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Implementing the Federal Trust Responsibility to Indians After President Nixon's 1970 Message to Congress on Indian Affairs: Reminiscences of Reid Peyton Chambers

Reid Peyton Chambers

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**IMPLEMENTING THE FEDERAL TRUST
RESPONSIBILITY TO INDIANS AFTER
PRESIDENT NIXON’S 1970 MESSAGE TO CONGRESS
ON INDIAN AFFAIRS:
REMINISCENCES OF REID PEYTON CHAMBERS**

Reid Peyton Chambers*

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* B.A. Amherst College, 1962; J.D. Harvard Law School, 1967; M.A. Oxford University, 1968. Mr. Chambers served as Associate Solicitor for Indian Affairs at the Department of the Interior from August 1973 through September 1976. Since 1976, he has been a partner in Sonosky, Chambers, Sachse, Endreson & Perry LLP, a law firm dedicated to representing Indian tribes and Alaska Native organizations.

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I. INTRODUCTION

A. *My Interview for the Job*

In late May 1973, Kent Frizzell interviewed me as a possible candidate to be Associate Solicitor for Indian Affairs, head of one of the five Divisions in the Interior Department's Solicitor's Office in Washington, D.C. Kent had recently been appointed and confirmed as the Solicitor (meaning general counsel) of the Interior Department. Prior to that, he had served as Attorney General of Kansas and, from early 1972 to early 1973, as Assistant Attorney General of the Lands Division at the U.S. Department of Justice – the Division that handled most litigation involving Indians. During the late winter of 1973, Kent had been the chief negotiator for the United States at the occupation of Wounded Knee on the Pine Ridge Reservation in South Dakota by the American Indian Movement and other Indian activists, and had successfully negotiated a peaceful end to that occupation, a major accomplishment that saved many lives.

This interview was the first time I had met Kent. I was just a few weeks shy of my thirty-third birthday, and I was a junior professor at UCLA Law School where I taught *inter alia* a seminar in Federal Indian Law with my colleague, Professor Monroe Price. I also served part-time as counsel to the Native American Rights Fund (“NARF”), a public interest legal organization funded by the Ford Foundation and other similar entities to provide pro bono legal services to tribes and Indians to protect their legal rights.

My recollection is that Kent asked what my objectives would be if he chose me as his Associate Solicitor. I had actually been thinking about that subject for about a year, and had periodically engaged in exchanges with Bill Gershuny, who served as Associate Solicitor for Indian Affairs from 1971 until early 1973. Although Bill had no prior experience in Indian law, he was an able lawyer and administrator who tried to orient the Division of Indian Affairs toward implementing President Nixon’s Indian policy of stricter adherence to the United States’ trust responsibility (discussed in Part I.C). In doing so, Bill had reached out to tribal leaders and tribal attorneys, including me. I had also discussed how the Solicitor’s Office might better protect Indian rights with my fellow lawyers at NARF and with my UCLA colleague, Monroe Price. My ideas developed in these exchanges and formed the basis for my conversation with Kent.

I think I said something like, “I could only succeed if you shared my goals, but they would be the following. First, I would want the United States to initiate more cases against states and private non-Indian interests where it is suing as trustee representing the rights of tribes and Indians.”

We discussed the Pyramid Lake case as an example. In 1972, the Justice Department had brought a suit in the original jurisdiction of the Supreme Court against Nevada and California claiming water rights in trust for the Pyramid Lake Paiute Tribe. I had assisted in pushing this case as one of the NARF attorneys representing the Tribe, and Kent was familiar with the case from his service as Assistant Attorney General at the Justice Department.

I said that I believed the Pyramid Lake case should be the prototype for initiating additional cases to protect tribal land, water and other resources, as well as for cases protecting tribes and Indians from unwarranted state taxation and other assertions of state jurisdiction that interfered with tribal self-governance. President Nixon’s 1970 Message to Congress on Indian Affairs boldly reaffirmed both that tribal governments should manage affairs on their reservations and that the United States owed a trust responsibility to tribes and individual Indians. I suggested this meant the United States, as trustee, should assert in court the Indians’ reasonable claims to resources that the United States held in trust for them – such as lands, water rights, and hunting and fishing rights – and it should challenge states’ intrusive assertions of jurisdiction over Indian reservations. I knew that the Interior and Justice Departments were already litigating some cases on behalf of tribal rights, and had done so historically, but I thought these should be increased.

