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DISCHARGE OF THE FEDERAL TRUST RESPONSIBILITY TO ENFORCE LEGAL CLAIMS OF INDIAN TRIBES: CASE STUDIES OF BUREAUCRATIC CONFLICT OF INTEREST

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"No servant can serve two masters; for either he will hate the one and love the other; or else he will hold to the one, and despise the other"

Luke 16:13

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The United States stands in a fiduciary relationship to Indians and Indian tribes. It has been held by the Supreme Court that "these Indian tribes are the wards of the nation."[1] The duty is a "self-imposed" one which derives from the status of Indians as "dependent and sometimes exploited people," Seminole v. United States, 316 U.S. 286, 296-97 (1942). In Seminole Nation, the Supreme Court held that the United States "has charged itself with moral obligations of the highest responsibility and trust." Ibid.

The existence of this trust relationship was recently reaffirmed by President Nixon. In a message to Congress on July 8, 1970, he emphasized that:

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

The President noted that many legal disputes concerning the extent of the Indians' land and water rights are between them and agencies of the federal government, their trustee. Such instances involve conflicts of interest, as it is impossible for the government vigorously to provide legal representation to the Indians and, at the same time, effectively pursue its own designs and policies with respect to land and water also claimed by the Indians.

In order to remove the conflict of interest, the President proposed creation of a new entity, independent of the executive branch, to provide legal representation to Indians. Legislation to establish this entity - the Indian Trust Counsel Authority - was sent to Congress on July 31, 1970. A copy of the proposed bill as sent to Congress is attached as Appendix A. As proposed, the Trust Counsel Authority would be controlled by a three member Board of Directors, appointed by the President with the advice and consent of the Senate.[2] The Board of Directors, in turn would appoint the Indian Trust Counsel, as the chief legal officer.[3]

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1. United States v. Kagama, 118 U.S. 381 (1886). In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), Chief Justice Marshall stated that the relationship between Indians and the United States "resembles that of a ward to his guardian." United States v. Payne, 264 U.S. 446, 448 (1924); Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886). See also Creek Nation v. United States, 295 U.S. 103, 109-10 (1935).

2. Proposed bill, sec. 2 (b).

3. Proposed bill, sec. 4.

While the Indian Trust Counsel Authority would be authorized "to render legal services in regard to rights or claims of Indians to natural resources"[4] in opposition to States and private claimants,[5] the most significant portion of the bill - Section 9 - authorizes the Authority to commence suit "acting in the name of the United States as trustee for the Indians . . . against the United States, its departments, agencies, officers, and employees."[6] Moreover, this section specifically waives sovereign immunity as a defense to such litigation.

The purpose of this paper is to evaluate the proposal to create an Indian Trust Counsel Authority by discussing several situations where a conflict has arisen between Indian trust rights and conflicting federal claims. The situations described herein have all arisen within the past three years, although in some cases, the conflict of interest has deeper historical antecedents. Since the trust reponsibility to the Indians is primarily reposed in the Department of the Interior, the conflict of interest is most direct when the agency with an interest adverse to the Indians is a bureau located in the Interior Department. Therefore, conflicts between either the Bureau of Land Management or Bureau of Reclamation - both Interior agencies - and Indian rights have been selected for most of the cases analyzed.

In analyzing the conflict of interest between government agencies and the Indians, it is imperative to perceive - as President Nixon did in his message[7] - that the federal government as trustee is charged with the protection of what are essentially private property rights. As trustee for private rights, the government does not act in its usual political capacity, but is charged with the same general obligations as are imposed on private trustees.[8]

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4. Proposed bill, sec. 8.

5. Proposed bill, sec. 9.

6. Proposed bill, sec. 9.

7. The President stated: "In many of these legal confrontations, the Federal Government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee." (Emphasis in original.)

8. In Menominee Tribe of Indians v. United States, 101 Ct. Clms. 10, 18-19 (1944) it was held that a special jurisdictional act providing that "the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary, add[s] little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." In Menominee Tribe, the government was barred from borrowing funds from the Indians without paying a normal rate of interest, and from making expenditures with high-interest funds before exhausting low interest accounts. In Sioux Tribe v. United States, 105 Ct. Cls. 725 (1946) the Court held that the government has a standard fiduciary duty to make a proper accounting to its beneficiary.

Indeed, the Court of Claims recently held that the United States should be held to "the most exacting fiduciary standards" with respect to Indians, whatever its other goals and preferences.[9] The same principle was announced by the Supreme Court in Seminole Nation v. United States, 316 U.S. 286, 297 (1942). Just as a private trustee, the United States has a duty of undivided loyalty, which has been called the "most fundamental" duty owed to the beneficiary by his trustee or a ward by his guardian.[10] Another important duty is the obligation to preserve and protect the trust property, which includes taking all reasonable steps to enforce the beneficiary's legal claims relating to the property.[11] And just as a conflict between the private trustee's fiduciary duty of loyalty and his own personal interests would be intolerable if it interfered with performance of his trust responsibility, a conflict between the rights of Indian beneficiaries and the public purposes embodied in federal programs with adverse interests MUST NOT IMPEDE the effective discharge of the United States' fiduciary obligation to protect private Indian property rights.

This "conflict" then, is not one which properly can be resolved through the political process of balancing conflicting interests. Such a balancing procedure within the executive department is desirable where competing public policies are being balanced; this, of course, is the method by which public policy is formulated. But private rights, which the United States is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes. The government's relationship to the Indians is, in this respect, unique in character.

On the one extreme, the prohibition against the United States, as trustee, having an interest adverse to his beneficiary could conceivably be resolved by holding that wherever a public purpose conflicts with Indian trust rights, the latter shall always prevail. Such an absolute frustration of competing public policies would clearly be intolerable for several reasons. Most importantly, the formulation of public policy must retain more flexibility than would be permitted by such an iron-clad rule. As will be seen, Indian property rights are sometimes difficult to define and raise complex legal and factual questions. Moreover, a private trustee faced with a conflict between a fiduciary duty and a critical personal interest could resign, whereas the federal trust obligations cannot be ended without an Act of Congress. What can be demanded as a minimum is that Indians' claims be asserted by an advocate with undivided loyalty.

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9. Navajo Tribe of Indians v. United States, 364, F. 2d 320, 322 (Ct. Cls. 1966), Compare Menominee Tribe of Indians v. United States, 102 Ct. Cls. 555 (1945).

10. Scott, Trusts, p. 1297 and §170-17.

11. Id., §§176-177.

The opposite extreme would be a rule requiring the Indian interest to yield to conflicting public purposes. In the past this extreme - while by no means a fast rule of administrative practice - aptly describes the result of most, although not all,[12] cases where a conflict of interest has arisen in the discharge of the federal trust responsiblity. In part, this consequence may derive from entrusting primary responsiblity for administering the trust obligations to Indians to the Secretary of the Interior and, within the Interior Department, to the Bureau of Indian Affairs.[13] The Department of the Interior's major responsibility is the management and conservation of public property and resources;[14] its bias, therefore, would be against conflicting private property rights.

The Indian Trust Counsel proposal represents a departure from either of these extremes. Without pledging that private Indian interests should prevail whenever they conflict with public purposes, the proposal represents an institutional rearrangement in which private rights can be advanced with undivided loyalty. Since the proposed bill waives the sovereign immunity of the United States in connection with actions commenced by the Trust Counsel, it favors resolution of conflict situations by the judicial branch rather than by executive fiat.

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12. While the case studies are ones where the Indian interests appear to have been compromised, this is, of course, not always the situation in which conflict arises. For example, in January, 1969, the Solicitor determined that the south boundary of the Salt River Indian Reservation in Arizona had been erroneously determined by the Bureau of Land Management to be the North, rather than the South, channel of the Salt River. Memorandum, Solicitor Edward Weinberg to Secretary of the Interior, M-36770, January 17, 1969. Similarly, the Solicitor determined in 1966 that the boundaries of the Yakima Indian Reservation had been erroneously surveyed and portions of the land that should have been included in the reservation administered by the BLM, should be returned to the Tribe. Memorandum, Associate Solicitor for Indian Affairs to Assistant Secretary for Public Land Management, June 21, 1967. "Restoration to Yakima Tribe of Lands Omitted from Survey."

13. 5 U.S.C. §§22, 481, 485; 25 U.S.C. §§1, 1A, 2.

14. Its duties include administration of public lands, mines, territories and possessions, fish and wildlife, national parks and petroleum conservation.

The Nature of Legal Conflicts of Interest

In legal representation, there are three basic conflict-of-interest situations. The first is where the attorney himself has a personal interest in property claimed by his client. It is obvious that an attorney will not zealously advocate his client's interests if he must sue himself, a corporation in which he has a substantial financial stake, or his employer. Such representation has repeatedly been declared to be unethical.[15]

Similarly, an attorney cannot effectively represent a client whose claimed rights conflict with those of another client.[16] An attorney "should resolve all doubts against the propriety of" representing multiple clients.[17] The multiple client problem, where a federal agency has a claim to property adverse to Indian claimants, is the most common conflict in federal representation of Indians.[18]

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15. E.g. American Bar Association, Committee on Ethics, Informal Opinion No. 967 (1966). In United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963), the Court stated:

> "Attorneys must not allow their private interest to conflict with those of their clients . . . . They owe their entire devotion to the interests of their clients."

Disciplinary Rule 5-101, (American Bar Association) Code of Professional Responsibility provides "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonable may be affected by his own financial, business, property, or personal interests."

