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INDIAN AMENDMENT TO FREEDOM OF INFORMATION ACT

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HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON

INTERIOR AND INSULAR AFFAIRS

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 2652

A BILL TO AMEND SECTION 552 OF TITLE 5, UNITED STATES
CODE, TO PROVIDE AN EXEMPTION TO THE REQUIREMENTS
OF THAT SECTION RELATING TO THE AVAILABILITY OF
INFORMATION

MAY 17, 1976



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Committee on Interior and Insular Affairs

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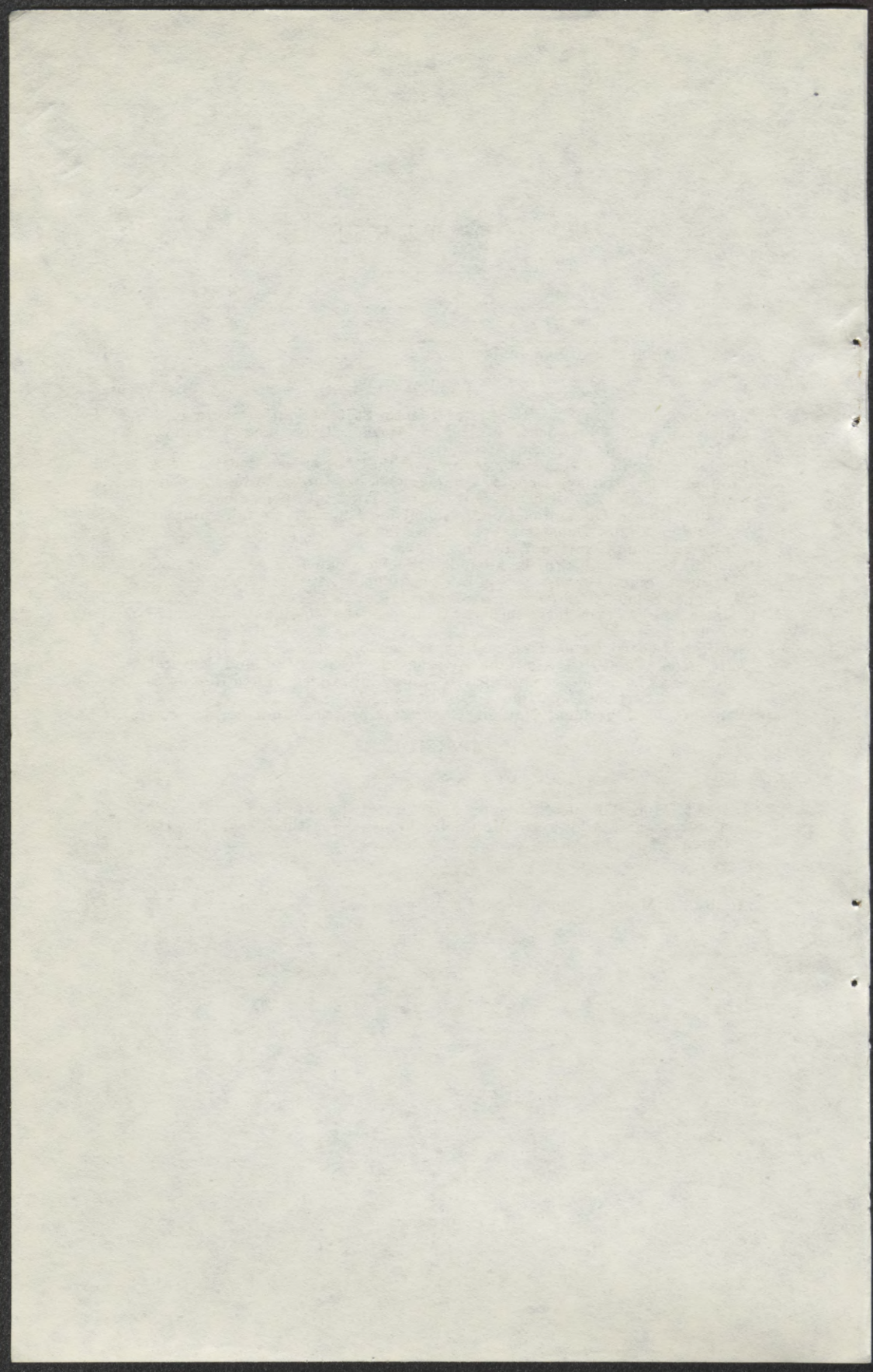
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INDIAN AMENDMENT TO FREEDOM OF INFORMATION ACT

MONDAY, MAY 17, 1976

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

The subcommittee met pursuant to notice, at 10 a.m., in room 3110 Dirksen Office Building, Hon. James Abourezk, presiding.

Present: Senator Abourezk.

Also present: Forrest J. Gerard, professional staff member; and Ella Mae Horse, research assistant.

OPENING STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ABOUREZK. The Indian Affairs Subcommittee hearing will come to order. This is an open public hearing to receive testimony from the administration and the Indian community on S. 2652, a bill to amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information.

As originally envisioned, when enacted into law in 1966, the Freedom of Information Act was designed to make Government information available to citizens, unless it would impair the Nation's security or frustrate legitimate investigative efforts.

The recent amendments to the Freedom of Information Act, approved in November 1974, stipulated that all Government information was public unless covered by nine narrowly drawn exemptions—in defense of which the Government would bear the burden of proof in a court test.

The 1974 amendments also imposed stringent time limitations for production of documents, and provided for possible disciplinary action against offending administrators.

Clearly, this sweeping and progressive statute has had the salutary effect of forcing countless public officials to release information and data to its rightful owners—the general public.

Unfortunately, the Freedom of Information Act, according to tribal leaders, has in several instances served to work against the best interests of the Indian community. This has occurred when third party interests demand release of information and data concerning Indian natural resources pursuant to the Freedom of Information Act.

Such information is generally maintained by the Department of the Interior, the agency charged with carrying out the Nation's trust responsibility to Indian tribes.

The Department, therefore, is placed in the anomalous position by the Freedom of Information Act of being forced to violate its fiduciary relationship with the tribes.

S. 2652 would resolve the dilemma of the Indians and their trustee by exempting information concerning the natural resources and assets of tribes from the Freedom of Information Act.

The purpose of this hearing is to establish a precise record of illustrative examples and cases in which the release of such information has, in fact, had a detrimental impact on the Indian community.

At this point, I shall order that S. 2652 and the Department reports be inserted in the record.

[The information follows:]

94TH CONGRESS
1ST SESSION

S. 2652

IN THE SENATE OF THE UNITED STATES

NOVEMBER 11, 1975

Mr. DOMENICI introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

A BILL

To amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 552 (b) of title 5, United States Code, is
4 amended—

5 (1) by striking out at the end of paragraph (8)
6 “or”;

7 (2) by striking out at the end of paragraph (9)
8 the period and inserting in lieu thereof a semicolon and
9 “and”; and

II

1 (3) by adding immediately below paragraph (9)
2 the following new paragraph:

3 “(10) information held by a Federal agency as
4 trustee, regarding the natural resources or other assets of
5 Indian tribes or bands or groups or individual members
6 thereof.”.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAY 14 1976

Dear Mr. Chairman:

Your Committee has requested the views of this Department on S. 2652, a bill "To amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information."

S. 2652 would exempt from provisions of the Freedom of Information Act (5 U.S.C. 552) "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof." This exemption would become paragraph (10) of 5 U.S.C. 552(b), as an addition to the nine categories of subject matter now listed in that section to which the disclosure requirements do not apply.

Instead of an amendment to the Freedom of Information Act, as proposed in S. 2652, we will be submitting to the Committee a substitute bill which will provide separate statutory authority for a special limited exemption to the Freedom of Information Act similar to that proposed in S. 2652.

We believe that such an exemption is necessary to preserve the fiduciary relationship of the United States to Indian people. The Bureau of Indian Affairs of this Department is the agency charged with discharging the Nation's trust responsibility to its Indian tribes, and this agency is finding it difficult to obey the mandate of the Freedom of Information Act (without this exemption) and at the same time faithfully perform the obligations of its trust to Indians. In essence, we have been placed in the position of being required by law to violate the confidential relationship which we have with Indian tribes and individuals. Indeed, such violations could well give rise to claims by tribes or individual



Indians against the Federal Government. As to this possibility, it should be noted that the United States Supreme Court has said that the United States in its dealings with Indian tribes -

" . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. U.S., 316 U.S. 286, 297 (1942).

As the agency charged with carrying out the Nation's trust responsibility to Indian tribes, the Bureau of Indian Affairs must oversee, supervise, and administer the programs by which the Indian tribes can develop their natural resources and their reservation and tribal economies. As one means of carrying out this function, the BIA is presently engaged in a series of inventories of natural resources and minerals deposits on Indian lands. The Bureau is often beset by requests for copies of these inventories by interested parties, sometimes by the very companies who will compete for the opportunity to develop these resources. Presently, the Bureau is required to disclose the results of these inventories under formal Freedom of Information Act requests.

Disclosure of reports such as these clearly places the tribes in a disadvantageous position in negotiating with companies for the development of these resources. In fact, many tribes in the past have depended largely upon bonus payments paid by these companies for the right to conduct exploration for these minerals. With much of the work done for them, and with access to detailed information concerning mineral deposits, these companies will not be willing to compete with each other and to pay large bonuses for exploration and prospecting permits. On the other hand, prudent management of these resources requires that the Bureau and the tribes inform themselves of the location and extent of these resources. Many tribes, however, are seriously discouraged by the fact that information developed may be disclosed by the Bureau upon request of other parties who have pecuniary interests adverse to those of the tribes. Surely, the purposes of this law are not served when it redounds to the benefit of already profitable commercial entities at the expense of the Nation's impecunious Indian wards, whom the Government has pledged to protect from such exploitation.

Another area in which the Freedom of Information Act works to the detriment of Indian tribes and seriously compromises the trust relationship is that of water rights. The right of Indian tribes to water arising upon, bordering, or traversing their reservations in sufficient quantity to irrigate all the "practically irrigable" acreage of their reservations is well established. Winters v. United States, 207 U.S. 546 (1908); Arizona v. California, 373 U.S. 564 (1963). In order to protect these rights to precious water in the arid West, the tribes and the BIA must engage in extensive and expensive soil classification surveys, water availability studies, agricultural economics analyses, and reservation development plans. These efforts are required as preliminary measures to determine the tribes' entitlements to water. And, when these studies are complete, lengthy and expensive litigation usually must follow to adjudicate these rights.

At present, in several of the large river basins, industries are busily securing option contracts for the use of water from State and Federal agencies, and they may now demand access to the detailed plans of the Indian tribes within these river basins - even though these documents may well be necessary for the tribes to develop their litigation strategy and posture at a later time. In at least one instance, the Bureau was required to release such a report, over the vigorous objection of the tribe involved. In another case it refused to release such a report and a lawsuit has been filed in the Federal District Court for the District of New Mexico over this very issue. Even though these requests are handled on an individual basis within the Department, when the Solicitor's office determines that a request cannot properly be fitted within one of the nine existing exemptions the result is that the Bureau of Indian Affairs must pit itself against the interests of the very group it exists to serve and protect.

The claims of the Indian tribes in these instances are compelling. They claim that the Bureau of Indian Affairs exists to serve them and to protect them in the enjoyment of their property. In the above instance in which disclosure was required, the tribe felt that the study was inaccurate in several respects and highly prejudicial to their claims to water rights, and that their trustee acted against their interests in providing to future opposing litigants a highly expensive bit of evidence which the tribe would have to refute in court. Under the present law, however, the Bureau felt it had no choice.

There are many other areas in which the Freedom of Information Act could have seriously damaging effects upon the trust relationship of the United States with its Indian tribes. The Bureau, for instance, administers some 100 million acres of Indian trust land, much of which is under lease for grazing or agricultural purposes. In order to ensure a proper return to the Indian landowners of this land, it must be appraised and offered for bid. If the non-Indian ranching and agricultural interests who profit from the use of this land can demand access to land ownership records and appraisals, they will be at an enormous advantage in negotiating and bidding for use of this land. In short, without an exemption such as the one proposed by S. 2652, the Indian tribes generally will be denied the opportunity to engage in the type of arm's length transactions that characterize free enterprise and honest commercial dealing.

It has been suggested that the various exemptions already existing provide ample protection against the evils suggested herein. The fourth exemption, 5 U.S.C. 552(b)(4), concerning financial information obtained from a person and privileged or confidential, does provide some degree of protection when the information is clearly financial and is clearly privileged. Information of any type may well produce financial rewards in the right hands, however. It is for this reason that we strongly support legislation which would exempt information, whether clearly financial or not, regarding the natural resources or other assets of Indian tribes and individuals.

It should be noted, in the context of the fourth exemption, that there are criminal penalties provided in 18 U.S.C. 1905 for an employee of the United States making known information coming to him in the course of his Federal employment which concerns "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" or who "permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law". In addition to a fine of not more than \$1,000 or imprisonment of not more than one year, a violator of this section "shall be removed from office or employment". Divulging information relating to Indian assets may violate one or more of these provisions and subject the Federal employee involved to the penalties provided. Our substitute bill would make it perfectly clear that divulging information relating to Indian resources and assets is not authorized by law and that Federal employees would divulge such information only under the peril of being prosecuted and punished under 18 U.S.C. 1905.

It has also been suggested that protection is provided by the fifth exemption concerning interagency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency. This may sometimes provide a degree of protection, especially in the working draft stages of inventories, reports, and other policy or planning developments. This, too, however, is but an unclear and inconclusive prospect, and it invites continuous appeals and litigation.

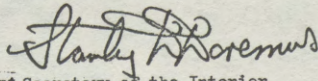
It has further been suggested that the ninth exemption, which exempts geophysical and geological information concerning wells, should protect against mandatory disclosure of water resource studies. This is by no means clear, and there is disagreement as to the scope of this exemption, as well as the other two exemptions mentioned above.

In short, while each of these exemptions offers some limited possibility of protection, none of them addresses the problem which the Bureau of Indian Affairs faces in this matter. We strongly believe that Government officials should not be required to resort to device and artifice in order to avoid the spirit and purpose of one law in order to carry out their responsibilities under another, especially when the conflict is so easily reconcilable as this one.

Failure to provide such an exemption would result in the continued confusion in the mind of the public and in the eyes of the law between the national governmental responsibility to the American public and the Nation's fiduciary responsibility as trustee of the private resources of Indian tribes.

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

Sincerely yours,



Deputy Assistant Secretary of the Interior

Honorable Henry M. Jackson
Chairman, Committee on
Interior and Insular Affairs
United States Senate
Washington, D.C.



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

May 26, 1976

MAY 25 10 22 AM '76

Honorable Henry M. Jackson
Chairman, Committee on Interior
and Insular Affairs
United States Senate
3106 New Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is in reference to your request for the views of the Office of Management and Budget on S. 2652, a bill "To amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information."

The Office of Management and Budget concurs in the views expressed by the Department of the Interior in its report and testimony given to the Committee and accordingly, also recommends that in lieu of S. 2652 legislation be enacted which would provide separate statutory authority for a special limited exemption to the Act similar to that proposed in S. 2652. Draft legislation to accomplish this purpose will be proposed by the Department of the Interior in the near future.

Sincerely yours,

James M. Frey
Assistant Director for
Legislative Reference

75-358 13

Senator ABOUTREZK. I would like to announce, also, that the sponsor of this legislation, Senator Domenici of New Mexico, is unable to be here today. He wanted to be in attendance, and he couldn't be, so he will submit a formal statement for the record.

[The prepared statement of Senator Domenici follows:]

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF
NEW MEXICO

Mr. Chairman and members of the subcommittee on Indian Affairs, I am pleased to have this opportunity to present written comments on S. 2652, a bill I introduced on November 11, 1975. I would first like to submit for the record the introductory statement I made on that occasion, a copy of which is attached.

It will be a difficult task to develop a legislative remedy for the existing problems without creating other problems resulting in little improvement over the present situation. Difficulty of accomplishing acceptable results, however, should never be sufficient reason to decline to try. So, I commend this Subcommittee and its Chairman for moving quickly to address the complex and important issues involved in S. 2652.

At this point, a brief description of why I introduced S. 2652 appears to be in order. During early 1975 several Indian leaders from New Mexico advised me that the Freedom of Information Act as interpreted was unfair to Indian people and that there was great potential for adverse effect on Indian Tribes across the country. Following an examination of these claims by my staff, I determined that there was genuine cause for concern since disclosure required under the Freedom of Information Act applies to information acquired or held by the government by virtue of the Trust Relationship just as it does to all other nonexempt information.

In the course of considerable deliberation on this matter, I concluded that the problems involved deserved, indeed, demanded consideration and resolution through the legislative process. S. 2652 was the product of that decision, a vehicle for legislative action.

Since it is a vehicle for legislative action, I have no undue "pride of authorship" in either the exact words used in S. 2652 or the legislative approach it embodies. In that regard, I encourage the consideration of other approaches such as that I understand the Department of the Interior and the Department of Justice will submit shortly. Regardless of the approach taken, certain points of conflict, some of which I shall address later, must be realized and dealt with appropriately in the final product.

It is my understanding that the Freedom of Information Act is founded primarily on the principle that the government exists to engage in only those activities having a valid public purpose. It follows, then, that information related to such activities is the public's information and as such should be publicly available on reasonable request. Whatever the other benefits, such as providing the means for measuring the performance or honesty of public officials, the FOIA codified the notion that what is done for public purposes, the public has a right to know and use for whatever legitimate reasons might be applicable. The Act then recognized, by means of specific, limited and narrowly drawn exceptions, that general disclosure of certain kinds of information would defeat the very purpose, the public purpose, for which that particular information was acquired.

One need look no further than the first statutory exemption to the FOIA for an illustration of this fact. By that exemption, matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" are not subject to disclosure under the FOIA. In that instance, the Congress correctly determined that the public purpose related to matters of national defense would be defeated or seriously damaged by general disclosure under the FOIA.

The same reasoning applies, in my opinion, to information which the government acquires or holds in the pursuit of another valid public purpose—the effective discharge of the unique Trust Relationship existing between the United States and the Indian people. Matters relating to that Trust Relationship are just as valid and just as special as matters relating to the national defense, and as such, are entitled to the same consideration and treatment if the disclosure would defeat the public purpose to which the information relates. I feel

the Indian people have made a strong case that disclosure of certain information obtained or held by the government in discharge of its obligations under the Trust Relationship will defeat the objectives of the Trust Relationship.

The principles cited above also lead me to conclude that the expenditure of public money in obtaining such information is not controlling on the question of public disclosure under the FOIA. Clearly, it costs money to generate information on matters related to the national defense, but few would seriously contend that such matters ought to be made public simply because they were acquired through public funding. The determining factor, again, is the nature of the public purpose and how that purpose is affected by requiring disclosure under the FOIA. Accordingly, while it will cause me to differ with many people whose judgment and views I respect, I disagree with the theory that public disclosure must necessarily follow public expenditure in the acquisition of information. I do accept that proposition as a guiding principle and agree that exceptions to it ought to be strictly limited to the "public purpose" theory outlined previously.

Having stated my understanding of the intent of the FOIA, colored to some extent by my own views, I am compelled to caution the Subcommittee that whatever legislative approach is followed ultimately to ensure that the Trust Relationship is not violated by FOIA disclosures, it must not be overly broad. In other words, I am not convinced that all information held by the government as trustee should be beyond reach of procedures under the FOIA. That is why I drew my amendment to the FIOA rather narrowly to encompass only that information "regarding the natural resources and other assets" of Indian people. I am sure there are other specific kinds of trust related information the Subcommittee may want to consider, but I urge as limited an exception as possible centered on the Trust Relationship.

Under my notions of the proper interplay between the government's obligations under the freedom of information concept and the Trust Relationship, disclosure should be allowed unless it would be detrimental to Indian people. When disclosure would not be harmful to Indian interests, the provisions of the FOIA should apply.

The theory I urge the Subcommittee to adopt and apply through appropriate legislation would have two tests for exemption from disclosure. The first would be "Is it information obtained or held by the government agency in discharge of the Trust Relationship? If not, it should be subject to disclosure. If it is, the second test is "Would disclosure be detrimental to the Indian interests in furtherance of which the information was acquired?" If not, it should be subject to disclosure. If it would be detrimental, it should not be subject to FOIA requirements.

It may be a difficult task to fashion a statutory framework to accommodate this dual test, but I think it is important to do so. The American public is entitled to information acquired at its expense unless good and valid reasons dictate otherwise. When Indian information is involved, it ought to be public unless disclosure would be harmful to legitimate Indian interests. For these reasons, I am impressed that any statutory provision to exempt trust related information should not only require a showing of potential harm from disclosure, but also provide a means for challenging that assertion.

In their testimony on May 17th, Indian leaders and BIA officials made repeatedly references to information on water, water resources and water rights as the kind of information that ought to be exempted from the freedom of information act. Under my notions regarding the proper tests for exemption, it would be improper to automatically exempt such information just because it had been acquired under the Trust Relationship.

A letter I have received from the State Engineer of the State of New Mexico, Mr. Steve Reynolds, addresses this issue from the non-Indian point of view. I have submitted Mr. Reynolds' letter for the record and I urge all members and staff of the Subcommittee to consider it carefully.

Mr. Reynolds makes a valid point, in my opinion, that certain kinds of water-related information is most effective for ensuring maximum beneficial utilization only when it is known to everyone concerned. Mr. Reynolds also points out that water is a resource unlike oil and gas reserves or mineral deposits. It is essentially a public resource regardless of where it exists. This is a point of view I feel the subcommittee should consider along with those asserted by the BIA and Indian leaders. For my own part, I urge the Subcommittee to limit the nondisclosure of hydrologic information to those situations where the information is strictly Indian rather than general public and where disclosure would be detrimental to Indian interests.

Another serious complication must be faced squarely if we are to deal with all the important issues. If an exemption to the FOIA is created, either by direct exemption as in S. 2652 or by amendment of some other statute, to whom should the exception apply? Should it apply to everyone seeking the kind of information to be exempted or should it apply only to non-Indians or non-tribal members? The Chairman raised that very appropriate question in the hearings on May 17th, but I do not feel that the responses on that day provide sufficient basis for resolution of this critical question.

Individual members of Indian Tribes will want to have access to tribal information for the same reasons all Americans want to have access to government information as provided by the FOIA. Having accepted the argument that non-Indians ought not to be automatically entitled to certain tribal information held by the government, I cannot in good conscience accept extension of that argument to include individual members of a Tribe. After all, the Trust Relationship encompasses Indian *people* not just their governing bodies.

The Department of Interior and BIA officials who testified on May 17th indicated that the "processes of the tribal government" should be relied on to allow individual members to reach tribal information. Likewise, leaders of Tribal governments testifying that day agreed that the governing bodies ought to have the authority to control availability of tribal information to tribal members.

My remarks in this regard are offered to advise the Subcommittee that by introducing S. 2652, I had no intention of limiting the availability of tribal information to individual tribal members. In my opinion this is a serious issue, one that should not be taken lightly, but should be considered carefully and thoroughly.

It may be that the contentions of the BIA and the tribal leaders are correct in that the relationship between Indian people and their governing bodies is so different from that between U.S. citizens and the U.S. government that the principle of full disclosure of government action is inapplicable or inappropriate. At any rate, it deserves further consideration which I hope the subcommittee will be able to provide. It would be an unfortunate result indeed if in our efforts to protect Indians from abuses by non-Indians under color of the FOIA, we inadvertently promoted Indian abuse of each other under color of the Trust Relationship.

In closing, I must again recognize the extreme difficulty of the task the Subcommittee has in resolving this conflict between two of the fundamental policies embraced by the American people. While the Trust Relationship is a sacred obligation to Native Americans, free and open disclosure is the very foundation, indeed, the cornerstone of a free society.

[From the Congressional Record, Tuesday, November 11, 1975]

(By Mr. Domenici)

S. 2652, a bill to amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information. Referred to the Committee on Interior and Insular Affairs.

Mr. DOMENICI. Mr. President, the Bureau of Indian Affairs serves as trustee for Indian lands, water rights, and other natural resources. Its responsibility in this area is not unlike that of any other private trustee or fiduciary, except insofar as the integrity of the U.S. Government is at stake in the Bureau's activities, and, thus, an even greater sense of responsibility and fidelity is required. As the Supreme Court has stated, the United States, in its dealings with Indian tribes,

"Has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should, therefore, be judged by the most exacting fiduciary standards." *Seminole Nation v. U.S.*, 316, U.S. 286, 297 (1942).

It has recently come to my attention that an existing Federal law, while motivated by an honorable and important concern with unwarranted and dangerous secrecy within Federal agencies, is now threatening to egregiously impair the fiduciary relationship between the United States and our Indian people. I refer to the Freedom of Information Act and our recent amendments thereto.

The amendment I introduce today is not intended to, and does not, categorically exempt the Bureau of Indian Affairs from coverage under the Freedom of Information Act. It does, however, reflect and respect the peculiar trust relationship between Indian people and the Federal Government. That such a narrowly drawn exemption is warranted should come as no surprise upon a moment's reflection. As long ago as 1831, the great Chief Justice John Marshall declared:

"The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . (T)he relation of Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831).

The Freedom of Information Act, as currently worded, places the Bureau of Indian Affairs officials charged with carrying out the Nation's trust responsibilities to Indian tribes in the uncomfortable and untenable position of determining whether or not a Federal law of general application, enacted without mention of this peculiar and historical relationship, was intended to abrogate the Nation's solemn pledge to these people. Let me provide a specific example of this conflict, or this dilemma.

The Bureau of Indian Affairs has been engaging in inventories of the natural resources and mineral deposits on Indian lands. This information is essential for prudent management of these resources, for without this information neither the BIA nor the tribes can intelligently assess the proposals made to them by mining companies and energy developers for permits and leases. I am advised that under existing law, it is possible for entities dealing with Indians to petition the BIA for information the Bureau has on energy and mineral deposits, as well as copies of leases and agreements entered into in the past.

Currently, the BIA can withhold geological and geophysical data "concerning wells," but this narrow exemption does not cover past transactions, other inventory data where no wells have been drilled or planned, or past commercial transactions. If the Senate believes, as I do, that disclosure of such information to the very entities that will profit from it at the expense of the tribe whose resources are at stake is a breach of the fiduciary responsibility we have assumed toward Indian tribes, then the amendment I propose will occasion no great suspicion or concern.

If the Members of the Senate further believe, as I do, that our Indian tribes are entitled to the economic return on their resources that market competition and arm's length transactions will bring, then the amendment I propose should cause no consternation.

The Bureau's and, ultimately, this Government's duty as trustee demands no less. The late Justice Cardozo, when he was sitting on the Second Circuit Court of Appeals fashioned the standard for fiduciaries that is "stricter than the morals of the market place" which has endured for years. Certainly, Mr. President, where the integrity and fairness of our Government is at stake, we should accept no less a standard for our dealings with Indian tribes.

Finally, Mr. President, we should not allow the results of two important national policies—the trust obligation we owe our Indian people and the openness of government we owe all our people—to combine to the unintended detriment of Indian people. I realize that the bill I introduce today may not be as effective as it could be to accomplish the protection of Indian rights under the trust relationship, that it may not address all the problems. I will, of course, work with the appropriate committee and other interested Senators to make this amendment as effective as possible for the purposes I have mentioned. I invite all those who share my concerns to make it known to the Government Operations Committee, to offer their suggestions for improvement and to push for rapid enactment. Likewise, I encourage those with opposite views to make them known, so that our final enactment will have had the benefit of all viewpoints.

I ask unanimous consent that the bill be printed in the RECORD.

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

S. 2652

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 552(b) of title 5, United States Code, is amended—

- (1) by striking out at the end of paragraph (8) "or";
- (2) by striking out at the end of paragraph (9) the period and inserting in lieu thereof a semicolon and "and"; and

(3) by adding immediately below paragraph (9) the following new paragraph:
 "(10) information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof."

STATE OF NEW MEXICO,
 STATE ENGINEER OFFICE,
Santa Fe, N. Mex., May 24, 1976.

HON. PETE V. DOMENICI,
*U.S. Senate, New Senate Office Building,
 Washington, D.C.*

DEAR SENATOR: On November 14, 1975 the State of New Mexico filed suit (State of New Mexico ex rel Reynolds v. Kleppe) in the U.S. District Court in Albuquerque to obtain disclosure of reports on certain U.S. Geological Survey hydrologic studies of water resources of particular interest to several Indian tribes in New Mexico, specifically the Jicarilla Apaches, the Mescaleros Apaches, the Pojoaque Pueblo, the Tesuque Pueblo, the San Ildefonso Pueblo and the Nambe Pueblo. The suit was filed on the basis of information and belief that the results of the studies would be valuable in the development and use of water resources within the State of New Mexico and that the reports are of the nature that the Department of the Interior is required by the Freedom of Information Act to make available upon request. I am advised that this pending litigation possibly would be mooted if S. 2652 (a bill to amend Section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information) is enacted as introduced.

I think there can be no question that water resources, both surface and underground, move across the boundaries of Indian lands, flowing from Indian lands to non-Indian lands and from non-Indian lands to Indian lands. It follows that the development and use of water for non-Indian activities must be expected to affect the water supply for Indians and the development and use of water for Indian activities must effect the development and use of water for non-Indian activities. In my view it follows that the widest possible dissemination of hydrologic information, particularly such information gathered by federal agencies at the taxpayers' expense, is in the best interest of both Indians and non-Indians. For this reason I respectfully suggest that S. 2652 be amended to make clear that it is not the intent of Congress to exempt such hydrologic information from the provisions of the Freedom of Information Act.

Your remarks upon introduction of S. 2652 (Congressional Record-Senate at S. 19623, November 11, 1975) reflect recognition that problems may be encountered in properly coordinating the policy of openness of government and fulfillment of the trust obligation owed our Indian people. I feel unqualified to address any such problems other than the one discussed above.

I would very much appreciate your having this letter made a part of the record of the hearings on S. 2652 before the Indian Affairs Subcommittee of the Committee on Interior and Insular Affairs if you find it appropriate to do so.

With warm personal regards.

Sincerely,

S. E. REYNOLDS,
State Engineer.

Senator ABOUREZK. The first panel of witnesses this morning will represent the administration. Hon. Peter R. Taft, Assistant Attorney General, Land and Natural Resources Division, accompanied by Miles Flint, Section Chief for Indian Resources, Department of Justice; Hon. Harley Frankel, Deputy Commissioner of Indian Affairs, accompanied by Martin Seneca, Director, Office of Trust Responsibilities, and Ralph Reeser, Director, Office of Congressional and Legislative Affairs, Bureau of Indian Affairs, Department of the Interior. You may come forward.

Mr. Frankel, you may introduce the participants on the panel.

Mr. FRANKEL. You know Mr. Reeser. You know Mr. Seneca. John Trezise of the Solicitor's Department who has been working on the Freedom of Information Act.

Mr. TAFT. And Miles Flint, who is section chief for Indian Resources and Land in Justice.

Senator ABOUREZK. If you are ready.

STATEMENT OF HON. HARLEY FRANKEL, DEPUTY COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY MARTIN SENECA, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, AND RALPH REESER, DIRECTOR, OFFICE OF CONGRESSIONAL AND LEGISLATIVE AFFAIRS, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. FRANKEL. Mr. Chairman, the committee has my prepared statement. If it will please you, I will just summarize it.

S. 2652 would exempt from provisions of the Freedom of Information Act information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof. This exemption would become paragraph (10) of 5 U.S.C. 522(b), as an addition to the nine categories of subject matter now listed in that section to which the disclosure requirements do not apply.

As indicated in our report on S. 2652, instead of an amendment to the Freedom of Information Act, we recommend enactment of separate statutory authority providing a special limited exception to the Freedom of Information Act similar to that proposed in the bill. We expect to submit a revised bill to the committee very soon.

Mr. Chairman, the purpose of the Freedom of Information Act as we understand it is to improve the manner in which the Federal Government provides to services to people by providing for a more open and, hopefully, a more enlightened decisionmaking process. However, because of an unanticipated conflict resulting from the unique trust responsibilities the Federal Government has for Indian people, just the opposite is likely to occur in the natural resources area in Indian affairs.

In effect, the Freedom of Information Act as currently drafted could serve to severely impair the manner in which the Federal Government would be providing services to Indian people, and unless modified this act would prove to be detrimental to the welfare of Indian people. Ironically, such an eventuality would be precisely the opposite of what was intended by the Congress, and we heartily applaud this effort to remedy that situation.

The basic conflict occurs because the Bureau's trust responsibility necessitates that we maintain detailed records of the natural resource assets of our constituency, the Indian tribes. However, it should be noted that no other organization shares the same kind of natural resource information with the Federal Government, thereby putting the tribes at a severe disadvantage because of the Freedom of Information Act.

The essential problem is that private firms and other private interests who negotiate with Indian tribes in the natural resource area often from adversarial, or at least competitive perspective, have access to the tribe's confidential natural resource information while maintaining the confidentiality of their own situation. This dichotomy is clearly

disadvantageous to the tribe, is patently unfair on the surface, and achieves precisely the opposite of what is intended by both the Freedom of Information Act and the trustee relationship between the Federal Government and Indian people.

We believe that an exemption is necessary to preserve the fiduciary relationship of the United States to Indian people. The Bureau of Indian Affairs is the agency charged with discharging the Nation's trust responsibility to its Indian tribes, and this agency may not be able to obey the mandate of the Freedom of Information Act without this exemption and at the same time faithfully perform the obligations of its trust to Indians.

In essence, we have been placed in the position of being required by law to violate the confidential relationship which we have with Indian tribes and individuals. Indeed, such violations may give rise to claims by tribes or individual Indians against the Federal Government. As to this possibility, it should be noted that the U.S. Supreme Court has said that the United States in its dealings with Indian tribes:

* * * has charged itself with moral obligations of the responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards.

For example, an area in which the Freedom of Information Act works to the detriment of Indian tribes and seriously compromise the trust relationship is that of water rights; the right of Indian tribes to water arising or bordering upon or traversing their reservations in sufficient quantity to irrigate all the practicably irrigable acreage of their reservations was well established by the U.S. Supreme Court in *Winters v. The United States*.

In order to protect these rights to precious water in the arid West, the tribes and the BIA must engage in extensive and expensive soil classification surveys, water availability studies, agricultural and economical analyses, and reservation development plans. These efforts are required as preliminary measures to determine the tribes' entitlements to water. And, when these studies are complete, lengthy, and expensive, litigation usually must follow to adjudicate these rights.

At present, in several of the large river basins, industries are busily securing option contracts for the use of water from State and Federal agencies, and they may now demand access to the detailed plans of the Indian tribes within these river basins even though these documents may well be necessary for the tribes to develop their litigation strategy and posture at a later time.

In at least one instance, the Bureau was required to release such a report over the vigorous objection of the tribe involved. In another case, the Department refused to release such a report, and a lawsuit has been filed in the Federal District Court for the District of New Mexico over this very issue.

Even though these requests are handled on an individual basis within the Department, when the solicitor's office determines that a request cannot properly be fitted within one of the nine existing exemptions, the result is that the Bureau of Indian Affairs must pit itself against the interests of the very group that it is to protect.

The claims of the Indian tribes in these instances are compelling. They claim that the Bureau of Indian Affairs exists to serve them and to protect them in the enjoyment of their property. In the above instance in which disclosure was required, the tribe felt that the study was inaccurate in several respects and highly prejudicial to their claims to water rights, and that their trustee acted against their interests in providing to future opposing litigants a highly expensive bit of evidence which the tribe would have to refute in court. Under the present law, however, the Bureau felt it had no choice.

It has been suggested that the various exemptions already existing provide ample protection against the evils suggested herein. The fourth exemption, 5 U.S.C. 552(b)(4), concerning financial information obtained from a person and privileged or confidential, does provide some degree of protection when the information is clearly financial and is clearly privileged.

Information of any type may well produce financial rewards in the right hands, however. It is for this reason that we strongly support legislation which would exempt information, whether clearly financial or not, regarding the natural resources or other assets of Indian tribes and individuals.

It should be noted, in the context of the fourth exemption, that there are criminal penalties provided in 18 U.S.C. 1905 for an employee of the United States making known information coming to him in the course of his Federal employment which concerns "trade secrets, processes, operations, style of work, apparatus, or to the identity, confidential statistical data, amount or source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" or who "permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law." In addition to a fine of not more than \$1,000 or imprisonment of not more than 1 year, a violator of this section "shall be removed from office or employment."

Divulging information relating to Indian assets may violate one or more of these provisions and subject the Federal employee involved to the penalties provided. Our substitute bill would make it perfectly clear that divulging information relating to Indian resources and assets is not authorized by law and that the Federal employee who divulges such information only under the peril of being prosecuted and punished under 18 U.S.C. 1905.

Mr. Chairman, in conclusion, as in the case of the fourth exemption both the fifth and ninth exemptions provide a limited degree of protection. However, none of these provide the complete protection that Indian people need, are entitled to, and have a right to expect from their trustee. Thus, we strongly support legislative action along the lines contained in S. 2652.

We will submit a revised bill providing separate statutory authority for a special exemption to the Freedom of Information Act similar to that proposed in the bill in the very near future.

This concludes my prepared statement, and I would be pleased to respond to any questions that you might have.

Senator ABOUREZK. Does the Justice Department have a statement?

STATEMENT OF HON. PETER R. TAFT, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY MILES FLINT, SECTION CHIEF, INDIAN RESOURCES AND LAND, DEPARTMENT OF JUSTICE

Mr. TAFT. Senator, my name is Peter Taft, Assistant Attorney General in charge of Land and Natural Resources of the Department of Justice. Ours is simply in support of what Interior has said.

As you know, we have deferred to them since they are the ones that primarily define the rights of Indian concerns. I point out that we are charged with protecting the natural resources of Indian tribes when they come to court and act as trustee and counsel for the trustee.

We have set up a special Indian resources section in Land to carry out this function. I would point out that in litigation often we are concerned with the quantification and plans for development of assets of the Indian tribes and as a result we are very concerned that they be protected as best they can.

We join with Interior on the position that they have taken here. We point out on top of that that I think it is right to distinguish between the capacities in which the United States acts. When we act as trustee we do not act in the same normal capacity that we do when all our other acts are under the Freedom of Information Act. And I think as trustee that there is a right to protect the relationship between the trustee and the beneficiary, which is the tribe.

It has traditionally been a confidential one, and it is one that I do not think should be changed simply because it is the United States as opposed to any other kind of trustee.

We therefore urge that Congress does in fact pass an act which would protect the resources and assets of Indian tribes, and which will protect us in acting as trustee.

I point out that our general policy under the Freedom of Information Act has been to turn over the information unless we feel there is a particular need on a particular document to protect it.

Now on Indian policy that is not the same approach. The approach there is they have a right to protect every bit of information which may affect the resources of the tribe. As a result if we continue under the Freedom of Information Act we will tend to foster litigation and a tremendous amount of unnecessary expense in order to protect the information relating to the tribes.