Second, I told Kent that I believed the Interior Department often had an administrative conflict of interest between its trust duties to tribes and Indian rights and the claims of other Interior Department agencies to the same lands, water, and other resources. For example, in the Pyramid Lake situation, for many years the Department allowed water to be diverted from the Truckee River, which fed Pyramid Lake, to upstream

non-Indian farmers in a federally sponsored project, funded and supported by the Interior Department's Bureau of Reclamation. I recall saying something like:

This Department is really a power broker among all western interests – Indians, reclamation projects, public power projects, public lands, national parks, fish and wildlife. If I were the Associate Solicitor, I would want to be free to advocate the maximum reasonable claims of tribes and Indians against these other interests within the Department, and to have no responsibility for protecting other Interior Department agencies.

Kent had mostly been listening as I talked and then asked me, "What if I decided not to bring a case you recommended?" I replied something like, "You are ultimately responsible for the legal decisions of the Department, and if you rejected a case I proposed, I would of course accept that. If you brought most of the cases I recommended, that would represent major progress in actively protecting the rights the United States holds in trust for tribes and Indians. If, on the other hand, you don't generally want to bring cases like this, it's better for you to select someone else for the job."

Kent then asked me about my political affiliations and activities, and I told him I didn't satisfy the usual criteria for a political appointment in the Nixon Administration by the Secretary (which would have to be cleared by the White House). I was a registered and active Democrat who had volunteered and voted for George McGovern in California in the 1972 election. I had been more active in organizations supporting Eugene McCarthy for the 1968 Democratic nomination and, when he lost, for Hubert Humphrey as a volunteer for Humphrey in Texas in the final week of the 1968 campaign. I told him I certainly appreciated that this activity could disqualify me from consideration.

Kent reflected and didn't make any commitment that day, but I think he told me then or shortly thereafter to send in the necessary forms to apply for government employment and he would consider it. We did agree that if I held the job, I would be a loyal team player and never undercut the Department with Congress or in the press, an agreement I understood and faithfully adhered to.

Several weeks after our meeting, Kent called and offered me the job. I have always greatly appreciated Kent giving me the opportunity as a young lawyer – and tolerating a Democrat to boot – to be one of his five Associate Solicitors. We have been friends ever since. He gave me wonderful support personally but, more importantly, he provided critical support for Indian rights at a juncture where federal Indian policy changed for the better, as I discuss below. This job also served as the foundation for the rest of my professional career representing Indian tribes in private practice.

B. The Directions Solicitor Frizzell Set for the Indian Division

When Kent hired me, he directed that my sole responsibility, and that of the other attorneys in the Indian Division, was exclusively to serve as attorneys for the United States as a trustee. To enforce and protect the resources of tribes – lands, water, minerals, and hunting and fishing rights – and other rights under federal law, such as freedom from state regulation or taxation and the authority to govern themselves and their affairs on reservations. We were to have no responsibility to defend suits brought by Indians against other Interior Department agencies (except that we enjoyed the freedom to advocate to

him as Solicitor that these cases be settled in a manner favorable to the Indian interests).

And in administrative issues before the Department, where Indian rights and interests conflicted with the goals or policies of another Interior Department agency, he charged us with asserting the maximum reasonable Indian claim to Department decision-makers. Kent and Interior Secretary Rogers C.B. Morton made it clear that we should actively bring conflicts of this sort to their attention.

In late 1975, after Thomas Kleppe became Secretary and Kent was appointed Under Secretary of the Department, the new Solicitor, Greg Austin, reaffirmed Kent's directions that the Indian Division should advocate exclusively the reasonable claims of Indian trust beneficiaries.

These directions were to a considerable extent based on the concerns expressed in President Nixon's 1970 Message to Congress on Indians Affairs (the "Message" or the "Nixon Message") of the importance of adhering, to the fullest extent possible, to the trust responsibility of the United States and minimizing possible conflicts of interest.¹ Because this Message to Congress² in fact became a template for the modern federal Indian policy from the Nixon Administration forward for the next five decades (and hopefully beyond), I want to discuss it before going into the specific matters we handled.

C. *President Nixon's Message to Congress on Indian Affairs*

The Nixon Message was a remarkable break with virtually all past Indian policies of the federal government. First, it expressly rejected the policy of "forced termination" of the trust responsibility of the United States to tribes – the post-World War II policy that involved abolishing federal Indian reservations, removing all protections of federal law for Indian lands and resources, and subjecting Indians to all state laws. Termination had been the bipartisan policy of the post-war Truman and Eisenhower Administrations, and Nixon had been Eisenhower's Vice President. But during the 1968 campaign, Nixon specifically promised the National Congress of American Indians that "termination of tribal recognition will not be a policy objective, and in no case will it be imposed without Indian consent."³

Second, the Nixon Message to Congress rejected what had been the longstanding practice of having Indian policy set by non-Indian officials and then imposed on Indians. President Nixon's Message specifically rejected this practice as fostering "excessive dependence on the federal government" where "the Indian community is almost entirely run by outsiders who are responsible and responsive to federal officials" rather than tribal

1. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 565 (July 8, 1970) [hereinafter Nixon Message].