16. For example, an attorney for an insurance company was engaged in representing X, a motorist insured by the company, in a suit against Y following an automobile accident involving X and Y. In this litigation, the attorney was contending before the court that Y had been negligent and X had not been negligent. Due to the length of the court proceeding, and the size of his out-of-pocket expenses in connection with his injuries, X requested an arbitration proceeding under the terms of the policy where, if successful, X could require prepayment of certain benefits. To resist prepayment, the company must show that X was negligent in the accident. It was held that the same attorney could not represent both X in court, and his company in the arbitration proceeding, even if both X and the company consented. Informal Opinion No. 977 (1967).

17. Ethical Consideration 5-15, American Bar Association, Code of Professional Responsibility.

18. The federal conflict-of-interest laws protect the Government against any such conflicting interest held by its employees. These laws, butressed by criminal sanctions against violators, prohibit any federal employee from representing a private party before a court or agency in a matter where the United States has an interest. 18 U.S.C.§§203, 205. This prohibition survives for a period of time after a person leaves government employment with respect to matters in which he actively participated while with the government and matters under his official supervision. 18 U.S.C.§207 (a), (b).

A third conflict of interest is that political influence may intercede between the lawyer and his clients. A conflict may thereby be created between the attorney's duty to his client and his dependence on third persons-here, chiefly higher officials in the Departments of Justice and Interior and members of Congress. Canon 35 of the American Bar Association, Canons of Professional Ethics would seem to be violated by the present structure by which federal legal representation is provided to the Indians. It reads (in part):

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual . . . . A lawyer's relation to his client should be personal, and the responsibility should be direct to the client."

The American Bar Association Code of Professional Responsibility similarly bars political influence exerted upon an attorney-client relationship.[19] Ethical Consideration 5-23 declares that:

> "Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."

While political influence may properly focus upon government attorneys who are charged with implementing public policies, it is unjustified in the case of attorneys employed in the discharge of a federal trust responsibility to protect private rights.

The case studies which follow demonstrate that all of the three types of prohibited conflicts of interest exist in the federal representation of the Indians. Additionally, they indicate that - where a conflict of interest of the "multiple client" type exists, and a federal agency is claiming trust property in which the Indians claim an interest - no government attorney is at present charged with single-mindedly advancing the Indians' claim. The Solicitor's

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19. Ethical Consideration 5-21 reads in part:

> "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer."

office, in evident violation of professional ethical standards, generally "represents" both the Indians and the agency involved. Moreover, the controversy is usually resolved in that office itself: the Solicitor issues an "opinion" which, far from resembling an opinion letter from a private attorney to his client, constitutes an adjudication of the dispute for all practical purposes. No government attorney will "appeal" the opinion to a court or higher administrative authority; it is accepted as a statement of the law.[20]

Opinions are, moreover, frequently based upon facts supplied to the Solicitors by agencies with interests adverse to the Indians, for example, hydrological studies by the Bureau of Reclamation and land surveys conducted by the Bureau of Land Management. These "facts" are seldom subjected to scrutiny comparable to that of cross-examination by a zealous attorney or the critical evaluation of a hearing examiner, commission or judge. The Indians generally have no comparable "expert" to which they can turn for technical expertise.

Finally, no systematic procedure exists for notifying Indian tribes or their protectors of actions which might infringe Indian trust interests. In some instances surveyed, the Indians have learned of the contemplated action too late to muster effective opposition.

I. Case Studies of Conflicts of Interest

A. The "Multiple Client" Problem

1. Lease of Colorado Riverfront Property, Claimed by Quechan Tribe, by the Bureau of Land Management.

The Bureau of Land Management (BLM) administers the public lands of the United States. Not infrequently the BLM sells or leases lands claimed by the Indians or Indian tribes.

The Colorado River serves as a boundary for a number of Indian reservations along its banks. Riverfront property in many areas is especially valuable for recreational purposes. In April, 1967, Interior's Program Support Staff recommended that Secretary Udall approve a lease of lands to Yuma County for an airport and park

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20. Mediation of disputed interests of two clients by an attorney is permissible only if (1) both clients affirmatively request it and (2) the attorney desists from further representation of either client on the matter involved. American Bar Association, Code of Professional Responsibility, Ethical Consideration 5-20; H. Drinker, Legal Ethics, p. 112.

facilities.[21] These lands, which border the Colorado River, were claimed by the Quechan Tribe to be part of their Ft. Yuma Reservation.

The conflicting claims of the tribe and the BLM were presented to the Department of Interior's Solicitor for his "opinion." The Solicitor reasoned that the Quechans possess a beneficial interest only in the irrigable lands within the reservation, but that Indian title to nonirrigable reservation lands had been ceded by an agreement of December 3, 1893, ratified by an act of Congress in 1894.[22] The Solicitor then determined that the proposed lease was legally unobjectionable so long as one irrigable parcel of land was excluded from it.[23]

In rendering this "opinion," the Solicitor was in reality arbitrating a dispute among various of his "clients." The Indian tribe and the BIA, on the one hand, resisted the lease; other Bureaus within the Department supported it. Clearly, the Solicitor could not provide complete legal representation to the competing interests. Rather than acting as an advocate, he functioned as an umpire and fashioned a "compromise" solution. Moreover, the critical technical determination as to which lands were irrigable and which were nonirrigable was made by the Bureau of Reclamation, one of the Bureaus which favored the lease.[24]

In sustaining the legality of the lease, the Solicitor held the 1893 Agreement, on which the 1894 statute was based, to be valid. This determination rejects certain claims of the Quechan Indians that the Agreement was an utter nullity because it was obtained by fraud, duress and even forgery, arguments the Indians could expect an uncompromised advocate to advance in a judicial or administrative proceeding.

In 1893, Congress granted a right-of-way to an irrigation company to construct a canal over lands on the Yuma Indian Reservation.[25] Three commissioners were appointed to negotiate with the Indians and obtain their consent to the right-of-way. The tribal members could not read, write, or understand English, and an Indian interpreter who was not a member of the tribe was engaged by the

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

22. Act of August 15, 1894, 28 Stat. 332 (1894).

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

24. Id. at p. 2.

25. Act of February 15, 1893, 27 Stat. 456 (1893).

commissioners. An "agreement" was concluded, by which the Quechans granted not only the canal right-of-way, but also forfeited all reservation lands in return for allotments once the canal was constructed. Evidence introduced before the Indian Claims Commission[26] indicates that the interpreter and commissioners forced some Indians to sign the document, forged other signatures, and failed to explain that the agreement would have the effect of ceding the entirety of the reservation.[27] Moreover, eight tribal members opposed to the agreement were imprisoned in Los Angeles at the time it was signed; some of these dissidents were whipped and one died in prison.[28]

The agreement was ratified by an Act of Congress in 1894, but significant portions of the Act were never carried out. The Act specifically provided that unless the company began construction of the canal "within three years from the date of the passage of this Act, . . . the rights granted by the Act aforesaid shall be forfeited."[29] The canal was not constructed within that time period. Instead, an irrigation project over reservation lands was finally constructed over a decade later pursuant to the Reclamation Act of 1902 then in effect and an appropriation bill enacted in 1904.[30] This legislation was far less advantageous to the Quechans than the 1893 agreement, for the entire cost of the irrigation project was to be borne by them, and the land was to be sold at its value prior to reclamation, rather than by auction at market value as provided in the 1894 act. Allotments were not made until 1912, nearly twenty years after the 1893 agreement.[31]

Clearly, an argument can be made - and would be advanced by an uncompromised advocate of the Quechans - that the 1893 agreement

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26. Prior to the leasing dispute discussed above, the Quechans filed a claim against the United States asserting the liability of the government for the loss of use of a considerable amount of their land. The Quechan Tribe of the Ft. Yuma Reservation v. United States, Ind. Cl. Com. Docket No. 320.

27. Indeed, the agreement and congressional enactment following it have never been interpreted as extinguishing the Quechan's beneficial interest in irrigable lands which have not been disposed of under the reclamation laws of the United States.

28. Memorandum, William H. Veeder to W. Wade Head, Area Director, Phoenix, Arizona, April 15, 1970, "Title of the Quechan Tribe in the Yuma Reservation."

29. 28 Stat. 286, 336 et seq.

30. 33 Stat. 189 at 224 (1904).

31. Veeder memorandum, supra, note 23, at pp. 23-24.

was void ab initio, and that even if the agreement were valid, the cession of Quechan lands contained in it and in the 1894 Act was revoked by the company's failure to commence construction of the canal within three years. The area continued to be administered as an Indian reservation after the 1894 Act,[32] and the 1904 Act recognized that the Indians maintained a beneficial interest in irrigable lands (the only lands the 1904 Act covered) not sold to settlers. If the 1893 Agreement and 1894 Act had really ceded all reservation land, no such beneficial interest could have continued. The issue, of course, is not whether these arguments would ultimately be sustained - the crucial point is that they were never articulated by the Solicitor.

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

The Bureau of Reclamation is the other agency within the Interior Department which most often has claims which conflict with Indian trust property rights. The federal reclamation program, originally limited to the construction of irrigation works for both public and private users, has expanded over the past seventy years to provide water for power, municipal, commercial and industrial users.[33] Reclamation projects may store and sell surplus waters, and may advance such objectives as navigation flood control.[34]

Frequently, these projects seek to use water to which Indians and Indian tribes have a claim under the "Winters Doctrine." First set forth in Winters v. United States, 207 U.S. 564 (1908), this doctrine is that when the Indians ceded lands to the federal government, they impliedly retained rights to sufficient water to serve the needs present and future,[35] of those lands which they retained.