As a result, I believe that a special exemption which would reverse the burden in this instance is proper, and an act as suggested by Interior would be really the only way to properly protect both the tribes and the United States in acting as a trustee.

Senator ABOUREZK. Is that your statement?

Mr. TAFT. That's right.

Senator ABOUREZK. My first question is: Why do you propose a separate bill instead of an amendment? Is there a particular reason for that?

Mr. FRANKEL. As you can tell from our statement, Mr. Chairman, there is no difference in philosophy in terms of what we are trying to achieve and we support what the committee is trying to achieve.

The proposal of a separate bill I think is a technical one. Our feeling is it is more likely to wind its way through the legislative process, and more likely to be finally accepted. And I think the decision was made along those lines rather than a philosophical and conceptual one.

Senator ABOUREZK. You haven't checked with the Parliamentarian about which committee would have jurisdiction over a separate bill?

Mr. FRANKEL. No, we haven't. Mr. Chairman, our feeling is it would be a separate piece of legislation relating to the U.S.-Indian trust responsibility and since the Interior has jurisdiction over S. 2652, it certainly would have jurisdiction over our proposed substitute legislation.

Senator ABOUREZK. It would be drafted that way?

Mr. FRANKEL. It would be drafted that way.

Senator ABOUREZK. What protection would there be for individuals and private members who might want access to tribal financial records? In the event the tribal administration is charged with mismanagement, how would the proposed legislation assist an individual under such circumstances?

Mr. SENECA. Mr. Chairman, in terms of protection this piece of legislation would afford to Indian tribes, it is our feeling that the legislation would also be protective of that tribal government from individuals reaching that information just as a matter of course. We would rely upon the processes of the tribal government to allow an individual member, then, to reach tribal information. Now it seems to me that there are processes that are available if an individual did not receive satisfaction going through the tribal court systems, that the Federal courts could probably be used, then, to reach that information.

It is a matter of concern from the standpoint of the individuals wanting information concerning tribal records and they are a member of that particular tribe. That kind of a situation on the face of it indicates perhaps they ought to be able to get that just by merely asking. However, it seems that if we are initiating a piece of legislation that is to maintain the integrity of that tribal information, that it would also have to be protection from that individual reaching that information just by the mere asking.

Senator ABOUREZK. I understand it would be a pretty delicate matter. There could be individual tribal members who might be, for one reason or another, asked by an oil company to find out what the resource assets were of the tribe. And that is the first thing that comes to my mind, and we want to protect against that sort of thing.

But say there is a legitimate concern by a tribal member of embezzlement by the tribal government, and he wants to obtain information or evidence from the tribal government to spur an investigation by the Justice Department. How would he do that under the proposed legislation and at the same time maintain protection to the information concerning resources? You would have to get into the financial aspect, and if I read your statement correctly, there is an exemption already from financial disclosure. Is that right?

Mr. SENECA. Of some sorts. The statement indicated, Mr. Chairman, in the Bureau of Indian Affairs we keep what are known as "individual Indian money accounts." And as I understand it, those individual

accounts are presently exempted from being reached by information requests.

However, it is a different question when we are talking about the corporate entity of the tribe and their funds that we hold in trust. And so when we talk about the financial records being exempted from the Freedom of Information Act we are saying that it is clear to us that they are exempted with regard to individual Indian rights. However, with regard to the corporate entity of the tribe there is still some question.

Senator ABOUTREZK. So would it be accurate to say that a tribal member could not go to the Government under the Freedom of Information Act and get the Government to disclose what the tribe's assets are but they could under certain court procedures go to the tribe and get disclosure there?

Mr. SENECA. That is right.

Senator ABOUTREZK. Now you gave some examples of the inventories and so on that have been turned over under the Freedom of Information Act that relate to Indian resources. Would you provide more specific examples, if you have them with you?

Mr. SENECA. Mr. Chairman, in the Department of the Interior we have a procedure which we follow under the Freedom of Information Act when a request comes in. If it is our decision to deny that request, then we must run that by the Solicitor's Office for their counsel. And if it does not fit within one of the exemptions of the Freedom of Information Act, then we are directed that as a matter of law from the interpretation the Solicitor's Office gives to the Freedom of Information Act that we must turn the information over.

The water inventories that we have been involved in were conducted on the Lower Colorado River. In addition, information on the Omaha Tribe's land litigation was turned over under the Freedom of Information Act. Those are two examples that come immediately to mind, but we also have done a number of mineral inventories.

Mineral inventories are essentially to assess what is under the land and assist the tribe in making some decisions with regard to development of that resource. It is conceivable that such information, if requested under the Freedom of Information Act, would also have to be turned over. So I can give you two specific examples beyond what is contained in our report.

Senator ABOUTREZK. It would be helpful to the subcommittee when we move forward on this legislation to have specific examples. For example, names of tribes and the exact information requested. And, also, if you know, or if you can estimate, how much income the Indian people have lost through these kinds of actions.

Mr. FRANKEL. We can certainly supply the former, and we will see whether or not we can come up with estimates on the latter.

Senator ABOUTREZK. Now in your statement you refer to release of a water basin study, presumably to a third party interest. Can you elaborate on this one at this time, or is that something you will have to research? I would like to know the name of the third party and the tribe involved if you have it.

Mr. FRANKEL. We will provide that for the record.

Senator ABOUREZK. And would you also provide a similar elaboration for the lawsuit which was filed in the U.S. district court in the district of New Mexico?

Mr. FRANKEL. Yes, sir.

Senator ABOUREZK. And if you have a brief, we would like to have that as well.

Mr. FRANKEL. OK.

Senator ABOUREZK. Or, the briefs of both sides. [See app. I, p. 67, letter of August 18, 1976, from Bureau of Indian Affairs.]

Now when you are confronted with a request under the act concerning Indian natural resources, do you confer with the Department of Justice officials to determine if the request falls under any of the nine exemptions, or is that done by your solicitor?

Mr. SENECA. Mr. Chairman, that is done through the Solicitor's Office within the Department of the Interior. The only time that we would actually be involved in conversation with the Justice Department directly is if we would actually have an item that is in litigation. And under our procedure within the Interior that when we have an issue that is in fact in litigation, those requests come through, then they are referred directly to the Justice Department.

Senator ABOUREZK. All right. Does the Solicitor issue a formal opinion to justify the release of the information?

Mr. SENECA. No, they do not.

Senator ABOUREZK. How are the Indians notified of such a release?

Mr. SENECA. Most often, Mr. Chairman, they are notified either by telephone call or by a memorandum from the Bureau of Indian Affairs indicating that such information has been released pursuant to the Freedom of Information Act.

Senator ABOUREZK. How long have you felt that the enactment of the Freedom of Information Act has compromised your trust responsibility for Indian tribes?

Mr. SENECA. Well, it came to light about a year and a half ago. And approximately a year now that we have had to deal extensively with the Freedom of Information Act requests. Primarily dealing, Mr. Chairman, with those controversial issues of water litigation or land exchange, or those kinds of things.

The impact of Freedom of Information Act requests has essentially created a lot of concern on the part of the American Indian tribes concerned from the standpoint of whether or not they want to get extensively involved with the Bureau of Indian Affairs in developing information. So it has been approximately a year now where this has caused considerable concern among the tribes and within the Bureau of Indian Affairs.

Senator ABOUREZK. I am curious to know why the Department didn't request an exemption earlier.

Mr. SENECA. As far as the Bureau of Indian Affairs is concerned we have been looking toward an exemption and have generated discussions and conversations on this issue from the very, very first. The conversations have been within the Department, within OMB, and now with this committee.

The Indian community and the Bureau of Indian Affairs have been very vocal on the problems of the Freedom of Information Act.

Senator ABOUREZK. Now, when can the committee expect to receive your draft bill?

Mr. FRANKEL. We hope to have a draft bill out of the Bureau in a week. Our indications are we can probably get clearances within another week, and as soon as OMB clears it thereafter, we will be up to the committee. I would hope within 30 days.

Senator ABOUREZK. I would like to know also, to what extent has the Department of the Interior undertaken a systematic program to apprise the tribes of the Freedom of Information Act and its potential impact on release of information concerning their natural resources?

Mr. SENECA. Mr. Chairman, about a year ago information on the impact of the Freedom of Information Act vis-a-vis Indian natural resources was disseminated to our area offices. They also received at that time copies of the procedures with which we deal with the Freedom of Information Act and referred to then with the contact with the Solicitor's Office here in Washington. We are in contact with the Solicitor, and in the field our area directors are in contact with the field solicitors in working out requests under the Freedom of Information Act.

As far as the actual dissemination of information, the tribes and the impact of the Freedom of Information Act to the tribes directly, that has been pretty much left up to the different areas in terms of the program which they would carry out to disseminate such information.

Senator ABOUREZK. To your knowledge, has the act discouraged tribes from free communication with you as a trustee?

Mr. SENECA. Mr. Chairman, on those sensitive issues concerning natural resources and contemplation of litigation, yes.

Senator ABOUREZK. Now should the tribe have a right to consent to the divulging of such information?

Mr. SENECA. As a conceptual matter and as a philosophical proposition, the tribes are the real parties in interest in any one of these issues. It is their natural resource which we hold in trust for them, and as a philosophical matter, yes, they should have that right.

Mr. FRANKEL. Let me add something here, Mr. Chairman. As I said in my opening statement, what we have here is an unfortunate reversal of the real intent of the Freedom of Information Act. That act was intended to improve the way the Government serves its recipients by having a more open decisionmaking process.

In effect, because of the Bureau's uniqueness, our trust relationship with the Indian people, what we have done is decrease the Bureau's effectiveness to serve as trustee for Indian people. And actually we have worked to improve the manner in which we deliver services to the Indian tribes. I think that is the way the framers of the Freedom of Information Act intended the act to work, and it is only because of our unique relationship with the Indian tribes that it has occurred this way.

We feel very strongly that philosophically we can remedy it at this point.

Mr. GERARD. Staff has a question they would like to pose to the Department of the Interior. Assuming that the Department has contracted with a tribe under the Buy Indian Act, say, to undertake a land classification study and, upon completion of the study a private developer decided he wanted access to that information, and requested it pursuant to the Freedom of Information Act; the question would be who is legally entitled to maintain that information, the tribe or the Department? And, would it be subject to release pursuant to the Freedom of Information Act?

Mr. SENECA. As to the contract with the tribe, at some point there comes a conclusion of that contract, and there has to be a receivable. And at the point that the contract is concluded and final reports are written and submitted by the contractor, that is, the tribe and whoever they sub out to. In fact, it does become at that point a Government document and when it becomes a Government document, it can be reached under the Freedom of Information Act.

As a general proposition, during the time that the contract is being performed, the information has not been reachable under the Freedom of Information Act primarily because it is not available and it is usually in its preliminary form. The bottom line being at that point, it is not a Government document.

Mr. GERARD. One final question. Assuming the tribe was attempting to secure information from another governmental agency beyond Interior under the Freedom of Information Act, would the trustee provide any assistance to that tribe in securing such information?

Mr. SENECA. In carrying out our trust responsibility, if that information had something to do with that trust and it was important to the tribe that it receive that in order to improve its decisionmaking process, it seems only consistent with our trust responsibility that we assist the tribe when necessary to receive all of the information. And that would include assisting the tribe working with another governmental agency in securing that information.

Mr. GERARD. Are you familiar with the Nisqually Tribe's efforts to obtain information from the Department of Defense?

Mr. SENECA. Yes; we are.

Mr. GERARD. Has the trustee assisted them in that particular request?

Mr. SENECA. Yes; we have.

Mr. GERARD. What is the status of it?

Mr. SENECA. The most recent action that has been going on, two staff people from my immediate office along with individuals from the Portland area office have met with the chairwoman of that reservation and have devised a strategy, or action plan if you will, in moving that issue forward.

I don't have the particulars of that with me at the present time, but would supply that.

Mr. GERARD. We would appreciate it. Thank you, Mr. Chairman. [The information was not received in time to be included in the record.]

Senator ABOUREZK. Thank you all for your appearance here this morning.

[The prepared statement of Mr. Frankel follows:]

STATEMENT OF HON. HARLEY M. FRANKEL, DEPUTY COMMISSIONER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the subcommittee, S. 2652 would exempt from provisions of the Freedom of Information Act "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof." This exemption would become paragraph (10) of 5 U.S.C. 552(b), as an addition to the nine categories of subject matter now listed in that section to which the disclosure requirements do not apply.

As indicated in our report on S. 2652, instead of an amendment to the Freedom of Information Act, we recommend enactment of separate statutory authority providing a special limited exception to the FOI Act similar to that proposed in the bill. We expect to submit a revised bill to the Committee very soon.

We believe that such an exemption is necessary to preserve the fiduciary relationship of the United States to Indian people. The Bureau of Indian Affairs is the agency charged with discharging the nation's trust responsibility to its Indian tribes, and this agency may not be able to obey the mandate of the Freedom of Information Act (without this exemption) and at the same time faithfully perform the obligations of its trust to Indians. In essence, we have been placed in the position of being required by law to violate the confidential relationship which we have with Indian tribes and individuals. Indeed, such violations may give rise to claims by tribes or individual Indians against the Federal Government. As to this possibility, it should be noted that the United States Supreme Court has said that the United States in its dealings with Indian tribes—

"* * * has charged itself with moral obligations of the responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942).

As the agency charged with carrying out the nation's trust responsibility to Indian tribes, the Bureau of Indian Affairs must oversee, supervise, and administer the programs by which the Indian tribes can develop their natural resources and their reservation and tribal economies. As one means of carrying out this function, the BIA is presently engaged in a series of inventories of natural resources and minerals deposits on Indian lands. The Bureau is often beset by requests for copies of these inventories by interested parties, sometimes by the very companies who will compete for the opportunity to develop these resources. Presently, the Bureau is required to disclose the results of these inventories under formal FOIA requests.

Disclosure of reports such as these clearly places the tribes in a disadvantageous position in negotiating with companies for the development of these resources. In fact, many tribes in the past have depended largely upon bonus payments paid by these companies for the right to conduct exploration for these minerals. With much of the work done for them, and with access to detailed information concerning mineral deposits, these companies will not be willing to compete with each other and to pay large bonuses for exploration and prospecting permits. On the other hand, prudent management of these resources requires that the Bureau and the tribes inform themselves of the location and extent of these resources. Many tribes, however, are seriously discouraged by the fact that information developed may be disclosed by the Bureau upon request of other parties who have pecuniary interests adverse to those of the tribes. Surely, the purposes of this law are not served when it redounds to the benefit of already profitable commercial entities at the expense of the nation's impecunious Indian wards, whom the government has pledged to protect from such exploitation.

Another area in which the Freedom of Information Act works to the detriment of Indian tribes and seriously compromises the trust relationship is that of water rights. The right of Indian tribes to water arising upon, bordering, or traversing their reservations in sufficient quantity to irrigate all the "practically irrigable" acreage of their reservations is well established. *Winters v. United States*, 207 U.S. 546 (1908); *Arizona v. California*, 373 U.S. 564 (1963). In order to protect these rights to precious water in the arid West, the tribes and the BIA must engage in extensive and expensive soil classification surveys, water availability studies, agricultural economics analyses, and reservation development plans. These efforts are required as preliminary measures to determine the tribes' entitlements to water. And, when these studies are complete, lengthy and expensive litigation usually must follow to adjudicate these rights.

At present, in several of the large river basins, industries are busily securing option contracts for the use of water from state and federal agencies, and they may now demand access to the detailed plans of the Indian tribes within these river basins even though these documents may well be necessary for the tribes to develop their litigation strategy and posture at a later time. In at least one instance, the Bureau was required to release such a report, over the vigorous objection of the tribe involved. In another case, the Department refused to release such a report, and a lawsuit has been filed in the Federal District Court for the District of New Mexico over this very issue. Even though these requests are handled on an individual basis within the Department, when the Solicitor's office determines that a request cannot properly be fitted within one of the nine existing exemptions, the result is that the Bureau of Indian Affairs must pit itself against the interests of the very group it exists to serve and protect.

The claims of the Indian tribes in these instances are compelling. They claim that the Bureau of Indian Affairs exists to serve them and to protect them in the enjoyment of their property. In the above instance in which disclosure was required, the tribe felt that the study was inaccurate in several respects and highly prejudicial to their claims to water rights, and that their trustee acted against their interests in providing to future opposing litigants a highly expensive bit of evidence which the tribe would have to refute in court. Under the present law, however, the Bureau felt it had no choice.

There are many other areas in which the Freedom of Information Act could have seriously damaging effects upon the trust relationship of the United States with its Indian tribes. The Bureau, for instance, administers some 100 million acres of Indian trust land, much of which is under lease for grazing or agricultural purposes. In order to insure a proper return to the Indian landowners of this land, it must be appraised and offered for bid. If the non-Indian ranching and agricultural interests who profit from the use of this land can demand access to land ownership records and appraisals, they will be at an enormous advantage in negotiating and bidding for use of this land. In short, without an exemption such as the one proposed by S. 2652, the Indian tribes generally will be denied the opportunity to engage in the type of arm's length transactions that characterize free enterprise and honest commercial dealing.

It has been suggested that the various exemptions already existing provide ample protection against the evils suggested herein. The fourth exemption, 5 U.S.C. 552(b)(4), concerning financial information obtained from a person and privileged or confidential, does provide some degree of protection when the information is clearly financial and is clearly privileged. Information of any type may well produce financial rewards in the right hands, however. It is for this reason that we strongly support legislation which would exempt information, whether clearly financial or not, regarding the natural resources or other assets of Indian tribes and individuals.

It should be noted, in the context of the fourth exemption, that there are criminal penalties provided in 18 U.S.C. 1905 for an employee of the United States making known information coming to him in the course of his federal employment which concerns "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" or who "permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law". In addition to a fine of not more than \$1,000 or imprisonment of not more than one year, a violator of this section "shall be removed from office or employment". Divulging information relating to Indian assets may violate one or more of these provisions and subject the federal employee involved to the penalties provided. Our substitute bill would make it clear that divulging information relating to Indian resources and assets is not authorized by law and that federal employees would divulge such information only under the peril of being prosecuted and punished under 18 U.S.C. 1905.

It has also been suggested that protection is provided by the 5th exemption concerning inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency. This may sometimes provide a degree of protection, especially in the working draft stages of inventories, reports, and other policy or planning developments. This, too, however, is but an unclear and inconclusive prospect, and it invites continuous appeals and litigation.

It has further been suggested that the 9th exemption, which exempts geophysical and geological information concerning wells, should protect against mandatory disclosure of water resource studies. This is by no means clear, and there is disagreement as to the scope of this exemption, as well as the other two exemptions mentioned above.

In short, while each of these exemptions offers some limited possibility of protection, none of them addresses the problem which the Bureau of Indian Affairs faces in this matter. We strongly believe that Government officials should not have to attempt to resolve a potential conflict between the spirit and purpose of one law and their responsibilities under another.

Failure to provide such an exemption would result in the continued confusion in the mind of the public in the eyes of the law between the national governmental responsibility to the American public and the nation's fiduciary responsibility as trustee of the private resources of Indian tribes.

This concludes my prepared statement. I would be pleased to respond to any questions that you might have.

Senator ABOUREZK. I would like the next panel of witnesses to come forward. Mr. Delfin J. Lovato, chairman, All Indian Pueblo Council; Mr. Roland Johnson, Governor of the Laguna Pueblo; Wendell Chino, president, Mescalero Apache Tribal Council and president, National Tribal Chairmen's Association, and Mr. James Martinez, Governor, San Ildefonso Pueblo.

I would like to welcome all of you to the subcommittee hearings. Del, are you going to chair the panel?

STATEMENT OF DELFIN J. LOVATO, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL

Mr. LOVATO. I will start off, Mr. Chairman. Before I do, I would like introduce members of the Pueblo delegation with me here.

I would like to introduce, to my left, Gov. Roland Johnson of Laguna Pueblo, Gov. James Martinez, and also Gov. Henry Esquibel of San Felipe, who is sitting in the audience there.

Mr. Chairman, the All Indian Pueblo Council has been looking into the matter of the Freedom of Information Act for approximately 2½ years. And at our request, Senator Pete Domenici introduced S. 2652.

Basically, Mr. Chairman, we are here in support of the legislation, of course. I think our basic reasons stem from the standpoint of the tribal sovereignty and the trust responsibility as they pertain to the trust relationship between the Federal Government and the Indian tribes. I think because of the trust relationship the Federal Government has a responsibility to protect and act in the best interests of the Indian tribes in all matters having to do with the assets or the resources of the Indian people.

I think the Freedom of Information Act in more recent months has been used to the detriment of the Indian tribes in several instances. I think from the standpoint of litigation the Justice Department having the responsibility to act as the private attorney for the Indian people is subject to releasing information, documents, studies relevant to the Indian tribes' assets and resources. This information would not otherwise be available to the adversaries, be it the State agencies or private individuals, under these normal rules of discovery and evidence.

I think as such the best interests of the Indian tribes has most often not been protected. Second, from the standpoint of commercial and industrial development many of the mineral studies that have been done, many of the land use studies, many of the financial records, and

other resources that the Indian tribes are seeking to develop and have done tremendous research in are again subject to the same exposure or dissemination without the consent of the tribes through the use of the Freedom of Information Act. And, of course, this works to the disadvantage of the Indian tribes.

I think, basically, Mr. Chairman, we are asking that S. 2652, or legislation to that effect, be passed so that the trust relationship between the Federal Government and the Indian tribes can be strengthened, reinforced, and maintained.

I would like to also comment, Mr. Chairman, on two points which were raised earlier. One has to do with the concern as to the information that a tribal member might request from the tribe itself.

I think you are aware, Mr. Chairman, that the Indian tribes across the country are faced with many difficulties right now in regards to civil rights actions that have been brought against them. Many of them based on the same basic principle, where individual tribal members are either wanting certain information or wanting certain actions changed that have been taken by the tribal government and tribal councils.

We strongly feel that this is not at issue in this particular legislation. We also strongly feel that these type of matters are internal matters, and there are procedures within the respective tribal councils to handle this type of situation.

In the Pueblo countries, at least this is the situation. I think with that, Mr. Chairman, I would like to give the other members of the panel an opportunity to present their views.

Senator ABOUREZK. Del, before you go on to the other witnesses, I would like to discuss the issue of individual tribal members' access to records of the tribe itself.

What concerns me about withholding information from tribal members is that there have been some occasions of corruption by tribal governments. Thank God, it has never happened out at the Pueblo. I think your people have got probably as good a government setup as anywhere in the country, or the world for that matter. But it is a matter of concern to me, having witnessed some actual cases of corruption on the part of tribal chairmen and councils, and the laxity of tribal councils in defending the interests of people they represent. I don't want to be party to any action that would shut off the ability of a tribal member to challenge what his government is doing. We have had enough problems here in the Federal Government with bureaucrats and Government officials stonewalling a request of Senators, Congressmen, and private citizens, and we don't want that to continue in tribal government if we have the ability to stop it.

And since Congress does have the ability, I don't want to become a party to that. That is why I raise the question. I guess one of the hazards of being in an elected office is that you are always subject to scrutiny by the public. All of us should be. And we don't want to try to prevent that scrutiny from happening.

Now, you probably don't disagree with that concept of it, either. I would think you wouldn't.

Mr. LOVATO. To some extent, I do.

[The prepared statement of Mr. Lovato follows:]

STATEMENT OF DELFIN J. LOVATO, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL

My name is Delfin Lovato, I am chairman of the All Indian Pueblo Council. With me is the Governor from Laguna Pueblo, Roland Johnson; the Governor from San Felipe Pueblo, Henry Esquibel; and the Governor of San Ildefonso Pueblo, James Martinez. Also accompanying me is the secretary/treasurer of the All-Indian Pueblo Council, Frank Tenorio.

The All-Indian Pueblo Council strongly supports S. 2652 which was introduced on our behalf by Senator Pete Domenici of New Mexico. This legislation would amend the Freedom of Information Act to protect the Indian people from an intrusion into their own affairs and dangerously erode the trust relationship between the United States Government and the Indian people.

No doubt the Freedom of Information Act, 5 U.S.C. 552, was well-intended by its proponents. No one could argue that removal of much of the secrecy in Government and the unreasonable restrictions placed by many agencies of the Government was beneficial to all American citizens. As is frequently the case, a major decision was made, affecting all governmental agencies, and no consideration whatever was given to American Indians. The result has been most dangerous, and the result must be reversed if the American Government is to keep faith with the Indian people.

The most dramatic example of the abuse which has resulted from the Freedom of Information Act is in litigation. Indian tribes throughout the United States, and particularly, it seems, in New Mexico, are beleaguered in court battles. States and others are challenging the rights of the Indian people to their land and water and sovereignty. This has worsened considerably because our adversaries in litigation may utilize the Freedom of Information Act to acquire information most damaging to the Indian cause, which information would not be obtainable under the normal rules of court, either under the rules of evidence or rules of discovery. The Indian litigant, on the other hand, does not have a similar device to obtain such information from its adversary. A case in point need not be hypothecated: it exists. In the case of *State of New Mexico, ex rel, S. E. Reynolds, State Engineer, v. Thomas S. Kleppe, Secretary of Interior, et al.*, Civil No. 75-684 M. in the United States district court for the district of New Mexico, this precise point is at issue. As you doubtlessly know, in the *Aamodt* case, the State engineer of New Mexico is challenging the long-standing water right priority belonging to Indians. The State is seeking to obtain certain water studies conducted on behalf of the certain Indian tribes, most of whom are presently involved in litigation. This information clearly would not be discoverable under the present judicial rules. While there is no present indication as to how this case will be decided ultimately, the plain fact is that in the exceptions to the act, none fit the unique problems of the Indians. The only answer is for the legislation you propose to be passed and to lay this difficulty to rest forever. The All-Indian Pueblo Council, incidentally, is an *amicus curiae* in this case, and we are urging that there is sufficient discretionary latitude in the court to favor the Indian litigants, even though there are no specific words in the statute that affects them. Even if the Indian people prevail in this case, the problem will exist, absent remedial legislation.

In addition to problems arising from litigation, there are also the everyday relationships between the Indian community and the United States. The Indian community is belatedly emerging in today's world of business and commerce and true self-determination is being realized. We must, however, have the continuing aid to the Bureau of Indian Affairs and other such agencies to provide information to best assess the economic value of business opportunities, be they mineral leases, land leases, commercial ventures, or whatever. As these agencies gather information, under the present law, persons with whom we are dealing can immediately gain access to this, and our bargaining position is eroded. It is indeed paradoxical that by virtue of the guardian-ward and trustee relationship which should represent a continuing "solicitude" by the Government on behalf of the Indian people, and protect Indian rights, has a reverse effect in that the bargaining position of Indians is worsened instead of made better. Countless examples could be given but the point is manifestly apparent.

The trust responsibility of the U.S. Government cannot continue to exist unless S. 2652 is passed into law. I, as well as all of the Governors of the nineteen Pueblos of New Mexico, urge the passage of this legislation at the earliest possible moment.

Senator ABDOUREZK. All right. Who is next?

**STATEMENT OF HON. ROLAND JOHNSON, GOVERNOR, LAGUNA
PUEBLO, ACCOMPANIED BY RICHARD SCHIFTER, COUNSEL**

Mr. JOHNSON. Mr. Chairman, my name is Roland Johnson. I am the governor of the Pueblo Laguna Indian community located in the State of New Mexico. I also have with me Mr. Richard Schifter, who is our local tribal attorney. And I would like Mr. Schifter, with your permission, to have an opportunity to give some of his legal points of view relative to the matter being discussed today.

Mr. Chairman, I am pleased to have this opportunity to testify in support of S. 2652. Let me emphasize at the outset that S. 2652 is a bill which is intended to change the existing law. It is a bill which is intended to clarify the existing law. The law with which we are dealing here is the Freedom of Information Act which was passed by Congress about 10 years ago.

As you well know, the intention of the Congress in passing the Freedom of Information Act was to open up for public inspection the records of the Government which deal with the public's business. The late Senator Dirksen once explained that the Freedom of Information Act would provide "the means by which the people of this country can become informed and thus be able to scrutinize the activities and operation of the Government." In the House of Representatives it was pointed out that the new law had to be passed because some "agency and department heads enjoyed a sort of personal ownership of news about their units."

Congressman Moss explained the purpose of the bill in this way: "We must remove any barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship."

What is clear from all that I have quoted so far is that the purpose of the Freedom of Information Act was to make sure that there would be available to the average citizen the documents which deal with the Government's activities in its capacity as a servant of the general public.

Most of the work done by the Government is work done by it as a servant of the general public. But there is one exception, and it is clear that when the Congress passed the Freedom of Information Act it did not give much thought to that exception. The Government of the United States also acts as trustee for Indian tribes. When the Government takes action in its trustee capacity it does not render a service to the general public, it renders a service to the specific Indian tribe for which it is trustee.

In discharging its obligations to Indian tribes, the Government often assembles information concerning the assets of those Indian tribes. That information would not be assembled if it were not for the Government's role as trustee. Similar information held by a non-Indian landowner would be considered private and confidential.

We don't believe that the Congress intended to put Indian property at a disadvantage against non-Indian property. It is for that reason that we believe that documents and other information collected by the Government in its capacity as trustee was not intended to be made available to the general public under the Freedom of Information Act.

The point which we are making is simply that, as the quotations from Senator Dirksen and Congressman Moss indicate, the kind of information which the Freedom of Information Act was supposed to make public is general information about governmental affairs which would make it possible for persons to do a better job of "responsible citizenship."

But I am sure you will agree, Mr. Chairman, that no one is helped to be a more responsible citizen if he gets material about someone else's private affairs. Private landowners consider information about their mineral and water resources their private business. As far as Indian tribes are concerned, such information should be a matter between the Government, as trustee, and the Indian tribe, as beneficiary of the trust. No one else should be allowed to stick his nose into the matter.

The issue with which we are here dealing is not just an issue of principle, of theory. It is also an issue of important, practical significance. As the Federal Trade Commission staff report entitled "Mineral Leasing on Indian Lands," dated October 1975 pointed out, Indian tribes often lack sound geological information about their lands.

The report found that this lack of data put Indian tribes at a serious competitive disadvantage in evaluating bids and making sound business judgments on mineral leases, and was, therefore, the single greatest impediment to the negotiation of more profitable leasing arrangements by Indian tribes.

There is one other crucial point which should be noted here. Some Indian tribes may be in a position of hiring private consultants to be paid out of tribal funds. The work product of these consultants can be kept confidential. But the poorer tribes who would depend on Government research, or Government-funded research would be the ones whose reports would be released to the general public.

As you can see, the situation is bad enough as it is, with our often not knowing enough about the value of our own resources. But at the present time the other side at the bargaining table does not know how much or how little we know. Please consider how much worse off we would be if the potential lessees were fully aware of how limited our knowledge is as to our own resources.

As I have said, when the Congress passed the Freedom of Information Act it probably did not even think of information concerning the assets of Indian tribes. If Congress had given thought to this issue, such information would surely have been expressly exempted from the coverage of the act.

Given the basic trust relationship of the Government with Indian tribes and the congressional intention in passing the Freedom of Information Act, we believe that exemption 4, which provides that the Freedom of Information Act does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential" should be interpreted to exempt from the Freedom of Information Act all documents stemming from the trust relationship. We believe that this is a reasonable interpretation of the law, but unfortunately the Department of the Interior has not agreed with us.

It has, so far, not taken the position which we would like it to take; namely, that all data collected by the Government as trustee is privileged. This is the reason why we asked Senator Domenici to introduce S. 2652.

A concrete example of our problem is the case of *State of New Mexico v. Kleppe*, a case which has been filed by the New Mexico State engineer against the Secretary of the Interior, and which is now pending in the U.S. District Court for the District of New Mexico.

The State asked for studies or reports collected and completed by the Geological Survey since 1970 on various Indian lands in the State of New Mexico.

The Department of the Interior furnished some of the information and refused other information. But even where the information was refused, it was not refused on the basis of exemption 4, which would cover all material collected by the Government as trustee. It was refused on the basis of exemption 5, which allows interagency or intra-agency memorandums or letters which would not be available by law to be withheld.

It is quite possible that the Department of the Interior will win the case of *New Mexico v. Kleppe*. Even if it does, the Department might continue to take the position that it will withhold only some but not all the records it holds in the capacity of trustee.

Since the case of *State of New Mexico v. Kleppe* was filed, the State has made demand, under the Freedom of Information Act, for the release by the Geological Survey of data on the water resources of my Pueblo. No reason was given as to what this information was needed for. It was simply a demand for the data.

We could, of course, bring suit against the Department of Interior, arguing that it should construe exemption 4 in the same way that we construe it, and thus turn down all such requests.

However, that will take time and will be expensive. The issue which will be the subject of such a suit will be to get the courts to decide what it is that Congress intended to do with regard to Indian records when it passed the Freedom of Information Act in 1966 and 1967.

A much simpler and much less costly procedure, both for the Indian tribes and for the Government, would be for the Congress to clarify its intention. We assume, as I have already said, that the Congress never intended to make essentially private information on Indian tribal resources available to the general public. That is why we hope that you will agree to pass S. 2652.

Senator ABOUREZK. Thank you very much.

STATEMENT OF HON. JAMES MARTINEZ, GOVERNOR, SAN ILDEFONSO PUEBLO

Mr. MARTINEZ. Mr. Chairman, my name is James Martinez, Governor for the San Ildefonso Pueblo, N. Mex. I would like to summarize my statement. However, I would like the written portion introduced for the record.

Senator ABOUREZK. It will be admitted.

Mr. MARTINEZ. Thank you for allowing me to testify in favor of S. 2652 which would amend the Freedom of Information Act to exempt

from disclosure information in the hands of Federal agencies pertaining to natural resources of Indian lands.

This legislation is vitally needed if Indian tribes are to protect or develop their natural resources. The land is our land, and in the interest of the United States to act as trustee for our benefit.

These are not public lands of the United States, held by the United States for the benefit of the public in general but are our lands held for our benefit. Therefore, for all purposes, these are our private lands subject to a trust.

The United States acting as trustee spends Federal moneys to help us protect and develop our lands and resources. Some of these moneys are spent on reports which identify and quantify our valuable water rights, timber, mineral, and other resources. Much of this information is extremely valuable to us. It helps us to make the choice of developing our resources and valuing what kind of development we should make.

If this information is made available to third parties without our consent by reason of the Freedom of Information Act, the Federal Government will have violated its trust to us.

Also, in many cases any negotiation involving our resources will have an advantage of having advanced notice. Mr. Chairman, my letter to Senator Domenici sets forth our position in more of an in-depth detail. And at this time I would like to also introduce for the record a copy of a letter to Mr. Domenici.

Senator ABOUREZK. That will be admitted. Thank you.

Mr. MARTINEZ. Thank you.

[The prepared statement of Mr. Martinez and accompanying letter follows:]

STATEMENT OF HON. JAMES R. MARTINEZ, GOVERNOR, SAN ILDEFONSO PUEBLO

Thank you for allowing me to testify in favor of S. 2652 which would amend the Freedom of Information Act to exempt from disclosure information in the hands of Federal agencies pertaining to natural resources of Indian lands.

This legislation is vitally needed if Indian tribes are to protect or develop their natural resources. The title to Indian land generally falls into two categories. These are:

1. Land where the U.S.A. holds title as trustee for the tribe.
2. Land owned by the tribe but which cannot be sold because sale is prohibited by Federal law.

In both instances, the land is our land and the interest of the United States is to act as trustee for our benefit. San Ildefonso has land in both categories. The Pueblo has title to the San Ildefonso grant. We also have land held by the U.S.A. in trust. Both categories of land are subject to the Federal laws pertaining to Indian lands. These are *not* public lands of the United States held by the United States for benefit of the public generally, but are our lands held for our benefit. Therefore, for all purposes, these are *our* private lands subject to a trust.

The United States, acting as trustee, spends Federal monies to help us protect and develop our lands and resources. Some of these monies are spent on reports which identify, qualify, or value water rights, minerals, timber and other resources. Much of this information is extremely valuable to us. It helps us to make the choice of developing our resources and valuing what kind of development we should make. If this information is made available to third parties, without our consent, by reason of the Freedom of Information Act, the Federal Government will have violated its trust to us. Also, in many cases, the other side to any negotiation involving our resources will have an advantage in having advance knowledge of this information.

My letter to Senator Domenici sets forth our position in detail.

SANTA FE, N. MEX., May 12, 1976.

Hon. PETE V. DOMENICI,
U.S. Senator,
Dirksen Building,
Washington, D.C.

DEAR SENATOR DOMENICI: On behalf of the Pueblo of San Ildefonso, I wish to express the support of the Pueblo for the enactment of S. 2652 into law. We are pleased that you took the lead to introduce legislation which will, if enacted, protect privileged information regarding Indian lands from being disclosed to third parties without our consent.

At the present time, the Freedom of Information Act (5 U.S.C., Sec. 552) contains no provision which specifically excludes information in the hands of Federal agencies, relating to Indian lands, from being disclosed. S. 2652, if enacted into law, would close this gap in the law.

The present disclosure provisions in Sec. 552(b) can cause serious problems to Indian Tribes in defending the integrity of Indian natural resources or being able to develop these resources in an orderly and profitable manner.

Let me give you an example of the problem: A tribe decides to lease a mineral resource such as coal, oil or uranium. This leasing decision is based upon a technical study of the availability of such resource on tribal lands, performed by a consultant firm under contract with the Bureau of Indian Affairs to perform the study. The lands involved in any such study are not public lands of the United States, but lands held in trust by the United States for the Tribe (or, in some instances, lands owned by the Tribes subject to restraints on alienation imposed by Federal law). Monies derived from the development of natural resources on, in or under these lands belong to the Tribe. In essence, then, this study is made for the benefit of, and relates to private lands of the Indians under the Trusteeship of the United States. Money for the study is provided by the BIA in its trust capacity.

After the study is completed and the development decision is made, the negotiations for leasing commence and the prospective lessee or lessees make demand of the BIA for release of the study to them. The findings in this study might be of great value to the potential lessees in determining which areas to lease and which areas not to lease and what lease terms are favorable to the lessee. Under 5 U.S.C., Sec. 552 as it now stands, the BIA official with a copy of the study would have to release it to the potential lessees without any consent from the Tribe for its release. Such a study, if funded by the Tribe from non-Federal sources or, if funded by any private landowner for himself would clearly be confidential information available to third parties only upon consent of the landowner. Therefore, the Freedom of Information Act, as applied to this situation, violates the confidentiality of the information.

It is the duty of the BIA, acting as trustee, to work with the Tribes in obtaining the most favorable lease terms in the circumstances. The release of confidential information can seriously impair this responsibility and weaken the bargaining position of the Tribe.