2. Two years earlier, on March 6, 1968, President Johnson had issued the first ever Message to Congress on Indian affairs entitled "Goals and Programs for the American Indian." The 1968 Johnson Message had similarly "propose[d] a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help." Special Message to the Congress on the Problems of the American Indians: The Forgotten American, 113 PUB. PAPERS 335, 336 (Mar. 6, 1968). However, President Nixon's Message embodied a more comprehensive strategy for protecting Indian rights and became more of a watershed event in federal Indian policy – setting the framework for all future administrations from then to the present.

3. Richard Nixon, A Better Day for the American Indian, Omaha, Nebraska (Sept. 27, 1968).

communities.⁴ In announcing his new policy of tribal “self-determination without termination,” President Nixon proclaimed: “The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”

Third, President Nixon strongly affirmed that the federal trust responsibility to Indians was a legal obligation of the federal government:

Termination implies that the federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the federal government is the result of solemn obligations, which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.

. . . .

[T]he special relationship between the Indian tribes and the federal government, which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.⁵

The emphasis in the Nixon Message to Congress on adhering to the trust responsibility and avoiding or at least minimizing conflicts of interest between Indian rights for which the United States served as trustee and other federal interests was the first time a president had committed the Executive Branch to adhere closely to its trust responsibility. Equally as important, for the first time I am aware of in the history of federal Indian policy, the Nixon Message also assured Indian tribes “that the United States government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable.”⁶ Federal protection of Indian property rights and tribal self-government was thus to be permanent, not some transitional way station until Indians were fully assimilated or considered to be fully competent to manage their affairs. As the Message pointed out, the threat of termination in the past

has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the federal government

4. Nixon Message, *supra* note 1, at 565.

5. *Id.* at 565–66. President Nixon also included in his Message specific proposals to Congress requiring federal agencies to, at the tribes’ options, transfer administrative responsibility for federal services and programs to tribes and spurring Indian economic development by providing federal loan guarantees, loan insurance, and interest subsidies. These proposals were enacted by Congress in 1974 and 1975 as the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 (1974), and Indian Financing Act, 25 U.S.C. § 1451 (1975).

6. Nixon Message, *supra* note 1, at 565.

will disavow its responsibility and cut them adrift.⁷

The Nixon Message recommended that Congress establish a new federal agency separate from the Justice and Interior Departments, the Indian Trust Counsel Authority, to represent tribes and individual Indians in the name of the United States as the trustee in litigation – both against states and private entities, but also against federal agencies as well. This legislation was supported by the Administration but had not been enacted.

Kent's direction to me and the Indian Division within the Solicitor's Office – to serve solely as advocates for reasonable positions protecting Indian resources, rights, and interests, much like an attorney for a tribal client – was similar to the Trust Counsel concept. It represented an administrative direction that my office should function as nearly as possible as an Indian Trust Counsel would – prior to the enactment of legislation establishing that entity. As it turned out, the Trust Counsel bill was never enacted by Congress, in part because it would have released the Justice and Interior Departments from their trust responsibilities – which raised opposition among some Indian leaders. It may also be that the institutional changes Kent initiated lessened the need for a separate Trust Counsel.

One of Kent's first assignments to me when I arrived in late August 1973 was to draft for him a discussion on the federal trust responsibility to Indians. I was happy to do this – it actually coincided with an article I had begun preparing but not finished, during my last year teaching at UCLA.⁸ I prepared a memorandum for Kent tracing the history of the trust responsibility back to the landmark decision by Chief Justice Marshall in the Cherokee cases in the 1830s.⁹ Drawing on the twentieth century cases, most of which involved suits against the United States brought by tribes under the Indian Claims Commission Act or earlier special acts of Congress conferring jurisdiction on the U.S. Court of Claims to decide particular claims of tribes against the United States, I concluded that federal executive officials had essentially the same fiduciary responsibilities to Indian trust beneficiaries as a private trustee has to his or her beneficiary. Kent authorized me to operate the Indian Division in that manner and saw our activities as implementing the new Indian policy established by the Nixon Message.