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32. This was recognized in an earlier opinion by the Solicitor, January 8, 1936, M-28198, pp. 10-11.

33. Irrigation is the paramount use for reclamation waters. 43 U.S.C.§§485h, 521-522. It was not until 1920 that Congress generally authorized the disposition of project water for uses other than irrigation. Act of February 25, 1920, ch. 86, 41 Stat. 451, 43 U.S.C.§521. But as early as 1906 the Secretary was authorized to supply water and power to "towns or cities on or in the immediate vicinity of irrigation projects." Act of April 16, 1906, ch. 1631, 34 Stat. 116-17 43 U.S.C.§§522, 567.

34. J. Sax, "Federal Reclamation Law," Water and Water Rights, p. 121.

35. United States v. Ahtanum Irrigation District, 236 F. 2d 321, 326 (9th Cir. 1956); Conrad Investment Company v. United States, 161 Fed. 829 (9th Cir. 1908).

There are a number of unresolved general issues concerning Winters doctrine rights. While it seems that the Indians can use their water for any purpose for which their reservation was created,[36] it is not clear how far they may depart from the initial agricultural use served by irrigation.[37] Moreover, the measure of the Winters doctrine right may be exceedingly complex, involving a present estimate of future beneficial needs. It seems obvious that they require an advocate who will press those claims to the fullest extent possible. In a number of instances, the Interior and Justice Departments have desisted from doing so, in large measure because of the conflicting policy of the Bureau of Reclamation to appropriate as much water as possible for the reclamation projects. Reclamation projects, in fact, cannot be authorized under present procedures unless found feasible from a financial standpoint. A finding of feasibility requires that the estimated cost of proposed construction which can properly be allocated to irrigation, power, municipal and miscellaneous purposes be repaid to the United States from the sale of water and power to private users.[38]

Another point of contention between the reclamation projects and Indian Winters rights claims is that - while the Winters doctrine extends to water needed for present and future use, the Bureau of Reclamation seems to plan projects where water sufficient to sustain the project is not currently being appropriated, irrespective of whether an Indian claim of future beneficial need might be asserted. This problem appears in the Rio Grande and Kennewick Dam case studies.

The Bureau of Reclamation constructed Yellowtail Dam on the Big Horn River in the late 1950's, on the Crow Indian Reservation in Montana. Lands belonging to the Crow Tribe and the right to use water owned by the tribe for power generation were condemned for

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36. "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlef Refuge and the Gila National Forest. Arizona v. California, 373 U.S. 546, 601 (1963).

37. In United States v. Walker River Irrigation District, 104 F. 2d 334, 340 (1939), the Court of Appeals for the Ninth Circuit held that a Winters doctrine right could be used for irrigation, power and domestic and stock-watering purposes.

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

this purpose.[39] Without legal opposition from within the government, the Bureau of Reclamation is currently selling waters from the Big Horn River to industrial users. These sales may be in violation of the Tribe's Winters rights,[40] which have never been inventoried or established.

In November, 1967, the Field Solicitor's Office in Billings, Montana, issued a memorandum sustaining the legality of the Reclamation diversions.[41] The Field Solicitor proposed a restrictive interpretation of the Winters case, which would limit the rights conferred by the doctrine to uses in agricultural production. Since the Crow Tribe is primarily desirous of developing coal deposits on the reservation - estimated at up to one billion tons - the Field Solicitor's opinion would deny them the right to use Big Horn water in preference to Reclamation for this purpose. The Field Solicitor adopted this position while admitting that "it has not been decided whether the use of Winter's [sic] Decree water may be changed from irrigation to industrial use.[42] Moreover, the Field Solicitor argued that since the Bureau had condemned the power site for Yellowtail Dam, it could urge that it had condemned the entire Winters doctrine rights of the tribe to the river, since the value of the power site would be diminished by tribal diversions. No opinion could be more damaging to the interests of the Solicitor's Indian clients. Surely, any committed advocate would be expected to urge on their behalf that, since the condemnation case explicitly compensated the tribe for the use of water for power generation, all other water rights remained intact and the power site value was merely paid for the taking of land. In this instance, the Field Solicitor chose solely to serve one of his "clients," to the inevitable detriment of the interests of the Indians.

The problem is a continuing one. In January, 1968, the Commissioners of the BIA and Bureau of Reclamation met, and it was agreed that the Crow Tribe would receive 110,000 acre feet annually of Big Horn water. This agreement was based on assurance contained

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39. United States v. 5677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1958).

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

41. Memorandum from Field Solicitor to Regional Director, Reclamation, "Diversion of water of Big Horn River under terms of Yellowstone River Compact," November 16, 1967.

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

in a study that this was all the water which could be made available to the Indians.[43] A year later, at the 1969 Reclamation Conference, the Commissioner of the Bureau of Reclamation and the Billings Regional Director reportedly indicated that about 750,000 acre feet of water would be available from Yellowtail Reservoir for industrial purposes - two and one-half times the amount projected in the study preceding the 1968 agreement. It was stated that much of this water had been contracted for, and that the sale of industrial water alone would repay the cost of constructing Yellowtail Reservoir earlier than planned. A persuasive argument can be made that the tribe is entitled to sufficient water to meet all of its beneficial needs, including industrial uses, or that it is entitled to compensation for the loss of water rights not covered by the condemnation of the Yellowtail power site. But since this would obviously involve a payment by the government, this claim has not been pressed by the Indians' trustee.

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43. Memorandum, March 22, 1968, Commissioners of Bureau of Reclamation and BIA to Assistant Secretaries Public Land Management and Water and Power Development, "Sale of M & I water from Yellowtail Unit, Missouri River Basin Project, Montana-Wyoming."

44. Conflicts between the Bureau of Reclamation and Interior's Indian wards in the Missouri River Basin are by no means limited to the Big Horn River. In a memorandum of March 14, 1967, to the BIA's Aberdeen Area Director, the Director of the BIA's Missouri River Basin Investigation claimed that upstream developments of the Agnostura Rapid City and (projected) Belle Fourche projects by the Bureau of Reclamation had depleted the flow of the Cheyenne River, leaving a barren several thousand acres of potentially irrigable bottom land and higher benches on the Cheyenne Indian Reservation. The Director quoted the Bureau of Reclamation's own Cheyenne Diversion Report to substantiate his charge:

> "A reconnaissance-grade reappraisal of the Cheyenne Pumping Units was made in 1958, with the conclusion that further consideration was unwarranted mainly because of the doubtful water supply . . . . No appreciable further development of either land or water resources may be expected in the Cheyenne River Basin. Five Bureau of Reclamation reservoirs, taking advantage of all the more attractive sites, effectively control most of the runoff."

3. Pyramid Lake

Pyramid Lake has often been cited as the prime example of a long-continuing conflict-of-interest between an Indian tribe and the Bureau of Reclamation.[45] The Pyramid Lake reservation was established in 1859; it essentially forms a circle around the lake, which is the terminus of the Truckee River in Nevada. Historically, the Paiute tribe, for whom the reservation was established, have been a fishing people, and the lake's fishery was the chief source of sustenance for the reservation.[46]

Reclamation's incursions into the water used to supply the lake began shortly after the passage of the Reclamation Act of 1902. In 1906, the Newlands Irrigation Project was established on the nearby Carson River, which constructed a dam and canal to divert water from the Truckee.[47] The canal steadily depleted the water supply of Pyramid Lake, reducing its level and ultimately destroying its natural fishery.

After the canal was constructed, the United States initiated quiet title actions to adjudicate the rights of water users along the Carson and Truckee Rivers. A temporary decree was entered in 1950 in United States v. Alpine Land and Reservoir Co., Equity No. D-183 (D. Nev.), adjudicating the resepective rights of the Newlands Project and private users to Carson River water. A final decree along the Truckee, the Orr Water Ditch decree, was entered in 1944.[48] Although the Winter doctrine was established when the case was brought, the Indians' federal fiduciary did not assert their Winters doctrine rights for water to stock Pyramid Lake and protect the dying fishery.[49] (The United States did, however, assert and secure a

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45. The major study of the federal conflict of interest, William H. Veeder "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in "Toward Economic Development for Native American Communities," Subcommittee on Economy in Government of the Joint Economic Committee, Congress, 91st Congress, 1st Sess. (Comm. Print 1969) (hereafter cited as "Veeder Committee Print") devotes major attention to Pyramid Lake.

46. United States v. Sturgeon, 27 Fed. Cas. 1357 (No. 16, 413) (D. Nev. 1879), aff'd, 27 Fed Cas. 1358; Veeder Committee Print, p. 498-99.

47. Veeder Committee Print, p. 499-500. The Carson River runs south of, and generally parallel to, the Truckee.

48. United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.).

49. After the case was begun, but long before a final decree was entered in it, the Supreme Court conclusively established the right of an executive-order reservation to protect and conserve its fishing rights. Alaska Pacific Fisheries v. United States, 248 U.S.78 (1918).

water right for the Newlands project to divert Truckee water.)[50] Between 1917 and 1967 the average annual diversion of Truckee River water for the Newlands project has been 250,000 acre feet - half the average annual flow of the Truckee River.