Another situation facing the Tribes is the effect of the Act upon litigation in which a Tribe may be involved. This is of particular importance in water rights adjudications and other litigation involving natural resources. Here again, much technical data, and the interpretation thereof, is necessary to properly prepare the case for the Indians. Obtaining this data and its interpretation is expensive. It must be Federally-funded. Before the results are ready for submittal to the Court as evidence, the data and interpretation must be worked and reworked over and over again; a number of preliminary drafts can be done from which the final work product is produced. The work is done in conjunction with Tribal and Federal attorneys and usually at their request and under their direction.

Under the rules of discovery as announced in the Federal Rules of Civil Procedure and the accepted rule that an attorneys work product is not subject to discovery by the opposing side to litigation, the data and preliminary work referred to above is not subject to discovery. Yet, if the Freedom of Information Act is to be invoked successfully in such situations, the opposition will be able to obtain the same, even though not discoverable under the rules applicable to civil sections.

In summary, Indian Tribes cannot properly protect their natural resources and the Federal government cannot perform its trust responsibility to the Tribes unless Section 522(b) is amended by the enactment of S. 2652 into law.

Would you please have this letter made a part of the record at the Senate Committee hearings on S. 2652, scheduled for May 17, 1976.

Respectfully,

JAMES R. MARTINEZ, *Governor.*

**STATEMENT OF WENDELL CHINO, PRESIDENT OF THE MESCALERO
APACHE TRIBE AND THE NATIONAL TRIBAL CHAIRMEN'S
ASSOCIATION**

Mr. CHINO. Mr. Chairman, as president of NTCA I would like to submit a statement regarding the proposed legislation, and to be more specific, I would like to read a statement as president of the Mescalero Apache Tribe.

I want to thank this committee for the opportunity to testify on Senate bill S. 2652 in behalf of the Mescalero Apache Tribe.

The Indian tribes have a unique relationship with the Government of the United States. On the one hand, Indian tribes retain substantial independence and sovereignty as semi-independent nations.

On the other hand, Indian land is held in trust by the United States and the United States has a trust obligation to Indian tribes. In carrying out the Government's trust obligations toward these tribes, certain governmental agencies of the United States with and for the tribes collect certain information and technical data which may be relevant to the development and preservation of Indian resources. This information is compiled on behalf of the tribe, and can truly be said to be information belonging to the tribe. It is held in trust by the U.S. Government. This private information of an Indian tribe is not for public disclosure.

Since passage of the Freedom of Information Act, a serious question has arisen. The question is whether the terms of the act, requiring virtually complete disclosure of every nonexempt item of information held by the Federal Government, requires disclosure of information held in trust for Indian tribes?

The act contains certain limited exemptions from the disclosure requirement, but there is no exemption provided for information concerning Indian tribes and their resources. As a result, perennial enemies of tribal interests, such as the States, have attempted to use the Freedom of Information Act to obtain information concerning tribal resources which they could not otherwise obtain.

As an example of what we are talking about, experts are often retained by Indian tribes to compile data for water resources inventory on Indian reservations. Under the Federal rules of civil procedure, if there is no present action pending to which such information is relevant, the State cannot obtain such information at all.

Once a lawsuit is filed a party has a right to retain experts of their choice to compile information for use in the litigation. Only under very rare circumstances can the opposing party obtain the facts and information from the adverse expert except immediately prior to trial.

The reason for this is that one party pays the expert to conduct costly studies and the other party should not be permitted to attempt to capitalize on this investment at no cost to him. Under the Freedom of Information Act, however, the State has made application for, and actually received, documents from Government departments—

for example: USGS—prepared at the request of Indian tribes with Indian funds—BIA. On some occasions, this information has been received by the States prior to being made available to the tribe's own attorneys.

A present pending case in which a State is attempting to obtain information concerning tribal water resources is *State of New Mexico v. Thomas S. Kleppe, Secretary of the Interior*. The State is seeking to obtain copies of Geological Survey hydrographic data, studies or reports collected or completed by the Geological Survey since 1970 on lands within the Pueblo of Nambe, Pojoaque, San Ildefonso, Tesuque and Taos, and the Jicarilla Apache, Mescalero Apache, and Navajo Reservations within the State of New Mexico.

If this request is granted, and it appears that it will, information compiled for the individual case of virtually every Indian tribe in New Mexico will become public information.

Nor is it only the States that we must fear. As Indian tribes move more and more into the mainstream of American economic life, they will deal more with private corporations.

In passing, may I state that corporations do not disclose their corporation information, for reasons of sound economic and competitive purposes.

The Indian tribes cannot ask the corporations to reveal all relevant information pertaining to an economic project, but the corporation can procure information concerning the Indian tribe under the Freedom of Information Act.

An example would be if the tribe attempts to negotiate the best price possible for the sale of its timber resources; a private corporation could obtain the appraisal done by the BIA experts on behalf of the tribe. This would put the tribe at a serious competitive disadvantage.

In summary, as the Freedom of Information Act now reads, it poses a grave threat to privacy of every Indian tribe in the country. In effect, confidential information for the use of the tribe only, is easily available to the general public. For this reason, every Indian tribe in America would support Senator Domenici's bill, S. 2652, amending the Freedom of Information Act to create an exemption for information held by the United States in connection with trust responsibilities toward Indian tribes. Only in this way can we protect our reservations and our people from abuse under the present law which is grossly unjust as it applies to Indian people.

We respectfully request that this committee support the proposed amendment under S. 2652. Thank you very much.

Senator ABOUREZK. Thank you. I wonder if any member of this panel of witnesses might have concrete examples you would be able to provide the committee of how disclosure under the Freedom of Information Act has injured the interest of any of the tribes?

If you don't have that with you, perhaps you could submit the information for the record. It would be helpful in moving this legislation through the committee and onto the floor of the Senate.

Mr. LOVATO. Mr. Chairman, there are a number of pueblos, as you know, that are located on the outskirts of a city such as Albuquerque. These tribes are looking into the possibility of commercial and industrial development. They are looking into development of their

land for other purposes, from housing to establishing their own business enterprises and developing their other resources.

There is a movement right now in the State of New Mexico, on the part of the State, on the part of many a private interest group who are looking at ways and means, or are trying to find out how the tribes are intending to use their land base, for one.

There are other smaller communities who are at the present time involved in complicated tax discussions with individual tribal members involving the development of their resources.

Obviously, these people are looking toward the Federal Government—in this case, the Bureau of Indian Affairs—to obtain much of this information. The Council, the All-Indian Pueblo Council, is presently involved with working with many of the tribes in developing taxing ordinances, developing other means by which we hope to protect this type of information from private individuals, and in many cases, State agencies which are looking to gain a foothold in our reservations.

I think more specific examples can be made available in working with the BIA.

Senator ABOUREZK. That is what we would like to have at this point. I can understand the potential threat and the interest of tribes in the disclosure of natural resource information, and it would also, as I said, be very helpful to have past examples that we would be able to point to.

I want to thank all of you for appearing here this morning. We appreciate your testimony.

[The statement of the National Tribal Chairmen's Association submitted by Mr. Chino follows:]

STATEMENT OF WENDELL CHINO, PRESIDENT, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am Wendell Chino, President of the National Tribal Chairmen's Association and President of the Mescalero Apache Tribe of New Mexico. I appear today to express our support for S. 2652—an amendment to the Freedom of Information Act offered by Senator Pete Domenici of New Mexico. This amendment would exempt from the public disclosure requirements of that Act "information held by a Federal agency as trustee regarding the natural resources or other assets of Indian tribes, or bands, or groups or individual members thereof."

This amendment must be passed and enacted.

We certainly have no quarrel with the basic thrust of the Freedom of Information Act. We realize the necessity of ensuring broader access by the general public to government documents and records. But Congress has recognized that a rule of blanket disclosure would be destructive of vital public and private interests. Thus, the Act requires that government documents be made available upon request unless they fall within one of nine exceptions, each designed to foster specific interests regarded as superior to the need for disclosure.

This amendment would create a tenth exception absolutely necessary to the continued protection of the confidentiality of Indian natural resource data, and, in our view, to the good faith performance of the federal government's trust responsibility to Indian tribes.

Time and again Congress, the federal courts, and the Executive branch have recognized the existence of the unique trust relationship between the United States and Indian tribes. For our part, we are committed to the fulfillment of the principles embodied in that concept. There is a great potential in this relationship for the realization of Indian aspirations and the development of the well-being of Indian people, if there is cooperation between us, pursued in the spirit of self-determination. But cooperation, self-determination, self-realization are not

possible without free and open communication, debate, exchange of information concerning the tribes and their resources. The free availability to the public of such communication under present interpretations of the Freedom of Information Act imposes an increasingly intolerable burden on such communication.

Government policy clearly should recognize the desirability of and need for facilitating open exchange of information between the federal trustee and its beneficiaries. Frankly, we do not see how the trust responsibility can be performed in any other way.

Over a year ago, the National Tribal Chairmen's Association together with the National Congress of American Indians held a joint National Conference on Indian Water Rights. That conference passed unanimously a resolution calling for the passage of the legislation before the subcommittee today. I believe the Subcommittee has a transcript of that Conference and I recommend that the transcript of the proceedings of April 4, 1975 (morning session) be made a part of this record. No purpose would be served in reviewing the extensive discussion we had that morning detailing the reasons the Indian Community needs this amendment. But I do wish to make a few observations:

1. Over the years, the Bureau of Indian Affairs, the United States Geological Survey and other agencies and Departments of the Federal Government have obtained much information and data concerning the natural resources—oil, gas, water, timber, coal, and other valuable minerals—of Indian tribes, data of critical economic importance to the tribes.

2. The information has been supplied to those agencies only in their capacity as *trustee* for the property rights of the Indians, not for distribution to the public at will.

3. Under the provisions of the Freedom of Information Act, however, as interpreted by the Federal Government, this information has, from time to time, been handed over to persons who might or might not have Indian interests at heart merely upon their asking for it. This information includes important inventories of the natural resources and mineral deposits on Indian lands. We do not believe that the government, acting in the best interest of the Indian people, should release such information without the consent of the Indian tribes or persons affected. These resources belong to *us*.

Presently, the Bureau of Indian Affairs does withhold from public dissemination pursuant to a specific exemption in the Act, "geological and geophysical data, including maps, concerning wells." But this protection does not cover past transactions, inventory data where no wells have been planned or drilled, or past commercial transactions between a tribe and a company.

Indian resource information must not be distributed to the general public.

The exemption we seek and which is embodied in S. 2652 not only is reasonable but flows logically from at least three of the exemptions already existing as part of the Act. The most obvious, of course, is the exemption of geophysical information concerning wells mentioned above. More importantly, however, we see absolutely no significant difference between the proposed exemption and the broad protection given to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (Exemption 4) Private corporations who must submit business information in order to comply with or be eligible for federal programs may be extended more protection than are Indian tribes whose information is of precisely the same nature. This is beyond our understanding. Finally exemption number 5 of the Act, pertaining to inter-agency communication, supports our proposal. Just as Congress has recognized that government cannot function where its deliberations are routinely exposed to public view, we state again that the same is no less true of the Federal-Indian trust relationship.

The amendment before the Subcommittee will do nothing more than extend to Indian tribes concepts of protection already a part of the Act. At the same time, it will aid Indian people immensely in their own development efforts and in their need to protect their land and natural resources from exploitation for purely private gain.

Thank you for asking me to present this statement today. It is a matter of grave concern to all Indian people.

Senator ABOUREZK. Mr. Schifter.

STATEMENT OF RICHARD SCHIFTER, COUNSEL FOR THE LAGUNA PUEBLO

Mr. SCHIFTER. Mr. Chairman, the remarks which I am about to make would no longer be relevant once the Congress were to pass the bill or legislation similar to it. I am somewhat concerned though about what the record would look like between now and when the Congress does act. And with regard to that, I want to emphasize that it is the position that the Pueblo Laguna has taken and the other Indian tribes have taken that the law, as it now stands, does not permit the release of confidential information of the type described here. And that the Department of Justice and the Department of Interior are wrong in construing the act that way.

What I would like to do is to get permission to file with the committee a memorandum to that effect, which would be filed with the Interior Department.

Our position is that the legislation that is here proposed would be helpful in clarifying this particular point so that further litigation of that issue won't be necessary.

Senator ABOUREZK. Yes; that will be accepted. Do you have it with you?

Mr. SCHIFTER. I have it back in the office. I will get it up here.

Senator ABOUREZK. You can mail it to us and we will get it in the record.

Mr. SCHIFTER. Thank you.

Senator ABOUREZK. Thank you.

[Subsequent to the hearing, the following material was submitted for the record:]

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., May 18, 1976.

HON. JAMES ABOUREZK,
Chairman, Subcommittee on Indian Affairs,
Senate Committee on Interior and Insular Affairs, Washington, D.C.

DEAR SENATOR ABOUREZK: You will recall that when I testified before the Subcommittee on S. 2652, I asked for permission, which you granted, to furnish for the record a memorandum which I had filed with the Department of the Interior on the subject of the applicability of the Freedom of Information Act to Indian tribes.

A copy of the memorandum, together with my letter of transmittal to Secretary Kleppe dated December 8, 1975, are enclosed herewith. I do hope that these documents can be made a part of the record.

Sincerely yours,

RICHARD SCHIFTER.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., December 8, 1975.

HON. THOMAS S. KLEPPE,
Secretary of the Interior,
U.S. Department of the Interior, Washington, D.C.

DEAR SECRETARY KLEPPE: The Pueblo of Laguna has been informed that certain information and data contained in geological and mineral resource surveys, now in possession of the United States Government, might be released upon request, in accordance with what are thought to be the requirements of the Freedom of Information Act. The Pueblo of Laguna hereby respectfully requests that all personnel under the jurisdiction of the U.S. Department of the Interior, both in the Bureau of Indian Affairs and the U.S. Geological Survey, be instructed not to release any such information until the legal questions discussed in this letter have been resolved and further requests that these questions be referred to the Solicitor's Office for a ruling thereon.

The legal questions with which we are here concerned arise under the Freedom of Information Act, 5 U.S.C. § 552. The issue which the Pueblo of Laguna hereby submits for consideration by the Solicitor's Office is that a clear distinction must be made, in interpreting the requirements of the Freedom of Information Act, between data and documents in possession of the United States as a result of its overall governmental responsibilities in serving *all* the people and data and documents of which the United States has possession as a result of its unique role as trustee of Indian land. There is no doubt that the entire thrust of the Freedom of Information Act was aimed at exposing to public view the data and documents collected by the United States Government only in its general governmental role. There is no indication that Congress intended, in enacting the Freedom of Information Act, to curtail the fiduciary obligations of the United States toward the Indian beneficiaries of its trust.

Yet that is precisely the question with which we are here dealing. It is because the United States is trustee of Indian lands that it has information on the resources of these lands that it would not have if the land were owned by non-Indians. The release of this information to third parties puts the Pueblo at a competitive disadvantage. That, we submit, is not a result intended by the Freedom of Information Act.

The position we are talking, it should be noted, is that given the long-standing fiduciary obligation of the United States toward Indians, a specific modification of that obligation in the Freedom of Information Act would have been necessary to extend the scope of that Act to Indian tribes. No specific exemption was, therefore, needed. As the Congress undoubtedly did not focus on the implications of the new law for Indian tribes, it should be construed as applying only to the area which Congress did have in mind: the Government's general functions, where the withholding of documents means that the public is not allowed to investigate the public's business. What Congress did not have in mind was the publicizing of private information, which the Government was ready to share with the interested private party.

Nevertheless, in view of the broad sweep of the statute, the question can appropriately be posed as to which words should be read so as to exclude Indian documents from its scope. We point to paragraph (b) (4) of the law, which excludes "trade secrets and commercial or financial information obtained from a person and privileged or confidential". We submit that information which is obtained by the United States by going on the Pueblo's land in a trustee capacity is obtained "from a person" and is, necessarily, "privileged". As the information in issue here is commercial information, it falls within the exception to the statute.

Submitted herewith is further support of the conclusions stated in this letter is a memorandum of law, for consideration by the Solicitor's Office.

Sincerely yours,

RICHARD SCHIFTER.

INDIAN TRIBES UNDER THE FREEDOM OF INFORMATION ACT

I. THE ROLE OF THE FEDERAL GOVERNMENT IN THE FIELD OF INDIAN AFFAIRS

Of all the powers and responsibilities exercised by the Federal Government, none are as unique and special as those that relate to the Government's ties to the Indian tribes. While it can generally be said that all other services performed by the Federal Government, even those which may be rendered toward specific groups, such as veterans, farmers, or aged people, are designed ultimately to serve the welfare of all citizens, that is not true with regard to service rendered to Indians. Such service may be an end in itself, rendered by the Government in its role of trustee.

That role of trusteeship, in turn, arose out of a position of unique power and authority, assumed by the Federal Government in the early years of the Republic and exercised ever since. In dealing with Indian tribes and Indian property, the United States has exercised greater powers over what would otherwise be considered the private affairs of individuals or groups than it has with regard to any other class of citizens. Cohen, in the *Handbook of Federal Indian Law*, quoted with approval the following statement of an earlier authority in the field of Indian law:

"In view of the express grants of the commerce power and the expenditure-for-the-general-welfare power, of the fact that the greater Indian tribes lived on the national domain and not within any state . . . and of the custom of dealing

with Indian tribes by treaty, the United States Supreme Court has never found, so far as I can learn, that any Congressional regulation of Indians has been beyond the reach of national power. Indeed, the net result is the creation of a new power, a power to regulate Indians." At 89.

What the courts have made clear is that associated with this "power to regulate Indians" is a relationship which, in the famous words of Chief Justice Marshall, "resembles that of a ward to his guardian". *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). And as Mr. Justice Murphy put it in *Seminole Nation v. United States*, 316 U.S. 286 (1941) :

"This court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with those dependent and sometimes exploited people . . . under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards." At 296-297.

In discharging its responsibilities toward Indian tribes, the United States Government has indeed been held to "most exacting fiduciary standards". As was noted by the Court of Claims in *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 22, 40 (1944), "the Government owes to the Indians the duties of a trustee, in the care and protection of their property". See also *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 19-20 (1944). And in *Oncida Tribe of Indians of Wisconsin v. United States*, 165 Ct. Cl. 487 (1964), the court, while holding that the Tribe could not recover on the claims it was making, said, nevertheless :

"We think that in this suit under the Indian Claims Commission Act we must hold that the United States had an obligation to the Oneidas *greater than that of a non-participating bystander, or of a sovereign toward its ordinary citizens, or of a landowner toward its tenant*. The relationship was special and from it there stemmed a special responsibility." (Emphasis supplied.) At 493.

The legal principle laid down by the Court of Claims in the *Menominee* and *Oncida* cases was restated by the United States Supreme Court in *United States v. Mason*, 412 U.S. 391 (1973) :

"There is no doubt that the United States serves in a fiduciary capacity with respect to . . . Indians and that, as such, it is duty bound to exercise great care in administering its trust." At 27.

There may even be occasions where the Government's responsibility to the general public might conflict with its trust responsibilities toward Indians and where such a conflict occurs it might have to be resolved in favor of the Indians. The Court of Claims so held in *Navajo Tribe of Indians v. United States*, 176 Ct. Cl. 502 (1966) :

"Although the action of the Bureau [of Mines] personnel may have been in the national interest, they were not consistent with the Government's duty to the Navajos." At 509.

It is against this background, a background of more than a century and a half of a trusteeship relationship between the United States Government and Indian tribes, that Congress enacted the legislation which came to be known as the Freedom of Information Act. To be sure, the legislative history of the various Congressional enactments which now constitute the Freedom of Information Act does not reveal any explicit references to the Government's role as trustee of Indian property. Yet, the absence of any such reference most certainly suggests that Congress had no intention to modify the existing trust relationship by implication.

II. THE THRUST OF THE FREEDOM OF INFORMATION ACT

In its role of trustee of the assets and particularly the land of Indian tribes, the United States Government comes into possession of information as to the value and extent of these assets, which it, of course, shares with the specific beneficiaries of the trust. That this is not the kind of information which Congress sought to expose to public view by enacting the Freedom of Information Act becomes abundantly clear from an examination of the legislative history of the various enactments which are now codified as 5 U.S.C. § 552.

When the Senate, in 1964, first passed the bill which two years later became the new law, it was Senator Dirksen who explained its purpose in detail on the floor of the Senate :

"This legislation which we have before us now is of the greatest importance because fair and just administrative proceedings require, first of all, that the people know not only what the statutory law is, but what the administrative rules and regulations are, where to go, who to see, what is required and how they must present their matter. They must be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter and whether these decisions were unanimous or divided. And, they should have the same right to the inspection of the information which the government may use against them as they would have to inspect the information which some private party might use against them. In addition, section 3 of the Administrative Procedure Act has a broader purpose. It provides the means by which the people of this country can become informed and thus be able to scrutinize the activities and operation of their Government." 110 Cong. Rec. 17088 (1964)

The theme which Senator Dirksen sounded and which appears throughout the legislative history is that when it comes to the general release of Government documents, the Congressional purpose is to make it possible for "the people of this country [to] become informed and thus be able to scrutinize the activities and operation of their Government."

Two years later, when the House took up the bill, the Committee report stressed the fact that the new law's purpose was to overcome the notion of a good many Federal officials that "agency and department heads enjoyed a sort of personal ownership of news about their units". H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). While anxious to prevent Federal officials from withholding Governmental information from public view, the Congress recognized that it would be unwise to establish an absolute rule:

"It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests." *Ibid.*

The thrust of the law, as so clearly stated in the foregoing passage, was to make it possible for the average citizen "to find out how his Government is operating". What Congress wanted to end was the practice of Government officials clutching to their breast informational material dealing with the public's business. There is no suggestion here that Congress also wanted to allow private third parties an opportunity to intrude into the trustee-beneficiary relationship between the Government and Indian tribes by forcing the former to make available information concerning the latter and collected for the benefit of the latter.

Congressman Moss, floor manager of the bill, repeated the principle laid down in the House Report in his opening statement on the floor of the House:

"... [O]ur system of government is based on the participation of the governed, and as our population grows in numbers it is essential that it also grow in knowledge and understanding. We must remove any barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.

"S. 1160 is a bill which will accomplish that objective. . . ." 112 Cong. Rec. 13641 (1966).

The underlying purpose of the Act to place *Governmental activities* in a fish-bowl, so that the public would understand these activities better and would be better able to decide public questions has also been emphasized by the court. As Chief Judge Bazelon noted in *Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971):

"Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate Federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that Governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives." At 1080.

III. EXCEPTION 4 OF THE FREEDOM OF INFORMATION ACT

As has been shown, the underlying purpose of the Freedom of Information Act was to expose the *public's* business to public view. There is no indication that Congress intended also to expose to public view the *private* affairs of Indian

tribes simply because the United States acts as trustee for Indian property. Yet, given the broad sweep of the statutory language, what words can be identified as exempting the trusteeship records from the requirements of the law?

It is respectfully submitted that the critical words, under which Indian trusteeship records must be held exempt, are contained in paragraph (b) (4) of Section 552, which provides that the Freedom of Information Act does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The relevant legislative history makes clear the nature of the material which Congress sought to exempt from public scrutiny through paragraph (b) (4):

"Trade secrets and commercial or financial information obtained from any person and privileged or confidential: This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. *It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government.* The exemption would include business sales statistics, inventories, negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations" (Emphasis supplied.) H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. (1966).

Shortly after the enactment of the revised Section 552 of Title 5, the Department of Justice published a guide on the administration of that section by the executive departments and agencies. That document, entitled "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act", contains the following significant passage interpreting what was originally paragraph (e) (4) (now paragraph (b) (4)):

"In view of the statements in both committee reports that the exemption covers material which would customarily not be released to the public by the person from whom the Government obtained it, there may be instances when agencies will find it appropriate to consult with the person who provided the information before deciding whether the exemption applies.

"One change was made in exemption (4) by the Senate committee in the 89th Congress: the phrase 'information obtained from the public' was amended by substituting the words 'any person' for 'the public'. It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulae developed by its personnel for inks and paper used in making currency.

"An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States, should be covered under exemption (e) (4)." At p. 34.

What should be noted in particular in the context of Indian records, is the observation that the applicability of the exemption does not depend on whether "the agency obtains the information from the public at large, from a particular person, or from within the agency". Thus, information gathered by the Government in its capacity as trustee would qualify for the exemption as much as would information which the beneficiary of the trust would turn over to the trustee.

The basic standard which has been laid down by the courts in determining the applicability of Exemption 4 was well stated in *Pacific Architects & Eng. Inc. v. Renegotiation Bd.*, 505 F.2d 383 (D.C. Cir., 1974):

"The established tests for determining whether documents are 'confidential' business statistics within the meaning of Exemption 4 are that the statistics must be the sort not customarily disclosed to the public and that disclosure of the

statistics must not be likely to either impair the Government's ability to obtain necessary information in the future or *cause substantial harm to the competitive position of the person from whom the information is obtained.*" (Emphasis supplied.) At 384.

In applying the foregoing principle, the courts have enjoined an agency from releasing details on a company's product marketing which, in the hands of competitors, would be harmful to the petitioning company, *Continental Oil Company v. FPC*, 519 F.2d 31 (5th Cir. 1975), and have also enjoined the release of a nursing home's financial data, where such release would harm its competitive position, *McCoy v. Weinberger*, 386 F.Supp. 504 (W.D., Ky., 1974).

Reliance on these two cases is not intended to suggest that the relationship between the Federal Government and an Indian tribe is similar to that between the Government and a regulated business enterprise. What these cases do suggest, however, is that if the Government should not release documents and information which come into its possession in its role as regulator because such documents or information may in the hands of a competitor be used to the detriment of the regulated company, it owes an even greater duty of confidentiality where it obtained the material in its role of trustee and its release could harm the beneficiary of the trust. The Congress made it clear that Exemption 4 applies to material which would "customarily [be] subject to the doctor-patient, lawyer-client, or lender-borrower privileges". This recitation of relationships indicates an intention to cover the trustee-beneficiary privilege as well.

IV. CONCLUSION

In its capacity of trustee of Indian land, the United States Government assembles a great deal of information on such land, including data on its mineral resources. This is information which the Government would not gather with regard to privately-owned land. Release of such information to the general public and particularly to those with whom an Indian tribe might enter into business negotiations places the tribe at a serious competitive disadvantage.

What has been shown in this memorandum is that it was the intent of the Congress, in enacting the Freedom of Information Act, to prevent Government officials from withholding entirely from public view material which they have collected in conducting the public's business, where such withholding has the result that information of interest and concern to the general public is treated as the private property of the Government bureaucracy. But this Congressional intention to see public documents made available did not extend to documents collected by the Government as trustee for Indian beneficiaries, which are shared with and available to the Indians and are withheld not for reasons of Government secrecy but to protect the economic interests of the Indians. Any other construction of the statute would constitute a breach of the Government's fiduciary obligations.

Accordingly, it is submitted that information and documents gathered by the Government in its role of trustee of the economic resources and economic transactions of Indian tribes should be held covered by Exemption 4 and should not be released without the consent of the affected tribe.

Senator ABOUTREZK. The next panel of witnesses are Mel Tonasket, president of the National Congress of American Indians; Zelma McCloud, chairwoman, Nisqually Tribal Council; and Shirley Palmer, secretary, Colville Tribal Council.

If you are ready, Mel, go ahead.

Mr. TONASKET. I guess we are not completely ready. There is still some documentation that we would like to put together to be inserted in the record.

Senator ABOUTREZK. The record will be held open for 30 days for any submission that anybody wants to make.

Mr. TONASKET. Fine. What I would like to do, Senator, is to introduce the two other members of this delegation, have them make their statements first and then I will kind of recap.

So first I would like to introduce to you Ms. Zelma McCloud who is the chairperson of the Nisqually Tribe in the State of Washington.

**STATEMENT OF ZELMA McCLOUD, CHAIRWOMAN, NISQUALLY
TRIBAL COUNCIL**

Ms. McCloud. Mr. Chairman, honorable members of the subcommittee, ladies and gentlemen, it is a pleasure for me to be with you today.

My name is Zelma McCloud. I am chairperson of the Nisqually Indian community located in western Washington State. I have held this position for the past 5 years. I have come to Washington, D.C., at the suggestion of the president of the National Congress of American Indians because the Nisqually Tribe, like many tribes, has been victimized by Federal agencies through the Freedom of Information Act.

The subcommittee is considering amendments to this act because the act has injured the interests of Indian people and does not fit the needs of Indian tribes. For example, disclosure by Federal agencies of the natural resource inventories of reservations has made some tribes easy targets for exploitation by unscrupulous businessmen.

The Nisqually Tribe supports the concept of amending the act. I want to suggest to the subcommittee that the mineral resources of an Indian reservation are not the only resources which deserve protection from exploitation by people outside the tribe. The privacy of their ancestry and personal affairs must be protected also.

The major concern of the Nisqually Tribe today is the reckless release of information about Indian people. These documents are not the ordinary records of Federal agencies. Instead the information is taken from Indian tribes because of the unique trust relationship existing between the United States and Indian tribes. There are no people whose lives are more closely regulated, examined, and studied by the Federal Government than Indian people.

The records which the Department of Interior and other agencies are distributing about us are not Federal records, they are the records of Indian tribal governments. They affect only Indian people. The records are in Federal hands only because the United States has chosen to place Indian people in the special position of Federal wards. It is inconsistent that our records are released purely because of the trust relationship between my tribe and the Federal Government.

I do not believe that the drafters of the Freedom of Information Act were thinking about the unique position of Indian people vis-a-vis the United States when they wrote the act. The drafters were careful to protect individuals from "clearly unwarranted invasions of personal privacy" in agency opinions, staff manuals, law enforcement investigative records, personnel, medical and similar files.

Yet the drafters forgot about the huge amounts of private information held by agencies in trust for Indian people and tribal governments. That omission must be corrected.

I want to show you a contrast in the willingness of an agency to release records which are its own, and the willingness of an agency to release records which belong to Indian tribes and are simply in the custody of an agency.

In November 1975 the Nisqually Tribe learned that the U.S. Army at Fort Lewis intended to forcibly take the Nisqually Reservation and evict tribal members from their ancestral lands. We learned, at about the same time, that the U.S. Army intended to hold artillery firing exercises which could effectively wipe out the chum salmon run in the river on our reservation.

The Nisqually Indian Tribe attempted to get information about both of these plans from the U.S. Army, by using the Freedom of Information Act. The Freedom of Information Act after all, was designed to help citizens to learn about the workings of Government agencies which affect them, and to the tribe, no activities of an agency could affect them more than artillery fire which could wipe out their livelihood and their homes.

The U.S. Army requested one extension after another to get around the strict time limits in the act for agency responses to requests. When we finally got responses, they were denials of all our requests for information.

The Army simply claimed that all of the materials were "intra-agency memorandums or letters" and that therefore they did not have to release them under the Freedom of Information Act. The Army would not even agree to examine the records to delete any sensitive national security information, if there is any, and release the rest to us; they simply refused to give us anything.

Finally, after the tribe had obtained the personal intervention of Senator Henry M. Jackson, the Army released a few of the documents requested. In the letter from the Acting Secretary of the Army to Senator Jackson the Army clearly stated that the tribe's request had been rejected, but then went on to say "but as a result of your interest, the Army has reviewed the denied information and has decided to release some of the requested documents."

The documents released constitute only a very small portion of the material requested, so the tribe is still left wondering whether or not the Fort Lewis military base will evict the tribe from its ancestral homes. Can the Army, under cover of the Freedom of Information Act, conspire and attempt to abrogate the treaty which was signed in good faith between the Nisqually Indian Nation and the United States? We still do not know.

I want you to contrast that chain of events to another one. I want you to know how easy it is for anybody to get copies of information belonging to Indian people which are held by Federal agencies. When the request is for our records, the Federal agency doesn't worry about disclosures which could embarrass them; the releases hurt only us.

As you know, a large quantity of highly personal and sensitive information is sent from tribal governments to the Bureau of Indian Affairs or is gathered by the Bureau from tribal members. In Portland, Oreg., the Office of the Regional Solicitor, Department of Interior at the Bureau of Indian Affairs Area Office, has recently adopted an informal policy of releasing large amounts of this personal information to whoever might request. They do so under the Freedom of Information Act.

The latest incident occurred on about March 9, 1976, when an attorney representing the State of Washington against the Nisqually Indian Tribe in a lawsuit telephoned the Bureau of Indian Affairs Area

Tribal Operations Officer to ask for complete records on enrollment procedures and members of the Nisqually Tribe. One telephone call is all it took! The Assistant Regional Solicitor for the Department of Interior, without notifying the Nisqually Indian Tribe or its members, or seeking the tribe's consent, or even tribal input, and apparently without even considering the invasion of personal privacy which he was undertaking, sent to the attorney all of the information he requested. The caller requesting the information did not even send an unconditional commitment to pay fees for the search and duplication of these materials. As you might imagine, when the Nisqually Tribe tries to get information from the Department of the Army all such strict formalities must be observed.

Applications for membership in the Nisqually Indian Tribe require very complete details about Indians' lives. They delve into addresses, background, legitimacy, and family history back through three generations. The information released named every individual in the Nisqually Indian Tribe and every individual who has applied for membership in the tribe within the last 3 years. The disclosure also gave out vital statistics about each person and also revealed confidential tribal governmental actions on each person's application for membership.

The Solicitor's Office in the Department of Interior maintains that no permission need be sought from Indian tribal members before release of such information. The Bureau of Indian Affairs states that its policy is to make Indian records available to the public to the greatest extent possible. This must be stopped.

I think it is appalling that under the Freedom of Information Act Federal agencies can be extremely generous in releasing information about the personal lives and ancestry of Indian people, but are very stubborn and as legalistic as possible when Indian tribes request information about actions which can literally destroy the tribe.

I would suggest to this committee that the purposes of the Freedom of Information Act, of allowing individual citizens to find out what the Government is doing to them, and at the same time protecting individuals from invasions of privacy by Government release of documents about their personal histories, can be best served by adding an additional exception to information which is releasable under the Freedom of Information Act.

Congress cannot allow this violation of the Federal trust responsibility by continuing to permit vicious attacks on tribal privacy. These attacks contradict the congressional policies clearly stated in the 1975 Indian Self-Determination and Education Assistance Act. The present Freedom of Information Act allows people with special interests to avoid the procedures for obtaining information under the Federal Rules of Civil Procedure and engage in a fishing expedition into the personal lives of Indian people all over the United States.

The amendment which I propose solves this problem. It does not go to the problems we have had with the Army because we hope that can be resolved administratively. To 5 U.S.C., section 552(b), a new subsection, No. (10), should be added, to read as follows:

All records relating to Indian tribes, bands, or persons, held by any agency, whether prepared by or received from said Indian tribes, band, or persons, or prepared by or received from said agencies.

Thank you.

Mr. TONASKET. The next witness from our delegation is Ms. Shirley Palmer.

STATEMENT OF SHIRLEY PALMER, SECRETARY, COLVILLE TRIBAL COUNCIL

Ms. PALMER. Thank you. Senator Abourezk, and members of the subcommittee, I want to thank you for affording me the opportunity to speak on behalf of the Colville Tribe.

I am Shirley Palmer, secretary of the business council of the Colville Confederated Tribes of the Colville Indian Reservation in the State of Washington. I am here to express the support of the Colville Tribes for the addition to the Freedom of Information Act of an exemption for information being held by the U.S. Government regarding Indian tribes and their members.

The United States occupies the position of a trustee with respect to Indian tribes and their members. In the course of carrying out this trust responsibility, the Government comes into possession of considerable information of a personal or financial nature involving Indian people. No other people in this Nation has this unique trust relationship with the U.S. Government.

As a result of this relationship, information that would otherwise remain personal and confidential to the individual Indian or tribe finds its way into the records of many Government agencies, in particular the Department of the Interior. Ordinarily, the position of the United States, as trustee for the Indian people, would seem sufficient to prevent the Federal Government from releasing to the public at large the information which it has obtained or compiled for the benefit of its Indian beneficiaries.

But the past few years have shown us that this Government has been permitted to avoid its trust duties to carry out a principle of public disclosure which should have no application to these unique Indian matters. And these violations of trust have resulted in the release of confidential information in a manner which has harmed the rights of the individual, as well as the rights of tribal government.

A prime example of the kind of problem that we face in this area has occurred on the Colville Indian Reservation. A lawyer made a request to the Bureau of Indian Affairs in Portland to see a copy of our tribal enrollment. We requested the Bureau of Indian Affairs not to make the entire tribal roll available to this lawyer because we did not want him to be able to flip through the pages and see information about the personal and financial matters concerning all of the members of the Colville Tribes. We have always made specific information about an individual or his family, which is contained in the tribal enrollment list, available to that individual for inspection at the Tribal Office.

The Bureau of Indian Affairs responded by stating:

"We conclude that the Freedom of Information Act requires disclosure of the census roll as requested by Mr. Coombs. Mr. Coombs is an attorney in Spokane who is representing individual Indians."

The information which the Bureau of Indian Affairs felt obliged to give to this lawyer consists of highly personal, confidential, and private information regarding thousands of enrolled members of the tribes and

their families, including individual identification numbers and ages, information regarding parents and legitimacy of birth, information regarding adoption, racial origin, multiple marriages, common law marriages, disenrollment from the tribe, degree of Indian blood, divorce and separation, financial information, residence in institutions such as reform schools and mental institutions, medical information, manner of death, suicide, desertion by spouse, imprisonment, name changes, and other personal and private information. However, the Bureau of Indian Affairs told us that they would have to release this information under the Freedom of Information Act.

We then had to have our tribal attorneys go to Federal court and get a temporary injunction to prevent the release of this information, and we are now in the process of litigating this matter under the Freedom of Information Act. It is clear to us that unless the Freedom of Information Act is amended to provide for an exemption for the kind of information being held by the U.S. Government as part of its trust duties toward Indians, we will have to fight each and every case in which the U.S. Government wants to give our information to someone else under the Freedom of Information Act.

In addition to the personal and confidential information regarding family and other such matters, the Bureau of Indian Affairs keeps as part of its trust responsibility, a great deal of information about the finances of Indians and Indian tribes. Information regarding timber sales and dealings in other resources are kept by the Bureau carrying out its trust function.

Correspondence regarding tribal and individual assets and other business and financial information is sent to the Bureau by Indians, presuming that it will remain confidential. We have been subjected previously to requests by the State of Washington to the Bureau of Indian Affairs for financial information about tribal businesses for the purpose of assessment of State taxes during the course of litigation regarding those taxes. It is improper for the Government on one hand to have assumed this trust relationship with Indian people and at the same time legislate so as to create a law which clearly violates that trust relationship.

The time is long over in which the U.S. Government can deal with Indians in a loose and unresponsive manner. We will not sit idly by while yet another Federal law seeks to strip us of our dignity and our rights.

Amending the Freedom of Information Act so as to exempt the kind of information referred to above would not violate the basic purposes of that act, since the information held by Federal agencies regarding Indian tribes and people is not the sort of information which was intended to be made available to the public under the act.