Several other institutional changes were made in the Executive Branch during the Nixon and Ford Administrations to further the goals set forth in the Nixon Message. Attorney General Mitchell stated in a letter dated February 28, 1972, to John Ehrlichman at the White House that in any brief the Department of Justice filed in court (including the Supreme Court as set forth in a similar letter from Solicitor General Erwin Griswold to Acting Attorney General Richard Kleindienst) involving a legal matter concerning Indian legal rights, the Justice Department would include any separate views of the Solicitor of the Interior Department advocating a different position as trustee for Indian rights. This "split brief" policy originated in a tax case, where the Justice Department supported the position of the Treasury Department and Internal Revenue Service that income individual

7. *Id.*

8. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

9. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Indians received from allotted lands that the United States held in trust for them was subject to federal income taxation. Kent's predecessor, Solicitor Mitchell Melich, had presented his contrary position in writing to the Justice Department. The Justice Department had included that position in its brief filed for the United States before the Ninth Circuit. The concept of the split brief policy was that the Solicitor should function in these situations as an Indian Trust Counsel would, acting as trustee for the Indians. The Ninth Circuit decided the case in favor of exempting the allottees from taxation, adopting the position of the Solicitor and rejecting the views set forth by the Justice Department on behalf of the other federal agencies – the Treasury Department and Internal Revenue Service.¹⁰

While the “split brief” in the tax case was filed before my tenure, the Solicitors I served approved filing split briefs in five other instances – and in each of the following cases the Interior Department position was adopted by the court.

1. In *Oneida Indian Nation v. Oneida County*,¹¹ the Supreme Court held that the federal courts had jurisdiction over a claim by the Oneida Nation that its title to certain lands in New York State had never been extinguished. While the United States did not participate in this case, the Supreme Court invited the Solicitor General to present the views of the United States on whether the Court should grant the Nation's petition for a writ of certiorari – which is the writ the Court issues when it decides to review a decision of a lower court. The Solicitor General included Kent's view – that the Court should grant the writ and hold that the lower federal court had jurisdiction over the claim. The Supreme Court did grant the Nation's petition to review the case and ruled that the lower court had jurisdiction over the Nation's claim.¹²

2. In *Critzer v. United States*,¹³ the Fourth Circuit reversed a criminal conviction of a tribal member for failing to pay income taxes on income derived from her business located on tribal lands assigned to her use, a position expressed in the Solicitor's statement in the United States' brief, which otherwise sought affirmance of her conviction.

When Kent sent our separate statement to Justice in this case, the Assistant Attorney General for the Tax Division, Scott Crampton, asked to meet with him and ardently urged Kent to withdraw his statement. Kent held his ground, and Assistant Attorney General Crampton very reluctantly filed the separate statement in the United States brief, after consulting with higher authority. On March 25, 1974, Special White House counsel Leonard Garment wrote a letter to Mr. Crampton confirming that the split brief arrangement remained in effect.

Assistant Attorney General Crampton, foreseeing that our separate statement would make it very difficult for Justice to persuade the Fourth Circuit to affirm Mrs. Critzer's criminal conviction, then decided to argue the case personally and bear any opprobrium the court expressed to the Justice Department.¹⁴ In fact, the court did state at the oral

10. *Stevens v. Comm'r*, 452 F.2d 741 (9th Cir. 1971).

11. 414 U.S. 661 (1974).

12. *Id.* at 682.

13. 498 F.2d 1160, 1164 (4th Cir. 1974).

14. I greatly admired Mr. Crampton's assumption of leadership in this fashion, which has served as something of a model in my professional life ever since. When there is a nasty job to undertake, I always try – remembering Mr. Crampton's example – to do it myself rather than leaving that task to a subordinate. The Department of

argument that it was reversing the conviction, with a judge stating that a woman shouldn't be criminally prosecuted if two government agencies disagreed on whether she owed the taxes.

3. In *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*,¹⁵ the court adopted the Solicitor's position set forth in our split brief that construction of the flood control project by the U.S. Army Corps of Engineers was unlawful because the project's destruction of the Tribe's treaty off-reservation fishing sites had not been specifically authorized by Congress.

4. In *Northern Cheyenne Tribe v. Hollowbreast*,¹⁶ the Supreme Court adopted the Solicitor's position – expressed in the Solicitor's separate statement in the Memorandum the United States filed concerning the Tribe's petition for certiorari – that the Tribe owned minerals beneath lands on its reservation that had been allotted to individual Indians. This position was contrary to the position the Justice Department had asserted in this litigation in the lower federal courts when it had represented an allottee.

