigation on the protection of Indian natural resources.

1/ Indeed, since the Department of Justice serves as attorney for the Department of Interior, and that Department remains trustee of Indian rights to natural resources, it seems that the Department of Justice remains in any case obligated to protect Indian rights, if for no other reason than to shield its client - Interior - from liability.

2/ It may be argued that the better course would be for the Authority, as an uncompromised advocate, to represent the Indians in all water rights adjudications. The difficulty with this argument is that these are proceedings of vast complexity, and the Authority may lack the financial ability to provide such representation. Particularly where, as in the Orr Water Ditch case, the action is brought by Justice, it should not be permitted to confront the Authority with the dilemma of devoting a disproportionate percentage of its time and resources to the defense of the Indians in that case, or of seeing the Indians' water rights lapse by default.

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.

B. Administrative Solutions to the Conflicts-of-Interest

Certain institutional protections contained in the Indian Trust Counsel legislation could be advanced by executive reorganization and regulation. For example, any Bureau proposing a project which may conflict with Indian claims to natural resources could be required by Interior Department regulation to notify the BIA. Similarly, efforts could be made to increase the availability of independent, "in-house" technical services to the BIA.

In addition, the Bureau of Indian Affairs could be provided with legal counsel independent of the Solicitor's Office. In several case studies, the Solicitor's Office was charged with conflicting duties to represent multiple clients - the BIA and other bureaus within the Department. Since the BIA is charged most directly with the trust responsibility, a conflict of interest arises whenever an Interior bureau uses

or seeks to appropriate property in which Indians claim an interest. The American Bar Association has held that an attorney cannot effectively represent a client whose claimed rights conflict with those of another client.[1/] The ABA's Code of Professional Responsibility provides that an attorney "should resolve all doubts against the propriety of" representing multiple clients.[2/] The

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

2/ Ethical Consideration 5-15, American Bar Association, Code of Professional Responsibility. The federal conflict-of-interest laws protect the Government against any such conflicting interest held by its employees. These laws, buttressed by criminal sanctions against violators, prohibit any federal employee from representing a private party before a court or agency in a matter where the United States has an interest. 18 U.S.C. §§ 203, 205. This prohibition survives for a period of time after a person leaves government employment with respect to matters in which he actively participated while with the government and matters under his official supervision. 18 U.S.C. § 207(a), (b).

"multiple client" problem seems irremediable so long as the Solicitor is obligated to advise both sets of "clients" as to their legal rights. As such, he is at present charged with resolving the dispute between his "clients" by issuing an "opinion." The Solicitor's "opinion," unlike an opinion letter from a private attorney to his client, constitutes an adjudication of the dispute for all practical purposes. No government attorney will "appeal" the opinion to a court or higher administrative authority; it is accepted as a statement of the law. Consequently, the Solicitor is placed in the ethically troublesome position of "mediating" between his clients. 1/

This mediating and adjudicating function is performed both in the Solicitor's central office in Washington and by the regional solicitors. At the regional level, the conflict of interest is institutionally more pronounced. In Washington, the attorneys in the Solicitor's Office are at least divided into sections - reclamation, Indian affairs and public lands, for example - with the Associate Solicitor for each section reporting directly to the Solicitor. In the regional offices, the regional solicitor himself is charged with advising the conflicting agencies; the conflict comes to rest in one person.

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

Creation of a "General Counsel for Indian Affairs," independent of the Solicitor, would remove this particular conflict. The "General Counsel," like the Solicitor, would report directly to the Secretary, and conflicting legal opinions and views would at least be arbitrated by the chief administrative official in the Department.[1/]

An administrative shift in this direction was announced by Secretary Morton on October 4, 1971, when he established an Indian Water Rights Office. The Secretary stated that the function of the office will be "seeing that appropriate action is taken to protect Indian water rights - including timely preparation of suits for submission to the Justice Department for filing in the courts."[2/] The office seems constructed to make legal recommendations and undertake field investigations, including inventories of Indian claims to water; its staff is to be drawn from the BIA, Solicitor's Office and Geological Survey. The office reports to the Commissioner of the BIA, who reports to the Secretary.

1/ A different problem, the role of the Solicitor in deciding administrative appeals within the Department as in the Mohave land claim, would persist. Here, even after establishment of the "General Counsel for Indian Affairs," the Solicitor would act as counsel for one party and judge in the same case. It is therefore recommended that the Solicitor be divested of all administrative responsibilities for adjudicating internal administrative appeals involving Indian claimants.