The language contained in S. 2652 is, in our opinion, too narrow to protect all of the documents and information held by the United States in the discharge of its trust obligations to Indians. For instance, documents filed with the Bureau under the requirements of Federal law relating to the Secretary of the Interior's supervisory role in tribal government should be covered by the exemption, whether or not land or specific assets are involved. We therefore urge that the key language in the amendment should read as follows:

"(10) Information held by a Federal agency in performance of a fiduciary obligation to any Indian tribe, band, group, or individual member thereof."

We feel that this amendment is necessary to clarify the extent of the application of the Freedom of Information Act and to protect the personal, governmental, and financial rights of Indian tribes and their members.

Thank you for the opportunity of appearing before the subcommittee in support of this amendment.

Senator ABOUTREZK. Thank you. Mel, do you have something you would like to wrap up with?

STATEMENT OF MEL TONASKET, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. TONASKET. Yes. I would like to represent the National Congress of American Indians and give you sort of an overview of some of the problems nationally that the Freedom of Information Act has caused and how it affects some tribes on the reservation.

And I would like to respond to some of the things that I heard from the administration this morning.

First of all, I would like to say I am personally glad to be here to see some of you people again, but it is very frustrating that we have to come back to Washington to fight time after time bills that have, in some respect, bad effects upon our Indian nations throughout this country. And it is very frustrating that when Congress passes legislation such as the Freedom of Information Act that it ignores the special status of Indian nations and the treaties which are recognized as supreme laws of the land in that these have drastic effects on rights and futures of our tribes throughout the country.

Senator ABOUTREZK. Mel, you know the old biblical saying is "The Lord giveth and the Lord taketh away."

Mr. TONASKET. Well, the Lord is going to get them. I would like to say, also, that the Freedom of Information Act, in the eyes of some of us, does not quite fit the purpose of the recently passed Self-Determination Act where contracting is a major part of the act. We remember what Mr. Seneca said just this morning—that the products produced under some of these contracts are then given to the Bureau of Indian Affairs as Federal documents and then in turn given out to the public if they are requested. So there is a conflict right there that I think should have been recognized not only by the Department but by the Indians when they were testifying on that act.

I would like to say, in reviewing some of the statements made this morning, that when Mr. Frankel said that the Bureau would have the draft within 1 week and would hope that the Office of Management and Budget would have it to this committee within 30 days, I would like to request that this committee really get a commitment from them and make them live up to it.

I would like to refer back to when S. 2010 hearings were held on March 5—the Justice Department and Interior promised their alternate bill within 30 days, and it has been well over 60 days and still nothing has been produced from OMB. And I don't know how we can be assured that this 30-day commitment can be honored by the Department of Interior and Bureau of Indian Affairs.

I would like to say that the tribes, when they met in April of 1975 here in Washington, D.C., at a conference on Indian water rights, passed a resolution to amend the Freedom of Information Act, and there was quite a discussion with Mr. Kent Frizzell at that meeting.

In looking at the minutes [see appendix II, pp. 157-165] Mr. Frizzell made statements that he supported an amendment to the Freedom of Information Act. And also in that meeting he made specific references to three instances where his office—at that time the Solicitor's Office—had interacted with the tribes concerning the FOI Act. One instance was the Northern Cheyenne Tribe, when he went over to the Department of Justice to argue on their side.

A second was the Aqua Caliente, where again he went over to the Department of Justice to argue the viewpoint of the Tribe. And the third instance was on *Arizona v. California*, concerning the Bureau of Indian Affairs contract.

More recently we have the *Walton* water case where the Colville Tribe is in a battle over evidence which was gathered by the Bureau of Indian Affairs contract. Also, on the Colville Reservation where the cigarette tax fight with the State of Washington has been ongoing for 6 years. The State of Washington has been trying to use the FOI Act to get copies of our tribal count so that they can prepare for litigation.

I think throughout the country the tribes are very leery about working with the U.S. Government because of the Freedom of Information Act. I will give you an example: The USGS has been sending out letters to tribal councils offering to do surveys—mineral and resource surveys—on Indian reservations. Our tribe specifically refused that service because we were afraid that under the Freedom of Information Act the surveys would be made public. And that was at the time when gas was being rationed during the energy crisis.

Other tribes I have talked to reacted the same way. We are afraid that if we take advantage of some of these studies and surveys that are offered to our tribes by the Federal Government, knowing their need for our resources, energy resources in particular, they will find a way to try to get those from us, whether by condemnation or whatever.

And it has had a sad effect on the development of our reservations throughout this country. And with my opportunity to travel with the American Indian Policy Review Commission I witnessed where reservations, particularly the poorer reservations, need development for their survival and they haven't always been able to take opportunities which I think they should have.

There has been expressed support by 110 member tribes of the National Congress of American Indians by resolution placing the need for legislation such as S. 2652 on the list of its legislative priorities for this 94th Congress, and we will supply this committee with copies of those resolutions and the minutes of the water meeting that was held in April of 1975. And you will also be getting in the mail letters and resolutions from tribes supporting S. 2652. [See appendix II.]

Senator ABOUTREZK: Could we also get a copy of that USGS letter and Colville's refusal letter as well?

Mr. TONASKET. Yes. As soon as we get home, we will get it in the mail for you.

I guess that pretty much is our statement this morning and if there are any questions that you would like to ask of us, we would be more than happy to reply.

Senator ABOUREZK. I don't have any questions. I think you have been very specific in your testimony which is appreciated. It is information that we can use as we move this legislation through.

I want to thank all of you for your testimony and your appearance here today.

Mr. TONASKET. We would like to thank you, Senator.

Senator ABOUREZK. The next and last witness will be Mr. Gerald Wilkinson, Executive Director of the National Indian Youth Council. Apparently Mr. Wilkinson is not here, so the hearing is adjourned.

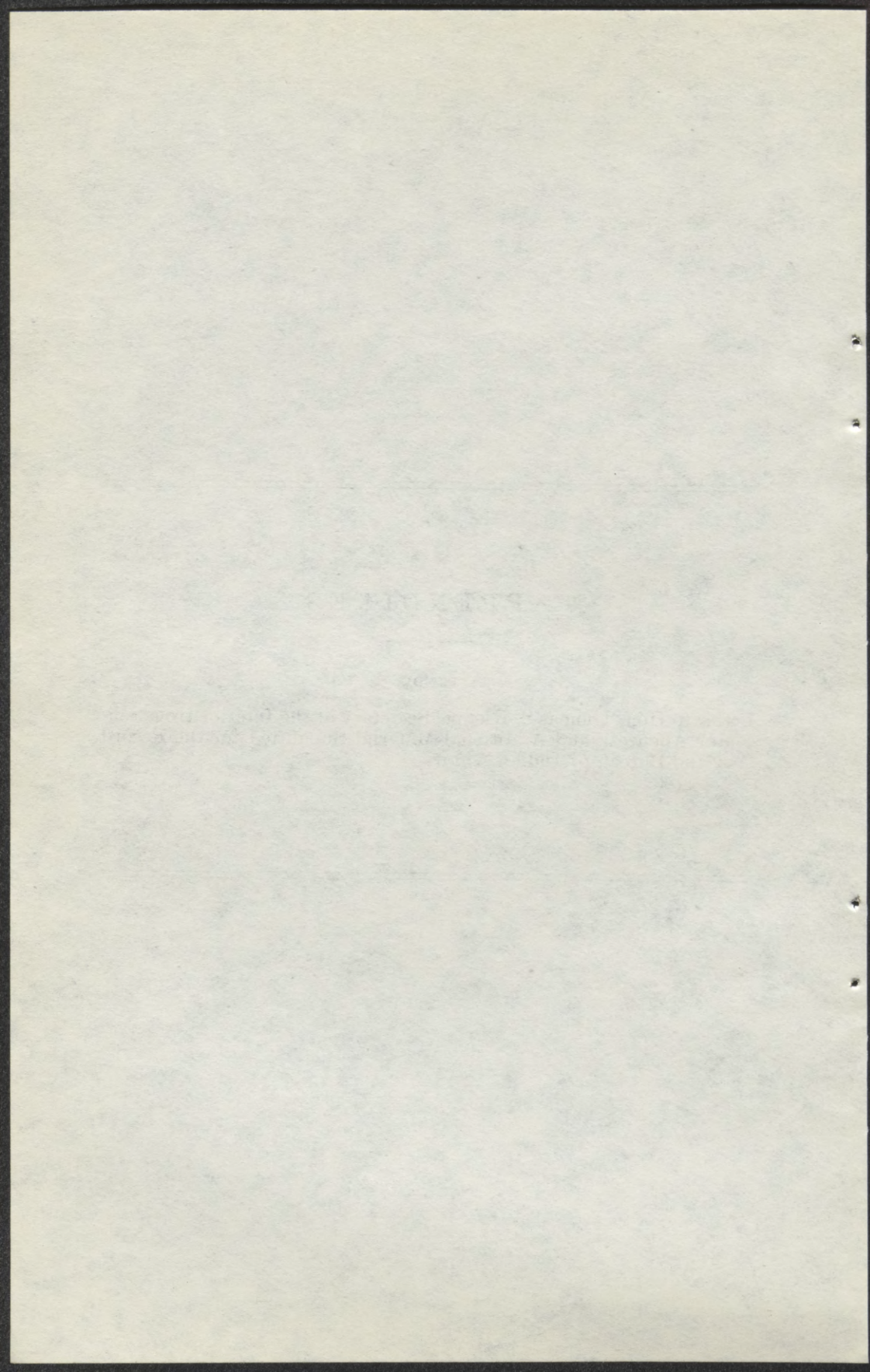
We would like to thank all the witnesses for their appearances.

[Whereupon, at 11:45 a.m. the hearing was adjourned.]

APPENDIXES

APPENDIX I

Letter to Hon. Thomas S. Kleppe, Secretary of the Interior from Senator Abourezk and Additional Material Submitted for the Record by the Bureau of Indian Affairs



HENRY M. JACKSON, WASH., CHAIRMAN
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 WILLIAM J. VAN HESS, CHIEF COUNSEL

PAUL J. FANNIN, ARIZ.
 CLIFFORD P. HANSEN, WYO.
 MARK O. HATFIELD, OREG.
 JAMES A. MCCLURE, IDAHO
 DENNEY F. BARTLETT, DELA.

United States Senate

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

July 19, 1976

The Honorable Thomas S. Kleppe
 Secretary of the Interior
 Washington, D. C. 20240

My dear Mr. Secretary:

As you know, a great deal of debate and concern has been expressed of recent date concerning confidential information held by the United States in its capacity as trustee for Indian tribes and members thereof and the extent to which, if any, the United States is required by law to release that information to individuals other than those to whom such information relates.

You will recall that the Subcommittee on Indian Affairs recently conducted hearings on S. 2652, a bill to amend section 552 of title 5, United States Code, to provide an exemption to the requirements of that section relating to the availability of information.

Mr. H. Gregory Austin, Solicitor for the Department, communicated to me under the date of June 29, 1976, as a followup to those hearings. As indicated in his letter to me, Mr. Austin stated "The Supreme Court and other courts have, for nearly 150 years, recognized that the Federal Government, and especially the Department of the Interior, as the agency principally responsible for Indian affairs, has a trust obligation to Indian tribes...In another recent case, the court spoke of the 'overriding duty of our Federal Government to deal fairly with Indians wherever located'... The Supreme Court has held the Federal Government 'has charged itself with moral obligations of the highest responsibility and trust' and its actions are 'judged by the most exacting fiduciary standards'... It is fundamental that a trustee owes a duty of confidentiality toward the beneficiary of the trust...."

I have carefully considered the question as to the need for legislation to make clear the position that in any case in which information held by the United States regarding any Indian tribe, including information relating to the natural resources or assets of such tribe, is requested by any source other than the tribe to which such information relates, such agency, if the release of such infor-

mation would result in a breach of the trust of confidential relationship between the United States and such tribe to which such information relates, is and should be prohibited from releasing such information so requested.

In connection therewith, I have carefully considered a number of drafts of proposed legislation the purposes of which were to make that point clear. I have delayed making a final judgment with respect to such question in anticipation of receiving a draft of suggested legislation which I have been informed, on several occasions, would be forthcoming from the Department. I must add, however, that I seriously question the need for legislation to clarify a position which is already a well-established principle of law. While I fully support the principle of the Freedom of Information Act, to place a construction on that Act to the effect that Congress intended to require the United States to release information which it holds in its capacity as trustee and also in a confidential relationship, and thus breaching that trust and relationship, is unthinkable.

Further, I am concerned that even the introduction of legislation to clarify such matter, if clarification is needed, might tend to be misconstrued as reflecting some doubt on the part of Congress as to its intent in enacting the Freedom of Information Act. This concern is even greater due to the limited amount of time available to this Congress for the ultimate passage of legislative measures not yet reported by the appropriate committees of the Congress. The failure of Congress to enact such legislation, due to the lack of time or the inability to convince Members, who hold views similar to mine, namely, that such legislation is not needed, may also be misconstrued by the courts and others.

I strongly request the Department to follow and continue to follow the policy reflected in the Solicitor's letter to me, dated June 29, 1976, to the effect that the Department will take a litigating position that the trust responsibility of the United States toward Indian people requires the withholding of any such information except with the consent of the affected Indian tribe.

If at any time you determine that such information cannot, under law, be withheld, notwithstanding the trust obligations on the part of the United States, I would appreciate being notified to that effect in order that I may take appropriate action necessary to assure that your Department or any other department of the United States, will not be required to breach your fiduciary relationship with the Indian tribes.

Thank you for your interest and consideration of this matter.

Sincerely yours,

James Abourezk, Chairman
Subcommittee on Indian Affairs



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

29 1976 JUN

Honorable James Abourezk
Chairman
Subcommittee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Abourezk:

This is in response to your request for our opinion concerning the applicability of the Freedom of Information Act, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, on the availability to the public of information related to tribal rolls in the possession of the Bureau of Indian Affairs and enrollment actions.

There are generally two types of enrollment information which the Bureau of Indian Affairs possesses. One type concerns persons enrolled as members in a particular tribe by that tribe. The Bureau may receive this information as a matter of courtesy from the tribe or as a matter of a longstanding practice. The Bureau, however, has no statutory responsibility to maintain current membership lists of tribes and it does not ordinarily update rolls in its possession. An exception is where tribal assets are being distributed on a per capita basis, where the Bureau does have the responsibility for preparing a roll of distributees. Furthermore, some tribes have adopted what are referred to as "census rolls" as base rolls to determine membership eligibility. Census rolls are rolls prepared by the Bureau sometime in the past by taking a "census" of tribal members on a particular reservation.

The other type of enrollment information the Bureau has in its files is that pertaining to judgment fund distributions as a result of awards by the Indian Claims Commission. If the award is to a tribe or tribal group, under the Judgment Fund Distribution Act of 1973, 25 U.S.C. § 1403, et seq., the plan of distribution may have the tribe



updating its roll and submitting it to the Secretary for payment of the funds. If the award is to a descendants group, the Secretary would prepare the roll. In some instances, he has been directed by statute to do so. For example, 25 U.S.C. § 1113 directs the Secretary to prepare a roll of the Miami Indians of Indiana. Information for these rolls would be provided directly to the Bureau through the submission of applications by persons seeking to be enrolled on the judgment fund roll.

Both the Freedom of Information Act and Privacy Act are applicable to both types of information. Since they are "agency records" (whether they are obtained indirectly through a tribe or from the affected individual) the Freedom of Information Act applies. See 5 U.S.C. §§ 552(a)(3). The Privacy Act also applies because tribal rolls have been identified by the Department as "a system of records" containing information about individuals. 5 U.S.C. § 552a(a)(5). However, the Privacy Act provides that such information cannot be disclosed unless the person concerned gives their prior written consent, or, inter alia, disclosure is required by the Freedom of Information Act, or disclosure is to the National Archives. The crucial question, then, is whether this type of information is required to be disclosed upon request under the Freedom of Information Act.

One exemption to the disclosure requirement in the Freedom of Information Act which appears applicable to the information contained on rolls is the sixth, 5 U.S.C. § 552(b)(6), which excepts application of the disclosure requirements to:

"personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

-3-

This is obviously a very stringent standard and one difficult to apply because of the need for assessing 1) whether privacy is involved, 2) whether it will be invaded by disclosure, and 3) whether that disclosure will be clearly unwarranted. Courts have held that mailing addresses of persons are exempt, Wine Hobby USA, Inc. v. United States Internal Rev. Serv., 502 F.2d 133 (3d Cir. 1974), and have also found exempt:

"information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation and so on"

in Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). Both types of information are included on tribal rolls.

In appropriate circumstances, material submitted to the Bureau may also be exempt from disclosure under the fourth exemption, 5 U.S.C. § 552(b)(4), as "commercial or financial information obtained from a person and privileged or confidential." I am enclosing an opinion by Solicitor Melich on September 24, 1971, M-36860. That opinion concerned a request for disclosure under 5 U.S.C. § 552 of a lease agreement furnished to the Department by the Seneca Tribe of Indians. In that opinion, the Solicitor found that disclosure was barred under 5 U.S.C. § 552(b)(4) because of "the unique fiduciary" and "confidential relationship" between the Department of the Interior and the Indians. In this situation, the lease agreement contained financial and commercial information which tribal rolls commonly do not, so we do not believe the fourth exemption is ordinarily applicable to the situation you posit.

In the Seneca lease opinion, the Solicitor indicated that--where a statutory exemption to the Freedom of Information Act is arguably applicable--the federal trust responsibility to Indians is an additional reason for denying the request for information. Citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942), Solicitor Melich said:

In the discharge of this fiduciary obligation it is essential that a confidential relationship be established and maintained. It has been understood that documents such as these are submitted to the Department in confidence and we would be remiss in discharging this fiduciary obligation if these documents were released unilaterally without the concurrence of the tribe. (pp. 2-3)

While case law does not exist on this precise question, this Department will adopt as a litigation position the view expressed by Solicitor Melich. That is, where information is arguably exempt under one of the nine statutory exemptions, we are willing to assert that the trust responsibility to Indians is a factor that also justifies withholding the information. The Supreme Court and other courts have, for nearly 150 years, recognized that the Government, and especially the Department of the Interior as the agency principally responsible for Indian Affairs, has a trust obligation to Indian tribes. In 1831, Chief Justice Marshall first interpreted the relationship between the Indians and the United States as "resembl[ing] that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). More recently, in Morton v. Mancari, 417 U.S. 535 (1974), the Supreme

Court reaffirmed "the solemn commitment of the Government toward the Indians" and recognized the necessity that the United States "[fulfill] its trust" responsibility to the Indians. 417 U.S. at 552-553. In another recent case, the Court spoke of the "overriding duty of our Federal Government to deal fairly with Indians wherever located." Morton v. Ruiz, 415 U.S. 199, 236 (1974). The Supreme Court has held the Federal government "has charged itself with moral obligations of the highest responsibility and trust" and its actions are "judged by the most exacting fiduciary standards." Seminole Nation v. United States, *supra*, 296-97.

It is fundamental that a trustee owes a duty of confidentiality toward the beneficiary of the trust. See, A. Scott, The Law of Trusts, § 2.5 (3d ed. 1967); G. Bogert, Trusts and Trustees, § 11, "[T]he duty of the trustee" concerning "standards of honesty and good faith" is "extraordinary." *Id.*, § 17. To maintain a trust relationship a "special intimacy" and a "great degree of trust and confidence" are required. *Id.*, § 481.

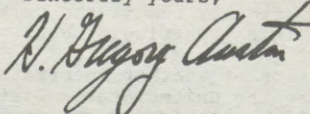
I should emphasize that--while the Department of Interior is prepared to take this litigating position--we are required by established procedures within the executive branch to seek the views of the Department of Justice before denying any request for information under the Freedom of Information Act. This Department cannot therefore finally commit the United States to a litigating position in any particular case.

The question of whether information on rolls is exempt is now before the United States District Court for the Eastern District of Washington. Colville Confederated Tribes v. Kleppe, et al., Civ. No. C-76-91. The Court has enjoined the Department from complying with a request for a copy of the 1937 census roll of the Colville Reservation which the tribe adopted as its base membership roll. We agree with the Tribe's contention that most of

the information on the roll falls within the sixth exemption. But census rolls, including the one involved, have been transmitted to the National Archives as part of the Department's records disposal policy. Thus, such rolls may have come into the public domain. If the Colvilles' roll is in the public domain, our taking the position that the roll is exempt from disclosure may be an untenable one to assert in this particular case.

While we are willing to assert this litigating position under present law, Secretary Kleppe has endorsed legislation to add a special exemption for Indian-related information. The Department's report on S. 2652, of May 14, 1976 and the testimony of the Deputy Commissioner of Indian Affairs at the hearing on May 17 before the Indian Affairs Subcommittee outline the particular problems with which this Department is faced. The position we are now advocating represents something of a departure from that presented to the Subcommittee. In the report and statement, disclosure of information in the instances cited was said to be required; however, the Department is now willing to take a contrary position in appropriate cases as I have stated above. Since the present state of the law is unclear, it is our view that specific legislation of this nature should be enacted, and that it is only by legislation that the uncertain legal situation can best be clarified.

Sincerely yours,



H. Gregory Austin
Solicitor

Enclosure

February 22, 1973

M-36860

NON-AVAILABILITY UNDER PUBLIC INFORMATION ACT OF
CONFIDENTIAL AGREEMENT OF INDIAN TRIBE SUBMITTED
TO DEPARTMENT FOR APPROVAL

Indians: Administrative Procedure Act: Public Information

The withholding, under 5 U.S.C. § 552(b)(4), of a copy of an agreement between the Seneca Nation of Indians, the First Seneca Corporation, the United States Pillow Corporation, and certain individuals, and all drafts of the agreement, is warranted when the agreement was submitted in confidence to the Department for approval, the documents contain commercial or financial information, the fiduciary relationship between the Department and the Indian tribe was a sound ground for invoking the exemption under 5 U.S.C. § 552(b)(4), and the party seeking the information failed to urge any reasons why the exemption should not be invoked.



United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

September 24, 1971

IN REPLY REFER TO:

M-36860

Hogan and Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attention: Sherwin J. Markman, Esq.
Joseph M. Hassett, Esq.

Gentlemen:

By letter to the Bureau of Indian Affairs dated October 26, 1970, you requested a complete copy of a 1965 agreement between the Seneca Nation of Indians, the First Seneca Corporation, the United States Pillow Corporation and certain individuals, and all drafts of the agreement which are contained in the Bureau's files. This request, submitted pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and Departmental regulations, 43 CFR 2.1 et seq., was denied by the Bureau on February 11, 1971, for the following reasons:

First, the documents were actually tribal business records and not agency records subject to the provisions of the Freedom of Information Act; second, the documents were received in confidence from the Seneca Nation and were being held by the Federal Government as trustee; third, a specific statutory exemption for the documents was claimed pursuant to the provisions of 5 U.S.C. § 552(b) (4).

On August 19, 1971, you appealed that decision to the Solicitor and on September 8, 1971, Mr. Hassett and counsel for the Seneca Nation, Mr. Lazarus, were afforded an opportunity to present their respective views orally.

There has been some question whether the requested documents are "agency records" within the meaning of the Act. For the purposes of this appeal I shall assume, arguendo, that they are "agency records."

At the outset we note that your original request sought the "agency agreement." The Bureau of Indian Affairs is not a party to the agreement, which in fact was prepared by or on behalf of the tribe and title to which is vested in the tribe. It should also be noted that the final agreement is merely submitted to the Secretary for approval because it involves the expenditure of funds made available to the Seneca Nation pursuant to Public Law 88-533, 78 Stat. 738. The agreement is not required to be filed with the Secretary, although a copy is retained as evidence of Secretarial approval.

Section 552 (b) (4) of Title 5 U.S.C. provides:

"(b) This section does not apply to matters that are * * * (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential * * * ."

The basis of the Bureau's reliance on this important exemption is, of course, the unique fiduciary relationship between the Department of the Interior and Indians. This fiduciary and confidential relationship has been aptly described by the Supreme Court in Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942):

"In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards."

In the discharge of this fiduciary obligation it is essential that a confidential relationship be established and maintained. It has been long understood that documents such as these are submitted to the Department in confidence

and we would be remiss in discharging this fiduciary obligation if these documents were released unilaterally without the concurrence of the tribe. As you are aware, the tribe has not consented to the release and, in fact, has urged that the Department reject your request. We are led to the conclusion that the documents requested clearly are encompassed within the scope of the exemption of 5 U.S.C. § 552 (b) (4).

Departmental regulations require that upon a determination that the requested records fall within one or more of the categories exempted under the Public Information Act, there be a further determination that sound grounds exist which require the invocation of the exemption, 43 CFR 2.2. While we feel that the fiduciary and confidential relationship between the Department of the Interior and Indians is a sufficient ground in and of itself requiring invocation of the exemption, we also point out that when Mr. Hassett was afforded an opportunity to state the interest of your client in the documents he declined to do so, and even disclaimed any knowledge of the litigation pending in the state courts of New York between the First Seneca Corporation and its construction contractor, in which, we are advised, the contractor unsuccessfully sought to obtain the documents.

Thus Mr. Hassett declined to urge any grounds on behalf of your client why the exemption should not be invoked. Accordingly, the decision of the Bureau of Indian Affairs of February 11, 1971, is hereby affirmed.

Sincerely yours,

(Sgd.) Mitchell Melich
Solicitor



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

AUG 18 1976

Honorable Henry Jackson
United States Senate
Washington, D. C. 20510

Dear Senator Jackson:

AUG 19 1976

We regret the delay in compiling the information which you requested with regard to S. 2652. With regard to New Mexico v. Kleppe, Civ. 75-684, United States District Court for the District of New Mexico, we have enclosed the following documents:

1. Complaint with Attachments
2. Answer
3. Motion for Summary Judgment with supporting Affidavits
4. Correspondence with regard to Discovery
5. Court Order of July 6, 1976

These documents should provide you with a complete record of this suit. The attachments to the Complaint also reveal the basin study request which was denied and gave rise to the suit.

You request an estimate of how much money Indian tribes have lost because of requests for data under the FOIA. We could not even give at this point in time a reasonable estimate of the extent of losses incurred by a tribe or tribes because the ramifications of such requests have not been fully explored by this Bureau or by the tribes. At this point, we are but assuming financial losses in the event that this information is released.

We hope that the information provided will shed some light on this issue, especially the affidavits.

Sincerely yours,

Enclosures 5

 Director, Office of
Trust Responsibilities


Save Energy and You Serve America!

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-64)
(Formerly D. C. Form No. 46 Rev. (5-49))

United States District Court

FOR THE

DISTRICT OF NEW MEXICO

CIV 75-684 B
CIVIL ACTION FILE NO.STATE OF NEW MEXICO ex rel
S. L. RAYMOND, State Engineer.

Plaintiff

v.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant

SUMMONS

To the above named Defendant s:

You are hereby summoned and required to serve upon

Paul L. Bloom
Peter Thomas White
Special Assistant Attorneys General

plaintiff's attorney , whose address

State Engineer Office
Bataan Memorial Bldg.
Santa FE, NM 87503

an answer to the complaint which is herewith served upon you, within ³⁰ ~~30~~ days after service of this
 summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
 taken against you for the relief demanded in the complaint.

JESSE CASBAUS

Clerk of Court.

Deputy Clerk.

Date: November 14, 1975

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
S. E. REYNOLDS, State Engineer,
Plaintiff,

v.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,
Defendant.

) CIV: 5-684

) Civil No.

ORIGINAL
FILED IN MY OFFICE
NOV 14 1975
JESSE C. ...

B

COMPLAINT

For its cause of action against the Defendant, Plaintiff
states:

1. S. E. Reynolds is the duly appointed and qualified State Engineer of the State of New Mexico and is, in that capacity, charged by law with the administration and supervision of the public waters of New Mexico.
2. The Defendant, Thomas S. Kleppe, is the duly appointed and qualified Secretary of the United States Department of the Interior; and in that capacity directs and controls the United States Geological Survey.
3. This cause of action is filed pursuant to the United States Judicial Code, 28 U.S.C. § 1346(a)(2), and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B).
4. S. E. Reynolds, by his letter of May 2, 1975, requested from William E. Hale, New Mexico District Chief of the Water Resources Division, U.S. Geological Survey, copies of U.S. Geological Survey hydrographic data, studies or reports collected or completed by the Geological Survey since 1970 on lands within the Pueblos of Nambé, Pojoaque, San Ildefonso, Tesuque and Taos, and the Jicarilla Apache, Mescalero Apache and Navajo Reservations, within the State of New Mexico. (A copy of said letter is attached hereto as Plaintiff's Exhibit 'A').

5. In response to this request for agency records, T. J. Lyons, Acting Assistant Director of the Central Region, U.S. Geological Survey, by letter dated June 11, 1975, denied the following agency records: (A copy of said letter is attached hereto as Plaintiff's Exhibit 'B').

- a. J. L. Kunkler & A. G. Scott, Plan for Study of Part of the Jicarilla Apache Indian Reservation, Letter Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, April, 1974).
- b. A Proposal for studies of the Water Resources of the Mescalero Apache Indian Reservation, Preliminary Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, July, 1974). (2)
- c. Techniques and data requirements for estimating the water availability on the Mescalero Apache Indian Reservation, Preliminary Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, January, 1975).
- d. Certain studies or reports, without reference to title, author or date, on the Pojoaque drainage basin, encompassing, in part, the lands of the Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso.

6. By letter dated July 7, 1975, S. E. Reynolds, appealed from the initial denial of agency records. (A copy of said letter is attached hereto as Plaintiff's Exhibit 'C').

7. The letter from Royston C. Hughes, Assistant Secretary, Program Development and Budget, United States Department of the

Interior, dated August 22, 1975, set forth the agency's decision to uphold the denial of the aforesaid agency records. (A copy of said letter is attached hereto as Plaintiff's Exhibit 'D').

8. The agency refused to produce the requested records on the ground that they were exempt under the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

9. The Plaintiff is informed and believes and therefore alleges that the requested records contain basic data and evaluation of basic data and that such records are factual, not deliberative, in nature.

10. The Plaintiff is informed and believes and therefore alleges that the requested records were not made in preparation for litigation and do not contain legal conclusions, opinions or theories.

WHEREFORE Plaintiff prays the Court to order the Defendant to promptly make available to the Plaintiff the requested records and to require the Defendant to pay the attorney's fees and other litigation costs incurred by the Plaintiff.



PAUL L. BLOOM
PETER THOMAS WHITE
Special Assistant Attorneys General
State Engineer Office
Bataan Memorial Building
Santa Fe, New Mexico 87503

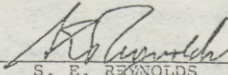
ATTORNEYS FOR THE PLAINTIFF STATE
OF NEW MEXICO EX REL. S. E. REYNOLDS,
STATE ENGINEER

AFFIDAVIT

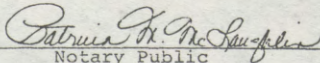
STATE OF NEW MEXICO)
) SS
COUNTY OF SANTA FE)

S. E. REYNOLDS, being first duly sworn upon his oath,
deposes and states:

That he is the duly qualified and appointed State Engineer
of the State of New Mexico; that he has read the foregoing
Complaint, is familiar with the contents thereof, and that
the matters contained therein are true and correct to the best
of his knowledge and belief.


S. E. REYNOLDS

Subscribed and Sworn to before me this 12th day of
November, 1975.


Notary Public

My Commission Expires: 5/2/76

May 2, 1975

Mr. William E. Hale
District Chief
Water Resources Division
U.S. Geological Survey
Post Office Box 4369
Albuquerque, New Mexico 87106

Dear Bill:

At pages 46 and 47 of the "Draft Environmental Statement of the Approval by the Secretary of the Interior of a Lease Between Sangre de Cristo Development Co., Inc. and Tesuque Indian Pueblo" reference is made to the USGS estimate of ground water flow across a 12.5-mile section extending from the southeast corner of the Tesuque Pueblo Grant to the northeast of the Marbe Pueblo Grant which was obtained from an analog model. It is requested that you furnish me a copy of the study together with criteria used to determine the analog model.

It is also requested that you furnish copies of any USGS hydrologic data, studies and/or reports collected or completed since 1970 involving the Pueblos of Marbe, Pojoaque, San Ildefonso, Tesuque, and Teco, the Jicarilla Apache Reservation, the Mescalero Apache Reservation and/or the Navajo Reservation.

Sincerely,

S. E. Reynolds
State Engineer

SEK:pat

(EXHIBIT 'A')



IN REPLY REFER TO:

United States Department of the Interior

GEOLOGICAL SURVEY
 Denver Federal Center
 Denver, Colorado 80225

1975 JUN 13 PM 12:09
 STATE ENGINEER OFFICE
 June 11, 1975
 SANTA FE, N.M.

FREEDOM OF INFORMATION ACT

Registered

Mr. S. E. Reynolds
 New Mexico State Engineer
 Bataan Memorial Building
 Santa Fe, New Mexico 87503

Dear Mr. Reynolds:

Your letter of May 2, 1975 to Mr. William E. Hale, District Chief, Water Resources Division, U.S. Geological Survey, Albuquerque, New Mexico requested certain data and reports pertaining to water involving Indian lands in New Mexico. Specifically, you requested information that relates to the Pueblos of the Nambé, Pojoaque, San Ildefonso, Tesuque, and Taos, and reservations of the Jicarilla Apache, Mescalero Apache, and Navajo Indians. Some of the material requested was furnished on May 20, May 29, June 5, and June 9.

You were advised in Mr. Hale's letter of May 30 that your request of May 2 would now be treated as a Freedom of Information Act inquiry. With regard to work and studies concerning the definition of water rights on the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque, plus the Jicarilla Apache and Mescalero Apache Indian reservations, we are withholding such information on the grounds that it is exempt from disclosure under 5 US Code, Sec. 552 (b)(5) of the Freedom of Information Act and that sound grounds exist for invoking said exemption by reason of the fact that such matters are involved in pending or anticipated litigation and would not be available to you under the Rules of Civil Procedure governing discovery (Rule 26 (b)(3), Federal Rules of Civil Procedure). My decision is based on the advice and recommendation of Lotario D. Ortega, Field Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, after consultation with Mr. George W. Whatstone, FOIA Officer, Water Resources Division, U.S. Geological Survey, Reston, Virginia.

The following list of material is being denied:

For the Jicarilla Apache Indian Reservation, a proposal to identify surface and ground water of an area tributary to the Chama River.

For the Pojoaque drainage basin, although three reports have been sent to you, there are other studies concerned with litigation which are being denied.

(EXHIBIT 'B')

For the Mescalero Apache Indian Reservation, material other than the four items referred to in Mr. Hale's letter of June 5, minor data have been collected and brief proposals made for study of the water supply. These were done with water rights in mind and are denied.

You may appeal this decision to the Assistant Secretary of the Interior for Program Development and Budget under 43 C.F.R. 2.17 by writing to the Freedom of Information Act Officer, Office of the Assistant Secretary, Program Development and Budget, U.S. Department of the Interior, Washington, D.C. 20240. Your appeal must be received within 20 working days of the date of this denial. Your appeal must be accompanied by copies of the original request, subsequent correspondence between you and Mr. Hale, and this initial denial. The appeal should be labeled both on the envelope and on the face of the letter with "FREEDOM OF INFORMATION ACT APPEAL." Your letter should contain a statement of the reasons why you believe this initial decision to be in error.

Sincerely yours,



Acting Assistant Director
Central Region

Copy to:

Freedom of Information Act Officer, Washington, D.C.
Chief Hydrologist, Water Resources Division, Reston, Va.
Regional Hydrologist, WRD, Denver, Colo.
Field Solicitor, Albuquerque, N. Mex.
District Chief, WRD, Albuquerque, N. Mex.
Chief, Program Office, Office of the Director, Reston, Va.



STATE OF NEW MEXICO

STATE ENGINEER OFFICE

SANTA FE

S. S. REYNOLDS
STATE ENGINEER

July 7, 1978

Bataan Memorial Building
STATE CAPITOL
SANTA FE, NEW MEXICO 87531

Freedom of Information Act Officer
Office of the Assistant Secretary
Program Development and Budget
U. S. Department of the Interior
Washington, D. C. 20240

Re: FREEDOM OF INFORMATION APPEAL

Dear Sir:

This is an administrative appeal from the partial denial of certain studies and reports under the Freedom of Information Act, 5 U.S.C. § 552, 43 C.F.R. § 2.17. Copies of the initial requests and partial denial are enclosed.

The letter dated June 11, 1978 specifically denies studies or reports for the following areas:

1. Jicarilla Apache Indian Reservation
2. Pojoaque drainage basin
3. Mescalero Apache Indian Reservation

These denials are founded upon Section 552(b)(5) of the Freedom of Information Act, which exempts inter-agency or intra-agency memorandums not available at law.

It is the State Engineer's belief that the requested reports and studies contain purely factual, rather than deliberative material; that they were not prepared as preparation for litigation; and that they do not contain legal conclusions, opinions or theories. Since they do not fall within either the privilege for confidential intra-agency advisory opinions or the attorney-client and attorney work product privilege, these reports or studies should be disclosed to this office.

Very truly yours,

S. S. REYNOLDS
State Engineer

Enclosures

(EXHIBIT 'C')



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 22 1975

Mr. S.E. Reynolds
State Engineer
State of New Mexico
Bataan Memorial Building
Santa Fe, New Mexico 87503

Dear Mr. Reynolds:

By letter dated July 7, 1975, you appealed from an initial denial by the U.S. Geological Survey of information requested by you. As I understand it, the following material was denied and is the material which you desired:

1. A proposal by the United States Geological Survey to identify surface and ground water of an area tributary to the Chama River in the Jicarilla Apache Indian Reservation.
2. A proposal by the United States Geological Survey to identify water sources for the Mescalero Apache Indian Reservation.
3. A digital model valuation study for the drainage basin of the Pojoaque Pueblo.

You were advised in a letter dated June 11, 1975, from Mr. T.J. Lyons, the Acting Assistant Director, Central Region, U.S. Geological Survey, that that information was being withheld on the grounds that it was exempt from disclosure under exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5). Your appeal, dated July 7, 1975, stated that you believe the material requested is not exempt as stated by Mr. Lyons, but rather is required to be disclosed because the information contained in the documents being withheld is factual rather than opinions or recommendations.

I have been advised by the Solicitor's Office that these documents were prepared in connection with litigation and that they fall within the attorney work-product privilege. It is clear that an attorney's work product which is privileged falls within exemption 5 of the Act,

(EXHIBIT 'D')

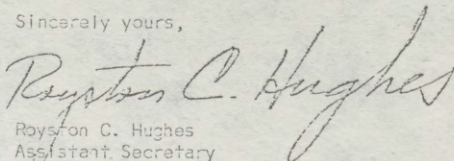
Sears v. National Labor Relations Board, 44 L. Ed. 2d 29 (1975). In addition to the application of exemption 5, there are good reasons for not disclosing the material in that disclosure might unduly hamper the position of the United States in an adversary proceeding.