5. In *United States v. Winnebago Tribe*,¹⁷ the Eighth Circuit adopted Solicitor Greg Austin's position that Congress had not authorized the condemnation of tribal lands for a Corps of Engineers' project.

Another institutional innovation that implemented President Nixon's Message was made by the Assistant Attorney General who succeeded Kent in the Justice Department Lands Division, Wallace ("Wally") H. Johnson. As the Interior Solicitor prepared and referred to Justice more cases protecting Indian resources and other rights, Wally in 1975 established a separate section of lawyers within the Division (independent of the General Litigation Section) to handle those cases. While the "split brief" policy unfortunately did not continue after the Ford Administration,¹⁸ the separate Indian Resources Section of lawyers expert in Indian law and advocating Indian rights and interests in litigation still survives within what has become the Environment and Natural Resources Division at Justice, more than forty years after Wally established it.

The Interior Department also made the institutional change of having the Commissioner of the Bureau of Indian Affairs ("BIA") report directly to the Secretary. Prior to 1973, the BIA Commissioner had been under the Assistant Secretary for Public Lands who also supervised the Bureau of Land Management ("BLM"), an agency with policy and programmatic objectives that often conflicted with those of the BIA and the

Justice had not sought the Interior Department's views on Ms. Critzer's tax liability before filing the criminal prosecution. After the Fourth Circuit's decision, the Tax Division did initiate a number of communications with our Division before commencing tax cases against Indians. Mr. Crampton, however, did not become a convert supporting the split brief policy. In 1976, after Nixon resigned and President Ford replaced him, the Department of Justice was defending a civil case Ms. Critzer had filed in the U.S. Court of Federal Claims seeking to recover federal income taxes she had been required to pay in connection with her business operations on tribal land. The new Solicitor, Greg Austin, asked the Justice Department to file a split brief in that case stating Interior's view that the taxes were not legally owed. Mr. Crampton persuaded the Deputy Attorney General, Judge Harold Tyler, to write a letter to White House counsel Philip W. Buchen asking to be relieved on the split brief agreement. Greg and I strongly resisted that. After a meeting at the White House, Mr. Buchen reaffirmed the policy.

15. 440 F. Supp. 553 (D. Ore. 1977).

16. 425 U.S. 649, 660 (1976).

17. 542 F.2d 1002, 1006 (8th Cir. 1976).

18. My understanding is that Attorney General Griffin Bell in the Carter Administration rescinded the Justice Department's adherence to the split brief policy.

rights of tribes to lands and other natural resources. Beginning in the Carter Administration, Congress formally created the post of Assistant Secretary of Indian Affairs, adopting a recommendation in President Nixon's 1970 Message on Indian Affairs.

Finally, an important institutional change initiated by the Nixon Administration was designating a very able and experienced high ranking officer in the White House, Bradley ("Brad") Patterson, as the person primarily responsible for implementing the President's Message on Indian Affairs and coordinating the actions of all executive agencies affecting Indians. Brad served as Executive Assistant to Leonard Garment, a former law partner of President Nixon, who was special White House counsel. During my years as counsel to NARF, I found Brad to be readily available to meet with me and other attorneys representing tribes and with tribal leaders. This was also the case during the period I served as Associate Solicitor, when I found Brad's assistance and support invaluable.¹⁹

In Parts II, III, and IV, I will describe the major cases and issues we worked on during my three plus years in the Department, until I left at the end of September 1976.

II. STATE JURISDICTION OVER INDIANS

A basic principle of federal Indian law – beginning with the historic Cherokee decisions written by Chief Justice John Marshall in the early nineteenth century – had been that federal jurisdiction over Indians and Indian lands is exclusive, and states are excluded under the Constitution from any authority over them. The two Cherokee cases – *Cherokee Nation v. Georgia*²⁰ and *Worcester v. Georgia*²¹ – are still the foundation of much Indian law today. In these cases, Chief Justice Marshall wrote opinions for the Court holding that tribes are governments – “distinct political societ[ies] . . . capable of managing [their] own affairs and governing themselves” – under the treaties between the tribes and the United States.²² Chief Justice Marshall construed the treaties and early federal statutes as establishing federal protection of tribes from assertions of state jurisdiction. Chief Justice Marshall relied on the Indian Commerce Clause in the Constitution as the source of this conclusion, contrasting it with the weaker authority over Indian affairs conferred on Congress in the Articles of Confederation. The Cherokee cases considered federal power over Indian affairs to be exclusive, leaving no room for state authority over Indians (and, indeed, in *Worcester*, over non-Indians too) on Indian lands.