In recent years, the government has been derelict in representation of the Pyramid Lake Indians in the following respects:

(a) The Orr Water Ditch decree did rule that the Indians were entitled to 30,000 acre feet per annum for irrigation purposes. When they sought instead to use this water to raise the lake's level, thereby improving the fishery resource, the Solicitor of the Interior Department in 1955 issued an opinion that this was unlawful[51] - hardly an act of zealous advocacy on behalf of the Indians. The tribe then sought to have the government modify the decree to permit such a use. In 1964, the Interior Department requested Justice to petition the court to amend the decree, but no action was ever taken.

(b) In 1957, Congress authorized construction of the Washoe Project by the Bureau of Reclamation.[52] This project has two principal components: (1) Stampede Dam on the upper Truckee River, and (2) Watasheamu Dam and Reservoir on the Carson River, upstream from the canal and Newlands project. The major threat posed by this project to Pyramid Lake is the construction and authorization of Watasheamu Dam and Reservoir. If operated for the benfit of upstream Carson users, it would have the certain effect of depriving the downstream Newlands project of Carson River water and increasing its demand upon Truckee River water.

The possibility that Watasheamu Dam and Reservoir might be constructed impelled upstream Carson water users to press for a settlement in the Alpine case (Carson River) more favorable to them than the 1950 temporary decree. Their hope was, in part, that enough water could be reserved for upstream users to make the construction of Watasheamu Dam feasible. Negotiations by Justice Department

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50. A 1968 report by Clyde-Criddle-Woodward Inc. of Salt Lake City, "Report of Lower Truckee-Carson River Hydrology Studies" concludes that there is substantial waste in this water use and that only half the diverted amount is beneficially used by the project. Such waste is a violation of the reclamation laws which limit water to beneficial uses.

51. Memorandum, Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs, May 5, 1955, M36282.

52. Act of August 1, 1957, ch. 809, §2(a) 70 Stat. 775, 43 U.S.C.§61a(a).

attorneys looking toward a more lenient settlement than the temporary decree aroused suspicions by the Indians that the Bureau of Reclamation was influencing the Justice Department negotiations. In addition, enforcement of the temporary decree by a court-appointed water master has in many respects permitted use by private parties not sanctioned by the decree. The Indians, therefore, sought to intervene in the Alpine case to require strict enforcement of the decree and to participate in any settlement so as to protect their existing use of Truckee water, which could otherwise be diverted to serve the Newlands project if the project's rights to use of Carson water were curtailed. The tribe charged that the Department of Justice had not adequately represented their interests.[53] The motion to intervene was opposed by Justice, and denied by the District Court and the Court of Appeals for the Ninth Circuit.[54]

(c) In April, 1969, the Interior Department recommended that the Department of Justice institute a quiet title action on the Truckee River on behalf of the tribe, limited to waters not already adjudicated in the Orr Water Ditch case. No such action has been commenced in the sixteen months since that request was made. Unable to receive a response from the government, the tribe finally filed suit in the Washington, D.C. Federal District Court against the Secretary of the Interior and Attorney General.[55] The relief sought includes an injunction compelling the Secretary to recognize the prior and paramount right of the Tribe to Truckee River water to maintain the lake's fishery. The tribe also requested a court order that the defendants enforce both the Orr Water Ditch and Alpine decrees, and an order requiring the Attorney General to seek a judicial determination of the tribe's water rights.

4. Water Right Litigation Concerning Tributaries to the Rio Grande River.

While the American Bar Association's Code of Professional Responsibility permits representation of potentially conflicting clients where litigation is not involved, it clearly enjoins an attorney from any representation of clients with differing interests in litigation.[56]

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53. Veeder Committee Print, pp. 507-508.

54. United States v. Alpine Land and Reservoir Co., No. 24, 156 (9th Cir. Aug. 24, 1970).

55. Pyramid Lake Paiute Tribe v. Hickel, Civil No. 2506 70, (D. D.C. filed August 21, 1970.

56. Ethical Consideration 5-15.

The wisdom of this absolute prohibition is demonstrated by the difficulties in which the Department of Justice has become enmeshed while conducting water rights litigation on behalf of Indian pueblos in New Mexico. In a real, albeit indirect, sense, the government may be said to be representing "both the plaintiff and defendants in an adversary action."[57]

The State of New Mexico has commenced five suits seeking to administer water to be diverted into the Rio Grande from the Colorado River system by the San Juan-Chama Reclamation Project.[58] The State Engineer of New Mexico is authorized to administer the Bureau of Reclamation's project in certain respects. Accordingly, the State Engineer has instituted these suits to determine all water rights to certain tributaries of the Rio Grande so as to aid in this administration.

One of the five pending cases[59] names as among the defendants four Indian pueblos - Nambe, Pojoaque, Tesuque and San Ildefonso. This case seeks to adjudicate water rights to the Nambe and Pojoaque Creeks. San Ildefonso Pueblo, and a number of other pueblos not named defendants, border on the Rio Grande and claim water in the Rio Grande by virtue of the Winters doctrine. Representatives of the Solicitor's Office in Albuquerque have even expressed the view that assertion of the Indians' full claim to Rio Grande water would exhaust the present flow.[60] Thus, the federal attorney for the pueblos is aware of an Indian property claim which, if asserted, might destroy the feasibility of a reclamation project which seeks to supply principally municipal and industrial users in Albuquerque that already use some Rio Grand water.

The Department of Justice intervened to defend the litigation on behalf of the pueblos and filed a complaint claiming "quantities of water sufficient to satisy the maximum needs and purposes of said Pueblos. . . ."[61] But, although one pueblo, San Ildefonso, has claims to water on the Rio Grande as well as Pojoaque Creek, the United States elected to accept the limitations on the case framed by the State and

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57. Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A. 2d 252, 254 (1957), cert. denied, 355 U.S. 966 (1958)

58. The San Juan Chama Project was authorized in 1962 76 Stat. 96.

59. New Mexico v. Aamodt, No. 6639, U.S. District Court, D. New Mexico.

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

61. Complaint, paragraph VI (a).

not assert any claims to the Rio Grande itself. Consequently, San Ildefonso must "compete" with the three other pueblos for water in the Pojoaque and Nambe creeks which, in fact, are almost dry.[62] Some of the Indian pueblos are concerned that the government's decision to limit the water rights adjudication to tributaries of the Rio Grande, and not to assert cliams to the main river itself, is influenced by a desire not to delay the completion and operation of the federal San Juan Chama Reclamation Project.[63] The First clear conflict of interest in New Mexico then, is that the United States Department of Justice and the Solicitor's office of the Department of Interior (the regular attorneys for the Bureau of Reclamation) are representing Indian interests which may not be compatible with the multi-million dollar project of another important government "client."

A second conflict of interest appears on the face of the pleadings. The same attorneys are representing interests of the Indians and the Santa Fe National Forest. Both the Indians and the National Forest must compete for the same limited supply of water.

These conflicts are not theoretical; they appear to have resulted in a serious failure to protect Indian rights.

The government has failed to contest a "settlement" arrived at between the State and non-Indian users following administrative procedures under New Mexico State law, notwithstanding the federal nature of Indian water rights. When it filed its complaint, the State prepared an elaborate hydrolographic survey showing its determination of all lands which have been irrigated within the Nabe-Pojoaque watershed. The State then made "offers of judgment" to the non-Indian defendants based on the survey. If accepted, these offers were signed as court orders. The federal attorneys in an unbelievable instance of non-adversary representation of the Indians, failed to require any non-Indian landowner to prove the source and character of his title, or the measure of rights to the use of water, or history of water use.[65] Indeed, these non-Indian defendants are not even required by the United States to answer its complaint and to plead - let alone prove - title to their land or use of water.[66]

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62. Rosenfelt Report, p. 28.

63. See also Memorandum, William H. Veeder to Commissioner, "Memorandum respecting rights to the use of water of the Pueblo Indians of New Mexico in the Rio Grande and its tributaries," October 31, 1969.

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

65. Rosenfelt Report, p. 39.

66. Id. at p. 43.

5. Private Trespass Over Tlingit and Haida Lands.

The Pueblo water rights claims to the Rio Grande (just as the Indians' claims to water for Pyramid Lake) involve the prospect of adjudicating all, or a substantial number of, the claims to use of water in a huge river system. The government's handling of more limited types of litigation, however, appears no more effective when blemished by the occurrence of a conflict of interest. An example of this deficiency can be seen from an analysis of the trespass committed by a private road builder over Tlingit and Haida lands near the native village of Klukwan, Alaska.

The construction firm initially sought a permit to construct the road from the Bureau of Land Management in Alaska. Since the road would pass over, and use timber situated on, land determined by the Court of Claims[67] to be held in aboriginal "Indian title"[68] by the Tlingit and Haida Indians, the BLM told the firm to secure the Indians' consent. The BLM specifically stated that "no cutting of right-of-way timber permits are issued."[69] Nonetheless, when consent was refused by the Tribal Council, the firm constructed the road without the permission of either the Indians or the BLM.[70]

In January, 1969, the Tlingits and Haidas requested the Solicitor for the Interior Department to take action against the builder for its trespass.[71] In April, 1969, a decision was reached to institute suit seeking money damages and injunctive relief. After suit was filed, the BLM was asked to "investigate" the facts of the situation. This

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67. Tlingit and Haida Indian v. United States, 147 Ct. Cl. 130 (1968).