As you are aware, it is the Department's policy to make our records available to the public to the greatest extent possible, 43 CFR 2.13(a). In light of this, I have asked the Solicitor's Office to go over each document and make available to you portions of them which contain factual information. You should be hearing from them in the near future.

Since this decision upholds a denial, you have the opportunity to obtain judicial review. You may file a complaint in United States District Court for the district in which the records are located, the district in which you reside or have your principal place of business or the United States District Court for the District of Columbia.

The officials responsible for this decision are Royston C. Hughes, Assistant Secretary - Program Development and Budget, and Timothy S. Elliott, Assistant Solicitor, General Legal Services.

Sincerely yours,

A handwritten signature in dark ink, reading "Royston C. Hughes". The signature is written in a cursive, flowing style. The first name "Royston" is written with a large, prominent "R". The last name "Hughes" is written with a large, prominent "H". The signature is positioned above the typed name and title.

Royston C. Hughes
Assistant Secretary
Program Development and
Budget

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
S. E. REYNOLDS, State Engineer

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior

Defendant.

CIVIL NO. 75-684 B

ORIGINAL
FILED IN MY OFFICE

DEC 16 1975

JESSE CASAUS
CLERK

A N S W E R

For his Answer to plaintiff's Complaint, the defendant,
Thomas S. Kleppe, Secretary of the Interior, United States
Department of the Interior, states:

FIRST DEFENSE

1. The defendant admits that S. E. Reynolds is the State Engineer for the State of New Mexico and lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph one of the complaint and the same are, therefore, denied.
2. The allegations of paragraph two of the complaint are denied, except that defendant admits that Thomas S. Kleppe is Secretary of the United States Department of the Interior and discharges the obligations and performs the duties of that office.
3. Paragraph three of the complaint merely sets forth plaintiff's characterization of this action and not allegations of fact for which an answer is required. Insofar as an answer may be required, the allegations of paragraph three are denied.
4. The defendant admits the authenticity of Exhibits "A", "B", "C" and "D" to the complaint and denies the remaining allegations of paragraphs four, five, six, and seven of the complaint.
5. With respect to the allegations of paragraph eight, the defendant would respectfully refer the Court to the letters referred to in the complaint for the complete and accurate terms

thereof; in other respects the allegations of paragraph eight are denied.

6. The allegations of paragraphs nine and ten are denied.

7. All allegations of the complaint not expressly admitted or denied herein are hereby denied.

SECOND DEFENSE

Plaintiff's complaint fails to state a claim upon which relief can be granted.

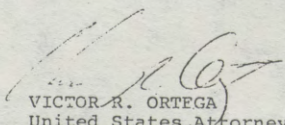
THIRD DEFENSE

The court is without jurisdiction over the subject matter of this action in that the records requested by plaintiffs are exempt from mandatory disclosure pursuant to exemptions set forth in 5 U.S.C. §552(b).

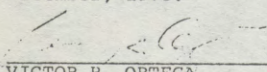
FOURTH DEFENSE

The defendant Thomas S. Kleppe is not a proper party to this action.

WHEREFORE, having fully answered, the defendant, Thomas S. Kleppe, prays that the plaintiff's complaint be dismissed with prejudice and that the costs of this action be assessed against the plaintiff.


VICTOR R. ORTEGA
United States Attorney
Attorney for the defendant,
Thomas S. Kleppe, Secretary of
the Department of Interior

THIS WILL CERTIFY that a true copy of the foregoing was mailed to opposing counsel of record this 17th day of December, 1975.


VICTOR R. ORTEGA
United States Attorney

COPY

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

APR 13 1976

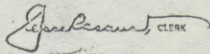
STATE OF NEW MEXICO ex rel.
S. E. REYNOLDS, State Engineer,

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant.

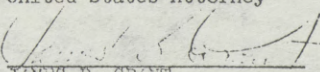


CIVIL NO. 75-684-M

MOTION FOR SUMMARY JUDGMENT

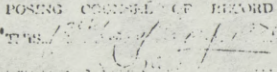
Comes now the Defendant by and through his attorneys Victor R. Ortega, United States Attorney, and James B. Grant, Assistant United States Attorney, attorneys for the defendant herein, and hereby moves the Court for an order pursuant to Rule 56, F. R. Civ. P., granting summary judgment to defendant, on the grounds that there is no genuine issue of fact in this case and that defendant is entitled to summary judgment in this case as a matter of law.

VICTOR R. ORTEGA
United States Attorney



JAMES B. GRANT
Assistant U. S. Attorney

THIS WILL CERTIFY THAT A
TRUE COPY OF THE FOREGOING
PLEADING WAS FILED TO OP-
POSE COUNSEL OF RECORD

THE 
CLERK OF DISTRICT COURT

COPIES

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

APR 13 1976

STATE OF NEW MEXICO ex rel.
S.E. REYNOLDS, State Engineer,

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant.

CIVIL NO. 75-684 M

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

BACKGROUND:

A. The State Engineer's Request	Page
B. Preparation of the Documents Withheld	2
C. Present Status of the Water Rights	5
Adjudications	11

ARGUMENT:

I. The deleted portions of the reports concerning the two Apache reservations are internal advisory memoranda which cannot be disclosed without damage to the Government's deliberative process and are therefore protected against disclosure under Exemption 5 of the Freedom of Information Act.	12
II. The other materials withheld from the State Engineer's request were prepared for use as possible evidence in the water rights adjudications, and should be sought through discovery in those cases.	17
A. Exemption 5 of the Freedom of Information Act incorporates the discovery rules of the Federal Rules of Civil Procedure	18
B. The materials sought would not be available through discovery at this stage in the proceedings for which they were prepared	19

ATTACHMENTS:

- Exhibit A--Affidavit of William E. Hale
- Exhibit B--Affidavit of John E. Carver
- Exhibit C--Affidavit of Donald W. Redd
- Exhibit D--Affidavit of Charles N. Estes, Jr.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
S. E. REYNOLDS, State Engineer,

Plaintiff,

vs.

CIVIL NO. 75-684 M

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

This proceeding was filed by the State of New Mexico, acting through the State Engineer, on November 14, 1975, under the provisions of the Freedom of Information Act, 5 U.S.C. §552. The State Engineer seeks certain reports, memoranda and data concerning the water resources of six Indian tribes of New Mexico prepared by the United States Geological Survey and withheld from release by the Department of the Interior. The materials sought are the following (see affidavit of Mr. William Hale, pp. 3-4):

- a. J. L. Kunkler & A. G. Scott, Plan for Study of Part of the Jicarilla Apache Indian Reservation, Letter Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, April, 1974).
- b. A Proposal for studies of the Water Resources of the Mescalero Apache Indian Reservation, Preliminary Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, July, 1974).
- c. Techniques and data requirements for estimating the water availability on the Mescalero Apache Indian Reservation, Preliminary Report, United States Department of the Interior, Geological Survey (Albuquerque, New Mexico, January, 1975).
- d. Miscellaneous streamflow measurements made on the Mescalero Apache Reservation on or about May 13, 1974.

- e. Digital-Model Evaluation of a Plan to Withdraw Ground Water in the Pojoaque River Basin, a Preliminary Report, by G. A. Hearne and F. C. Koopman, United States Geological Survey, Albuquerque, New Mexico, August, 1974, together with certain memoranda by Geological Survey personnel concerning the digital model and certain related test results.

The State Engineer's request for these materials was formally denied by the Department of the Interior by letter dated August 22, 1975 from Assistant Secretary Royston C. Hughes. The United States takes the position that these materials are exempt from release under the Freedom of Information Act (hereafter F.O.I.A.) because they fall within Exemption 5 of the Act (5 U.S.C. §552(b)(5)). This provision exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". These materials were all prepared in connection with water rights adjudications pending either in this Court or in the New Mexico District Court for Chaves County, cases to which the State of New Mexico and the United States are parties.^{1/} To the extent that these documents are subject to discovery, they may be obtained by the State through discovery requests made pursuant to the Federal or New Mexico Rules of Civil Procedure.

BACKGROUND

A. The State Engineer's Request. - The background of this case, including both the preparation of the material sought by the State Engineer and the response by the Department

^{1/} State of New Mexico v. Aragon, et al., U.S.D.C. N. M., Civil No. 7941 (Adjudication of Chama River, including portion of Jicarilla Apache Reservation); State of New Mexico v. Lewis, et al., N.M.D.C. for Chaves County, No. 20294 (consolidated with No. 22600) (adjudication of Rio Hondo, including portion of Mescalero Apache Reservation); State of New Mexico v. Amodeo, et al., U.S.D.C. N. M., Civil No. 6539 (adjudication of Rio Pojoaque, including portions of Pueblos of Nambe, Pojoaque, Tesuque, and San Ildefonso).

of the Interior to the State Engineer's F.O.I.A. request, is set forth in the affidavits attached to this memorandum, particularly the affidavit of Mr. William E. Hale, the New Mexico District Chief of the United States Geological Survey. In early May, 1975, Mr. Hale received a letter dated May 2, 1975 from Mr. S. E. Reynolds, the State Engineer of New Mexico. The letter requested a copy of an "analog model" analysis made by the U.S.G.S. of ground water flow in the Pojoaque Valley. As the letter noted, reference to this analysis had been made in a publicly-released draft environmental statement prepared by the Bureau of Indian Affairs in connection with the approval by the Secretary of the Interior of a lease of land at Tesuque Pueblo. The State Engineer's letter also requested "copies of any U.S.G.S. hydrologic data, studies and/or reports collected or completed since 1970 involving the pueblos of Nambe, Pojoaque, San Ildefonso, Tesuque and Taos, the Jicarilla Apache Reservation, the Mescalero Apache Reservation and/or the Navajo Reservation".

In response to Mr. Reynold's request, a number of reports and compilations of data were made available to the State Engineer's Office in May and June, 1975. The particular study which included a discussion of the analog model was furnished although it had been prepared by the U.S.G.S. at the request of the Bureau of Indian Affairs for use in the water rights adjudication of the Pojoaque River (State of New Mexico v. Aamodt). This study was released because it was felt that any privilege which the Government might have claimed because of its connection with the water rights litigation had probably been waived by utilizing the study's results in a widely circulated environmental impact statement. Two other reports which the survey had prepared in connection with the Pojoaque adjudication were also released because they were so closely related to the analog model study. ^{2/}

^{2/} Footnote on following page.

Certain other studies, not related to litigation, were also released. (See Hale affidavit, pp. 2-3.)

The release of this information meant that only those materials within the State Engineer's request listed on pages 1 and 2 had been withheld from release; ie, reports which reviewed the water resources information available with respect to a portion of the Jicarilla Apache Reservation and the Mescalero Apache Reservation, certain miscellaneous streamflow measurements made on the Rio Ruidoso within the Mescalero Reservation on or about May 13, 1974, and the digital-model study of ground water conditions within the Pojoaque River basin, together with related memoranda and test results. The letters from the Department of the Interior denying the State's request for those items made clear that the denial was based on the fact that the material had been prepared for litigation. (See Exhibits "B" and "D" to plaintiff's complaint.)

In his letter of August 22, 1975, the Assistant Secretary asked the interested parties within the Government to undertake a final review of the reports withheld and make available any purely factual material which could be released without compromising the Government's position in litigation. Certain portions of the three reports concerning the Jicarilla and Mescalero Apache Reservations (detailed, infra; pp. 6-8.) were forwarded to the State Engineer. None of the materials relating to the Pojoaque basin model were released, however.

2/ To avoid possible confusion it should be noted that the "digital-model" study of proposed ground water withdrawal in the Pojoaque basin, which is among the items withheld from release to the State Engineer (item "d", page 2, supra) is quite different from the "analog model" discussed in the environmental impact statement and made available in response to the State Engineer's request. The analog model is very much less sophisticated and makes no attempt, as does the digital model, to simulate changes in basin conditions as the result of ground water pumping. (see explanation in Hale affidavit, pp. 8-9.)

The State Engineer thereupon filed this proceeding, seeking an order requiring the Secretary of the Interior to make available the requested materials which had been withheld.

B. Preparation of the Documents Withheld. - The affidavits attached to this memorandum make clear that all of the material withheld was unquestionably prepared in connection with the three water rights cases listed on page 2.

1. The report concerning the Jicarilla Apache Reservation was prepared at the request of the Bureau of Indian Affairs with the advice of the attorneys for the Department of Justice, for use in the case of State of New Mexico v. Aragon, U.S.D.C. N.M., Civ. No. 7941. This case is an adjudication of water rights in the Chama River and its tributaries in northern New Mexico. The case was filed in 1954 in the New Mexico District Court for Rio Arriba County and was removed to this Court in 1969. At that time the United States was permitted to intervene as plaintiff in order to assert the water rights of the Jicarilla Apache Tribe and the Pueblo of San Juan from the Chama River.

The Aragon case was one of a number of cases filed by the State of New Mexico to adjudicate water rights of certain streams in northern New Mexico as a prerequisite to administering water to be imported into the Rio Grande basin through the San Juan-Chama diversion project. The Albuquerque Area Office of the B.I.A. has had a primary role in preparing the technical evidence required to establish the extent and priority of the water rights of the Indian tribes involved in all of these adjudications. As the affidavits of Messrs. Hale and Carver explain, the B.I.A. has regularly contracted with the Geological Survey for technical assistance. The Bureau's efforts in connection with these cases has of course been under the direction of attorneys for the Department of the Interior and the Department of Justice.

In the fall of 1973, the B.I.A. decided, after consultation with the trial attorneys, to ask the U.S. Geological Survey to prepare a study of the water resources of that portion of the Jicarilla Apache Reservation within the Chama drainage. The Survey in response prepared a preliminary reconnaissance report outlining the basic information already available on water resources in that area and indicating further steps which might be taken to learn more about its hydrogeology.

The affidavit of Mr. Hale of the Geological Survey (pp. 4-5) explains the nature of this report, dated April, 1974. Following introductory portions, the report contains a general description of the geologic features of the area proposed for study and summarizes the previous investigations made in the area. These pages of the report (pages 8-22) have been made available to the State Engineer, as they contain no evaluative material. (One paragraph is omitted on page 17 which comments briefly on reports prepared by private consultants for the tribe.)

The concluding sections of this report contain a critical evaluation of the accuracy and comprehensiveness of the existing information about the study area. The report concludes with a summary plan for a more comprehensive water resources study of this section of the Jicarilla Apache Reservation. These concluding sections (pages 23-35) have not been released to the State Engineer.

2. The two reports concerning the Mescalero Apache Reservation are quite similar to the Jicarilla Apache report, both in their origins and in their objectives. (Again, see Hale affidavit pp. 5-6 and Carver affidavit pp. 3-6.) Both of these reports were prepared by the U.S.G.S. at the request of the Albuquerque Area Office of the B.I.A. for use in litigation, viz., State of New Mexico v. Lewis.

This case was originally an adjudication of rights to the use of ground water in the Roswell Artesian Basin. The case was filed in 1956 and was completed in the fall of 1973 when the United States and the State of New Mexico entered into a stipulation as to the Government's rights to ground water in the basin. On January 10, 1974, however the scope of the case was enlarged to include rights to the use of surface water of the Rio Hondo and its tributaries, which form a major source of supply for the Roswell Artesian Basin. The Rio Ruidoso, which arises in large part on the Mescalero Apache Reservation, is a major tributary of the Hondo.

After the Lewis adjudication was extended to the Rio Hondo, the Department of Justice urged the B.I.A. to take steps to prepare for the eventual adjudication of the water rights of the Mescalero Apache Tribe. (See affidavit of Mr. Donald Redd.) It was recognized that the Lewis case related to only a portion of the Mescalero Reservation. However, it was agreed that the water resources of the entire reservation should be considered as a whole. ^{3/}

The Geological Survey was accordingly contacted by the B.I.A. and requested to undertake a reconnaissance survey of the existing information concerning the water resources of this reservation similar in scope to the report previously prepared in connection with the Jicarilla Apache Reservation. An initial report along these lines was completed by the U.S.G.S. in July, 1974. A more comprehensive and detailed report was prepared in January, 1975. Again, the nature of these reports is summarized in the affidavit of Mr. Hale.

^{3/} The two Mescalero reports are not divisible into portions dealing with different watersheds on the reservation.

As was done with respect to the Jicarilla Apache report, the portions of these studies which merely summarize the current information available or describe the physical features of the reservation have been made available to the State Engineer. On the other hand, the portions of the reports which consist of evaluation by the U.S.G.S. of the quality or completeness of the available information or which suggest a program for additional study have been withheld. ^{4/}

^{4/} The disposition of the various portions of these two reports is indicated in the following tables:

<u>Report Dated July, 1974</u>		
<u>Pages</u>	<u>Subject</u>	<u>Disposition</u>
--	Cover letter dated July, 15, 1974 to Mr. Wendell Chino, President, Mescalero Apache Tribe.	Released.
1-2a	Title page, table of contents.	Released.
3-5	Summary of background and purpose of the request.	Withheld.
6-8	Summary of previous investigations.	Released (except for one evaluative para. of p. 8).
9-16	Need for additional data, outline of study program.	Withheld.
17, 18	References, location map.	Released.
<u>Report Dated January, 1975</u>		
<u>Pages</u>	<u>Subject</u>	<u>Disposition</u>
1-4	Title page and table of contents.	Released.
5, 6	Background and purpose of the study request.	Withheld.
7, 8	Physical features and geology of the reservation.	Released (except for one evaluative para. of p. 7).
9(1st ¶)	Summary of average surface flows.	Released.
9(2nd ¶), 10	Suppositions about ground water conditions.	Withheld.
11-14	Summary of qualitative and quantitative information about surface water.	Released.
15, 16	Techniques for additional study of surface water.	Withheld.
17	Summary of existing ground water data.	Released.
18-20	Techniques for ground water study.	Withheld.
21, 22	Summary of existing water quality data.	Released.
23-34	Techniques for water quality studies; outline of program for collection of additional data.	Withheld.
35-37	References.	Released.
Fig. 1	Location map.	Released.
Fig. 2	Map locating proposed stream gauging stations.	Withheld.

3. Also withheld from release are certain miscellaneous streamflow measurements made along the Rio Ruidoso by Geological Survey personnel. In the winter of 1973-1974, the Tribe had constructed a pumping station and pipeline to direct water from the Ruidoso across a divide as a supplemental water supply for a reservoir built by the Tribe as part of a resort complex.

In the early part of 1974, the State had unsuccessfully sought to enjoin any diversion of water by the Tribe from the Ruidoso. Because of this controversy, it was felt that measurements of the diverted flow should be taken. For this reason the Geological Survey was asked to make streamflow measurements above and below the pumping station. This was accomplished on or about May 13, 1974. (See Hale affidavit, p. 6; Carver affidavit, p. 5.) These records will form part of the basis for the hydrologic evidence to be submitted on the Tribe's behalf in the water rights adjudication.

4. The last set of materials withheld from the State Engineer's request concerns a digital-model study of the effects of potential ground water withdrawal in the Pojoaque River basin. As the affidavits again establish, this work was undertaken by the Albuquerque Office of the Geological Survey at the request of the Bureau of Indian Affairs for use in a water rights case, viz., State of New Mexico v. Aamodt, the adjudication of the Rio Pojoaque. The United States in this case is asserting water rights on its own behalf and on behalf of four Indian pueblos located in part within the Pojoaque watershed: Nambe, Pojoaque, San Ildefonso and Tesuque.

The Aamodt case was filed in the spring of 1966, but the first portion of the trial was not held until April, 1974. (The delay was due largely to the unsuccessful effort by two Indian pueblos on the main stream of the Rio Grande to intervene in the proceeding.) In December of 1973, the B.I.A., attorneys for the Department of Justice, and private attorneys retained

by the Indian pueblos (with financial assistance from the B.I.A.) undertook a review of preparations previously made by the United States in this case. One major suggestion that emerged from this review was that a more comprehensive study be undertaken of ground water availability within the Pojoaque River basin.

The B.I.A. had previously developed a tentative engineering plan for use in the Aamodt case outlining the portions of the four Indian pueblos felt by the B.I.A. to be "practicably irrigable". (This is the formula suggested by the United States Supreme Court in Arizona v. California, 373 U.S. 546 (1963), as the basis for determining the water rights of Indian tribes.) The suggestion was made that the B.I.A. investigate the possibility of greater reliance on the use of ground water in their engineering plan. In order to analyze the effect of pumping ground water, it was suggested that the U.S.G.S. be asked to utilize a digital computer model to simulate ground water conditions in the Pojoaque basin and indicate the changes pumping might be expected to induce. (Mr. Carver's affidavit, pp. 6-8, sets forth in greater detail the background and purpose of this request.)

As Mr. Hale's affidavit indicates (p. 9), the values utilized in the model to represent the hydrogeologic parameters of the Pojoaque aquifer were based almost entirely on the empirical data set forth in the four reports concerning this basin which have been made available to the State Engineer. ^{5/} In June of 1974, some limited field investigations (viz., infiltration tests and neutron moisture logs) were made to develop additional data for use in setting the model parameters. This data did not prove definitive enough for use in the model, however. (See Hale affidavit, pp. 9-10.) A preliminary report on the computer model

^{5/} The reports are indicated in Mr. Hale's affidavit, p. 7.

investigation was prepared by the U.S.G.S. in August, 1974.

In addition to the U.S.G.S. August 1974 report and results of the infiltration tests and moisture logs, the U.S.G.S. has also withheld a number of memoranda concerning the Pojoaque basin model written by Survey personnel. These documents include memoranda to the files by members of the Albuquerque district office, memoranda to the Albuquerque district office from employees of other Survey offices, and letters by Survey personnel in Albuquerque to the B.I.A. transmitting the results of several intermediate computer runs. The memoranda written by U.S.G.S. personnel consist entirely of summaries of discussions concerning the model, evaluations of the techniques and assumptions employed in the model, and suggestions for various refinements. None of these letters or memoranda contain any factual material beyond that already provided to the State Engineer.

C. Present Status of the Water Rights Adjudications. -

Trial is neither scheduled nor even reasonably imminent in any of the three cases for which the U.S.G.S. prepared the reports, memoranda and data sought by the State Engineer. Adjudication of Indian water rights cases in the Chama River, including the rights of a portion of the Jicarilla Apache Reservation (State of New Mexico v. Aragon), will not be undertaken until resolution of certain common legal questions in the Pojoaque case. That case (State of New Mexico v. Aamodt) is itself on interlocutory appeal to the United States Court of Appeals for the Tenth Circuit from the decision of Judge Payne that the water rights of the four Indian pueblos should be governed by the state-law principle of prior appropriation rather than by the "reserved rights" doctrine spelled out in Arizona v. California, 373 U.S. 546 (1963). Aamodt has been briefed and was argued in November, 1975, but the Court of Appeals has not yet ruled. Regardless of the Court of Appeals' decision, appeal to the

United States Supreme Court is likely. All proceedings in the district court have of course been stayed pending appellate resolution of the central legal issues.

Date of trial in the adjudication of the water rights of the Mescalero Apache Reservation is similarly uncertain (State of New Mexico v. Lewis). The Supreme Court of New Mexico recently ruled that the New Mexico courts did have jurisdiction to determine the water rights pertaining to the Mescalero Reservation, and remanded the case to the district court. However, preparations for trial have just begun and it will undoubtedly be some months before a trial date is set.

In none of these cases has the State of New Mexico (which acts in these matters through the State Engineer) sought the materials requested, or any information about them, through the normal discovery process. In the Aamodt case, the State was advised of the existence of the digital model and given names of the witnesses who would be called to testify about it in a "Motion for Pretrial Order" filed by the United States on June 10, 1974. Since that date the State has not sought any information about these investigations through interrogatories under Rule 33, requests to produce under Rule 34, or through other forms of discovery under the Rules of Civil Procedure. In neither of the other two cases has any information been sought by the State through discovery.

ARGUMENT

I

THE DELETED PORTIONS OF THE REPORTS CONCERNING THE TWO APACHE RESERVATIONS ARE INTERNAL ADVISORY MEMORANDA WHICH CANNOT BE DISCLOSED WITHOUT DAMAGE TO THE GOVERNMENT'S DELIBERATIVE PROCESS AND ARE THEREFORE PROTECTED AGAINST DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT.

The Freedom of Information Act, 5 U.S.C. §552, was enacted in 1956 to ensure broader access by the general public to government documents and records. The Act requires that such documents be made available upon request unless they fall within one of nine specific exceptions. In the resolution of the present case, the most important of these is Exemption 5, dealing with intra-government memoranda. Subsection (b) of the Act (5 U.S.C. § 552 (b)), which sets forth the exceptions, provides in part that "[the Act] does not apply to matters that are:

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

There is no question that the materials sought by the State Engineer in the present case fall within the category of "inter-agency or intra-agency memorandums or letters". The Government would be happy to have the Court examine all of these materials in camera in order to confirm this fact. Each of the four basic reports sought in this case indicates in its text that it was prepared in response to a request from another government agency, the Bureau of Indian Affairs. The affidavits of Messrs. Hale and Carver establish that the streamflow measurements made at Mescalero were likewise made at the B.I.A.'s request. The memoranda prepared in connection with the Pojoaque Basin digital-model study indicate on their face that they are internal government documents. The circumstances surrounding the compilation of the related test results also indicate that they were prepared for use within the Geological Survey in determining the proper values to use in the model.

The documents withheld from the State Engineer's request fall into two separate categories and require somewhat distinct treatment. The three reports prepared in connection

with the Jicarilla and Mescalero Apache reservations (items "a"- "c" on pp. 1-2, supra) were requested by the Bureau of Indian Affairs strictly for background information and for advice as to the measures which ought to be taken to prepare one aspect of the tribes' case in these water rights proceedings. These reports, while prepared by expert consultants retained in connection with litigation, were never intended to be used in trial.

These reports are shielded from disclosure under Exemption 5 of the F.O.I.A. which incorporates the principle that internal government documents may be held confidential if they are advisory in nature in order to avoid revealing an agency's "deliberative process". The factual parts of these reports have been released; only evaluative and advisory portions have been withheld. Such materials must be protected from disclosure if effective intra-governmental communication is to be maintained.

Exemption 5 was added to the F.I.O.A. to ensure that written policy deliberations within the Government would remain frank and uninhibited, so that all points of view are expressed and taken into account in making decisions. As the Senate Committee Report explains (S. Rep. No. 813, 89th Cong., 2d sess., p. 9):

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."

See also H. Rep. No. 1497, p. 10 (U.S. Code Cong. & Admin. News 1956, p. 2427) for a similar statement. In the recent case of NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), the Supreme Court echoed this congressional concern and made it clear that

documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are within the scope of the fifth exemption. 421 U.S. at 150 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.C. 1965)). See also EPA v. Mink, 410 U.S. 73, 85-87 (1973).

These considerations are clearly applicable to the three reports prepared by the U.S.G.S. to assess the available water supply information concerning the Jicarilla and Mescalero Apache Reservations. The purpose of each of these reports was to evaluate for another agency, the Bureau of Indian Affairs, the quality of technical information available concerning the water resources of the two reservations, and to render detailed advice as to what steps might be undertaken to obtain more complete data. It is surely difficult to characterize these reports as anything but "advisory opinions" or "recommendations" to be used by the B.I.A. and the Department of Justice in deciding what steps should next be taken to prepare for litigation.

The fact that these matters are in litigation makes this an especially treacherous area in which to order disclosure. We have noted that the B.I.A., in requesting these reports of the Geological Survey, was acting at the recommendation of attorneys responsible for preparing the Government's case on behalf of the two Indian tribes. Materials specifically requested to advise attorneys and the experts assisting them (in this case engineers at the B.I.A.) as to steps which might be taken to prepare one vital aspect of a matter in litigation is clearly within the scope of the attorney's deliberative process and thus within the work-product doctrine which the Supreme Court in the Sears case found incorporated in Exemption 5. ^{6/}

^{6/} "Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5" 421 U.S. at 154.

The fact that these reports "contain basic data and evaluation of basic data", as alleged in paragraph 9 of the State Engineer's complaint, should not obscure the fact that they are essentially advisory in nature. The State's contention seems to be that no scientific report can be regarded as "deliberative" and within the scope of Exemption 5, because it will be based on factual complications. This analysis would have made automatically available the scientific and technical documents concerning the "Cannikan" nuclear test sought by plaintiffs in EPA v. Mink, supra, and would have saved the Supreme Court a difficult decision. Instead, as the Court noted in that case, "Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data" in favor of "the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." 410 U.S., at 91.

In Washington Research Project, Inc. v. Dept. of H.E.W., 504 F. 2d 233, the Court of Appeals for the District of Columbia Circuit held the evaluative portions of reports prepared by expert consultants evaluating research proposals for the National Institutes of Health (definitely based on factual analysis) to be privileged from disclosure under Exemption 5 of the F.O.I.A. Even compilations of evidence consisting entirely of factual material have been found within the scope of this exemption where the compilations were made by an agency staff member to summarize an administrative record for agency decision and disclosure of the compilation would reveal the internal decision-making process of the agency. Montrose Chemical Corp. v. Train, 491 F.2d 63 (C.A. D.C., 1974).

As noted previously, the purely factual summaries in the three reports about the Apache reservations have been made available to the State Engineer. The remaining portions of these reports are strictly evaluative. These portions at least should be shielded against disclosure in order both to preserve the confidence of the governmental deliberative process and to permit parties to seek confidential expert advice in planning their approach to litigation.

II.

THE OTHER MATERIALS WITHHELD FROM THE STATE ENGINEER'S REQUEST WERE PREPARED FOR USE AS POSSIBLE EVIDENCE IN THE WATER RIGHTS ADJUDICATIONS, AND SHOULD BE SOUGHT THROUGH DISCOVERY IN THOSE CASES.

Somewhat different considerations apply with respect to the streamflow measurements made on the Mescalero Reservation (item "d" on p. 2, supra) and the Pojoaque computer model and its associated empirical tests (item "e"). A major purpose for making the streamflow measurements was to obtain information which might be necessary for use at trial. Likewise the Pojoaque model study was initiated both to provide necessary information to the B.I.A. engineers in developing their plan outlining the pueblos' "practicably irrigable" lands, and also for direct use in trial. Discovery of information concerning materials prepared by experts for use in litigation may certainly be obtained -- but only within the constraints imposed by the Rules of Civil Procedure. Under those rules, discovery of this information would be premature at this time since trial is far from being scheduled in either the Lewis or the Aamodt cases. 7/

7/ The considerations set forth above (under part I of this argument) with respect to purely advisory documents to apply, however, to the miscellaneous memoranda in the Geological Survey's files concerning the computer model. These memoranda consist entirely of advice and recommendations (or summaries of such recommendations) of Survey personnel to one another concerning the development of the model. These documents are clearly protected by the basic policy of Exemption 5.

Moreover questions of whether this material is now properly discoverable should be resolved in the context of the water rights cases for which this information was prepared.

A. Exemption 5 of the Freedom of Information Act incorporates the discovery rules of the Federal Rules of Civil Procedure. - Exemption 5 is drafted in terms which expressly make the availability of internal government documents turn on whether they would be available "by law" to a party in litigation with the United States or one of its agencies. The Supreme Court in two cases last term unambiguously rules that Exemption 5 was coextensive with the discovery principles of the Rules of Civil Procedure. The Court stated that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context. . . ." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975) (citing the companion case, NLRB v. Sears, Roebuck & Co., 421 U.S. 132).

The House Committee Report which accompanied the Freedom of Information Act in its final form makes the scope of Exemption 5 turn on basic rules of civil discovery: "Thus, any internal memoranda which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H. Rep. No. 1497, 89th Cong., 2d sess; U.S. Code Cong. & Admin. News 1966, p. 2428. As summarized by Professor Moore (4Moore's Federal Practice §26.61 [4.-3]):

Subsection (b)(5) provides that inter-agency and intra-agency memoranda are public information only insofar as they would be available "by law" in an action between the agency and a party not an agency. "By law" refers, of course, to the Rules of Civil Procedure. [Citing General Services Admin. v. Benson, 415 F. 2d 876 (C.A. 9, 1969).] Thus, the availability of such materials under the Rules is unaffected by the statute, except as memoranda might qualify under subsection (a)(2)(C) [governing "administrative staff manuals and instructions"].

In addition to the Grumman and Sears cases, a number of lower court decisions (including Benson cited by Professor Moore) have confirmed the principle that Exemption 5 incorporates the discovery tests of the Rules of Civil Procedure: e.g., Brockway v. Dept. of the Air Force, 518 F. 2d 1184, 1189-1194 (C.A. 8, 1975); Sterling Drug v. F.T.C., 450 F. 2d 698, 704-705 (C.A. D.C., 1971). This Court has also held that ". . . the tests to be applied under the [Freedom of Information] Act are the same tests applied under the discovery rules." E.E.O.C. v. Los Alamos Construction Co., 382 F. Supp. 1373, 1379 (U.S.D.C. N.M. 1974).

B. The materials sought would not be available through discovery at this stage in the proceedings for which they were prepared. - The discovery of the materials sought in this case is properly governed by two subsections of Rule 26 of the Federal Rules of Civil Procedure: Subsection (b)(3), which regulates discovery of materials prepared for litigation, and subsection (b)(4), which concerns discovery of "facts known and opinions held" by experts retained to assist in trial preparation.

The portions of the Federal Rules of Civil Procedure governing discovery, including Rule 26, were amended substantially in 1970. One of the goals of the 1970 amendments was to make it clear that information developed for litigation purposes by experts was subject to discovery for purposes of cross-examination. (See Advisory Committee note to Rule 26, 28 U.S.C.A., p. 160.) The new rule was also intended, however, to prevent either party from building its affirmative case from the other side's preparations. For this reason, Rule 26(b) imposes important restrictions on the discovery of expert information.

Rule 26 (b)(4) provides in general that discovery of "facts known and opinions held by experts. . . acquired or developed in anticipation of litigation or for trial" may be obtained without court order only through interrogatories asking the party to identify the expert witnesses which he expects to call and indicating the "substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion". Further discovery is possible but only upon motion and court order. An important corollary of this rule is that "[d]iscovery [of expert information] is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be." (Advisory Committee note, supra, p. 161.) ^{8/}

With trial in both the Lewis and Aamodt cases completely unscheduled it is clear that the State's attempt to obtain this expert information now is entirely premature. Preparations by the Government for the Lewis case are in mid-stream and it is certainly unclear who will be called as expert witnesses concerning the Mescalero Tribe's water resources. With respect to the Aamodt case, which is of course on interlocutory appeal to the Tenth Circuit, a good deal of work is

8/ See also, Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stanford Law Review, p. 487, cited with approval by the Advisory Committee Note, supra, p. 161:

[t]he timing of discovery is extremely important. If we are to ensure, in the absence of a showing of good cause for complete discovery, that discovery is to be limited to obtaining a foundation for cross-examination, it is appropriate to permit discovery only as to those experts who will in fact testify. Therefore, discovery should be allowed a short time before trial, when it is clear which experts a party will actually present as witnesses.

This limitation on discovery to trial witnesses is followed and discussed in Bulley v. Meister Brau, Inc., 57 F.R.D. 11 (D. Ill. 1972) and Insulation Consolidated Copper Co. v. Lumberman's Mutual Casualty Co., 60 F.R.D. 205, 210 (E.D. N.Y., 1973).

currently being done by the Albuquerque Office of the Geological Survey both to refine the computer model and to gather more information concerning the characteristics of the aquifer. This information is intended to define more accurately the parameters of the model. Until this work is completed, the United States will not know whom it will call as witnesses to testify about this study nor will the witnesses know precisely the facts to which they will testify. Once trial dates have been set in these two cases, it will be entirely appropriate for the State to submit interrogatories as contemplated by Rule 26 asking the Government to specify the witnesses it will call and the facts and opinions to which they will testify. At this point, however, such discovery is forbidden by the rules. ^{9/}

When documents and other materials prepared for litigation are themselves sought, Rule 26(b)(3) also becomes applicable. This provision specifies that

a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

^{9/} At the argument on motions held before the Court on April 7, 1976, counsel for the State pointed out that Judge Payne had ruled that no further hydrologic evidence would be permitted in the Aamodt case. This ruling was made shortly before the Court granted an interlocutory appeal, however, and the Government has chosen to use the additional time inevitably made available by the appeal to gather more information about the hydrology of the Pojoaque Basin. It is hoped, of course, that Judge Payne will permit this information to be presented once Aamodt is returned for trial. In any event, there is no doubt that this material is being prepared for litigation purposes. If it is ultimately excluded, then presumably it will not be discoverable at all -- all the more reason to require that discovery in Aamodt follow the normal course.

The essence of this standard is that the discovering party must show that he cannot obtain the materials sought through his own efforts. ^{10/} (See Advisory Committee Note, supra, pp. 157-158.) As noted, no such showing has ever been attempted by the state in any of the three water rights adjudications. Moreover, there is no reason to assume that such a showing could be made. Experts employed by the State Engineer are certainly competent to make streamflow measurements on the Ruidoso or analyses of ground water conditions in the Pojoaque basin. While the United States acknowledges that the State has a right under the Rules to information about the testimony the Government's experts will offer at trial so that it can prepare cross-examination and rebuttal; we do not believe that the State can show a "substantial need" for these materials in the preparation of its own affirmative case. For this reason discovery of such information at this time would be premature.

If nothing else, it is surely clear from these considerations that the trial materials sought by the State Engineer in the present case are not inter-agency memoranda which would "routinely be disclosed" (emphasis added) in litigation with the Government. The Supreme Court has expressly adopted this language, taken from the House Committee Report, supra, as the standard to be applied in F.O.I.A. cases raising Exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. at 149, n. 16. ^{11/}

^{10/} A number of district courts have turned down requests to produce expert reports prepared for litigation on just these grounds. See, e.g., Breedlove v. Beach Aircraft Corp., 57 F.R.D. 202 (N.D. Miss., 1972); Wilson v. Resnick, 51 F.R.D. 510, 511 (E.D. Penn., 1970); United States v. 145.31 Acres, 54 F.R.D. 359, 360 (E.D. Penn., 1972); Sea Colony v. Continental Ins. Co., 63 F.R.D. 113, 114 (D. Dela., 1974).

^{11/} See also Davis, Administrative Law Treatise, 1970 Supplement, §3A.21, pp. 157-158, for more complete discussion to the same effect.

Absent a finding by this Court that disclosure of these documents in pre-trial discovery would be "routine", their disclosure in this suit would be improper.

Finally, the United States urges that this Court not attempt to resolve in this case the question of whether material prepared by the Government for use in other litigation is presently discoverable by an opposing party. The Supreme Court has indicated that it does not look with favor on the use of the F.O.I.A. as a "tool of discovery" in litigation, when the Rules of Civil Procedure provide ample opportunity for the adverse parties to obtain relevant information from the Government. ^{12/}

The State is free to utilize normal discovery techniques in each of the three pending water adjudications to obtain documents it feels it must have for its trial preparations. Should such discovery be attempted, and resisted by the United States, the courts can then judge the propriety of the State's request in the context of each particular case. It would be entirely inappropriate to order production of these documents here and thus permit the State to circumvent the orderly discovery procedures established by both the Federal and the New Mexico Rules of Civil Procedure.