However, throughout American history, states have chafed at and sought to whittle away the restrictions on their power over Indian lands, and resisted the concept of having enclaves within their boundaries free from state control, regulation or taxation. But except for cases allowing some state authority over non-Indians on Indian reservations, where exercise of that authority does not infringe on important tribal interests, the basic limitations on state jurisdiction over Indian land set in the Cherokee cases remain in force today.

In what has become a landmark decision in the modern era, the Supreme Court in

19. After President Ford took office, Brad and Dr. Ted Marrs shared the responsibility within the White House for coordinating and implementing Indian policy.

20. 30 U.S. (5 Pet.) 1 (1831).

21. 31 U.S. (6 Pet.) 515 (1832).

22. *Cherokee Nation*, 30 U.S. at 16.

*Williams v. Lee*²³ reiterated the principles established in the Cherokee cases, holding that Arizona state courts had no jurisdiction over a contract suit brought by a non-Indian trader against a Navajo Indian on his reservation because that would infringe on the federally protected right of the Indians to make their own laws and be ruled by them. The spring of 1973, just before I became Associate Solicitor, the Supreme Court, in *McClanahan v. Arizona Tax Commission*,²⁴ had struck down an attempt by Arizona to tax the income of an Indian earned on the Navajo Reservation in a unanimous decision written by Justice Thurgood Marshall. Given the continuing resistance of states in the 1970s to limits on their authority over reservation Indians, I determined that a major role for the Indian Division should be to support tribes and Indians resisting state taxes and regulatory control – by initiating litigation or having the United States file *amicus curiae* (“friend of the court”) briefs on the Indian side in pending cases brought by Indians. Vigorous advocacy against excessive state assertions of jurisdiction on reservations, particularly over Indians, seemed to me essential to protect the governmental authority of tribes on their reservations.

A major obstacle we confronted was a statute called “Public Law 280,”²⁵ enacted by Congress in 1953 during the termination era that prevailed in the Truman and Eisenhower Administrations. In this statute, Congress conferred criminal and civil jurisdiction over Indian reservations upon five states: California, Oregon, Nebraska, Minnesota, and Wisconsin.²⁶ Public Law 280 also allowed other states to assume jurisdiction over reservations within their boundaries, and several states had elected to do so in the 1950s and 1960s. These elective assumptions of state jurisdiction ceased after 1968, when Congress amended Public Law 280 to require that future state assumptions of jurisdiction receive tribal consent.²⁷ Tribes and Indians uniformly and vigorously resisted Public Law 280 assumptions of jurisdiction, and no tribe has ever consented since 1968 to the assumption of state jurisdiction.

Assumptions of state jurisdiction under Public Law 280 prior to 1968, however, were unaffected by the 1968 amendment. Tribes were making a concerted effort in the mid-1970s to repeal Public Law 280, and a bill was introduced in Congress in 1975 to do that.²⁸ In March 1976, BIA Deputy Commissioner Harley Frankel and I testified on behalf of the Ford Administration in favor of an amendment to that bill that would have permitted individual tribes to vote to retract Public Law 280 jurisdiction on their reservations. The Indian Division and Justice Department had drafted that amendment, and Harry Sachse, my close friend and Assistant to the Solicitor General (who later joined me and the late Marvin Sonosky in 1976 to form our law firm representing tribes), testified on behalf of the Justice Department, also in support of this amendment. Since tribes had not consented to the imposition of jurisdiction over them under Public Law 280, we testified that they should now have the right to remove themselves from that jurisdiction if they wished. Unfortunately, because of the resistance of the Public Law 280 states, Congress did not

23. 358 U.S. 217 (1959).

24. 411 U.S. 164 (1973).

25. Pub. L. No. 83-280, 18 U.S.C. § 1162 (1953).

26. *Id.* § 1162.

27. 25 U.S.C. § 1326 (1968).

28. S. 1328, 94th Cong. §§ 101–05 (1975).

pass the bill.

Despite this failure, we also tried to undercut Public Law 280 by persuading courts to read the conferral of jurisdiction in Public Law 280 narrowly and to construe certain exceptions contained in the statute broadly. NARF, other publicly funded legal organizations like California Indian Legal Services (“CILS”), tribes, and tribal attorneys were engaged in litigation to accomplish that, and I was able to get the United States to assist in those cases.