68. Indian title is a right to exclusive possession of land, based upon occupancy since "time immemorial." Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Choteau v. Molony, 57 U.S. (16 How.) 203 (1853); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872); Buttz v. Northern Pacific R., 119 U.S. 55 (1886); Cramer v. United States, 261 U.S. 219 (1923); United States v. Shoshone Tribe, 304 U.S. 111 (1938).

69. Letter, James W. Scott, Manager, Anchorage District Office, BLM, to Moore & Poeser, Inc. May 21, 1968.

70. Letter, I.S. Weissbrodt to Edward Weinberg, Solicitor, Department of the Interior.

71. Ibid.

investigation revealed that the road had indeed been constructed in August, 1968, and a report described in some detail the factual results of the investigation.[72] No action was taken to prosecute the claim. In the view of the Indians' Washington counsel this was because the theory of recovery was resisted by the Public Lands Division of the Solicitor's Office.[73] Ultimately, the action was dismissed by the United States.

The Solicitor's Office, evidently, did not wish to claim that aboriginal "Indian title" gives the Indians enforceable rights to the land -- despite the fact that the Tlingit and Haidas title had been recognized by the Court of Claims, and Indian title has been held by the Supreme Court to furnish a basis for the recover of money damages.[74] This is not surprising in view of Interior's history of dealing with Indian title in Alaska.

Between the time of Alaskan Statehood Act of 1958 and promulgation of the land freeze in January, 1968,[75] the BLM patented six million acres in Alaska - mostly to the State. Half of this land was claimed by Alaskan natives by virtue of aboriginal possession.[76]

To some degree, the Solicitor's reluctance to assert the enforceability of Indian title as a property right may have been due to the fact that the Interior Department was, in the latter part of 1969, considering the issuance of right-of-way permits for construction of a trans-Alaskan pipeline, which would pass over lands claimed by Alaska natives by virtue of Indian title.[77]

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

73. Letter, I.S. Weissbrodt to Mitchel Melich, Solicitor, Department of the Interior, November 5, 1969.

74. United States v. Santa Fe Pacific R. Co., 314, U. S. 339 (1941).

75. PLO 4582, 34 Fed. Reg. 1025 (1967).

76. Federal Field Committee for Development Planning in Alaska, Alaskan Natives and the Land, (1968), p. 453

77. In April, 1970, a preliminary injunction was issued barring issuance of right-of-way permits to traverse some lands claimed by Alaskan native villages. Native Village of Allakaket v. Hickel, Civil No. 706-70 (A.D.C. filed March 9, 1970).

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

The Department of Justice's statutory duty[78] to defend proceedings commenced by Indian tribes or bands in the Indian Claims Commission results in a conflict which has, on occasion, prevented it from fulfilling its trust responsibility to protect and conserve Indian property rights.

In October, 1968, the Rincon and La Jolla Bands of Mission Indians requested the government to commence an action on their behalf against the Escondido Mutual Water Company for an injunction and damages for unlawful appropriation of San Luis Rey River water claimed by the Indians.[79] Despite repeated requests, and a growing urgency as negotiations progressed concerning the terms under which the water company would sell all its assets to the City of Escondido and liquidate, the government refused to make any decision.[80] Finally three days before the water company's shareholders were scheduled to meet to vote formally on the city's offer to purchase the company's assets and on the liquidation plan, the Rincon and La Jolla Bands filed suit in the federal district court in San Diego against the

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78. 25 U.S.C. §70n.

79. Letter, Robert S. Pelcyger, California Indian Legal Services, to Mr. William E. Finale, Bureau of Indian Affairs, October 31, 1968.

80. During the course of discussions between the Indians, and their attorneys with California Indian Legal Services, on the one hand, and the Department of Justice and the Interior, on the other hand, a report together with recommendations was submitted to the Department of the Interior by the Sacramento Regional Solicitor's Office. Although the Indians' attorney requested an opportunity to review this report and discuss it with the individual preparing it, the Regional Solicitor's Office refused to make the report available. After its submission, it was classified as "confidential." The withholding of this report from the Indian wards seems in violation of the trustee's duty to disclose opinions of counsel dealing with his own management of the trust property. Scott, Trusts, p. 1407. This disclosure must be made even if it reveals the trustee's own negligence. American Bar Association, Informal Opinion No. 1010. The government's defense of its action - that the document constituted an attorney's "work product" - constitutes an admission that the Department's of Justice and the Interior have interests adverse to those of their Indian beneficiaries.

Escondido Mutual Water Company, and the City of Escondido. The Secretary of the Interior and the Attorney General of the United States were named as defendants because of their failure to represent the Indians.[81]

The government's reluctance to commence litigation proceeded in part from a desire not to embark upon general riverwide water rights adjudications.[82] Another reason given by the Department of Justice for its failure to represent the Mission Indians was the fact that the Department was currently defending an Indian Claims Commission proceeding in which the Indian Bands claimed that the government had been derelict in its preservation of their water rights in the river.[83] This institutional conflict-of-interest is particularly troubling since, when the government filed its proposed findings of fact and brief in the San Luis Rey case it had urged that the Indians' best course was to seek redress from the water company rather than the government, and even that receiving damages from the government could preclude the Indians and the government from later asserting their water rights.[84] If such an adjudication is a desirable means to protect the trust property, the government as trustee should have brought it. Similarly, if the statutory requirement that the Department of Justice defend Indian Claims Commission actions makes that agency less vigorous in protecting Indian trust property, new institutional arrangements should be created to fulfill that vital function.

Indeed, the Department of Justice has acknowledged that the pendency of the claims proceeding and concern that the United States could be liable for its sanctioning of the water company's diversion

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81. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal. filed July 25, 1969).

82. In a letter to representatives James B. Utt, August 15, 1969, Assistant Attorney General Kashiwa pointed out that such adjudications require several years and entail great expense both for the United States and all water users in the area. It is far from clear that a general stream adjudication would have been required in the San Luis Rey case, since only the water company's appropriation was complained of - not that of other water users.

83. Rincon Band of Mission Indians v. Escondido Mutual Water Co., No. 69-217-S (S.D. Cal. filed July 25, 1969). Response of Attorney General and Secretary of the Interior to Court Order dated November 26, 1969.

84. Memorandum, Robert S. Pelcyger, to Thomas S. Susman, Staff, Committee on the Judiciary, U.S. Senate, November 14, 1969, "San Luis Rey Water Case," p. 14.

(the Secretary of the Interior had entered into a 1914 contract with the water company without the Indians' consent, limiting their use of the river's water) influenced the Department's attitude toward representation of the Mission Indians. Assistant Attorney General Kashiwa, justifying the Justice Department's ten month delay in deciding whether to assist the Indians, stated that:

> "The La Jolla, Rincon, Pauma and Pala Bands of Mission Indians are not only wards of the United States but must be considered as potential adversaries in litigation against the United States." [85]

The Department of Justices' defense of Indian Claims Commission cases on behalf of the government adversly affects its representation of Indians in those situations within the Interior Department where the Solicitor or another official "arbitrates" an Indian claim. For example, the Quechans also had a claim pending before the Indian Claims Commission at the time the Yuma County lease was signed.[86] The government's determination that the riverfront lands were non-irrigable may have been motivated by a desire to minimize their value before the Claims Commission.[87]

C. Conflict of Interest Between the Attorney's Duty to Represent Indian Trust Property Rights and Political Influences from the Executive Department and Congress.

In addition to his representation of conflicting Interior Department bureaus, the Solicitor's zeal in representing Indian trust beneficiaries is further strained by his position as the legal advisor to the Secretary of the Interior. The Solicitor is thus clearly responsive to the Secretary's desires. There is evidence in the Quechan lease case that Secretary Udall was influenced to favor the lease by political pressures from his home state of Arizona. Prior to the Solicitor's opinion, a meeting was held in March, 1968, between the Yuma County River Parks Advisory Committee and representatives of the Solicitor and the Secretary. In a letter to "Dear Stu," the Chairman of this Yuma County Committee reported on this meeting and expressed disappointment with the sympathy shown by Deputy Solicitor Weinberg for the Indians' claim.[88] Secretary Udall responded to

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85. Letter to Representative James Utt, August 15, 1969, p.4.

86. The Quechan Tribe of the Ft. Yuma Reservation, California v. United States, Ind. Cl. Com. Docket No. 320.

87. See Letter, Roy R. Young, to Honorable Steward L. Udall, March 13, 1968.

88. Letter, Roy R. Young, to Honorable Steward L. Udall, March 13, 1968.

"Dear Roy" on March 22, and expressed the hope that the lawyers could promptly overcome the obstacles involved. The same day, the Secretary urged the Commissioner of the Bureau of Reclamation to make his determination as to the irrigability of the lands "as rapidly as possible," and indicated that "I consider this matter of great priority." [89]

Congressional pressures may also obstruct effective legal representation of Indian trust rights. The opinion in United States v. Ahtanum Irrigation District, 236 F. 2d 321 (9th Cir.. 1956) - a case commenced by the government to protect the rights of the Yakima Tribe in the waters of Ahtanum Creek - describes how letters from prominent congressmen and resolutions contributed to postponing the bringing of the litigation for thirty years.[90]

D. Technical Determination by Interior Agencies With an Interest Adverse to the Indians: the Kennewick Dam Extension.

One problem illuminated in the Quechan lease case was the unquestioning reliance which Interior Department decision-makers placed upon the technical determinations made by the Bureau of Reclamation as to the irrigability of the land in controversy. Similarly, the Tlingit and Haidas were required to rely on a BLM investigation of the trespass to their lands.