^{12/} "Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see Seares Roebuck & Co. v. NRE, 433 F.2d 210, 211 (C.A. 6, 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings. See 32 CFR §§1480.1-1480.12 (1972). Discovery for litigation purposes is not an expressly indicated purpose of the Act." (Renegotiation Board v. Bannerkraft Co., 415 U.S. 1, at 24 (1974).)

CONCLUSION

For the reasons stated above, the Federal defendant herein urges that summary judgment be granted in his favor pursuant to Rule 56, F.R. Civ. P.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant U.S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 13th day of April, 1976.

Assistant U.S. Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.	)	
S. E. REYNOLDS, State Engineer,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. 75-684 M
	)	
THOMAS S. KLEPPE, Secretary of	)	
the Interior, United States	)	
Department of the Interior,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT

State of New Mexico)
) ss:
 County of Bernalillo)

WILLIAM E. HALE, first being duly sworn, deposes and says:

I am the District Chief of the New Mexico District of the United States Geological Survey, Water Resources Division. Our district headquarters is located in Albuquerque, New Mexico. I have held my present position since January 27, 1966.

On May 5, 1975, I received a letter, dated May 2, 1975, from Mr. S. E. Reynolds, the State Engineer of New Mexico. This letter made reference to an "analog model" used by the Geological Survey to estimate the ground water flow "across a 12.5 mile section extending from the southeast corner of the Tesuque Pueblo Grant to the northeast of the Nambe Pueblo Grant." The letter requested "a copy of the study together with criteria used to determine the analog model." The letter also requested "copies of any USGS hydrologic data, studies and/or reports collected or completed since 1970 involving the Pueblos of Nambe, Pojoaque, San Ildefonso, Tesuque, and Taos, the Jicarilla Apache Reservation, the Mescalero Apache Reservation and/or the Navajo Reservation."

Exhibit A

Upon receipt of this letter, I asked members of my staff to begin to determine the materials which might be covered by Mr. Reynolds' request. I contacted the Albuquerque Area Office of the Bureau of Indian Affairs about this request because most of the data to which it referred was prepared at their instance. I also contacted Mr. Lotario Ortega, the Albuquerque Field Solicitor of the Department of the Interior because I knew that at least some of this material was related to matters in litigation.

By a memorandum dated May 15, 1975, Mr. Ortega furnished me his advice about this request, advice on which I then acted. Mr. Ortega advised the release of the analog model study requested in the first part of Mr. Reynolds' letter. A discussion of this analog model, and a summary of its results, was included in a study prepared by Mr. F. C. Koopman, formerly of my office, entitled "Estimated ground-water flow, volume of water in storage, and potential yield of wells in the Pojoaque River drainage basin, Santa Fe County, New Mexico." This study was requested by the Bureau of Indian Affairs in September 1969 in connection with a water rights adjudication in the Pojoaque River. This drainage basin encompasses the lands of four of the Indian pueblos referred to in Mr. Reynolds' letter: Nambe, Pojoaque, Tesuque, and San Ildefonso.

The analog model and its results were described in a draft environmental impact statement prepared in connection with a lease of lands at Tesuque Pueblo. Because this statement had been widely circulated, Mr. Ortega advised me that any privilege which the Government might claim with respect to the analog model study had probably been waived. Accordingly, I forwarded a copy of the study to Mr. Reynolds by letter of May 20, 1975.

With respect to Taos Pueblo and the Navajo Reservation, I advised Mr. Reynolds that no work had been done for litigation purposes and that he was free to inspect and copy the limited investigations into domestic water supplies on these two reservations which we had made for the Public Health Service. With respect to all other studies, however, Mr. Ortega

advised me that, as they had been prepared for use in water rights litigation, they should not be released. I so informed Mr. Reynolds in my letter of May 20, 1975. The letter of May 2, 1975, from Mr. Reynolds was treated as an ordinary letter of inquiry at that time.

During the next several weeks, certain additional information came to my attention which our office had prepared concerning the Mescalero Apache Reservation and which did not relate to matters in litigation. This information included an analysis of the effects of road construction on a spring near Mescalero and suggestions for locating and developing stock wells. This material was made available to Mr. Reynolds.

During the last weeks of May and early June 1975, I was informed by the field solicitor that certain additional materials, which had been prepared at the request of the Bureau of Indian Affairs for use in water rights litigation, might nevertheless be released to the State Engineer. This material included data on the water supply in Dulce Canyon on the Jicarilla Apache Reservation, together with a check on the capacity curve of Dulce Reservoir. On this advice we also released two other reports which had been prepared for the adjudication of the Pojoaque River: "Estimated mean-monthly and annual runoff at selected sites in the Pojoaque River drainage basin, Santa Fe County, New Mexico," by Louis J. Reiland; and "Estimated availability of surface and ground water in the Pojoaque River drainage basin, Santa Fe County, New Mexico," by Messrs. Reiland and Koopman.

This meant that as of June 11, 1975, in a letter signed by T. J. Lyons, Acting Assistant Director of the Central Region of the U.S. Geological Survey in Denver, Colorado, the following reports prepared by this office and considered within Mr. Reynolds' request were withheld from release: (1) A proposal for a study of surface and ground water resources on the portion of the Jicarilla Apache Reservation drained by tributaries of the Chama River; (2) Two similar proposals for studies of the water resources of the Mescalero Apache Reservation, together with miscellaneous stream flow measurements made on or about May 13, 1974; (3) A report on a digital model evaluation of ground water availability

within the Pojoaque River Basin, together with certain related test results and intra and interagency memoranda concerning the model. In the following paragraphs I will explain the nature of the materials withheld and the background of their preparation, to the extent of my personal knowledge.

1. "Plan for a Study of Part of the Jicarilla-Apache Indian Reservation" by J. L. Kunkler and A. G. Scott.

In October 1973, Mr. John Carver of the Albuquerque Area Office of the Bureau of Indian Affairs requested that our office make a study of the ground and surface water resources of the portion of the Jicarilla-Apache Indian Reservation located within the watershed of the Chama River in northern New Mexico. In response to this request, our office indicated that because of the lack of data and previous studies in this area, it would first be wise to prepare a planning study to indicate the current availability of data and the problems that would be involved in making a full-scale water resources study. The report here in question was designed to meet this limited objective and was completed in April 1974. This report summarizes and evaluates the existing information on the water resources of this area and proposes a plan of study to meet the BIA's objectives. The report outlines the time-frame for such a study, manpower needs, and the costs that would be involved.

Following introductory pages (including a table of contents, location map, and background summary), this report contains a general description of the topographic and geologic features of the area proposed for study. The following section summarizes briefly previous investigations which have been made in the area. Another section then summarizes the available information derived from oil wells and test holes which have been drilled in this area. The next section summarizes the existing information concerning the chemical analysis of surface waters in the study area.

There then follows a critical evaluation of the accuracy and comprehensiveness of the existing data. The report discusses the extent to which basic questions about the water resources of this area can be

answered and indicates probable ground water yield of the various geologic formations underlying this area based on existing information.

The report concludes with a section summarizing a plan for a more comprehensive water resources study for this part of the Jicarilla-Apache Indian Reservation. The report indicates various alternative approaches which might be taken in studying water availability, indicates the cost associated with each approach, the time and manpower needs required by each and the value of taking these alternative steps.

2. (A) Proposal for Studies of the Water Resources of the Mescalero-Apache Indian Reservation, Otero County, New Mexico, July 1974.

This preliminary report was prepared at the request of the Mescalero-Apache Tribe and the U.S. Bureau of Indian Affairs made on June 20, 1974. The purpose of the request was to have the Geological Survey outline the existing state of knowledge concerning the water resources of the reservation and suggest steps which should be taken to improve this information.

This report includes a brief discussion of the scope of previous investigations of hydrologic and geologic conditions on the reservation and indicates the surface stream gauges that have been maintained on or in the vicinity of the reservation.

The report then briefly outlines the areas in which additional data are needed and suggests certain general steps which might be taken to increase the available information. The report also includes an indication of the manpower that would be necessary to complete the studies that it suggests and indicates the total costs which might be involved.

2. (B) Techniques and Data Requirements for Estimating the Water Availability on the Mescalero-Apache Indian Reservation, Otero County, New Mexico, January 1975.

This report was, again, prepared at the request of representatives of the BIA and the Mescalero-Apache Tribe made during meetings on December 10 and 11, 1974. The report is essentially an expanded discussion of many of the same topics covered in the earlier proposal relating to this reservation.

This report includes a discussion of the basic topographic and geologic features of the reservation. It then summarizes preliminary estimates of the availability on the reservation of both surface and ground water and discusses the estimates of the chemical quality and sediment load of these waters. Because of the need for additional data in all these areas, these preliminary estimates were somewhat speculative in nature.

With respect to surface water availability, ground water availability and the quality of water supplies, the report then discusses the nature and comprehensiveness of the existing data that is available and indicates analyses which could be undertaken based on that existing data. It also indicates in some detail methods by which the additional data could be gathered during a 5-year period of future study. The report then sets forth a program for the collection of additional data concerning both quantitative and qualitative aspects of the water resources of the Mescalero-Apache Reservations. The program includes specific techniques that might be utilized over specified time periods. The report also indicates the benefits which could be obtained as a result of the study program outline.

2. (C) Miscellaneous Stream Flow Measurements Made on the Mescalero Apache Indian Reservation.

Some weeks prior to May 13, 1974, the Mescalero Tribe indicated to our office that they planned to operate a pumping station on the Rio Ruidoso within the reservation boundary and asked us to make measurements of the streamflow above and below the diversion. The purpose was to determine the diversion rate of flow. The request was concurred in by the Bureau of Indian Affairs, and the measurements were made on or about May 13, 1974.

3. (A) Digital Model Evaluation of a Plan to Withdraw Ground Water in the Pojoaque River Basin, by G. A. Hearne and F. C. Koopman, August, 1974.

In the last part of February or early March, 1974, a meeting was held in my office to discuss the work which we had done for the Bureau of Indian Affairs during the preceding several years in connection with the

adjudication of water rights in the Nambe-Pojoaque-Tesuque watershed in North-central New Mexico. Attending the meeting were two members of my staff, James Cooper and Frank Koopman, two representatives of the BIA, John Baker and Loyd Nickelson, and Mr. William Gookin, a private consultant in hydrology who had been retained by the BIA. At this meeting we reviewed the reports concerning the Pojoaque basin which had previously been prepared in our office at the request of the Bureau of Indian Affairs for use in this proceeding:

- (a) "General Geology and Hydrology of the Pojoaque Area, Santa Fe County, New Mexico" by Frederick D. Trauger,
- (b) "Estimated Mean-Monthly and Annual Runoff at Selected Sites in the Pojoaque River Drainage Basin, Santa Fe, New Mexico" by Louis J. Reiland,
- (c) "Estimated Availability of Surface and Ground Water in the Pojoaque River Drainage Basin, Santa Fe County, New Mexico" by Louis J. Reiland and Francis C. Koopman,
- (d) "Estimated Ground-Water Flow, Volume of Water in Storage, and Potential Yield of Wells in the Pojoaque River Drainage Basin, Santa Fe County, New Mexico" by F. C. Koopman.

These reports, in their final form, have been made available to the State of New Mexico.

There was considerable discussion at this meeting of the possibility of our office making a more comprehensive study of the availability of underground water in the Pojoaque River basin. At that time the question was raised, primarily by Mr. Gookin, whether the Geological Survey could undertake a computer-model analysis to predict the effects of ground water withdrawals on the water table in this area. We discussed the fact that similar computer models had been developed by the Geological Survey, universities, etc., to analyze the effects of ground water use in many other watersheds.

After this meeting I asked members of my staff to investigate the possibility of adapting a ground water computer model to the Pojoaque area. In early March, Mr. Glenn Hearne, a mathematician on our staff in Albuquerque, outlined to me the possibilities of using a particular

mathematical model for the purposes I had indicated, utilizing a computer located at Kirtland Air Force Base in Albuquerque. On or about March 22, 1974, Messrs. Koopman, Hearne, and I conferred with representatives of the BIA (including, I believe, Messrs. Nickelson, Baker, and John Carver) concerning the nature, potential value and cost of a computer model of the Pojoaque basin.

On March 29, 1974, we were contacted by Mr. Baker of the BIA and asked to begin work on such a model. The BIA was to provide funding and immediately furnished this office with data in the nature of a ground water development plan. This plan indicated a number of wells, which were located on a map, and set forth the rate at which each well would be pumped. This information, which was revised several times, was imputed to the model with the intent of developing an approximate indication of the effects of such ground water withdrawal at the end of given periods of time.

Between March and August 1974, when this report was completed, we made a number of computer runs in connection with this model utilizing various assumptions and seeking to refine our analysis. We had the advice of employees of the Geological Survey from both our Regional Office in Denver and the Survey's headquarters in Reston, Virginia. We had numerous meetings concerning the results of our analysis and the nature of the techniques and assumptions employed with representatives of the BIA, their consultants, attorneys representing the four Indian Pueblos involved in the water rights adjudication, and attorneys from the Department of the Interior and Department of Justice. As indicated, the costs of this modeling effort have been borne by the Bureau of Indian Affairs.

The model employed is designed to take certain assumed rates and locations of ground water withdrawal and combine this information with certain assumptions about the physical properties of the aquifer under study in order to make general predictions about the effects of such withdrawals on the contours of the area water table and on the flow of nearby streams. The model utilizes a rectangular grid of node points

which is superimposed on a map of the area to be modeled. In our case the nodes were spaced one-half mile apart in the area of the Pojoaque basin and somewhat farther apart outside the basin.

At each node we entered certain assumptions about the physical properties of the ground water aquifer at that point. We entered figures for (a) the saturated thickness of the aquifer at that point, (b) its "transmissivity" (the ability of the aquifer to transmit water), and (c) a "storage coefficient" (a ratio indicating the volume of water the aquifer will release per unit volume of dewatered sediments). We also entered assumptions as to conditions at the boundaries of the model. Finally, we entered the projected rates of pumping (provided by the Bureau of Indian Affairs) at each appropriate node. The computer was then programmed to calculate the effect of this pumping over given periods of time (in our case for 10, 50 and 100 years) on the water table at each node.

The values chosen to represent the hydrogeologic parameters of the Pojoaque aquifer in this model, as outlined above, were based primarily on the information set forth in the four reports concerning this basin (mentioned previously) which have already been provided to the State. We did make various runs of the model with a range of assumptions as to the physical parameters in order to test the sensitivity of the results to various assumptions.

During the development of the model, a major concern of all parties involved was that there was insufficient aquifer data available to set the physical parameters accurately. For this reason, certain limited tests were made in June of 1974 to develop further information. Infiltration tests were made on the alluvial surface in places along the Pojoaque River to obtain information on the infiltration capacity of the soil. Although the information was not used, it was considered for use in estimating recharge to the ground-water system primarily as a result of flood flows. Temperature profiles of the water in selected wells was made for the purpose

of using heat flow approach as an indicator of hydraulic conductivity. The data gathered were not definitive enough to use in setting the model parameters, however. Finally, neutron moisture logs were obtained in a few wells for the purpose of estimating the specific yield of the sediments. The logs were made on ordinary wells not specifically designed for this kind of data acquisition. The results were deemed too poor for use in estimating specific yield and hence were not utilized in the model.

3. (B) Memoranda concerning the Pojoaque basin model written by Geological Survey personnel to the files, to other members of the Survey, and to the Bureau of Indian Affairs.

In addition to the Pojoaque basin computer model study itself, we have withheld a number of memoranda and letters in our files which reflect the evolution of this study from the first request by the Bureau of Indian Affairs. This material consists of three sorts of items: memoranda to the files by staff members of Albuquerque District Office of the Survey; memoranda from employees of other offices of the Survey itself (i.e., our Regional Office in Denver and Headquarters in Reston, Virginia) containing evaluations of our modeling efforts and suggestions for various refinements; and letters by staff members here in Albuquerque to the Albuquerque Area Office of the BIA transmitting the results of several intermediate computer runs. They consist mostly of evaluation and criticism of the techniques, approaches and assumptions used in the model and summary of results cited in letters of transmittal to the BIA.

William E. Hale
WILLIAM E. HALE

1976.

SUBSCRIBED AND SWORN to before me this 7th day of April.

Daniel S. Sandoz
Notary Public

My commission expires:

My Commission Expires Nov. 1st, 1977

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel,
S. E. REYNOLDS, State Engineer

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior

Defendant.

CIVIL NO. 75-684 M

AFFIDAVIT

State of New Mexico)
) ss:
County of Bernalillo)

JOHN E. CARVER, being first duly sworn, deposes and says:

I am the Area Natural Resources Manager in charge of the Branch of Land Operations for the Albuquerque Area Office of the Bureau of Indian Affairs. I received a B.S. degree in Agricultural Engineering from New Mexico State University in 1951 and have had extensive experience in the natural resource field including agricultural and irrigation engineering, soil and moisture conservation and water resource evaluation and development. I have been employed by the Bureau of Indian Affairs since 1957 in various locations in New Mexico and Colorado and have been Natural Resources Manager for the Albuquerque Area since November 1972. In that capacity I have been responsible for supervising the work of Bureau employees helping to prepare the defense of Indian tribal water rights as they have become involved in litigation. The responsibility of this office extends to all Indian reservations within New Mexico, except the Navajo, and to the Southern Ute and Ute Mountain Ute Reservations in southern Colorado.

In early May, 1975, I was informed by Mr. William Hale, Chief of Albuquerque District Office of the U.S. Geological Survey, that the New Mexico State Engineer, Mr. S. E. Reynolds, had asked him to make available studies and reports prepared since 1970 with respect to the water resources of some of the Indian reservations in the State. I am familiar with most of the

material within the scope of Mr. Reynolds' request and have usually been responsible for requesting such data and reports from the Survey.

I understand that four reports, together with certain memoranda and test results, have ultimately been withheld from Mr. Reynolds on grounds that they were prepared for use by the Government in litigation involving Indian water rights. I am familiar with the background of these matters. In the following pages I will discuss each of these subject areas in turn.

1. Plan for a study of Part of the Jicarilla
Apache Indian Reservation

I was transferred to the Albuquerque Area Office shortly after it was established in the spring of 1966. (The area office for all New Mexico and Colorado reservations had previously been located in Gallup, New Mexico.) From that time until becoming Natural Resources Manager in November 1972, I was Area Conservation Engineer and Supervisory General Engineer for the Albuquerque Area Office, Branch of Land Operations.

On assuming my duties in the Albuquerque office, I learned that the State of New Mexico had recently filed suit to adjudicate water rights along a number of the tributaries to the Rio Grande in northern New Mexico as a prerequisite to administering water to be imported into the Rio Grande Basin via the San Juan-Chama Diversion Project, then under construction. We were informed that the State intended to adjudicate the rights of Indian tribes located along these streams along with the rights of all private parties. The largest of the streams to be adjudicated was the Rio Chama, which includes a part of the Jicarilla Apache Reservation within its watershed.

We understood at that time that the Rio Chama was already being adjudicated in state court (without the presence of the Indian tribes or the United States as parties). In the Spring of 1969, however, we received copies of pleadings and were informed that the United States had intervened in the Chama adjudication and that it had been removed to federal district court (State of New Mexico v. Aragon, et al., Civil No. 7941, U.S.D.C. N.M.). At approximately the same time, we understood that the United States had intervened in several of the other tributary suits where either it had interests or the interests of Indian tribes were involved. We were informed that the rights of the United States and Indian tribes in the Pojoaque drainage just

north of Santa Fe would be the first to be adjudicated and that the government and Indian rights in the other watersheds would be adjudicated subsequently. For that reason we obviously put first priority on preparation for the Pojoaque case (State of New Mexico v. Aamodt, Civil No. 6639).

In the fall of 1973, however, we determined that it would be advisable to gather hydrologic information concerning that portion of the Jicarilla Reservation located in the Chama watershed. We therefore forwarded a request to the Albuquerque District Office of the Geological Survey, asking them to review the existing information concerning the hydrogeology of this area and to formulate a plan to gather more extensive information. This work was completed in April, 1974, when the report here in question was forwarded to our office. As indicated, the report was entitled "Plan for a Study of Part of the Jicarilla Apache Indian Reservation." We have not yet taken further steps to carry out the study program outlined in the Survey's report.

Our decision to request this preliminary report from the Geological Survey was entirely the result of our awareness of the need to begin preparations to assert the water rights of the Jicarilla Apache Tribe in the Chama adjudication. Even though studies of this nature are considered desirable for all the Indian reservations under the jurisdiction of the Albuquerque Area Office, budgetary limitations have meant that they can generally only be funded for use in pending or expected litigation.

2. Proposals for Study of the Water Resources of the Mescalero Apache Reservation

In December of 1973, I was contacted by Mr. Lotario Ortega, the Field Solicitor in Albuquerque for the Department of the Interior, and informed that a petition had been filed in the state district court for Chaves County, New Mexico, to adjudicate the waters of the Rio Hondo and its tributaries in southeastern New Mexico. I was told that this petition had been filed in connection with the adjudication of the rights to use ground waters in the Roswell Artesian Basin, which had previously been completed, on the grounds that the Rio Hondo was a major source of supply to the ground water of that Basin. I later received a copy of an order of the district court indicating that motion to file this petition had been granted on January 10, 1974.

A primary tributary of the Rio Hondo is the Rio Ruidoso, which arises in part on the Mescalero Apache Reservation. I was told that the United States had already been a party to the Roswell Basin adjudication and that expanding that suit to cover the Rio Hondo and its tributaries might mean that the United States would have to assert the water rights of the Mescalero Reservation.

During the winter of 1973-74 the Mescalero Apache Tribe constructed a pump station on the Rio Ruidoso within the Reservation to divert water across a divide to the drainage of Cienegita and Carrizo Creeks, where it has (together with natural runoff) since been used to fill a reservoir constructed by the Tribe as part of a recreation complex. After the order was entered extending the Roswell Basin adjudication to the Rio Hondo and its tributaries the State of New Mexico sought a preliminary injunction against the United States to prevent the Tribe from pumping water from the Ruidoso. (The State's motion was subsequently denied).

On January 29, 1974, a meeting was held in our office in Albuquerque to discuss this situation. Attending were Wendell Chino, the President of the tribe; several members of the tribal council; Mr. George Fettingner, the tribe's attorney; Mr. Donald Redd, an attorney with the Department of Justice assigned to this case; Field Solicitor Ortega, myself and several members of my staff. It was suggested at this meeting that, while the United States would probably resist efforts to have the state court exercise jurisdiction over the tribe's water rights, the time might come fairly soon when tribal rights to water in the Hondo drainage (and possibly other parts of the reservation) would be determined in some court proceeding. Mr. Redd urged that work be started as soon as possible to assess the water resources of the reservation as well as the potential water requirements of the Tribe. It was assumed that such a study would take several years to complete. Although it was recognized that the Rio Ruidoso (the subject of the pending suit) drained only a portion of the reservation, it was felt advisable, for purposes of developing a study, to treat the reservation as a whole. However, priority would be placed on developing information concerning the Ruidoso.

As a preliminary to undertaking a full-scale study of the tribe's water resources, it was determined that the U.S. Geological Survey should be asked to review the current hydrologic information available concerning the

reservation and make recommendations for further study. Mr. Hale of the Survey's Albuquerque office was contacted during January, 1974 about this matter. I explained at the time that we were seeking preliminary advice from the Survey about the scope of a study which would later be used to help establish the tribe's water rights in court.

Later in the spring of 1974 the Tribe began to operate the pumping station on the Ruidoso. Because of the controversy surrounding this pumping (including the State's unsuccessful effort to have it enjoined), it was felt advisable to obtain accurate measurements of the pumping's effect on the streamflow. The Geological Survey was asked to make streamflow measurements both above and below the diversion site for this purpose. These measurements were made on or about May 13, 1974.

On June 20, 1974 members of the Survey met with tribal officials and myself to discuss a water resources study. At that meeting we made it clear to Mr. Frank Koopman of the Survey that the preliminary study was required to protect the Tribe's water rights in court proceedings. The Survey agreed to undertake this study, and a draft report was received on July 18, 1974. The report was entitled "A proposal for studies of the water resources of the Mescalero Apache Reservation, Otero County, New Mexico," and dated July, 1974.

After receipt of the Survey's first report, discussions continued concerning preparation of a complete evaluation of the tribe's water resources and requirements. On December 10 and 11, 1974, a meeting was held in the Mescalero Tribal Office of Mescalero to review and consider proposals by private consultants to carry out the complete study. Mr. Hale of the Survey was in attendance along with tribal officials, members of my staff, and Mr. Redd of the Department of Justice.

At this meeting it was determined that the Geological Survey would refine and expand their report of July, 1974 and outline in greater detail procedures that might be followed to evaluate the reservation's water resources. At this meeting it was again recognized that the tribe's water rights in the Rio Ruidoso were already in litigation and that the rest of the reservation would probably be adjudicated in time. While it was also recognized that these studies would be useful to the tribe and Bureau of Indian Affairs for management purposes, everyone involved with this study

recognized that the existence of pending litigation gave urgency to this undertaking. The expanded report was received from Geological Survey in January, 1975.

3. Digital Model Evaluation of Potential Ground Water Withdrawal in the Pojoaque River Basin.

As I have mentioned, I was informed that water rights adjudication suits had been commenced by the State on certain Rio Grande tributaries in the spring of 1966. The United States intervened in the adjudication of the Nambé-Pojoaque-Tesuque water shed (State of New Mexico v. Aamodt) soon after it was begun. There are four Indian pueblos whose rights are involved in the Pojoaque case: Nambé, Pojoaque, San Ildefonso, and Tesuque. Since mid-1966, I have been actively engaged in helping to prepare technical materials needed to substantiate the water rights claims of the four pueblos.

In January of 1974, The Albuquerque Area Office approved a contract with an organization formed by five of the northern Indian Pueblos which would permit the organization to retain legal counsel and expert technical help to review the preparations which the United States had made in this water rights adjudication. Pursuant to that arrangement, the organization, called the Northern Pueblos Tributary Water Rights Association, entered into a contract with Mr. William S. Gookin of Phoenix, Arizona, a consulting hydrologic engineer. During February of 1974, Mr. Gookin met several times with myself and other members of my staff and reviewed the preparations we had made to present evidence relevant to the four pueblos' water rights claims. In particular we reviewed the engineering plan developed by my staff outlining the lands on each of the pueblos which we found to be "practically irrigable" (the measurement of Indian tribal water rights adopted by the Supreme Court in Arizona v. California).

From the outset Mr. Gookin was concerned that we acquire greater knowledge of the extent to which ground water might be available for use by the four pueblos and whether additional lands might be classed as practically irrigable if ground water were used for irrigation. He suggested that we discuss with the Albuquerque District Office of the Geological Survey the possibility of their undertaking a computer model study to assess the potential effects of pumping ground water in the Pojoaque area.

In March 1974, Messrs. Loyd Nickelson and John Baker (also of the BIA) joined Mr. Gookin and me in several meetings with Mr. William Hale and other representatives of the Geological Survey to discuss the advisability of such a modeling effort. After consultations with the attorneys representing the pueblos and attorneys with the Department of the Interior and Department of Justice, we decided to request that the Survey undertake to develop a model of this nature. By letter dated April 1, 1974, our office authorized Mr. Hale to go forward with the modeling effort.

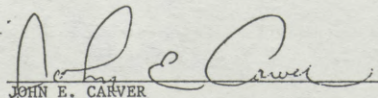
At that time we furnished to the Geological Survey a map (derived from our irrigation plan) indicating the proposed location of a number of wells to serve the irrigable lands of the four pueblos. We also submitted a proposed schedule of pumping rates for these wells. We asked that the Survey use this data, together with assumptions about the characteristics of the aquifer based on existing data, and predict the changes in ground water levels which might be expected as a result of this pumping over a period of 10, 50, and 100 years. This information was vital in preparation of our irrigation plan for the pueblos; the feasibility of irrigating these lands with ground water would depend in part on the pumping lifts involved. Since those lifts would be affected over time by ground water withdrawal, it was important to have an estimate of the effects sustained pumping might have on the local water table.

The Bureau of Indian Affairs was to assume the cost of this effort, and a purchase order to this effect was forwarded to Mr. Hale in early April. I have attached to this affidavit a true copy of Voucher No. 4635-0071-43-74, dated June 12, 1974 (a carbon copy of which was retained in our office), by the authority of which funds were actually transferred from the account of the Albuquerque Area Office of the Bureau of Indian Affairs to the Geological Survey for the first phase of this model study. The voucher specifies that payment is made "for data furnished in connection with Nambe-Pojoaque Water Suit, Civil No. 6639."

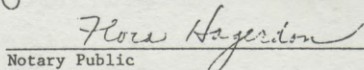
After this work was requested, in March of 1974, until it was completed, in August of the same year, I attended numerous conferences with representatives of the Geological Survey and attorneys involved in this proceeding concerning the techniques and assumptions used in the model and assessing the results of a number of separate computer runs. It was plainly discussed at

each of these meetings that this work was being done as an aspect of the preparation for the adjudication of the four pueblos' water rights.

One problem repeatedly discussed was the fact that the Geological Survey did not feel that sufficient information was available to use more than a broad range of values to represent the physical properties of the aquifer in the model. We recognized the need for additional data but believed at that time that all materials relating to the trial had to be available for submission to the Court on August 15, 1974. It was agreed that certain limited tests be conducted in an attempt to better define the parameters. In response to this request the Survey conducted infiltration tests at a number of sites in the Pojoaque Basin and also ran temperature and neutron moisture logs of several wells in the area. It is my understanding that the results of these tests were not considered sufficiently definitive to use in the model.


JOHN E. CARVER

SUBSCRIBED AND SWORN to before me this 7th day of April, 1976.


Notary Public

My commission expires:

September 19, 1979

STANDARD FORM 1001
2 TREASURY FORM 2500
FISCAL SERVICE
BUREAU OF ACCOUNTS
1001-107

VOUCHER AND SCHEDULE OF WITHDRAWALS AND CREDITS

Vou. No. _____ (Office Use Only)

Vou. No. 4635-0001 (Billing Office Use Only)

To Disbursing Officer—Office Billed

(D.O. symbol)

You are authorized to effect the withdrawals and credits indicated below.

Disbursing Officer—Billing Office

(D.O. symbol)

PAID BY

(Address)

WITHDRAW FROM—			PAY TO—		
DEPARTMENT Interior BUREAU Indian AGENCY STATION SYMBOL HQ ADDRESS Albuquerque Area Office, P. O. Box 8327 Albuquerque, New Mexico 87103			DEPARTMENT Interior BUREAU Geological Survey AGENCY STATION SYMBOL 14-CB-0001 ADDRESS National Center, Mail Stop 271 Reston, VA 20192		
BUREAU REFERENCE	APPROPRIATION OR FUND SYMBOL	AMOUNT	BUREAU REFERENCE	APPROPRIATION OR FUND SYMBOL	AMOUNT
	100/-01/4/2201/1035-8600/4824	\$2,740.00		146804	\$2,740.00
	P. O. 4800-0102027				
TOTAL		\$2,740.00	TOTAL		\$2,740.00

Approval for Payment 6/24/75

Approved by _____

Accepted by _____

Details of charges or reference to attached supporting documents

Bureau of Indian Affairs
Albuquerque Area Office
P.O. Box 8327
Albuquerque, NM 87103

Attn: L. H. Craig

For data furnished in connection with Max Pojosque Water Suit, Civil No. 6639, Phase Two Study. Authorized by P. C. no. FWH-00-0102027 and Amendment no. 1 (copies attached).

Work has been completed.

For use of office billed:

For use of billing office:

Project account: 4-4635-32000

Date: June 12, 1974

CERTIFICATE OF OFFICE BILLED

I certify that the items listed herein are correct and proper for payment from the appropriation(s) designated.

(Date)

(Authorized administrative or certifying officer)

Paid by check No. _____

C/D No. _____, dated _____

341,760.00

U.S. GOVERNMENT PRINTING OFFICE: 1959 OF-300-482 (2-74)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
S.E. REYNOLDS, State Engineer,

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant.

CIVIL NO. 75-684 B

AFFIDAVIT

IN THE DISTRICT OF COLUMBIA:

DONALD W. REDD, being first duly sworn, deposes and
says:

Since July 3, 1967, I have been a trial attorney in
the Land and Natural Resources Division of the U.S. Department
of Justice. In that capacity I have been responsible for
preparation of the United States' position in three water rights
adjudications in the State of New Mexico: State of New Mexico v.
Aragon, U.S.D.C. N.M., Civil No. 7941 (adjudication of the Chama
River and its tributaries); State of New Mexico v. Lewis, New
Mexico District Court for Chaves County, Nos. 20294 and 22600
(Roswell Artesian Basin, extended to Rio Hondo and its tribu-
taries); and State of New Mexico v. Aamodt, U.S.D.C. N.M.,
Civil No. 6639 (Rio Pojoaque). In each of these cases the
United States is representing the water rights of Indian tribes
whose reservations lie in whole or part within the drainages
being adjudicated. The Jicarilla Apache Reservation and San
Juan Pueblo are both partly within the drainage of the Rio
Chama (State of N.M. v. Aragon), the Mescalero Apache Reservation
is on the Rio Ruidoso, a tributary of Rio Hondo and thus included
in Lewis; and the Pueblos of Nambe, Pojoaque, San Ildefonso and
Tesuque are included in Aamodt.

In May, 1975, I was advised by Mr. Lotario Ortega,

the Albuquerque Field Solicitor for the Department of the Interior, that Mr. S. E. Reynolds, the New Mexico State Engineer, had requested that the Geological Survey make available to him all reports and studies prepared by the Survey since 1970 in connection with most of the New Mexico Indian reservations. It is my understanding that, while a number of reports were made available to the State, a total of four reports, together with certain memoranda and field measurements, were not released. Those reports relate to the water resources of the Jicarilla Apache Reservation, the Mescalero Apache Reservation, and the four Indian pueblos located in the Pojoaque drainage. I am personally familiar with the circumstances in which the Geological Survey was requested to make these studies and I will discuss each of them in turn.

1. Plan for a Study of Part of the Jicarilla Apache Reservation

In 1964 the State of New Mexico filed a water rights adjudication of the Chama River in the New Mexico District Court for Rio Arriba County. On March 5, 1969, this adjudication was removed to the United States District Court for the District of New Mexico as Civil No. 7941. At that time the United States was permitted to intervene as a plaintiff and filed a complaint in intervention asserting water rights for the Jicarilla Apache Tribe and the Pueblo of San Juan from the Chama River.

By agreement with the State of New Mexico, no steps have been taken to adjudicate the rights of the United States or the Indian tribes along the Rio Chama pending resolution, in the Pojoaque adjudication (State of New Mexico v. Aamodt), of certain basic legal questions common to both cases. This arrangement was discussed with Field Solicitor Ortega and with Mr. John Carver and others of the Albuquerque Area Office of the Bureau of Indian Affairs. In these discussions it has always been clear that the water rights of the Jicarilla Tribe in the Chama watershed would eventually be adjudicated.

Because the Pojoaque adjudication was to go to trial first, the Bureau of Indian Affairs has focused its efforts on preparing that case. However, with my encouragement, the Bureau in the fall of 1973 did ask that the Geological Survey begin to prepare a hydrologic study of that portion of the Jicarilla Reservation within the Chama drainage. It is my understanding that the study now in question was prepared in response to that request.

2. Proposals for Study of the Water Resources
of the Mescalero Apache Reservation

... In the fall of 1973 I represented the United States in working out a stipulation with the State of New Mexico as to the rights to ground water of the United States in the Roswell Artesian Basin. Suit to adjudicate ground water rights in this basin had been filed in 1956 (State of New Mexico v. Lewis, et al.), and entry of this stipulation completed that adjudication.

However, in December of 1973, the Department of Justice was served with a petition filed by the Pecos Valley Artesian Conservancy District and the State of New Mexico to extend the Roswell Basin adjudication to include rights to use surface water of the Rio Hondo and its tributaries. The Hondo is itself tributary to the Pecos River and was alleged to be a major source of supply for the Roswell Artesian Basin. On January 10, 1974, the District Court for Chaves County entered an order extending the scope of the Lewis case to encompass the Hondo.

The Rio Ruidoso, which arises in large part on the Mescalero Apache Reservation, is a major tributary of the Hondo. Later in January, 1974, the Department of Justice was served with a motion for a preliminary injunction to prevent officials of the Government from allowing diversion of water from the Ruidoso for use on the Mescalero Apache Reservation. It was apparent that the United States would either have to assert

water rights for the Mescalero Apache Tribe or challenge the jurisdiction of the state court to adjudicate those rights.

Late in January, 1974 I attended a meeting in the Albuquerque Area Office of the BIA to discuss the position of the Mescalero Tribe in this proceeding. In attendance were representatives of the Tribe, the BIA, the Albuquerque Office of the U. S. Geological Survey and the Albuquerque Field Solicitor. I indicated that the United States would probably move to dismiss the case as it related to the Tribe on grounds that the state court did not have jurisdiction to determine Indian tribal water rights. I advised, however, that the water rights of the Tribe were likely to be adjudicated in either state or federal court within the next few years, and I suggested that work be commenced to inventory the water resources and water needs of the Mescalero Reservation as soon as possible. We discussed the fact that the Lewis case related only to the Rio Ruidoso, which drains only part of the reservation, but there was general agreement that the reservation should be treated as a whole in studying its water resources.

It was determined at that meeting to ask the Geological Survey to make a preliminary study of the current status of water resources information concerning the Mescalero Reservation and to make suggestions as to the scope of further investigations. Arrangements for such a study were left in the hands of the BIA.

At a hearing in April, 1974 the United States did move to dismiss the case as it related to the Mescalero Reservation. This motion was granted and the State of New Mexico appealed to the New Mexico Supreme Court. We advised the Bureau of Indian Affairs to continue work with the Geological Survey on the reservation's water resources, for it remained our belief that the Tribe's water rights would be adjudicated at some future time. (On February 9, 1976, the district court's order of dismissal was in fact reversed and the case remanded for proceedings on the merits.)

In December, 1974 I attended another meeting at the BIA office in Albuquerque at which proposals by private consultants to undertake full-scale studies of the Mescalero Reservation's water resources were considered. We reviewed at that time a report of the Geological Survey dated July, 1974 outlining a study program for the reservation. It was my understanding that that report was prepared as a result of our meetings earlier in the year.

At the December, 1974 meeting, Mr. Hale of the Survey offered to expand the Survey's July report so that it would serve as a more complete foundation for studies by a private consultant. This second report was prepared and dated January, 1975.