A. *Bryan v. Itasca County*

We scored a major success in narrowing the jurisdictional grant in Public Law 280 in a case the Supreme Court decided in 1976, *Bryan v. Itasca County*.²⁹ The County had levied a property tax on a mobile home owned by a tribal member on a reservation. The case was essentially identical to the *McClanahan* case, but since it occurred in a Public Law 280 state, the County argued that Public Law 280 authorized the tax. Public Law 280 granted states jurisdiction over “civil causes of action” and provided that “civil laws . . . [of] general application” should have the same force and effect on Indian lands as elsewhere in the state.³⁰ The statute also contained an exception barring the “taxation of any real or personal property . . . belonging to any Indian or Indian tribe . . . that is held in trust by the United States.”³¹

The County’s argument was straightforward – it contended that the property tax was a “civil law . . . of general application” to everyone in the County and the exception did not apply because the mobile home was not trust property.³² The Minnesota Supreme Court had agreed with the County’s contentions, and the tribal member – represented by a legal service program in Minnesota – petitioned the United States Supreme Court to reverse that decision. I asked Kent to sign a letter to the Justice Department asking that they file an *amicus* brief supporting reversal.

Kent looked at the statute’s language and felt the Minnesota Supreme Court had probably read it correctly. Since Congress specifically prohibited certain taxes – those on Indian trust property – Kent thought it was reasonable to assume Congress must have intended to allow other taxes. I had to concede that this was a reasonable conclusion and that an objective judge might fairly read the statute that way.

But I persuaded Kent there were reasonable counterarguments we should make as trustee for the Indians. The statute only authorized states to hear “civil causes of action,” not to tax or regulate Indians. And, since it was also reasonable to read the statute as not authorizing taxes on Indians, but only allowing civil cases against reservation Indians to be filed and decided in state courts, I said that as the trustee the United States should argue that was how it should be read. I also thought we should argue that this was the reading most consistent with the policy in the Nixon Message of furthering tribal self-government. If Public Law 280 states could tax and regulate Indians on reservations, there seemed little room left for tribal self-government in those states.

29. 426 U.S. 373 (1976).

30. 28 U.S.C. § 1360(a) (1953).

31. *Id.* § 1360(b).

32. *Bryan*, 426 U.S. at 375.

Kent agreed and asked the Solicitor General to make these arguments before the Court – even though from an objective standpoint Kent thought it was a weaker reading of the statute than the lower court’s interpretation. We sent the letter and the Solicitor General filed an *amicus* brief making these arguments. I was elated when the Supreme Court adopted our arguments in a unanimous opinion authored by Justice Brennan in June 1976.³³ For me, this episode was a prime example confirming the policy Kent had adopted when he hired me – as a trustee, the Department would support reasonable legal positions of the Indian trust beneficiaries – not just ones he or I thought were legally correct or stronger from a more objective standpoint. Instead, the United States should function as lawyers for the Secretary’s trust responsibility to his Indian beneficiaries.

B. *Menominee Restoration*

In the 1950s, Congress had terminated the federal trust relationship with several dozen tribes, including large tribes like the Menominee in Wisconsin and the Klamath in Oregon, and smaller tribes like many rancherias in California (many of which had only a few acres in trust and a few members). Under the termination statutes, the tribes’ lands were converted into fee simple ownership and full state jurisdiction was extended over them. The policy had been recognized as a failure, as President Nixon stated in his 1970 Message to Congress. And in 1973, as I was taking office, Congress was in the process of restoring the federal trusteeship over the Menominee Tribe, culminating a long and courageous fight led by one of the Tribe’s leaders, Ada Deer (who later became Assistant Secretary for Indian Affairs under President Clinton in the 1990s). My friend and former colleague at NARF, Charles Wilkinson, was a principal attorney for the Tribe in this effort.

When the United States had terminated its trust relationship with the Menominee Tribe pursuant to the Menominee Termination Act of 1954,³⁴ the Tribe’s assets had been transferred to a state chartered corporation, Menominee Enterprises, Incorporated (“MEI”). In December 1973, Congress passed the Menominee Restoration Act, which directed the Secretary of the Interior to negotiate with the members of the Menominee Common Stock and Voting Trust and the Board of Directors of MEI to develop a plan for transferring the assets of MEI back to the United States in trust for the Menominee Tribe.³⁵ Although it had taken from 1954 to 1961 to develop the plan for transferring the tribe’s assets to MEI, the Secretary was given only one year under the Restoration Act in which to negotiate a plan to transfer the assets back to the Tribe. The development of this plan required endless hours of work and the giving of formal opinions and informal advice to BIA by the Indian Division and by the Twin Cities Field Solicitor Elmer Nitzschke and Mariana Shulstad of his staff. The plan was completed on time in 1974 and the Secretary accepted the land into trust and entered into a unique trust and management agreement with the Tribe which allows the Tribe to exercise its rights of self-determination to the fullest. Shortly afterwards, Pam Sayad of my staff and I enjoyed a visit to the Menominee Reservation, hosted by Ada Deer, amidst the resplendent early fall colors.