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

On July 16, 1969, a meeting was convened by the Assistant Secretary for Public Land Management, attended by representatives from the tribe, the National Congress of American Indians, the Bureau of Reclamation, Interior's Legislative Counsel, and members of the Solicitor's Office representing both Indian Affairs and Reclamation. All present agreed that a 1945 court decree constituted a full and complete adjudication of water rights in the Yakima River above the

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

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

contemplated project and of all waters in tributaries to the Yakima River flowing through the Yakimas' land - particularly Toppenish and Satus Creeks, where two Indian irrigation projects were planned by the tribe. At this meeting, Reclamation officials stated that they would make no use of tributary water, and the Assistant Secretary accepted their technical determination that the hydrology of the river did not require their use of these waters.[91] This assurance however, was directly contradictory to a prior House Report, wherein Reclamation had stated that, in order to establish project feasibility, it did rely on the inflows from these tributaries during certain times of the year.[92]

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

92. H. Rep. No. 296, 88th Cong. 2d Sess., states in part:

"Available Water"

"The flow of the Yakima River at Prosser Dam consists of spills over Sunnyside Dam, the next diversion above Prosser Dam, and inflow between Sunnyside and Prosser Dams is made up of tributary inflow and return flow from irrigated lands. The spills over Sunnyside Dam constitute the greatest volume of the total annual runoff, but are a fluctuating, unrelable irrigation supply. By comparison the return flows below Sunnyside Dam comprise a smaller portion of the total runoff, but because they are dependable flows, they provide a large portion of the irrigation supply for the Kennewick Division.

"Inflow, Sunnyside to Prosser Dam"

"The inflow to the Yakima River below Sunnyside Dam is made up of runoff from tributaries (Toppenish and Satus Creeks) and return flows from irrigated lands. Tributary runoff is of little importance in the months of July-October, when it amounts to about 2 per cent of the total inflow. Return flows drain to the river from the Wapato project, south and west of the river, and from the Sunnyside and Roza divisions of the Yakima project on the north and east. A high total inflow is sustained during the irrigation season because the maximum tributary runoff and the maximum return flow occur at different times. Tributary runoff reaches a maximum during the spring and early summer, when return flows are relatively small. After May or June, tributary runoff decreases abruptly, and return flows increase sizably, reaching a maximum during the late summer. In the fall and winter, inflow is small and does not increase appreciably until augmented by melting snow and spring rains." (Emphasis supplied.)

The Bureau of Reclaimation's July disclaimer[93] is also inconsistent with a memorandum less than one month earlier, which stated that the extension would utilize only "return flow from upstream irrigation and uncontrolled spills past the point of diversion."[94]

Despite these plain inconsistencies in Reclamation's reports, the Assistant Secretary stated that his study confirmed Reclamation's disclaimer,[95] and on August 12, Secretary Hickel reaffirmed his support for the Kennewick Dam Extension.[96]

E. Prior Notification to Indian Tribes of Projects Which May Affect Their Interests: the "Return" of Lands Claimed by Fort Mojave Indians to the State of California.

As is apparent from the discussion of Kennewick Dam Extension affected Indians are sometimes not notified when a federal agency contemplates actions adverse to their trust property rights. Consequently the Indians may be stripped of the land and other natural resources on which they rely for their livelihood, and left with only a claim for money compensation.

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93. Jim Letter, p. 3.

94. Memorandum, Commissioner of Reclamation to Legislative Counsel, Office of the Under Secretary, "Water Supply and Water Rights for the Kennewick Dam Extension, Washington," June 17, 1969, p. 5. The proposal to use uncontrolled spills is inconsistent with a portion of the 1945 decree, which allocated spills over Sunnyside Dam, (the project directly upriver from the Kennewick Division) relied upon by Reclamation, to existing users (as of 1945) "in accordance with its practice prior to the entry of this judgment." William H. Veeder, Memorandum, "Yakima Indian Nation's Rights to the Use of Water Imperiled by Bills: To Provide for the Construction, Operation, and Maintenance of the Kennewick Division Extension, Yakima Project, Washington," July 7, 1969, p. 15.

95. Jim Letter, p. 3.

96. Letter to Senator Jackson, August 12, 1969.

On March 15, 1967, a BLM hearing examiner issued a proposed decision to award to the State of California a substantial portion of the lands claimed by the Mohave Indians to be included within their reservation. The basis for this decision was a determination that the land in question was public land on September 28, 1850, the date the Swamp and Overflow Land Act[97] was passed, and was hence "returnable" to the State by the United States. At no time did the Mohave Tribe have notice of the proceeding. By accident, in June, 1967, the BIA learned of the decision. Shortly thereafter, both the BIA and the Mohave Tribal Council petitioned to intervene.[98] The grounds for the petitions were that the Indian Claims Commission had determined the lands in question to be held by the Mohaves by "Indian title" in 1850.[99]

These petitions were referred to the Office of the Solicitor--the Indians' trust attorney. Earlier in 1967, the Solicitor had rejected the BIA's request to resurvey the Ft. Mohave reservation boundaries, and a member of the Solicitor's staff who had written that decision also participated in the decision concerning the petitions to intervene. At first the Solicitor denied the BIA's petition (on the ground that since a government attorney had participated in the hearing, the BIA had been adequately represented) and granted the Mohaves a limited right to intervene which was conditional upon the Solicitor and the Secretary making certain determinations. Then, in October, 1969, the Solicitor broadened his decision and granted the tribe a de novo hearing, with the right to cross-examine witnesses who had testified earlier.[100] Although the tribe requested that a government attorney represent them in this costly proceeding, the Department of Justice refused to provide one and the Mohaves were ultimately required to secure private counsel.

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97. 43 U.S.C. §§981 et seq.

98. Speech, Representative Pettis of California, December 4, 1969 (H 11816, Cong. Rec.) (hereafter referred to as Pettis speech).

99. 7 Ind. Cl. Com. 219. The Supreme Court has declared the Swamp and Overflow Land Act to be inapplicable to lands which the Indians held in 1850. United States v. O'Donnell, 303 U.S. 501, 509 (1937); United States v. Minnesota, 270 U.S. 181, 206 (1925). Also, the act applies only to lands made unfit for cultivation, see Keeran v. Allen, 33 Cal. 542 (Cal. Sup. Ct), and the Mohaves rely on the Colorado River to irrigate and fertilize their fields. 7 Ind. Cl. Com'n 219, 252 (App.).

100. Pettis speech, supra note 98.

F. Conflicting Interests Among Indian Clients: Intervention into Rio Grande Litigation by Puebloes of Santo Domingo and San Felipe.

As discussed earlier[101] certain Indian pueblos believed that their interests to water on the Rio Grande should be asserted in the New Mexico litigation which was limited by the state and the United States to tributaries of the river. On April 23, 1970, the pueblos of Santo Domingo and San Felipe moved to intervene in all five cases commenced by the state, and to assert their claims to the Rio Grande. This motion was resisted by the Departments of Justice and Interior, on the ground that the interests of the intervening pueblos were adequately represented by government counsel.

The Commissioner of the Bureau of Indian Affairs sought to assign a highly experienced water rights lawyer in the Bureau's employ, Mr. William H. Veeder, to represent these pueblos. The Justice Department resisted Mr. Veeder's being assigned as a co-counsel to them, so the Commissioner assigned him to the pueblos themselves,[102] and the pueblos directed that he appear in court. After Mr. Veeder had made one court appearance, a dispute arose as to whether Mr. Veeder's assignment was to act as counsel or as an expert witness. The Commissioner took the position that Mr. Veeder was only to be an expert witness. Accordingly, Mr. Veeder's assignment was retracted on the grounds that government attorneys could not oppose other government attorneys, and that the Department of Justice adequately represented the pueblos. Mr. Veeder was even threatened with prosecution for violating the federal conflict of interest laws[103] if he continued to represent the pueblos against the government.[104]

The New Mexico litigation and the intervention by the pueblos dramatizes another problem: that Indian tribes or groups may have conflicting interests among themselves which require resolution. Either different Indians may have conflicting claims to particular property, as the four pueblo defendants obviously had competing claims to the waters in the Nambe-Pojoaque system; or they may differ on tactical questions, such as whether to assert their rights to the Rio Grande itself. Notably San Ildefonso, and the other pueblos with Rio Grande claims, did not join Santo Domingo and Dan Felipe in requesting that

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101. Pp. 17-19, supra.

102. The Commissioner relied on 25 U.S.C. §48 which provides:

"Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

103. 18 U.S.C. §§201 et seq.

104. Washington Post, August 22, 1970, pp. A1, A6.

the litigation be broadened to include the Rio Grande.[105]

II. Evaluation of the Proposed Indian Trust Counsel Authority.

This paper has discussed at some length at least eight separate instances where a conflicting interest on the part of an Interior Department Bureau has obstructed legal enforcement of an Indian claim to land or natural resources. Each situation is current - arising in 1967 or later - and some are continuing controversies.