Throughout these meetings it was fully understood that the Geological Survey was being requested to outline study needs for the Mescalero Reservation so that studies could be performed to help establish the Tribe's water rights in judicial proceedings.

3. Digital Model of Pojoaque River Basin and Related Memoranda and Test Results

Since 1968 I have been responsible for overseeing the Government's preparation for trial in the Pojoaque River adjudication (State of New Mexico v. Aamodt). Beginning in the summer of 1973, a second Department of Justice attorney, Charles N. Estes, has been responsible for much of the liaison in the field with the Bureau of Indian Affairs, under my general supervision.

In February, 1974 Mr. Estes and I discussed certain recommendations made by Mr. William Cookin, a private hydrologist retained as a consultant by the BIA to review the preparations for this case. Chief among Mr. Cookin's suggestions was that the Geological Survey be asked to prepare a computer model of ground water conditions in the Pojoaque River Basin. The model was to analyze the effect on the water table and on

streamflows of ground water pumping by the four Indian pueblos whose rights are being adjudicated. Mr. Estes and I agreed that this would be a useful tool of analysis and we suggested that the BIA make arrangements with the Geological Survey for such a model to be prepared.

As I understand it, the memoranda and test results which have been withheld from the State Engineer are related to efforts to refine this computer analysis. To the best of my knowledge, all of this material was prepared for ultimate use in proving the extent of the four pueblos' water rights.

DONALD W. REDD

SUBSCRIBED AND SWORN to before me this ____ day
of April, 1976.

Notary Public

My commission expires:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
S.E. REYNOLDS, State Engineer,

Plaintiff,

vs.

THOMAS S. KLEPPE, Secretary of
the Interior, United States
Department of the Interior,

Defendant.

CIVIL NO. 75-684 B

AFFIDAVIT

STATE OF NEW MEXICO }

COUNTY OF BERNALILLO }

SS:

CHARLES N. ESTES, JR., being first duly sworn, deposes
and says:

I am currently an Assistant United States Attorney for
the District of New Mexico and I was formerly a trial attorney
in the Land and Natural Resources Division of the Department of
Justice in Washington, D.C. since October of 1972. Since that
time I have been assigned to help direct the trial preparations
for the United States in the case of State of New Mexico v.
Aamodt, Civil No. 6639, U.S.D.C. N.M. That case is in adjudi-
cation of water rights within the Nambe-Pojoaque-Tesuque stream
system in north-central New Mexico. The United States, as
trustee, is representing the interests of four Indian pueblos
located within that watershed: Nambe, Pojoaque, Tesuque and
San Ildefonso.

In January of 1974, I attended several meetings at
the Area Office of the Bureau of Indian Affairs in Albuquerque
to review the technical preparations which the Bureau had made
to support the pueblos' position in this lawsuit. Mr. William
Cookin, an engineering consultant retained by the BIA to help
in this review, raised a question as to whether more emphasis
ought to be placed on the use of ground water in preparing an
irrigation development plan for the four pueblos. Mr. Cookin
suggested that we investigate the possibility of having the

Geological Survey develop a computer model to assess the ground water potential of the Pojoaque area.

In March of 1974, I attended several additional meetings in Albuquerque at which members of the Geological Survey were present. They outlined the approach that might be followed in a computer study of this nature and suggested the benefits and limitations of such a study. They indicated that a computer at Kirtland Air Force Base, in Albuquerque, might be utilized.

After discussing this matter with my superiors in Washington, I contacted Mr. John Carver of the BIA and indicated that we felt that the development of such a model by the Geological Survey would be highly beneficial in presenting the four pueblos' water rights claims in the pending litigation.

Between that time (March, 1974) and the completion of the report in August, 1974, I attended a number of meetings in Albuquerque to discuss progress on the computer model. On a number of occasions I reviewed with the BIA the pumping schedule they had submitted to the Survey. On many of these occasions we discussed the fact that there was a serious absence of data concerning actual subsurface conditions in the Pojoaque Basin. In order to try to remedy this deficiency, the Geological Survey conducted certain limited field tests in the summer of 1974. These tests were thus directly related to development of the computer model.

At all times in discussion of the model with representatives of the BIA and the Geological Survey, it was recognized that the results of this effort would be utilized by the United States in establishing the four pueblos' water rights in the pending adjudication.

Charles N. Estes, Jr.
CHARLES N. ESTES, JR.

SUBSCRIBED AND SWORN to before me this 13th day of April, 1976.

Notary Public
Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103
POST OFFICE BOX 97

E. L. MECHEM
JUDGE

April 30, 1976

Mr. Paul L. Bloom
Special Assistant Attorney General
State Engineer Office
Bataan Memorial Building
Santa Fe, New Mexico 87501

Mr. James B. Grant
Assistant U. S. Attorney
P. O. Box 607
Albuquerque, New Mexico 87103

Mr. Phillip R. Ashby
Ashby, Rose & Sholer
618 Manzano, N.E.
Albuquerque, New Mexico 87110

Mr. Calvin Hyer
Ussery, Burciaga & Parrish
P. O. Box 487
Albuquerque, New Mexico 87103

Re: State of New Mexico ex rel.
S. E. Reynolds v. Thomas S.
Kleppe, Secretary of Interior
No. 75-684-M Civil

Gentlemen:

I would not begin to consider the defendant's motion for summary judgment based on affidavits when the plaintiff has no factual basis on which to refute nor counter such motion and accompanying affidavits and does not have the opportunity to counter nor refute.

The affidavits at this point are at most conclusive or recitals of opinion without factual basis.

The defendant will have to produce matters of substance to avoid disclosure.

Sincerely,


E. L. Mechem

May 14, 1976

Honorable E. L. Mechem
United States District Judge
United States District Court
Albuquerque, New Mexico 87103

Re: State of New Mexico ex rel
S. E. Reynolds v. Thomas S. Kleppe,
Secretary of the Interior
No. 75-684 M Civil

Dear Judge Mechem:

This is in response to your letter to counsel of April 30, 1976 concerning this case and in response to plaintiff's motion filed on April 27, 1976 for denial or continuance of defendant's motion for summary judgment. In hopes of expediting decision in this case, we enclose with this letter copies of a number of documents which support the affidavits filed herein. We believe that these documents indicate without question that the materials requested in the present suit were prepared in connection with water adjudications pending in this court and in the New Mexico District Court for Chaves County. A list of these documents follows:

I. Documents related to "plan for a study of part of the Jicarilla Apache Indian Reservation", dated April, 1974.

1. Memorandum dated October 27, 1973 to the District Chief, U. S. Geological Survey, Albuquerque, from Area Director, Bureau of Indian Affairs, concerning ground and surface water report for the portion of Jicarilla Reservation within the Chama watershed, together with attached map.

Honorable E. L. Mechem
May 14, 1976

Page 2

2. Requisition dated November 19, 1973
for reconnaissance water study.

3. Order dated November 20, 1973 for same
study.

4. Cover of April, 1974 Report and pages
2-7: Contents, Introduction, Location Map, Purpose of Study.

II. Documents concerning two proposals for
studies of the water resources of the Mescalero Apache
Indian Reservation, dated July, 1974 and January, 1975.

1. Letter of introduction dated May 13, 1974
from Wendell Chino, President of the Mescalero Apache Tribe.

2. Letter dated July 15, 1974 from
Francis Koopman, U. S. Geological Survey, Albuquerque, to
Wendell Chino forwarding July, 1974 report (copy of this
letter previously provided to the State).

3. Cover of July, 1974 report together with
page 3 from same, setting forth purposes of study.

4. Cover of January, 1975 report together
with pages 5 and 6 concerning the request for the study
and its purposes.

5. Letter dated March 5, 1975 from Pat Soule,
U. S. Geological Survey, Albuquerque, to Wendell Chino,
summarizing work done by the Survey for the Mescalero Apache
Tribe.

6. Memorandum of Understanding between the
Bureau of Indian Affairs and the U. S. Geological Survey
to provide a basis for reimbursement to the Survey by the
B.I.A. for work performed by the Survey for the Mescalero
Tribe, including \$2,000 for the preliminary water supply
report previously furnished.

Honorable E. L. Mechem
May 14, 1976

Page 3

III. Documents concerning the "Digital Model Evaluation of a Plan to Withdraw Ground Water in the Pojoaque River Basin" dated August, 1974.

1. Letter dated January 29, 1974 from William C. Schaab to W. S. Gookin & Associates, retaining said firm for review of hydrologic evidence prepared for the Rio Pojoaque water adjudication suit (State v. Aamodt). (This is the only contractual document entered into between the Northern Pueblos Tributary Water Rights Association and Mr. Gookin.)
2. Memorandum dated April 1, 1974 to Mr. William Hale, U. S. Geological Survey from Area Director, Bureau of Indian Affairs, forwarding requisition for "simplified digital model" of ground water levels within the Pojoaque Basin, together with requisitions dated April 2, 1974 and study outline dated March 26, 1974.
3. Letter dated August 12, 1974 to U. S. Geological Survey, Albuquerque, New Mexico, from Area Property & Supply Office, B.I.A., enclosing Memorandum of Understanding between the B.I.A. and the U.S.G.S. for ground water studies dated July 1, 1974, together with requisition therefor, dated August 8, 1974.
4. Cover sheet of Digital Model Evaluation dated August, 1974 together with page 2 of said report "introduction", (with numbers masked out).

We also enclose the certificate for Mr. John Carver, Area Natural Resources Manager, Albuquerque Area Office, Bureau of Indian Affairs, as to the authenticity of the copies provided.

With respect to additional discovery in this case, the United States would like to respectfully suggest that initial discovery be limited to interrogatories to the defendant pursuant to Rule 33, Federal Rules of Civil Procedure. We believe that this procedure would be appropriate in the

Honorable E. L. Mechem
May 14, 1976

Page 4

instant case because of the danger that during deposition material which is protected from disclosure under the exceptions to the Freedom of Information Act would inadvertently be revealed. We feel confident that, through submission of detailed interrogatories, plaintiff will be able to obtain complete answers to any questions it may have concerning the origin, nature and purpose of the documents that have been withheld. Should plaintiff file interrogatories and then prove to be dissatisfied with the answers provided, the Court could at that time consider ordering further discovery of some other means.

Sincerely yours,

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant U. S. Attorney

JBG:bgm

Enclosures

cc: Peter Thomas White w/enclosures
Special Assistant Attorney General
State Engineer's Office
Santa Fe, New Mexico 87503

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103
POST OFFICE BOX 87

E. L. MECHEM
JUDGE

June 8, 1976

Mr. Paul L. Bloom
Special Asst. Attorney General
State Engineer's Office
Bataan Memorial Building
Santa Fe, New Mexico 87501

Mr. James B. Grant
Asst. U. S. Attorney
P. O. Box 607
Albuquerque, New Mexico 87103

Mr. Phillip R. Ashby
Attorney at Law
618 Manzano, NE
Albuquerque, New Mexico 87110

Mr. L. Lamar Parrish
Attorney at Law
P. O. Box 487
Albuquerque, New Mexico 87103

Re: State v. Kleppe
No. 75-684-M Civil

Gentlemen:

We had better proceed with dispatch to discovery in this matter.

While interrogatories would assist me in ruling on certain questions and the answers to them I understand why depositions would be helpful here and discovery can proceed in either manner.

If material is being proposed for litigation, I want that fact clearly enunciated for future consideration and for availability to the tribunal trying the case.

To all counsel of record

-2-

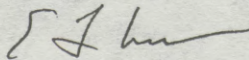
June 8, 1976

If challenge is raised, an in camera inspection will be held but this should be held to matters of real necessity.

I need more briefing on b(9) concerning geological and geophysical information and data, * * * concerning wells. Are there any wells involved here that are contemplated by the Act? I would assume this is more applicable to oil and gas than to water wells.

The fact that water is migratory and not fixed in place and that it is public and subject to capture for beneficial use only and not outright ownership seems to me to give everyone in the state some right to know what is taking place and that geological data is being compiled for each prospective use and user. This is a question and not an assertion.

Sincerely,



E. L. Mechem

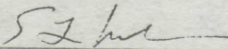
Civil No. 75-6845-M D
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUL 6 1976

This matter having come before the Court upon the defendant's, Thomas S. Kleppe, Secretary of the Interior, Motion for Protective Order, the plaintiff's, State of New Mexico ex rel. S. E. Reynolds, State Engineer, Motion for Order Compelling Discovery, the Court having heard oral argument on said motions, the defendant's Motion for Summary Judgment, the plaintiff's Cross Motion for Denial or Continuance of Motion for Summary Judgment and Cross Motion to Strike Motion for Summary Judgment and Annexed Affidavits, the defendant having submitted by letter to the Court the Certification by John E. Carver and documents numbered I-1 thru 4, II-1 thru 6 and III-1 thru 4, and the Court being fully advised in the premises,

3. That the February 11, 1976, oral deposition of William E. Hale be reconvened on July 1, 1976, at 9:30 a.m. at a place convenient to the parties.

4. That no later than the day set for Mr. Hale's deposition the defendant file with the Clerk of the United States District Court in separately marked and sealed envelopes the non-disclosed reports which will be subject to such in camera inspection as the Court may deem appropriate.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103
POST OFFICE BOX 97

E. L. MECHEM
JUDGE

August 2, 1976

Mr. Paul L. Bloom
Special Assistant Attorney General
State Engineer's Office
Bataan Memorial Building
Santa Fe, New Mexico 87501

Mr. James B. Grant
Assistant U. S. Attorney
P. O. Box 607
Albuquerque, New Mexico 87103

Mr. Philip R. Ashby
Ashby, Rose and Sholer
618 Manzano, N.E.
Albuquerque, New Mexico 87110

Mr. L. Lamar Parrish
Ussery, Burciaga and Parrish
P. O. Box 487
Albuquerque, New Mexico 87103

Re: State of New Mexico ex rel
S. E. Reynolds v. Kleppe
No. 75-684-M Civil

Gentlemen:

I have reviewed in camera the material furnished by
defendant in this matter.

It appears that the review of material in the Pojoaque-
Tesuque system should be presented to the judge handling
the adjudication litigation for production inasmuch as
552(b)(5) exempts inter-agency or intra-agency memorandums
or letters which would not be available by law to a party
other than an agency in litigation with an agency. An
agency in litigation seems to be an exception to the
exception and in my view should be treated for discovery
as in any other civil case.

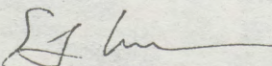
Mr. Paul L. Bloom
Mr. James B. Grant
Mr. Philip R. Ashby
Mr. L. Lamar Parrish
August 2, 1976
Page 2

As to the Jicarilla and Mescalero matters, the burden is on the United States to establish that the information is not discoverable. This has not been done to date. Fifteen (15) days is given (August 18, 1976) to provide this information. My review indicates that these reports are not geared to pending litigation.

It appears that the respective Tribes are the ones who have requested the review by USGS into the matters in question. BIA appears as a conduit or referring agency in the matter. I would like to know if this has any bearing on the question where the information is being prepared for and concerns a non-governmental entity.

I don't believe any of you have yet discussed the question of the geological information exception.

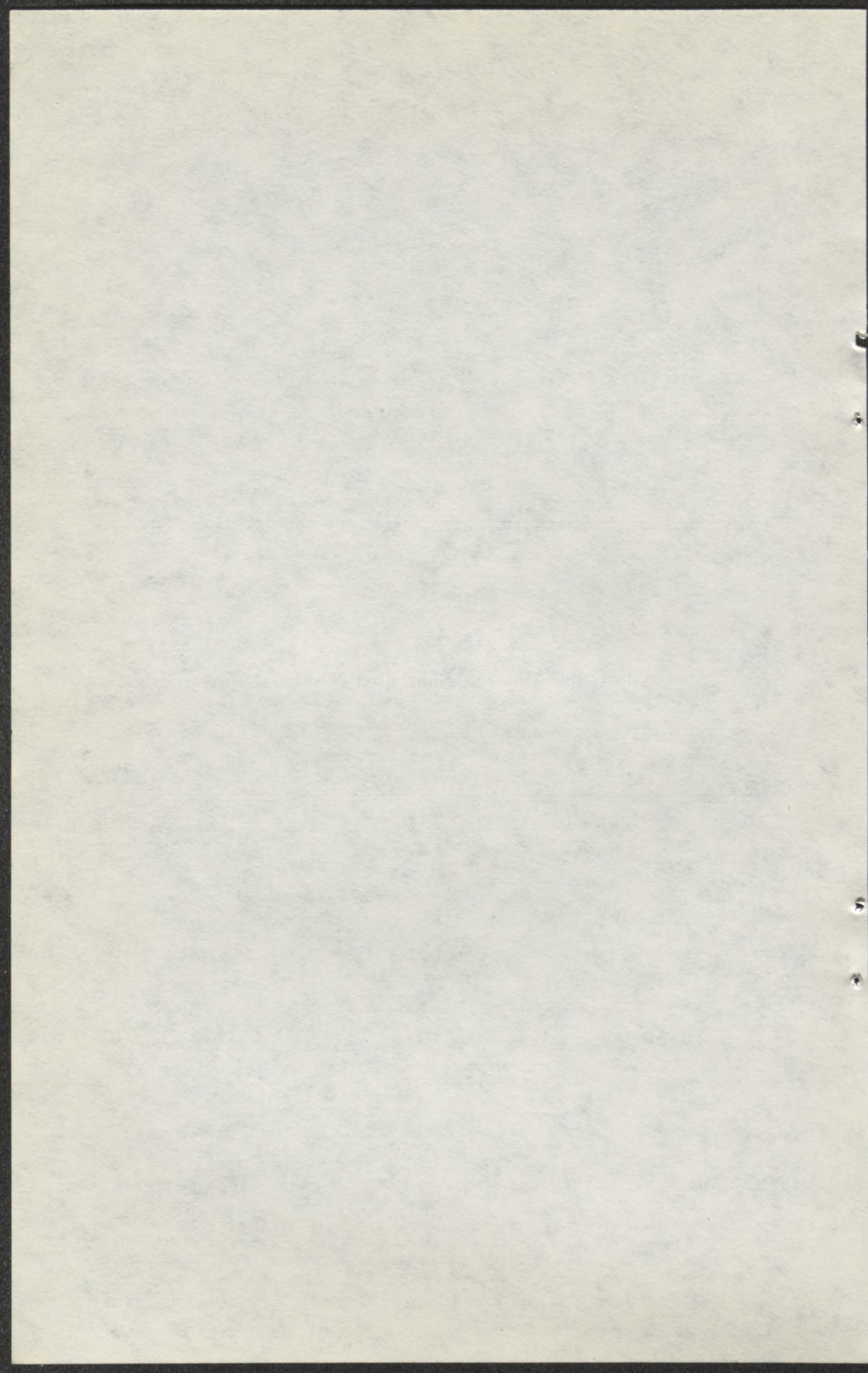
Sincerely,



E. L. Mechem

APPENDIX II

Additional Material Submitted for the Record



COLORADO RIVER INDIAN TRIBE,
Washington, D.C., May 7, 1976.

HON. HENRY M. JACKSON,
*Senate Office Building,
Washington, D.C.*

Colorado River Indian Tribe of the Colorado River Indian Reservation are in full support of S. 2652, a bill to amend section 552 of title 5 United States Code, to provide an exemption to the Freedom of Information Act which would allow the United States to withhold information held by a Federal agency as trustees. We feel that if this is not amended it would be a hindrance, individually and collectively as a people and our reservation as a whole. We have already experienced such an impact against our reservation if a suit was ever initiated in our behalf.

ANTHONY DRENNAN, Sr.,
Chairman, Tribal Council.

RESOLUTION 1975-617

Whereas, U.S. Geological Survey, the Chief of Okanogan Highlands Project, has requested permission to conduct a geological and mineral resources study on the Colville Indian Reservation; and

Whereas, it is the split recommendation, of the Land and Forestry Committee, of the Business Council, that, permission, to conduct a Geological and Mineral Resource Study on the Colville Indian Reservation: Now, therefore, be it

Resolved, That we, the Colville Business Council, meeting in special session, this 6th day of October, 1975, at the Colville Indian Agency, Nespelem, Washington, acting for and in behalf of the Colville Confederated Tribes, do hereby deny the permission for U.S. Geological Survey to conduct a geological and mineral resource study on the Colville Indian Reservation.

The foregoing was duly enacted by the Colville Business Council by a vote of 5 for; 8 against, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

Attest:

AL AUBERTIN,
Chairman, Colville Business Council.

DNA-PEOPLE'S LEGAL SERVICES, INC.,
Window Rock, Ariz., May 21, 1976.

HON. HENRY M. JACKSON,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR JACKSON: I have just become aware of the introduction of Senate Bill 2652, and wanted to write to you to express my strong feelings on this proposed legislation. The bill would add a tenth exemption to the Federal Freedom of Information Act, at 5 U.S.C. § 552, exempting from disclosure any information regarding the natural resources of "Indian tribes or bands or groups of individual members thereof." As an Indian, and as director of a legal services program which serves individual Indians who would be seriously harmed by this bill, I strongly object to this proposed legislation.

The federal government has broad powers over the Indian people, much broader powers than any government has over any other group of Americans. It controls the registry of our births, the probate of our estates at death, and very much in between. It determines where we can build homes and to whom we can lease our land, it supposedly educates our children, and supposedly cares for our sick, poor and aged. Even though our tribal governments are trying to assume more of this responsibility, the federal government, through the BIA, still exercises tremendous power and influence over the tribal governments.

There are many Indians like myself who believe that the federal government has not done a very good job at managing Indian affairs, that its motives often seem less to advance the best interests of the Indian people than to accommodate the interests of whites—individuals and large corporations—who wish to exploit us. This is best illustrated in the area of Indian natural resources, where the BIA has pressured tribes to agree to, and has then hurriedly added its own approval to, deals which give tribal resources away for minimal royalties and rentals, and provide little or no protection for long-term tribal interests.

I believe the government should be at least as accountable to the Indian people for its actions which affect them as it is to other Americans, if not more so, because of the extreme degree to which we Indians are governed. The Freedom of Information Act was a great step forward in providing that accountability, because it meant that no longer could government deal behind closed doors. Senate Bill 2652, though, would shut the doors in the faces of Indians, in an area that is now a critical concern to Indian people all over the country—the disposition of their last source of wealth, their vast natural resources. This bill looks like little more than an effort to reinstate the corrupt practice of old, just at the time when our natural resources are being greedily eyed by the great energy combines of American capitalism, and by such agencies as the Bureau of Reclamation.

I know that some tribal officials will say they support this bill, but I do not believe anyone could say that the great body of Indian people would ever support it. Tribal officials all too often operate under the thumb of the BIA, and they are the targets of, and are subject to, powerful persuasion by the government and the corporations. There is no check on government activities in this vital area, thus, unless the Indian people themselves can have access to what is going on.

Our legal services program represents hundreds of persons whose lives have been or will be radically and tragically affected by resource development projects, yet these people and their lawyers are frequently unable to get any detailed information on these projects. We have even had to assist members of the Navajo Tribal Council in learning of the details of such agreements before they are given to the Council for a vote. Now the Congress is asked to legalize this perversion of democratic government. I hope you will agree with me that the benefits of the Freedom of Information Act to the workings of democracy should not be denied to Indian people, alone, in this manner.

I believe this bill should be defeated entirely. It has no business being made law. If it is to be passed in any form, however, I urge you to seek to have it amended at least so that the exemption would bar members of the particular tribe (or band, or group) involved from obtaining information from the government about this action with respect to that tribe's natural resources.

Once again, we Indians have been singled out for perverse, unfair, and oppressive treatment. Please speak out for us, and against this bill. We will be grateful.

Sincerely yours,

PETERSON ZAH, *Director.*

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., June 25, 1976.

Hon. JAMES ABOUREZK,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR ABOUREZK: The purpose of this letter is to state the support of our tribal clients, the Miccosukee Tribe of Indians of Florida, the Metlakatla Indian Community, the Salt River Pima Maricopa Indian Community, and the Hualapai Tribe, for the proposal to protect confidential information held by the Federal Government acting in a fiduciary capacity for Indian tribes from unauthorized disclosure.

As long as the so-called "guardian-ward" relationship between the United States and the Indian tribes continues, the deliberations of most tribal governments will involve consultation with or observation by Federal officials. This relationship should not automatically make public the information which Federal officials obtain from tribal councils and officials. Many times tribes may legitimately wish to keep private information relating to tribal planning, information relating to litigation in which the tribe may be engaged, or other matters relating to tribal resources and assets. Non-Indians should not have the legal right to obtain such information without tribal consent just by asking the United States for it.

The Solicitor of the Department of the Interior has stated to us that the Freedom of Information Act has already made the performance of the Secretary's legal role as a trustee extremely difficult because the tribes now are unwilling to share with Federal officials information which the Secretary must have in order to perform his trust responsibility properly.

We are enclosing language which is adequate in our view to protect tribal information held by the United States in a fiduciary capacity from unauthorized disclosure. We understand that this language has been prepared by the Bureau of Indian Affairs. On behalf of our clients we urge that the Congress take action to approve this proposal in the near future.

I respectfully request that this letter be included in the record of the hearings on this matter recently concluded by the Senate Subcommittee on Indian Affairs.

Sincerely,

S. BOBO DEAN.

A BILL To restrict disclosure of information possessed by the Department of the Interior or other Departments or agencies of the United States related to Indian tribes, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any other provision of law to the contrary notwithstanding, no officer or employee of the Department of the Interior or of any other Department or agency of the United States shall disclose (other than to an officer or employee of the Department of the Interior or other Department or agency of the United States whose duties require that he have the information concerned) any information in the possession of such officer, employee, Department, or agency related to the natural resources or other assets of any Indian tribe, except that such information may be disclosed—

- (1) if it has previously been lawfully made public,
 - (2) to the chief executive officer or an elected member of the governing body of the tribe concerned,
 - (3) when authorized by the tribe concerned,
 - (4) to the Committee on Interior and Insular Affairs, or, to the extent of matters within its jurisdiction, any other committee of either the United States Senate or House of Representatives,
 - (5) which concerns funds provided under a Federal grant or contract if such information is otherwise required by statute including but not limited to section 5(c) of the Indian Self-Determination and Education Assistance Act (88 Stat. 2205), to be provided to the requester, or
 - (6) as may be required by a Federal court of competent jurisdiction.
- (b) No other statute now or hereafter enacted shall be construed as overriding the provisions of this Act unless such statute shall do so by express reference to this Act.
- (c) For purposes of this Act, the term "Indian tribe" means any Indian tribe, band, nation, pueblo, colony, or other organized group or community which is recognized as eligible for the special programs and services provided to Indians because of their status as Indians and for which the United States has a trust responsibility.

(d) (1) Any officer or employee of any department or agency of the United States, who has possession of, or access to, records of such a department or agency which contain information the disclosure of which is prohibited by this Act, and who knowing that disclosure of such information is so prohibited, willfully discloses the information in any manner to any person or entity not entitled to obtain it, shall be guilty of a misdemeanor and fined not more than \$5,000, or subjected to imprisonment for not more than one year, or both.

(2) Any person who knowingly and willingly seeks and obtains in any manner from any officer, employee, agency, or department of the United States any information to which said person is not entitled and the disclosure of which is prohibited under this Act, shall be guilty of a misdemeanor and fined not more than \$5,000, or subjected to imprisonment for not more than one year, or both.

NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION NO. NCAI ECO 76-4—LEGISLATION

Whereas, there exists in the 94th Congress worthy legislative proposals to meet many of the needs of Indian people; and

Whereas, the National Congress of American Indians realizes that the remaining schedule of the 94th Congress is constrained by the national party conventions and the elections; and

Whereas, the National Congress of American Indians feels that consideration by Congress for enactment of proposed legislation needs to be narrowed down to the highest priority of Indian needs: Now therefore, be it

Resolved, That the Executive Council of the National Congress of American Indians, consisting of official delegates of each of the 100 member tribes, submits to the Congress and to the Administration its legislative priorities, as follows:

1. Legislation to provide Indian tribes the option to reacquire civil and criminal jurisdiction from the states, and for the improvement of law enforcement on Indian reservations as embodied in S. 2010.
 2. Passage of the Indian Health Care Improvement Act, with adequate appropriations to meet the needs in the area, as contained in S. 522.
 3. Legislation to extend the life of the Indian Claims Commission.
 4. Legislation to protect information held by a Federal agency as Trustee in regard to the natural resources or other assets of Indian tribes and individual tribal members, as contained in S. 2652.
 5. Legislation amending the Comprehensive Employment and Training Act of 1973 to permit Indian tribes to qualify as prime sponsors under Title I of that Act, as contained in S. 2399.
 6. Legislation amending the Internal Revenue Code of 1954 to provide the same tax exemptions and general tax treatment to recognized Indian tribes as are applicable to other units of government, as contained in H.R. 8989.
 7. Legislation to authorize Indian tribes to consolidate their land holdings and to provide for inventories of Indian trust resources.
 8. Repeal of the Act of May 10, 1926 (44 Stat. 498), relating to the condemnation of certain lands of the Pueblo Indians in the State of New Mexico, as contained in S. 217.
 9. Legislation to amend the Bankruptcy Act, Sec. 4-506, as follows:
 - (a) Exceptions from Discharge. A discharge extinguishes all debts of an individual debtor, whether or not allowable, except: . . . (11) *any liability to an Indian tribe or tribal lending agency for a loan from such tribe or tribal lending agency if the loan instruments so provide.*
 10. Legislation to establish within the Department of the Interior the position of an Assistant Secretary of the Interior for Indian Affairs, as contained in H.R. 11258.
 11. Legislation regarding Siletz Restoration, as contained in S. 2801 and H.R. 11221.
 12. Legislation to provide grants for the development, operation and improvement of Indian community colleges, as contained in H.R. 11220.
 13. Legislation to protect and conserve fishery resources by declaring pending international agreement, management and conservation authority and responsibility over such resources in a 200 nautical mile zone off the coasts of the U.S., and to establish a national fishery management program to prevent overfishing, rebuild overfished stocks, insure conservation and realize full potential of fishery resources, as contained in S. 961: Be it further
- Resolved*, That the National Congress of American Indians supports the passage of an amendment to Alaska's Limited Entry Act, which will recognize the right of members of the Metlakatla Indian Community to continue their historic practice of fishing in the waters of Southeast Alaska.

NATIONAL INDIAN YOUTH COUNCIL, INC.,
 Albuquerque, N. Mex., May, 1976.

STATEMENT ON AMENDING THE FREEDOM OF INFORMATION ACT

The National Indian Youth Council is in sympathy with the problems that have prompted S. 2652. The problems it addresses are real and need to be dealt with. Too often confidential information held by the federal government regarding tribal resources and assets has been plundered by corporations and other federal and state agencies whose interests are in conflict with those of the tribes. This situation is well known and a genuine problem. However, we believe that this bill will not adequately deal with these problems and will have side affects which will be injurious to Indian People in the long run.

We would like to bring to your attention, at the request of the Committee, another side of the problem which we believe deserves your consideration. There is a serious problem of individual Indians getting information on financial matters relating to land held in trust for them. The files of DNA are filled with examples of people who, one morning find a bulldozer at work in their front

yard, and can't get adequate information on what they supposedly signed to allow such a situation.

The proposed amendment to the Freedom of Information Act will create the same situation with tribes and tribal governments. It appears that the assumption is being made that federal agencies will in all cases make information which they hold concerning a tribe available to that tribe upon the request of tribal authorities. That may not be true at all. Federal agencies, particularly the BIA and the Geological Survey, gather much information about tribes and reservations which is not available to the tribe unless the agency chooses to make it available. Under the proposed tenth exemption to the Freedom of Information Act, federal agencies would apparently be free to withhold such information. Nothing in the tenth exemption even guarantees the access of tribal governments to information concerning them. It may seem unlikely or far-fetched that the BIA would deny tribal information to tribal governments, but we have seen it happen.

There is also the problem of tribal councils not being able to get information from the federal government regarding their tribes' natural resources which is essential in making decisions on economic development if the tribal administration and the BIA don't want them to have it. A good example is the Navajo Tribal Council. Negotiations between the Navajo Chairman and WESCO and El Paso Natural Gas regarding coal gasification, have been going on in secret for sometime. The council will ultimately have to approve the agreement which already had been reached. They cannot obtain documentation upon which such a decision can be effectively reached. When they approve or disapprove the agreement they will do so based upon information which the Chairman and the BIA choose to give them.

Even if they pass resolutions demanding certain information they cannot know what information to ask for and cannot be assured that they are getting the full picture.

The Navajo Chapter Houses where the gasification developments and strip-mining are to take place are in a similar situation. These are the people directly affected.

NIYC is conducting a Power Elite Study of San Juan County, New Mexico where the gasification plants will be built. We are attempting to learn how leases are made and who controls the resources there. We asked the Navajo Tribe and the federal government for copies of the Navajo leases in the county. We were refused by them on the grounds that this information was confidential. Later we learned that a corporation service company in Denver called Mineral Service Company had all this information already. This information included the complete history of every corporate lease on Indian land. They informed us we could purchase this information on computer print-outs from them.

The point is that in many respects the corporations and the states and other governmental entities know more about our natural resources than the Indian People, and possibly more than the tribal governments.

As you are aware at present a grand jury in Phoenix, Arizona is sitting to investigate corruption in the Navajo Tribal Administration. This investigation not only involves the siphoning off of federal funds but bribes from corporations doing business on the reservation. This is an Indian Watergate of fantastic proportions, involving millions of dollars. The reason that this activity could take place was that the tribal council, not out of lack of interest but out of lack of access to information, did not act.

In Oklahoma, NIYC is conducting a lawsuit (*Harjo v. Morton*) on behalf of a group of traditional Creek Indians. It involves a question of the validity of the present Creek tribal government set up by the BIA as opposed to the old Creek Constitution which provided for a House of Warriors and a House of Kings based on representation from tribal towns and having total financial control of the tribe. These traditional Creeks are asserting that the old constitution has not been abolished and is still valid. The principal chief has been exercising total power in handling Creek finances and natural resources for many years. Creeks could not get any financial information from the principal chief or the BIA; nor could they obtain information from the tribal government or BIA on the validity of the old constitution.

NIYC supports the effort to amend the Freedom of Information Act to protect confidential tribal information from disclosure to unauthorized persons and corporations. We believe, however, that the bill is defective in its present form because the new exemption to the Freedom of Information Act can and will be used to deny essential information on tribal affairs to tribal members them-

selves, and even to tribal councilmen. Tribal officials and the BIA often have a common interest in preventing tribal members from having access to tribal information. Unfortunately, the BIA still exercises a controlling influence over many tribal governments and tribal officials. Under the proposed bill, access to tribal information by tribal members will depend solely on the cooperation and good will of incumbent tribal officials. The bill would give BIA and tribal officials iron-fisted control over tribal information.

In many instances this information monopoly will be illegitimately used to maintain the power of the BIA and incumbent tribal officials. We have seen this happen in many instances in the past. We believe the BIA supports S. 2652 primarily for this very reason. Prior to the passage of the Freedom of Information Act, the BIA often told inquiring tribal members to get whatever information they wanted from tribal officials. Tribal officials would then advise the inquirer to get it from the BIA.

This problem grew to extremely serious proportions with the Five Civilized Tribes of Oklahoma. The Freedom of Information Act provided tribal members with badly-needed access to business information affecting their tribe. The proposed bill will simply close the door on tribal members. We believe that it is impossible for tribal governments, particularly democratic tribal governments, to function legitimately and maintain the loyalty of tribal members in a climate so conducive to self-serving abuse.

There is a way to overcome this problem and still deny confidential tribal information to unauthorized parties. We suggest that S. 2652 be amended by adding the following language to the proposed language: "provided, however, that this exemption shall not be applicable to requests for information concerning a tribe of which the person making the request is a member."

Addition of this language will preserve the important right of tribal members to have access to information concerning their own tribe. We believe the bill in its present form may institutionalize an already corrupt system.

RESOLUTION

Whereas, the Nez Perce Tribal Executive Committee has been empowered to act for and in behalf of the Nez Perce Tribe, pursuant to the Revised Constitution and By-Laws, adopted by the General Council of the Nez Perce Tribe, on May 6, 1961 and approved by the Acting Commissioner of Indian Affairs on June 27, 1961; and

Whereas, the Nez Perce Tribe of Idaho has supported legislation which would strengthen individual rights of all tribal members within the various tribes; and

Whereas, the solicitor of the Department of the Interior has interpreted the Freedom of Information Act to require the disclosure of confidential information and documents received by the U.S. Government as a trustee to any member of the general public who request this information including persons who may be suing the tribe and are seeking the documents as an alternative to following the normal legal procedures which are available for obtaining information from the defendants in law suits; and

Whereas Congress is currently considering amendments to the Freedom of Information Act Senate Bill 2652 which protects the documents of Indian tribes in the possession of the United States from disclosure to the general public; and

Whereas, the U.S. Government as trustee of Indian tribes obtains much information which is of a confidential and privileged nature; and

Whereas, the U.S. Government as trustee for an Indian tribe stands in a unique position much the same as an attorney to his client or a minister to his penitent; and

Whereas, the disclosure of this confidential and privileged information to the general public by the U.S. Government is not only a breach of faith but a breach of the Governments trust responsibility: Now, therefore, be it

Resolved, That the Nez Perce Tribal Executive Committee does hereby urge the passage of the amendment to the Freedom of Information Act Senate Bill 2652 which would exempt from disclosure "information held by a Federal agency as trustee regarding the natural resources of other assets of Indian tribes or bands or groups or individual members thereof".

Be it further resolved, that the Nez Perce Tribal Executive Committee urges that section 10 of Senate Bill 2652 be broadened to cover all documents filed with the BIA under requirements of Federal law relating to the Secretary of Interior supervisory role in tribal government whether or not land or other trust assets

are involved. To accomplish this objective we urge that section 10 of said bill be amended to read as follows: "10 information held by a Federal agency in performance of a fiduciary obligation to any Indian tribe, band, group or individual member thereof"

Now, therefore, be it further resolved, that this resolution, NP 76-299, be forwarded to the Senate Subcommittee on Indian Affairs, Washington, D.C.

CERTIFICATION

The foregoing resolution was duly adopted by the Nez Perce Tribal Executive Committee meeting in regular session May 11, 12, 1976, in the tribal conference room, Lapwai, Idaho, all members being present and voting.

Attest:

ALTA A. GUZMAN,
Secretary.
WILFRED A. SCOTT,
Vice-Chairman.

ALBERT W. TRIMBLE,
Batesland, S. Dak., April 28, 1976.

Re: S. 2652.

Mr. MEL TONASKET,
NCAI President,
FOI Hearing, Washington, D.C.

DEAR MR. TONASKET: This letter is in regards to S. 2652 which amends the Freedom of Information Act to protect information regarding Indian natural resources. Please be assured that I, as President of the Oglala Sioux Tribe, will fully support the efforts of NCAI in getting S. 2652 enacted into law, since the amendment would appear to protect disclosure by the United States of natural resource information relative to the Oglala Sioux Tribe from the provisions of the Freedom of Information Act.