2/ Secretary Morton, Press Conference on October 4, 1971 (hereafter "Morton Press Conference").

In the water resources area, the proposed Water Rights Office appears significantly to alleviate the internal conflict-of-interest within the Solicitor's Office. It seems also to serve the need for providing technical assistance to Indians in water matters independently of other Interior bureaus. The most encouraging aspects of the proposal are: (1) that it does impressively seek to undertake some action to measure and enforce Indian claims to natural resources; and (2) that its level of appropriations is relatively high; for the first year, the Secretary has reserved two million dollars.[1]

A major deficiency in the office is its dependence on the Justice Department for the filing of litigation. If the Department is sluggish about the filing of litigation, the Office's funds should be available to contract with tribal attorneys or outside counsel to commence litigation. In addition, the Office's role in intra-departmental proceedings is unclear; could the Water Rights Office, for example, participate in informal administrative proceedings, such as the authorizations to the Bureau of Reclamation to sell Big Horn water to industrial users? It is likewise not clear whether the office is permitted to represent Indians in more formal administrative hearings, like renewal proceedings for hydroelectric projects before the Federal Power Commission.

1/ Morton Press Conference, p. 4.

The proposal to establish a Water Rights Office likewise falls short of the promise of the Indian Trust Counsel Authority to provide legal services directly to Indian tribes and individuals affected by the institutional conflict-of-interest. Since the Office reports to the Commissioner of Indian Affairs,[1/] it may function solely as "house counsel" to the trustee. The Authority, on the other hand, would be independent of the trustee, enforcing the beneficiaries' claims against him in fact. The roles of house counsel to the trustee and counsel to the beneficiary need not conflict in every case; they will be harmonious to the extent that the BIA espouses a policy of maximum practicable advocacy of Indian water rights (although, of course, even within the contours of such a commitment, differences of opinion would arise). But the roles are conceptually very different,[2/] and the independence of the Authority from any obligations to an existing executive department appears preferable.

1/ Secretary Morton emphasized that "the Water Rights Office has got to be very close to the Commissioner in every sense of the word." Morton Press Conference, p. 11-12.

2/ Secretary Morton may have recognized this divergence on roles, and blurred the "house counsel" function of the Water Rights Office by inviting the National Tribal Chairman's Association to appoint "an advisory board to work with the Indian Water Rights Office." Morton Press Conference, p. 4.

The Secretary may not presently possess statutory authority to provide legal services directly to Indian tribes. 1/ But in securing technical assistance, and in his investigations to protect Indian rights, the Indian Water Rights Office may discover instances where litigation would be appropriate, where the Department of Justice may be unwilling to proceed. In such situations, the Office should contract with outside "special counsel" - as provided in the Indian Trust Counsel bill - to commence and handle litigation.

A legislative remedy would also be necessary to remove the institutional conflict of interest within the Justice Department and to ensure that conflicting claims to land, water and other natural resources are presented to courts for resolution. Absent legislation, the Justice Department will continue to serve as attorney for both Indian wards and public agencies, and will control the flow of litigation by both in federal courts.

In terms of presenting Indian claims which conflict with other federal interests to court, and securing their resolution by an impartial judiciary, pursuant to a waiver

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1/ As noted, p. 51 , n. 1 , supra, 25 U.S.C. § 48 may authorize the Commissioner of Indian Affairs to transfer control over BIA employees to competent Tribes. Mr. Veeder was "assigned" to the Rio Grande pueblos under this section (an assignment subsequently revoked) and the Zuni Tribe has assumed control over all operations of the local BIA office on the Zuni reservation pursuant to that section.

of sovereign immunity, legislation appears necessary. Similarly, the inherent conflict that the Justice Department is charged with <u>defending</u> Indian Claims Commission proceedings, and may hence be less vigorous in protecting Indian property rights in the courts, cannot be removed without legislation. In short, the need for independent presentation of litigation can only be addressed by Congress.

However, the case studies indicate that litigation is not the only, or even the most overriding, necessity for resolution of these administrative conflicts of interest. All of the conflicts studied arose initially with executive determinations by Interior officials, and some involved solely administrative proceedings within the Department. Revisions in administrative procedures within the Interior Department may be more significant in providing protections for Indian rights than altering the control over litigation to enforce the trust responsibility. And clearly, many of the changes contained in the Trust Counsel bill and our recommended amendments can be implemented by executive order.

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