The responsibilities of the Interior Department's Solicitor to other departmental bureaus and the duty of the Department of Justice to other agencies and to defend Indian Claims Commission proceedings in practice greatly diminish their zeal and effectiveness in providing legal representation to the Indians. The Solicitor is particularly compromised as an advocate for Indian rights by the fact that he must render opinions settling many intra-departmental disputes, including such procedural matters as whether the Mojaves can intervene in a pending BLM proceeding. He is thus charged with serving both as lawyer and as judge. The Department of Justice seems sluggish in responding to Indian requests that litigation be brought; moreover, the defense of Indian Claims Commission proceedings forces upon the Department the role and also the mentality of being an adversary to many Indian Claims to natural resources. Similarly, the Interior Department's duty to conserve and protect public resources engenders a hostility on its part in some instances to claims by Indians of private property rights. Even the existence of a suspected conflict of interest - as in Justice's negotiations to settle the Carson River Alpine case or its decision to confine the scope of New Mexico water rights litigation - raises just doubts in the minds of the Indian clients as to the fidelity of their attorney. Attitudes as well as the existence of a number of indisputable conflicts of interest damaging to the advocacy of Indian property rights, necessitate the establishment of a separate institutional arrangement, under which uncompromised attorneys can directly represent and advance Indian trust rights unhampered by the fact that they also represent an executive department. The Indian Trust Counsel Authority thus represents a salutary concept and would, if adopted, substantially reduce the instances in which a conflict of interest has forestalled effective implementation of the trustee's duty to enforce Indian trust property rights.

A. Suits in the Name of the United States.

The most striking substantive feature of the bill, apart from the establishment of the Authority, is empowering it to commence suit in the name of the United States and, correspondingly, the waiver

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105. Even if San Ildefonso had asserted its rights solely to the Rio Grande, three pueblos would have been left to rely exclusively on the tributaries.

of sovereign immunity. A suit by the Authority in the name of the United States as trustee against the United States would be a justiciable controversy, for there are two separate interests involved.[106] The Authority would be suing to vindicate private property rights for which the government is the trustee, and the Department of Justice would be defending the United States in its general governmental capacity.[107] Thus, the policy of the rule that the same person cannot be both plaintiff and defendant - the barring of collusive lawsuits - would be inapplicable here.[108] Government counsel has occasionally appeared on both sides of a controversy, where agencies are in disagreement, [109] or where one side - as here - represents the government's interests in a non-governmental capacity.[110]

B. Sovereign Immunity

Section 10 as presently drafted bars the filing of any claim which "has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other statute authorizing a suit to be brought against the United States" (emphasis supplied). This section could be read to preclude any suit for money damages, for the Tucker and Federal Tort Claims Acts [111] are surely

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106. Of course, much litigation commenced by the Authority challenging federal action will seek injunctive relief and be filed against an officer of the government rather than the United States.

107. In United States v. I.C.C., 337 U.S. 426 (1949) the United States as a shipper was permitted to challenge an I.C.C., order sustaining railroad charges against it. The case was held to be justiciable despite the fact that Justice Department attorneys represented both sides. 337 U.S. at 431.

108. See generally, Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 Harv. L. Rev. 1050, 1055-56 (1949).

109. For example, the Secretary of Agriculture is authorized by statute to appear in Interstate Commerce Commission proceedings concerned with the rates for farm products, 7 U.S.C. §1291, and appeal determinations to the courts. Secretary of Agriculture v. United States, 350 U.S. 162 (1956). The Office of Price Administration intervened in suits against the I.C.C. North Caroline v. United States, 56 F. Supp. 606 (E.D. N.C. 1944), rev'd 325 U.S. 507 (1945).

110. United States v. I.C.C. 337 U.S. 426 (1949). In Western Airlines v. CAB., 347 U.S. 67 (1954), the Solicitor General appeared for the Postmaster General seeking review of a Civil Aeronautics Board order fixing the mail pay subsidy for an air carrier.

111. 28 U.S.C. §§1346, 1491, and 1505.

"statutes" within the ambit of that section. Indeed, to the extent that a court might hold that a suit against a particular officer seeking equitable relief were, in reality, a suit against the United States under a statute, such a suit could also be barred. Section 10 therefore, could effectively eliminate the waiver of sovereign immunity contained in section 9.

To remove any possible misunderstandings concerning the section's meaning it should be removed; it adds nothing to the bill but confusion. If there is serious concern about the act's being so broad as to reopen Indian claims which are now barred substitute language could accomplish such a purpose. A possible revision of Section 10 designed to cover the only possible legitimate objectives of the present section without emasculating it would read:

> "The powers granted to the Authority by this Act shall not extend to the filing or prosecution of any action, claim, or other proceeding against the United States if such action, claim or proceeding is barred by section 70k of Title 25 or by a similar provision in any special jurisdictional act authorizing a particular tribe or other identifiable group of Indians to bring an action or present a claim against the United States."

C. Administrative Actions With Continuing Conflicts of Interests.

While the substantive tenor of the bill contemplates litigation, the case studies indicate that conflicts between Indian property rights and Interior agencies will continue to be resolved within the Interior Department. Four of the eight case studies - the Quechan lease, the Kennewick Dam Extension, the return of the Mohave land, and the use of water in the Big Horn River - never progressed to litigation. A fifth, Pyramid Lake, has involved years of administrative determinations and judgments concerning water allocation, and administrative decisions, such as permitting Reclamation to rely on unappropriated waters to which there may be an Indian claim.

In order effectively to represent Indian clients at an early stage of proceedings which may infringe upon their rights, the Authority must intervene in such matters within the Interior Department before a decision is reached. For example, the Authority should submit "briefs" to the Solicitor's Office in cases such as the Quechan lease, and pursue administratively matters such as the Crow and Yakima claims to the Big Horn and Yakima Rivers before plans for a reclamation project are finalized. Advocacy within the Interior Department with the possibility of subsequent litigation or legislative presentations may prove to be the most important function of the Trust Counsel.

In two of the four above situations - the Kennewick Dam and the Mohave land - the tribes were not apprised of the prospective threat to their property rights. To be effective administratively, the Authority and its Indian clients must be notified of contemplated actions which may affect Indian trust property rights. The bill should contain a provision requiring federal agencies contemplating actions which may infringe upon Indian rights to land, water and other natural resources, to notify the Authority and its potential clients - the Indians or tribes which may be affected. Prior notification to other agencies is commonly required in reclamation enactments. Under the Flood Control Act, the Secretary of the Interior is required to give affected states and the Secretary of the Army information about the contemplated reclamation projects and an opportunity to submit adverse comments to Congress along with the Secretary's Report.[112] The Secretary must also consider water quality control officials in each state, including all state agency reports in his submission to Congress.[113] State fish and wildlife officials must similarly be consulted and their views considered and submitted. The Secretary is under a statutory duty to include in his reclamation project plans "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." [114]

D. Technical Determinations

A problem which recurs throughout the case studies is the reliance by the Interior Department, particularly the Solicitor's Office, upon technical determinations made by Interior bureaus with interests conflicting with those of the Indians in the particular controversy involved. Not only do the present federal attorneys representing Indians fail to question these determinations, but they lack the resources to make independent technical evaluations. This shortcoming in discharge of the federal trust responsibility to Indians is rectified by the bill, which both permits the Authority to "request... information" from other governmental departments and agencies to assist in carrying out its functions[115] and allows it to hire "such...[independent] experts as it deems necessary." [116]

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112. 33 U.S.C. §701-1(c). Similarly, in proposing navigation and flood control projects, the Army Corps of Engineers is required to consult with affected states and with the Secretary of the Interior, and transmit their views to Congress. Sax, Federal Reclamation Law, supra, note , p. 156.

113. 33 U.S.C. §466a(b) (1).

114. 16 U.S.C. §662(b).

115. Proposed bill, Sec. 11(2).

116. Proposed bill, Sec. 5 (b).

E. Imposition of Fees.

The Administration bill authorizes the Authority to charge a fee "based upon the Indians' ability to pay for services rendered pursuant to Section 8."[117] Since Section 8 includes both the "render[ing of] legal services" with respect to Indian claims to natural resources and "the preparation and trial and appeal of cases in all courts, before Federal, State, and local commissions, and in all administrative proceedings," this provision may authorize a fee to be charged for all litigation conducted by the Authority. On the other hand, Section 9 of the bill overlaps to a considerable extent with Section 8, for it authorizes the Authority to sue "the United States, its departments, agencies, officers and employees," any "States or their subdivision, departments and agencies," and "persons" and "corporations." Thus, the way the bill is presently drafted, it is impossible to tell whether a particular piece of litigation is commenced under Section 8 or Section 9. It does seem, however, that all other legal services are covered only be Section 8, and that a fee may be charged for them.

Although a private trustee may ordinarily charge the trust property for legal services, it is undesirable for the Authority to receive fees from its Indian clients for several reasons. First, in those cases which must be brought because of the existence of a conflict of interest, clearly no fee should be charged. Where there is a conflict between an Indian claim and the interest of a federal agency, the controversy arises because of an act by the trustee. It would be unconscionable for the trustee to charge his beneficiary a legal fee to defend the trust property against the trustee's own infringement.[118] Secondly, the Authority may be tempted to favor performing services for fee-paying clients, and neglect those cases where the tribe or Indian is too poor to remunerate it. Richer tribes, which can to some extent protect themselves against conflicts of interest by securing private counsel, would then receive the maximum benefit from the Authority. The possibility of recovering contingent fees from poorer tribes will not be great in cases where the Indians seek only to secure their title or enjoin interference with a valuable natural resource rather than recover money damages.

The section authorizing imposition of fees provides that funds collected shall be paid into the miscellaneous receipts in the Treasury. A better mechanism, if fees are to be charged, would be to direct that they be credited to the Indian Trust Counsel Authority.