Sincerely yours,

ALBERT W. TRIMBLE,
President, Oglala Sioux Tribe.

STATEMENT OF PHILLIP LUJAN AND ALAN PARKER OF THE AMERICAN INDIAN LAW CENTER, UNIVERSITY OF NEW MEXICO, BY REQUEST AND ON BEHALF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

S. 2652 proposes to amend Section 552 of Title 5, U.S.C., the "Freedom of Information Act," by inserting a new section 10 specifying that information held by federal agencies relating to the natural resources or other assets of Indian Tribes, bands, groups or individuals is exempt from disclosure to the public.

We understand that other witnesses testifying on behalf of various Indian Tribes intend to discuss by way of concrete examples the nature of the problems created because federal agencies are not able to keep confidential information relating to trust resources and assets under the present interpretation of this law. Our discussion of the proposed amendment will accordingly be confined to two narrow points:

1. This amendment creating an exemption to the Freedom of Information Act for trust resource information is not inconsistent with the overall purpose and intent of the Freedom of Information Act; and

2. The amendment need not be interpreted so as to restrict the rights of access to such information on the part of individual tribal members or groups other than the tribal government.

In a recent opinion, the U.S. Supreme Court interpreted the purpose of Section 552 as "to open public records to greater public access and . . . to preserve confidentiality undeniably essential in certain areas of government operation." (*F.A.A. v. Robertson*, 95 S.Ct. 2140.) The court also has commented that, "This section is fundamentally designed to inform the public about agency action and not to benefit private litigants." (*NLRB v. Sears Roebuck and Co.*, 95 S.Ct. 1504.) A federal circuit court recently expanded upon this interpretation by pointing out "(the) purpose of this section is to provide necessary machinery to assure the availability of government information necessary to an informed

electorate by permitting access to official information shielded unnecessarily from public view and attempting to create a judicially enforceable public right to secure such information from possibly unwilling public officials." (*Wine Hobby, Inc. v. I.R.S.*, 502 f2d 133.)

We understand that tribal representatives in their statements will document the pattern whereby state government agencies and other private interest groups opposing the asserted Indian natural resource rights have been able to force the federal government to divulge information concerning trust assets which is then used against the Tribes in the course of litigation or other adversary proceedings. Clearly, it has not been a case of federal bureaucracies arbitrarily withholding information necessary for an informed electorate. Normally, one would assume that since the United States acts as Trustee and/or legal representative for the Indian Tribes the type of information referred to should be exempt from public disclosure on the basis of an attorney-client or other privilege. However, the record shows that this is not the case for the related reasons: (1) The present statute (552) is so narrowly drawn that in order for information to be exempt it must clearly fit into one of the categories spelled out in section b of 552; and, (2) the federal courts in interpreting this section have adopted the principle of construction that "the exemptions of this section are exclusive and are to be interpreted narrowly." (*Montrose Chemical Corp. of California v. Train*, 491 f2d 63) We concede that this principle of construction is clearly consistent with the intent of the law, however, the fact remains that a successful demand for trust related information by other than the beneficiaries of the trust (Indians) clearly compromises the trust role delegated to the federal agencies. The proposed amendment (S. 2652) relieves the relevant federal agencies from this untenable position by, in effect, classifying information obtained by federal agencies in their "trust" capacity as being confidential and not public in nature such that the entire "public" has an enforceable right to access.

We are aware that criticism has been leveled at the proposed amendment, charging that it is too broadly worded and that it would empower federal agencies to keep secret information relating to trust resources. Possibly this Subcommittee could consider narrowing the language of the proposed amendment by spelling out a right of access on the part of Indian tribal government, individual tribal members or other non-governmental Indian groups, who are all beneficiaries of the trust. Certainly this might cure the potential problem of an agency withholding such information from the tribal government itself. Identification of a right of access to such information on the part of individual tribal members or non-tribal governmental groups would also anticipate the potential problems resulting from internal corruption within a tribal government itself.

We see some difficulty in expressing such concerns in statutory language and, in addition, it can be argued that the existing exemptions in section 552 are all worded to simply cover broad categories of information. From this perspective, the proposed amendatory language of S. 2652 is consistent with the format and approach of the present section. The very legitimate concerns alluded to above could easily be addressed in the committee reports in order to make it clear that the Congress did not intend to amend the law so as to open the door for the kinds of potential abuse discussed above.

WILKINSON, CRAGUN & BARKER,
Washington, D.C., June 17, 1976.

Re: Proposed S. 2652—Freedom of Information Act Exemption for Indian Trust Property.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior & Insular Affairs, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We welcome this opportunity to present on behalf of the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the National Congress of American Indians, comments pertinent to proposed legislation on the applicability of the Freedom of Information Act to information held by the United States Government as part of its continuing fiduciary duty towards Indian tribes and peoples. We respectfully request that these comments be made part of the record of the hearing held on S. 2652 on May 17, 1976.

We wholeheartedly support the need for legislation in this area, and we endorse the concept presented in S. 2652. We note that the approach taken in S. 2652—amendment of the Freedom of Information Act to provide a specific exemption for tribal trust information—is not the sole method by which the United States can fulfill its fiduciary duty to Indians to avoid indiscriminate release of “trust” information. An alternative, and we think better, approach would be to amend 25 U.S.C. to provide a blanket exemption for Indian “trust” information and grant flexibility to Federal agencies to act consistent with their trust responsibilities in dealing with such information. We have drafted such a proposal which is attached to this letter for your consideration. If such an amendment were made to 25 U.S.C., the Freedom of Information Act would not apply to such information, pursuant to 5 U.S.C. § 552(b) (3), exempting material specifically exempted from release by statute. See *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975).

It is a fundamental axiom of trust law that the trustee owes a duty of complete loyalty to the beneficiaries of a trust, and must exclude all selfish interest and all consideration of the welfare of third persons in administration of the trust. Dissipation of trust assets through unauthorized release of trust information is a clear violation of the trustee's duties. See Bogert, *The Law of Trusts and Trustees*, § 543 (1960).

It is our basic proposition that the Freedom of Information Act was never intended to justify violation of the fiduciary duty owed by the Federal Government to Indians, and should not be construed to alter the trust responsibilities of the United States toward its Indian wards. There was no discussion of Indian trust information prior to passage of the Act itself or the 1974 amendments to the Act. Statutes in derogation of the treaty responsibilities of the United States toward Indians are to be strictly construed in favor of the Indians, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–413 (1968); *Squire v. Capoe-man*, 351 U.S. 1, 6–7 (1956), and the absence of legislative history discussing diminution of Indian rights is generally construed as an indication of the intent not to diminish those rights. *Bryan v. Itasca County*, Supreme Court, 75–5027, June 14, 1976 (Slip Opinion at 7). Generally, specific statutory language applicable to Indians supersedes contrary language in a statute of general applicability. *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

However, it appears from the testimony of Mr. Harley Frankel before the Subcommittee on May 17, 1976, and the prepared statement of Mr. Stanley Doremus submitted with that testimony, that the Department of Interior has taken the position that its trust responsibilities are superseded by the Freedom of Information Act. Thus, on page 1 of Mr. Doremus' prepared statement, of the following language appears: “In essence, we have been placed in the position of being required by law to violate the confidential relationship which we have with Indian tribes and individuals.”

The prepared statement then goes on to describe examples of Bureau of Indian Affairs and Department of Interior violation of trust responsibility by releasing information to outsiders, purportedly on the basis of the Freedom of Information Act.

What is more, in reviewing the motion for summary judgment filed in the case of the *State of New Mexico ex. rel. Reynolds v. Kleppe*, filed by the United States in support of its position on this bill, the nature and effect of the trust responsibility is not mentioned at all.

While not pretending to be able to predict the outcome of judicial decisions in this difficult area, there are powerful arguments which the United States could advance, under the Freedom of Information Act in support of its refusal to release tribal trust information to outsiders based primarily on the nature of the trustee-beneficiary relationship.

The exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential” (5 U.S.C. § 552(b) (4)) would protect substantial amounts of tribal trust information. Contrary to the assertions of the Department of Interior, this exemption is not limited to material which is “clearly financial and clearly privileged.” (Prepared statement of Mr. Doremus, p. 4) By its terms it is applicable to *all commercial information* held by the United States as trustee—both privilege and confidentiality being derived from that relationship. It is significant that the legislative history evidences a congressional intent to exempt *all* privileged information from release, not just commercial or financial information. See H. Report No. 1497, 89th Cong.,

2nd Sess., May 9, 1966, at 10; S. Report No. 813, 89th Cong., 1st Sess., Oct. 4, 1965, at 9. If these arguments were to be accepted, most Indian trust information would be protected under current law.

However, the outcome of projected judicial proceedings is uncertain, and the Department of Interior admits to present subordination of its fiduciary duty to the Freedom of Information Act. No matter where the fault lies, current release of trust information adverse to the interests of Indians must be speedily brought to an end. The importance of legislation in this area is underscored by a partial listing of important information held by the Department of Interior as part of its trust duty. Such materials include:

All tribal minutes.

All tribal resolutions.

All contracts between tribes and parties subject to BIA approval.

Leases on tribal trust lands.

Royalty statements from tribal trust land leases.

Cost statements on operation of leases where tribes share in profits.

Tribal ledgers and individual ledgers on IIM funds.

Tribal rolls.

Records of trust lands in heirship.

Copies of audit statements where tribes are audited.

Complaints of individual Indians against the Tribal Council or an Indian agent.

Inventories of natural resources and mineral deposits on Indian lands.

Water rights studies conducted on Indian lands.

And this is clearly only a partial list of the materials accumulated by the Bureau of Indian Affairs in its administration of the United States' fiduciary responsibility toward Indian tribes and individuals.

Even assuming that current exemptions under the Freedom of Information Act would be liberally applied to Indian trust information, the Act itself is an inadequate means for dealing with the United States' fiduciary responsibility toward Indians and Indian tribes. If the Freedom of Information Act as it now stands is used as the basis for withholding such documents, the agency wishing to withhold them following a request under it will be forced to justify withholding specific pieces of information under specific exemptions (often different ones for different documents), will be forced to provide (at least upon judicial review) a detailed index of the information and will be forced to justify to a court in a judicial hearing *de novo* the grounds for such withholding. Due to the peculiar nature of all information received by the United States in its trust capacity, no justification other than the trust nature of the information and the potential violation of the fiduciary duty should be required to justify withholding. This is the rationale of our attached proposed draft bill.

The basic premise of the Freedom of Information Act is that the people of the United States are entitled to all information within their government except that the release of which would interfere with national security, the workings of the government, or protectable private rights. No such presumption in any way applies to tribal trust information, as it is by its very nature private.

Tribal trust information should thus not be dealt with under the Freedom of Information Act on an "exempt-non-exempt" basis. Instead, federal agencies should be directed by law in no uncertain terms to look to the fiduciary responsibilities which they have to Indians in dealing with trust information. In other words, information held by the United States in its trust capacity is held for Indian tribes or individuals in trust, and the method of its disposition should be dealt with strictly in fiduciary terms. The Bureau of Indian Affairs or other appropriate agency holding tribal trust information should be required by statute to subordinate the Freedom of Information Act to the fiduciary duty owed by the United States to the tribes. As this duty is not now clear, Congress should act to make it so.

Sincerely,

GLEN A. WILKINSON.

Attachment.

ATTACHMENT

PROPOSED DRAFT BILL AMENDING 25 U.S.C.

A BILL To restrict disclosure of information possessed by the Department of the Interior or other Departments or agencies of the United States related to Indian Tribes, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States assembled, That (a) As used in this section, the term Indian Tribe or Tribes shall include any federally recognized Indian Tribe, band or identifiable group. (b) Whenever information held by any Federal agency as trustee, regarding the natural resources or other assets of Indian Tribes or individual members thereof, or any other information held by the United States in its capacity as trustee for such Indian Tribes, tribal members or individuals to whom such information relates, the agency having custody of the records containing such information shall not release it unless it shall have made an affirmative determination, in writing, that such release is in the best interests of the Indian Tribe or individual to whom the information relates. No such information shall be released under the Freedom of Information amendments to the Administrative Procedure Act 5 U.S.C. § 552, without the consent of the Tribe or individual to whom the information relates. (c) The district court for the district in which the plaintiff resides, or in which the information is located, shall have jurisdiction to enjoin release of any information described in subsection (b) if it determines that said information is held by the United States by virtue of a trust relationship between the United States and the Tribe or individual objecting to its release.

[From the Indian Water Rights Conference, Friday, Apr. 4, 1975]

PROCEEDINGS

The National Tribal Chairmen's Association and the National Congress of American Indians National Conference on Indian Water Rights convened at 10 o'clock a.m. in the Auditorium, National Education Association Building, 1201 16th Street, Northwest, the Hon. Mel. Tonasket, President, NCAI, and Hon. Wendell Chino, President, NTCA, presiding.

Mr. CHINO. We will begin our discussion with the reading of the resolution that was tabled yesterday. The reason for tabling the resolution was that we wanted Mr. Frizzell here.

If there are any questions, we wanted him to respond to the resolution. So we will have Mel read the resolution and we will begin our discussion.

Mr. TONASKET. Good morning once more.

The resolution that was tabled reads:

"Whereas, the Bureau of Indian Affairs, the U.S. Geological Survey and other agencies and Departments of the Federal Government have obtained information and data concerning the property and rights of Indian Tribes; and

"Whereas, the information has been supplied to those agencies only in their capacity as trustee for the private property rights of the Indians; and

"Whereas, this information has been handed over to private individuals and State agencies planning to sue, and even actually in the process of suing the Tribes; and

"Whereas, Federal agencies claim they cannot protect the confidentiality of such information because of the Freedom of Information Act: "Now, therefore, be it

Resolved, The National Conference on Indian Water Rights, sponsored by the National Tribal Chairmen's Association and the National Congress of American Indians, in Washington, D.C., hereby resolve that a bill be promptly prepared and introduced amending the Freedom of Information Act to provide that all data and information gathered by, or in the possession of Federal agencies concerning Indian Tribes and their members relating to:

1. Property rights and interests;
2. Financial Data;
3. Geological and hydrological data;
4. Any data submitted to the Federal Government in confidence;
5. Any data which is the subject of litigation pending or prospective.

We added:

6. Tribal financial records and information, be excluded from the coverage of this Act, and be subject to release only by permission of the tribes or by valid court order."

There was a question as to whether or not there needed to be a bill introduced or was this an administrative decision that could be made?

Is there a final decision and should we quit fighting for support that this information does not legally have to be given under the Freedom of Information Act?

Mr. CHINO. Mr. Frizzell, it is our understanding that you issued an opinion that under the provisions of the Freedom of Information Act that certain information pertaining to the tribes could be released on, I suppose, demand by anyone.

There is some feeling among the tribes that this is a privilege at information and the trustee should not release any information pertaining to the various tribes without their consent.

Would you inform us as to whether our presumption here, our understanding is correct?

Mr. FRIZZELL. Good morning. Thank you for inviting me over to defend what is obviously an unpopular position taken by the Solicitor's office.

I appreciate the opportunity to share with you why that position was taken and why we felt it was necessary and what some of the possible solutions might be that would help and aid.

First of all, let me briefly tell you my understanding of the Freedom of Information Act because that is the Act of Congress that comes into play with regard to this problem that you have experienced as representatives of tribal government.

The original Freedom of Information Act was passed by Congress back in 1967. It was amended as recently as last year, 1974.

What it essentially says without coloring it, and making it difficult to understand in lawyer's language, is simply this: that all documents in possession of any Federal Board, agency, commission, department of the government, is available to third parties, to the public, upon demand.

First of all, Congress saw fit to exempt themselves from the provisions of the Act, of course.

Secondly, they said that there may be good reason in certain instances where documents in the possession of the government shouldn't be turned over to members of the public. They specifically spelled out nine exemptions. I have two members of my staff here that are the specialists for the whole Department of Interior on Freedom of Information requests.

They can spell out what those nine specific exemptions are for you. They essentially make sense, those exemptions, of types of material that shouldn't be turned over to the public.

However, the Act does say that if the information requested doesn't fall in one of those nine categories that we have specifically set out, then it shall be turned over to the public and in fact if an employee of the Federal Government doesn't turn it over within 10 days and the decision is not to turn it over, the requester has an appeal.

The government can only take 20 days in deciding that appeal.

If they still refuse to turn over the information and claim that it falls under one of those nine exemptions, then the member of the public can take that official, the government, to court and, if successful in reversing that decision, can get attorney fees and other penalties.

So you have to watch your step on Freedom of Information Act requests because the intent of Congress generally was to make available to the public any documents or information in the possession of the government.

What has happened since that Act was passed in 1967 and amended last year?

The courts in all of the cases that I am familiar with in interpreting that Act have restricted those nine exemptions rather than broaden them out. They have said if your reason for withholding the information doesn't clearly fall under one of these nine exemptions, then you are wrong, you have got to release it.

Nowhere in those nine exemptions, folks, does it appear and we have been over to the Department of Justice—this just isn't our interpretation, we weren't sure, and Reid Chambers, sitting at the far left here, argued on the other side as your resolution does, that even though it is not listed in the freedom of Information Act as one of the nine exemptions, it should be or it should be read into it or interpreted under one of those.

We went over to the Department of Justice, who has the chief responsibility for deciding these types of cases, where you decide to turn down a request for information. They found difficulty in finding anywhere in those nine exemptions any rationale for saying that merely because it is information that is of an Indian origin or records of a tribe that you can claim an exemption.

It just isn't there, I am sorry to say. As a lawyer, I can't prostitute myself and read it in if it isn't there.

One thing that I want to clarify here. Your resolution would indicate that all tribal information would be available to third parties or to the public. That is not quite accurate. It is only tribal information that by law or statute or rule or regulation you have to furnish to the Secretary or the Department.

The member of the public isn't entitled to come in and ferret through your files or request of the tribe any and all information. Only in those areas where, like I say, regulations require that you submit a certain document to the Secretary of Interior or to the BIA or to the Department.

It is only when that information gets in the hands of a Federal agency or department that it comes under the purview of the Freedom of Information Act. Otherwise, your general tribal business is your own and wouldn't be available.

I have talked long enough. I am more interested in your questions. One more thing I want to say. What is the answer to this problem?

The answer obviously is if it isn't in the law, if it can't be interpreted as such, then you are going to have to go to Congress and make your case to them and say, gentlemen, there ought to be a tenth exemption, and the tenth will not be in these specific instances as it affects Indian tribal business.

I see you had a question.

Mr. Cox. One thing, it sounds good but you shouldn't have said, if the Indians are going to work with their trustee and obtain advice from their trustee, they can't keep their trustee as to mushroom in the dark and not feeding true, good information.

So, therefore, as a practical matter, every bit of tribal information if the trustee and the beneficiary are working together, becomes in the Federal files.

Mr. FRIZZELL. That could well be true.

Before we go on, Fred, the first gentleman on my left is Fred Karem, my Special Assistant, and the second gentleman is Tim Elliott, Assistant Solicitor, who handles Freedom of Information requests for the Department. Do either one of you want to add anything that I have rushed over here?

Mr. KAREM. Just to add one or two points to elaborate on what Kent said. There are many organizations and individuals who have to submit records to the government. The fact that the document comes from an outside party under the force of law isn't per se adequate basis for being exempt from application of the law.

Picking up on one other aspect of what Kent said, even those documents and records that you do have to turn over to the government are not automatically all discoverable. Many of these documents even under the present state of the law can be withheld if they fit within the scope of one of these exemptions as interpreted by the courts.

Mr. FRIZZELL. Give them an idea of what the exemptions cover, generally? You don't have to tick off all nine, but give them an idea.

Mr. KAREM. The exemptions are referred to in the Act as being the sole basis for not following the general rule of mandatory disclosure and the language in the statute is what is reinforced by the legislative history as limiting the effect of any opportunity to withhold documents.

The exemptions that would probably be most applicable to Indian documents would be trade secrets and commercial or financial information obtained from a third party and privileged or confidential; personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy might also be applicable in certain cases.

But the nature of these exemptions are such that at the time that Congress enacted them they made two that showed how careful and detailed they were in outlining what would be exempt. For example, out of the nine exemptions, two of them relate to geological and geophysical information and data, including maps concerning wells, and another one would be contained in or related to examination, operating or condition reports prepared by or on behalf of or for the use of an agency responsible for the regulation or supervision of financial institutions.

So that we are dealing with a situation where the Congress has been very specific in its exemptions and the courts have followed likewise in their interpretation of them.

Mr. FRIZZELL. Sometimes it helps to put things in perspective if we will tell you what the problem that brought this about was.

Let me share with you the opinion that Wendell speaks of that we were faced with. The actual request that came to the Department of Interior was for a copy of the attorney contract of one Richard Kleindienst representing Agua Caliente Indians of California.

They wanted to know how much he was being paid and what the terms of that contract were. I used to work for Richard Kleindienst. He is a friend of mine. I didn't relish turning this information over either from the viewpoint of the tribe or the guy involved in the contract.

The truth of it is that the member of the news media that requested that information had sat in on the tribal council meeting where they had discussed the contract, had all of the information, had already published all of the information, knew exactly the hourly rate of compensation spelled out in that contract.

So really what we were talking about was the principle, because he already had the information; the principle of having to turn over a tribal contract with its attorney for dissemination of that information to the general public.

Mr. POTENCIO. I disagree. That is incorrect.

Mr. FRIZZELL. I want to be corrected if it is incorrect.

Mr. POTENCIO. The reporter involved, Mr. Will Thorn, was not involved in any tribal council meetings whatsoever.

Mr. FRIZZELL. That was not the information—somebody told me that a member of the press in that immediate area had sat in on the tribal meeting and published the information.

Mr. POTENCIO. I am Ray Potencio, the Chairman for the Agua Caliente Indians. The information that was leaked out was through one of our own tribal members. The press did not engage nor was invited to attend any of our tribal council meetings.

As a matter of fact, I think as conversation with Mr. Elliott, we envisioned this as an invasion of privacy, invasion of tribal information, private tribal information, that we are not a public agency, we are a private agency and we opposed it altogether. It is just unfortunate it had to work out this way.

Mr. FRIZZELL. So at none of your tribal meetings was there a member of the press? You didn't hold an executive session, I was told. There was already published reports that it was so much—

Mr. POTENCIO. Yes, that is essentially correct, but there was no member of the press invited to the council meeting.

Mr. FRIZZELL. But of course what made it come under the purview of the Freedom of Information Act wasn't the action you took or the resolution or the contract because, as you know, each attorney contract must be approved by the Secretary of Interior.

Once that contract was submitted to the Department of Interior, then it became available under the Freedom of Information Act inasmuch as there was no exemption to allow us to say no to the media that requested it.

Mr. SPARKS. My name is Joe Sparks. I represent the San Carlos Apache Tribe. We have a suit.

My understanding of the Freedom of Information Act was that it was not the documents merely that were required to be presented to the government or an agency by ordinance adopted or statute or regulation, but rather the documents in the possession of the agency. I think the words are "in possession."

Mr. FRIZZELL. That is true.

Mr. SPARKS. You said those that were required to be given. The trouble is the Freedom of Information Act as construed in certain instances have hypothetically conflicts with the whole body of trust relation law that has evolved over the last 400 years and was confirmed in the case of *Manoma v. United States* in 1944, that the traditional law applies to the United States in its relations with the Indian tribes.

It is no doubt between thee and me that if you and I were representing a lady in her relationship with her institutional trustee and we were advised by our client that we wanted, that she wanted a certain result from the trustee, we communicated with the trustee and asked the trustee to negotiate with a third party in an instance, that that trustee couldn't by law disclose sensitive information to the third party.

So it conflicts with the body of trust law. I think that is the relationship that we are talking about.

Mr. FRIZZELL. Don't you suppose Congress knew that when they passed the Freedom of Information Act?

Mr. SPARKS. What I am saying is I am assuming that they did not intend to overturn the entire history of the trust law and the trust relationship when they are talking about the Freedom of Information Act?

I think the intent of Congress was to provide members of the public with documents from governmental agencies which vitally concerned them and the affairs between the trustee and an Indian tribe could not vitally concern a member of the public who is not a member of that tribe.

Mr. FRIZZELL. Just because you and I represent a ward in a trust relationship, it wouldn't mean that we were immune or exempt from acts of Congress, would it?

Mr. SPARKS. Nor would it mean that we were free to ignore the body of law that describes our relationship with the beneficiary.

Mr. FRIZZELL. Congress had the opportunity twice in the last eight years to add an additional exemption and spell out that another area where information should not be available to the members of the general public is in the area of Indian Affairs. They chose not to do so.

Mr. SPARKS. I don't think there is any evidence that they specifically and expressly chose not to limit the information disclosed on Indian Affairs. Is there any history that shows that they did that?

Mr. FRIZZELL. To our knowledge, it is not spoken to one way or another.

Mr. SPARKS. I believe that is correct. It is not spoken to. Therefore, I can't see legislative history which intends that it be disclosed and in the event that there is financial penalties for the individual who does not or fails or refuses to disclose that information; on the other hand, there is financial liability to that person who does so and thereby jeopardizes the beneficiary and jeopardizes the property and interest of the beneficiary in so doing.

Mr. FRIZZELL. What you are saying is based on that theory of the interpretation of the law we should subject ourselves to litigation and test the law rather than go the legislative route.

Mr. SPARKS. I don't say rather than, in addition to.

Mr. CHAMBERS. Maybe I can clarify that. This very question came up with respect to the Northern Cheyenne petition which had been requested. They had submitted a lengthy petition to the Department as trustee, disclosing a number of financial aspects of the Cheyenne transaction and their legal arguments that they were making for the invalidity of the leases.

Peabody Coal Company and some of the other coal companies requested the petition. I tried to make the argument you are making now before the new amendments to the Freedom of Information Act.

What happens in the government is this: If an agency is going to withhold a request for information, we have to go over to the Justice Department and they have a committee over there of experts on the Freedom of Information Act.

We have to consult with the committee. The solicitor was initially inclined to withhold that information. We sent our Memorandum over to that committee. They will not defend us in litigation if the matter is litigated unless we take their advice.

Fred Karem and I went over there and made this argument. We really made the argument on the third exemption which states something like there is an exemption for material which is required not to be disclosed by statute.

We argued that the trust responsibility was really partly created by statutes of Congress and therefore that this whole body of trust law clamped onto the material.

The Justice Department thought that was a very unpersuasive argument and rated our chances as very minimal in the context of the Northern Cheyenne situation. They did say if we had a different kind of situation where it wasn't an administrative matter that was before the Secretary for decision they would reconsider that argument and they might be willing to take it to court.

So I think the thing is still open.

Mr. SPARKS. Is the beneficiary notified when the documents that have been placed in the hands of the trustee are going to be given to the third party?

Mr. CHAMBERS. They were certainly already with that context.

Mr. SAVILLIA. They are not in other cases. On behalf of the Indians, have come a long ways, spent a lot of money, we ought to get down to the nuts and bolts of

this situation. You lawyers can argue this out tonight at the legal club or wherever you hang out.

Mr. Frizzell, this is not the only issue. The Palm Springs case is not the only issue involved here. What is at issue is the Colorado tribes of the lower Colorado River. The information, if your information is correct to us this morning, the studies were stolen from the tribes, stolen from us by the Bureau of Indian Affairs, delivered to you and you, in turn, delivered them to our enemies, the irrigation districts, State of California, Arizona, Nevada, and others; 44, as I understand, 44 of our enemies.

If Mr. Frizzell—Mr. Frizzell, you know, you came down here for a specific purpose. One of them was, I think, that I have a chance to talk with you now. If you believe in the letter of the law like you just said, the Constitution, other laws notwithstanding, says that the United States is our trustee.

I understand that we are not your clients, that the Department is your client; but on the other hand, as the clients or the attorneys for the Interior Department, I believe that you also have an obligation to become an advocate for the Department of Interior's responsibilities and one of those responsibilities is being an advocate for the Indian people.

I for one do not appreciate the position taken in this important matter where arbitrarily, I think, you take the position not in favor of the Indian people. The lower Colorado River tribes have never been informed of your decision not to turn over this material.

Our attorney was at that meeting and I understand in a matter of minutes you said yes, I will deliver the material. But according to your own reading of the law, you had several days at least, 10 days to decide whether to turn that material over, plenty of time to contact the tribes and say is this material all right to turn over, or whatever. But anyway, this material that was turned over is very important to the tribes and it was never approved by the tribes. It was still in the hands of the tribes when it was delivered.

So under what I have just said, I do accuse the Bureau of Indian Affairs of stealing that information from us and delivering it to our enemies, thereby coming under the trade secret part of the exemption, I believe.

I think that Indians here are being deprived of their personal property, a study made for the benefit of the Indians, for their actual survival, the study was personal property and should never have been handed over. The information does not become government property subject to the law, in your own words, until they are turned over to the tribe or turned over to the government by the tribes. The tribes never asked you to approve of this study, to approve of these documents, these maps, never once except at a local level. We have not approved them.

So, Mr. Frizzell, I am asking you from the Indian viewpoint here today, do you intend to continue on this line or do you intend to become an advocate for the Indian position?

Mr. FRIZZELL. Elmer, I appreciate you asking me that question. It gives me opportunity to say yes. I intend to continue to be an advocate for the Indian position as I was when the first opportunity came to me under the Freedom of Information Act on request for information from an Indian tribe. You are right. There have been three instances where the Freedom of Information Act has interacted with Indian tribes.

The first one was Northern Cheyenne. We went over to the Department of Justice. We became your advocate. We argued your viewpoint and we said we think it ought to be exempt. Our attorney who represents us in court and you said, no, you can't do that. The second instance that came along was Agua Caliente. I had been over to argue the viewpoint with the Department of Justice. There wasn't much use in going back when they gave me an answer.

The third instance was *Arizona vs. California*. First of all with regard to that contract, it was not a study that was in the possession of the tribes only. The BIA funded a \$200,000 contract for a study. The contract was between them and the environmental earth-something, and it was their study.

Secondly, it has not been delivered over to your enemies. We are treating it like any other request under the Freedom of Information Act. Your enemies do not have a copy of it yet. They were told they would have to make a request in writing under the Freedom of Information Act.

We have treated it like any other. It came in. I have referred it to Morrie Thompson in the BIA for their comments as to what their recommendation is. When I get that recommendation, then part of our rules and regulations say we must contact the party involved, which is you. You will be contacted. I am sure I know in advance what your answer will be. I am sure I know what Morrie

Thompson's answer will be. I am still faced with the Freedom of Information Act, the Department is, when the decision has to be made whether to turn it over or not. What I am telling you here in all honesty and candor is I find none of the nine exemptions that will allow me to say no to the requestor of that information.

Mr. BURNETT. Mr. Frizzell, for over 10 years as an individual member of the Rosebud Sioux Tribe, I sought records belonging to the Rosebud Sioux Tribe on all levels, the agency, the Arizona office, and here in Washington, and through the Secretary of the Interior; and I was refused every time saying the Bureau said that is a tribal matter and you must get approval from the tribe. That was the answer from every level.

Now you are saying that you must turn documents over to whoever requests them. I certainly couldn't get it, even though I was a member of the tribe. I wonder why?

Mr. FRIZZELL. First of all, you say for the last 10 years. The Freedom of Information Act wasn't passed until 1967. So I can well imagine that from 1965, 1967, they did say no to you and there was no law saying that you were entitled to it. Since 1967, though, had you made the request under the Freedom of Information Act and if you will do so tomorrow under prevailing law, you are entitled to those items of tribal business that do not fall under one of the nine exemptions unless you all, these two associations get Congress to amend the Act and make it a 10th exemption in your instance.

Mr. SCHAAAB. I am Bill Schaab. We have had a couple of problems arise in the water adjudication suit relating to the Freedom of Information Act. I don't think I want to ask for your opinion or any ruling on those particular questions; but I would like to have your general comments and those of the experts that you brought along on the Freedom of Information Act as it is applied in litigations.

As you are aware, water adjudication suits involve a great mass of technical information. There are studies which the BIA staff may do. There are studies which the USGS may do. There are studies which independent consultants may do. There are a variety of research. In our case, we have also historical research.

The research may be embodied in reports, computer printouts, memoranda, drafts in preliminary or revised stages. The materials are passed around among attorneys, among people in the government, in independent offices because not only the hydrological, but the historical and legal information tends to have an interacting effect on the work that the various components of the suit are doing. Everyone needs to have access to it, be informed of it, develop the thread of argument, for instance.

This is all a part of an attorney's workout in developing a complex and at least a very hard fought adversary proceeding. Confidentiality, as you may imagine, is very important under these circumstances where particularly the results of the studies may not be conclusive subject to reasonable construction and possible debate, conjecture and difficulties with cross-examination at a later stage.

I would like in that overall context to have some of your thinking as to the effect of the Freedom of Information Act and how it relates to the ordinary rules of procedure that have some safeguards against the reach of ordinary legal discovery.

There are materials that are beyond the reach of discovery and preliminary stages, working papers and so forth. Once the study has been completed, then, of course, the expert can be deposed and examined and a study produced on interrogatories or other methods.

I am talking now mainly about the stage before the completion of the work and whether or not this Act would require either the government agency involved or the independent organization whose product is in the possession of the agency for purposes of review to disclose it before the time when it would be disclosable under the rules of procedure.

Mr. FRIZZELL. I think I know the answer to that because one of the nine exemptions addresses itself specifically to those types of information. But I have talked too long. If these guys want to earn the money we pay them, would anybody like to comment?

Mr. ELLIOTT. I don't want to go into the long legal discussion between us as to each kind of document that you have talked about.

There are a couple of exemptions which might apply in a given case. One is the fifth exemption which speaks to interagency or intra-agency memoranda or letter not available by law to the party other than an agency in litigation with the agency. What that says is those things which aren't discoverable must be released.

That has been subject to a lot of interpretation by the courts. It is very technical. I won't get into it. It resolves down to a difference between factual matters and things which are opinions.

The other possibility, and I think that is probably less of one, is investigatory records. It is a very long exemption. But basically, it talks to investigatory records compiled for law enforcement purposes and it has some exemptions or exceptions to the exemption which narrow that exemption down.

That was given broad, fairly broad interpretation as to what an investigatory record was in the past. Apparently, the intent of Congress, they did change that exemption—one of the two that got changed in 1974. The intent of Congress in changing that was to narrow the application of that exemption. So there are some.

But in each case, we have to look at each piece of information and each document. It is permissible, in fact encouraged by Congress to expunge from a document information which ought not be disclosed and disclose that which Congress in the Act has required be disclosed, even though it may not make any sense to the person who receives it and reads it where it has blanks throughout the piece of paper.

Mr. SCHAAAB. I guess I had two short supplemental comments. One is, do you think there would be any possibility of amending the Act, put in a general exemption for situations arising in the course of litigation governed by the rules of civil procedure?

The second one is, in order to preserve confidentiality in a litigated suit, it sounds as if the work ought to be done by a private consulting agency instead of a governmental agency.

Mr. FRIZZELL. You know, Bill, I don't mean to cut you off. You deserve an answer. My staff and I are available to you and any other lawyer in this audience after we finish this meeting, for as long as you need us. But I don't think these people are going to appreciate, or should we take their time to argue fine legal points?

My reason for being here this morning, and my staff, is to talk to the Indian community, very frankly, and answer questions they have got. Fine legal points, I am more than willing to spend time with you; but I don't think they are as interested in that as some other things.

Mr. BURNETT. I have one other question; I think a very important one at this stage. I want to know why you as legal counsel for the Secretary of the Interior did not advise them to use Indian water rights as a constraint on the agreement between the Secretary of the Army and the Secretary of the Interior on the Missouri River waterways?

Mr. FRIZZELL. Wendell, are we finished with freedom of information? I am willing to get into this.

Mr. CHINO. I want to ask, or at least express an opinion here; that is, that I have known in certain situations where positions have been taken that the general law does not apply to Indian people unless Congress specifically exempts or refers to Indian people. I know for instance, like the Federal Housing Act, the Federal agencies told us that this didn't apply to Indians because the Indians weren't specifically mentioned in the Act. So we have to get that law amended so that the law could at least be made applicable to the Indian people.

Now it seems like we are just talking the reverse here. I am like Elmer Savillia here, I take the position that here is a general law. If the Federal agencies want to exchange information and they want open to the Washington Post or the Chicago Sun or whoever they want to, I think that is their business.

But I think that the information of the Indian tribes or the confidential information, I am just as sure as I am standing here, that Elmer is not interested in the Mescalero, nor am I interested in his tribal information. I think this is our business and this is the position that I think the tribal leaders take.

Mr. FRIZZELL. Just one short statement, if I may, to answer that. The only problem I have with your argument, Wendell, is that in the—what was the NEPA suit, Morton vs. Juarez—the NEPA Act, Congress did not spell out and say it doesn't apply to Indians, but the court certainly held that it did, I am sorry to say.

Mr. GERARD (Senate Interior Committee). I would like to pose a question to several of the representatives from the Administration. Possibly, they cannot answer it at this time. But if the idea would be to advance legislation that would exempt certain documents or information growing out of the trust relationship between the trustee and the beneficiary, would it not be better for

the former to sponsor that kind of legislation and send it forward to Congress, rather than encouraging the Indian groups here to go to Congress, try and get a Senator or a Congressman to introduce a bill.

We would then be faced with the problem of getting a favorable report out of the Administration and maybe not all of the representatives here understand the subtleties of legislation. But that report is going to have a very important bearing on whether or not that legislation will have a chance of flying or not.

I gather from the discussion here that certainly you recognize the problem. Would the trustee be willing to send that kind of legislation forward or at least recommend it?

Mr. FRIZZELL. Of course, this is the old game of the hot potato goes to you. It is true the Administration could support such a bill, could initiate it, inaugurate it; but it is also true that the Senate Interior Committee could do the same thing.

I will tell you what. Personally, I will tell you here and now, I endorse this approach of an exemption for Indians. I can't speak for the Office of Legislative Counsel. I can't speak for the Assistant Secretary for Legislative Liaison. I can't speak for OMB. I can't speak for this Secretary or the Secretary to be. I personally would endorse it.

Why don't we go this route? Why don't we both try to get a bill in about the same time?

Mr. BURNETT. Mr. Chairman, I move we do just exactly that, have the Administration advance a bill and also ask the Senators to advance a bill.

Mr. CHINO. Is there a second to the motion?

From the floor. I second it.

Mr. CHINO. It has been moved and seconded that the Department and the Water Conference would each initiate legislation to exempt the tribes on the information on the Freedom of Information Act provisions.

Dr. MARRS. Forrest, we will arrange for you to meet with representatives from Justice and from Interior in my office next week and we will work this particular area jointly.

From the floor. I call for the question.

Mr. CHINO. Are you ready to vote on the motion, even though Dr. Marrs hit it in the head already?

All in favor say "aye"; those opposed say "no."

The motion is carried.