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117. Proposed bill, Sec. 11(5)

118. It may be that the intent of limiting the fee-charging provision to Section 8 is to exclude such cases, since Section 9 expressly authorizes commencement of actions against the United States by the Indian Trust Counsel Authority.

The greatest practical difficulty facing the Authority will most probably be securing appropriations, since, to the extent it is successful in establishing Indian claims to natural resources, the Authority may offend powerful political groups which favor a contrary use of those resources. Specifically, adverse claimants in the case studies discussed included Yuma County, Arizona (the Quechan River-front lease), water users in Escondido, California and Albuquerque, New Mexico, industries in the Missouri River basin, and ranchers and farmers in the Rio Grande Valley, along the Yakima River in Washington and in California and Nevada near the Carson and Truckee Rivers. These groups are likely to find significant support for their interests in Congress, and the ultimate success of the Authority will depend upon the extent to which it is able to achieve independence from close congressional control.

The appropriation issue may be critical in another respect. The language of 25 U.S.C. §175 indicates that the Department of Justice has a mandatory duty to represent owners of Indian trust property. Section 175 provides:

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

In Siniscal v. United States,[119] the Court of Appeals for the Ninth Circuit held that the U. S. Attorney need not represent Indian defendants where the Department of Justice is prosecuting the very claim that is the subject matter of the suit. In the San Luis Rey case discussed above, the district court judge ordered the Attorney General to take action within 45 days either to represent the plaintiff Indians or to file a separate suit on their behalf, and if he should decide to do neither, to explain to the court why it would not be in the best interests of the Indians to do one or the other. An attorney from the Justice Department reported back to the court that the Attorney General elected to do nothing because in his discretion, he found that it would not be in the best interests of the Indians for the Department of Justice to represent them. Without finding that a conflict of interest existed, as in the Siniscal case, the court found that, since the duty to represent Indians is not mandatory (citing Siniscal), the Attorney General had exercised his discretion, and it is not within the power of the court to dictate the manner in which that discretion may exercised. The ruling is being appealled.

The interpretation of §175 as mandatory finds support in the most prominent text on Indians, itself a product of the Department of the Interior, in which it is stated that §175 insures that "federal legal services...are available to the Indians in cases involving the protection of property...[held] in trust for the Indians' by the United States.[120]

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119. 208 F. 2d 406 (9th Cir. 1953), cert denied 348 U.S. 818 (1954).

120. Department of the Interior, Federal Indian Law, 252 (1958).

The bill as proposed would relieve the Department of Justice of all responsibility for representation of Indian rights to natural resources, whether or not it has a conflict of interest.[121] A discretionary authority of the Trust Counsel to represent Indians is substituted for what may be a mandatory duty on the part of the Justice Department to provide services where no conflict of interest is involved. If Trust Counsel appropriations are insufficient to permit it effectively to represent Indian claimants, the property rights of Indian tribes may be even less adequately protected than at present.[122]

If the Trust Counsel's resources are too limited to permit it to represent all reasonable claims of Indian trust rights, it is important that the beneficiaries be involved as directly as possible in the determination of what cases will be brought. A larger Board of Directors, largely composed of Indians, might serve the purpose of representing as diverse a range of Indian interests as possible. Further, extension to the Authority of Indians' statutory preferences to employment in government agencies primarily serving Indians[123] would help ensure that qualified Indian attorneys employed by the Authority would participate in these decisions.

F. Conflicts Among Indian Claimants.

The possibility of conflicting interests between Indian claimants, illustrated by the New Mexico litigation and by the intervention of the Pueblos, will almost certainly arise in some Trust Counsel matters. The bill could be strengthened in this regard by authorizing the Trust Counsel to contract with private attorneys to represent one or more, or conceivably all, conflicting parties, and by providing that the waiver of sovereign immunity shall attach to any litigation so contracted for.[124]

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121. Proposed bill, Sec. 8.

122. Since the waiver of sovereign immunity attaches only to suits commenced by the Trust Counsel, but not by his clients, inadequate appropriations could throttle this substantive innovation.

123. 25 U.S.C. §§44, 46, 47 and 472.

124. Section 5(b) of the proposed bill, authorizing the Authority to "appoint....special counsel" would seem to solve the problem of conflicting claimants; however, Congress's intent in this regard should be more precisely fixed.

Conclusion

It is recommended that the Indian Trust Counsel Authority be established, with the following alterations:

(1) deletion of Section 10 as an undesirable limitation on the waiver of sovereign immunity;

(2) deletion of section 11 (5) which authorizes imposition of fees or, as an alternative, inclusion of a provision that fees shall be credited to the Authority;

(3) insertion of a requirement that federal departments, bureaus and agencies which propose actions that may affect Indian claims to land, water and natural resources (a) give prior notice of the action to the Authority and to the affected tribe or Indians; (b) solicit any comments they may have; (c) give those comments due consideration in light of the government's trust responsibility to protect and conserve Indian rights, and (d) transmit the comments of the Authority and tribes to Congress with any report or proposed legislation;

(4) enlargement of the Board of Directors and extension of the Indian preference statutes for employment to the Authority; and

(5) provision for the Authority to contract with private attorneys to provide legal services to Indian claimants, allowing the claimants to assert the statutory waiver of sovereign immunity.

APPENDIX A.

A B I L L

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

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

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

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

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

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

three year term, and one shall be appointed for a four year term. A member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. Upon the expiration of his term of office, a member shall serve until his successor has been appointed and qualified.

(e) The president shall designate one of the Directors to serve as Chairman at his pleasure.

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

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

SEC. 4. The Board of Directors shall, without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, appoint and prescribe the duties of a chief legal officer for the Authority, who shall have the title of Indian

Trust Counsel, and who shall be paid at a rate equal to that provided for in level V of the Executive Schedule (5 U.S.C. 5316), and a Deputy Indian Trust Counsel who shall be paid at a rate not in excess of that provided for grade GS-18 in section 5332, of Title 5, United States Code.

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

(b) The Board of Directors shall appoint and fix the compensation of such special counsel and experts as it deems necessary.

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

SEC. 6. The Board of Directors shall, subject to the provisions of Title 5, United States Code, appoint such employees as it deems necessary in exercising its powers and duties.

SEC. 7. The Authority, in the exercise of its functions, shall be free from control by any Executive Department.

SEC. 8. The Authority, with the consent of an aggrieved Indian, Indian tribe, band, or other identifiable group of Indians, is authorized to render legal services in regard to rights or claims of Indians to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, and minerals, and rights to hunt

and fish; within the United States' trust responsibility owing to the Indians, which services are now rendered by the Department of the Interior or by the Department of Justice, but nothing in this Act shall absolve the Department of the Interior and the Department of Justice of their responsibilities to the Indians, except that the Department of Justice as of the effective date of this Act or as soon thereafter as practicable, is relieved of its responsibility to Indians with regard to their rights or claims to natural resources, including, but not limited to, rights to land, rights to the use of water, timber, minerals, and rights to hunt and fish. The legal services performed pursuant to this section may include, but shall not be limited to, the investigation and inventorying of Indians' land and water rights, and the preparation and trial and appeal of cases in all courts, before Federal, State, and local commissions, and in all administrative proceedings.

SEC. 9. The Authority, with the consent of an aggrieved Indian, Indian tribe, band or other identifiable group of Indians, acting in the name of the United States as trustee for the Indians, may initiate and prosecute to judgment in all courts of the United States and of the States, against the United States, its departments, agencies, officers and employees, or against any of the States, their subdivisions, departments and agencies, or against persons and corporations, public or private, all actions in law and equity for the protection, preservation, utilization, conservation, adjudication, or administration of natural resources or interests therein had or claimed by the Indians, including,

but not limited to, rights to lands, rights to the use of water, timber, and minerals, and rights to fish and hunt. The Authority is authorized to prosecute appeals in all courts of the United States and of the States, and to intervene in any Federal, State or local administrative proceeding in order to protect the rights of the Indians. The United States waives its sovereign immunity from suit in connection with litigation initiated by the Authority under this section.

SEC. 10. The powers granted to the Authority by this Act shall not extend to the filing or prosecution of any action, claim, or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946, as amended, or any other statute authorizing a suit to be brought against the United States.

SEC. 11. The Authority is authorized to:

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

(2) Request from any department, agency, or independent instrumentality of the Government any information, personnel, services, or materials it deems necessary to carry out its functions under this Act; and each such department, agency or instrumentality is authorized to cooperate with the Authority and to comply with a request to the extent permitted by law, on a reimbursable or non-reimbursable basic.

(3) Receive and use funds or services donated by others.

(4) Make such expenditures or grants, either directly or by contract,

as may be necessary to carry out its responsibilities under this Act.

(5) Charge a fee based upon the Indians' ability to pay for services rendered pursuant to section 8 of this Act. The fees collected pursuant to this subsection shall be paid into miscellaneous receipts in the Treasury of the United States.

SEC. 12. There are authorized to be appropriated to the Authority created herein such sums as may be necessary to carry out the provisions of this Act.

Subject Files: Trust Responsibility. 1969–1979; n.d. MS The Indian Rights Association, 1882-1986: Series 2, Organizational Records, 1881–1989 Box 322, Folder 9. Historical Society of Pennsylvania. Indigenous Peoples of North America, link.gale.com/apps/doc/AHIJHH619751239/INDP?u=umuser&sid=bookmark-INDP. Accessed 23 Apr. 2026.