The reason for our visit concerned Public Law 280. Restoration had left open the

33. *Id.*

34. Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973).

35. Act of Dec. 22, 1973, Pub. L. No. 93-197, 87 Stat. 770.

question of whether the State of Wisconsin had “Public Law 280” jurisdiction over the restored Tribe, its members and its trust lands. Public Law 280 originally applied to Wisconsin except for the Menominee Reservation, but after the Menominee Termination Act of 1954, Congress had amended Public Law 280 to remove the Menominee exception. In December 1975, after meeting with the State Attorney General’s Office on my trip to Wisconsin, I issued an opinion that the 1973 Restoration Act precluded Public Law 280 jurisdiction. To remove any possible uncertainty, the Governor of Wisconsin issued a retrocession proclamation, which BIA Commissioner Morris Thompson accepted.

C. Rancheria Termination Cases

In 1958, Congress passed the Rancheria Termination Act, a statute setting forth procedures by which forty-one “rancherias” (i.e., small pieces of trust land in rural northern California held in trust for Indian tribal groups) were to be terminated.³⁶ In some instances, the lands and other assets had been conveyed out of trust status by the BIA before certain services and improvements had been provided as required by the 1958 Act. Section 3 of the Act specifically required the Department to construct certain improvements, such as a water and sanitation system, prior to conveying the assets to the rancheria.³⁷ When I became Associate Solicitor, some litigation was pending against the Department challenging the validity of the termination of some rancherias. Other suits were filed after I took office.

After consulting with BIA Commissioner Thompson and his Deputy Harley Frankel, and with the Department of Health, Education and Welfare (because Indian Health Services programs were involved), I concluded that termination had not been lawfully accomplished where trust assets had been distributed prior to the provision of mandatory improvements and services, and that several rancherias and their members remained eligible for BIA services. Commissioner Thompson supported this decision, as did Kent’s Deputy Solicitor, David Lindgren.

Our conclusion represented a new position for the Department, a change that I saw as in accord with President Nixon’s Message renouncing termination. I also felt that the several hundred members of these rancherias had been forced into termination without their consent and I wanted to reverse that course to the extent it was legally possible. The Sacramento Regional Solicitor, however, resisted this decision and asked the Solicitor to review it. (I think the Regional Solicitor may have been expressing the concerns of the BIA Area Director, who seemed concerned that he would not have the funds to provide the services to the rancherias or to administer their trust lands.)

The way the Solicitor’s Office was structured, as Associate Solicitor I could not direct a Regional or Field Solicitor to adhere to a policy on Indian law I had set. Only the Solicitor or Deputy Solicitor had “line authority” over regional and field offices. Since I was changing the position of the Department on this and some other legal issues, this produced some conflicts with regional and field offices which I will discuss in more detail in Parts IV and V.

36. Pub. L. No. 85-671, 72 Stat. 619 (1958).

37. *Id.* § 3.

On September 20, 1976, shortly before I left office, the new Deputy Solicitor Hugh Garner – who had replaced Dave Lindgren - issued a Memorandum to the BIA Commissioner agreeing with our conclusion and rejecting the Regional Solicitor’s contrary views. Hugh’s opinion concluded that if the improvements mandated in the 1958 Act, principally water and sanitation systems, had not been completed, termination of the rancherias had not legally occurred. The United States did not appeal district court decisions in suits against the Secretary reaching the same legal conclusion and the BIA undertook a review of all forty-one rancherias covered by the 1958 Act to determine which ones had not been validly terminated. I understand many of these rancherias were administratively restored to the status of recognized Indian tribes after I left office.

D. Siletz Tribe Restoration

In March 1975, BIA Commissioner Morris Thompson and I testified in support of a bill introduced by Senator Hatfield of Oregon restoring federal recognition to the Siletz Tribe on the west coast of Oregon. Although the bill stated that it did not grant or restore any hunting or fishing rights to the Tribe, the Oregon Attorney General’s Office was protesting vigorously that the Tribe would have off-reservation fishing rights free from state regulation if the bill passed. My testimony showed that – unlike tribes in other parts of Oregon that did have off-reservation treaty rights – the United States had never ratified a treaty with Siletz and they had no such rights. I think this presentation helped Senator Hatfield in his successful efforts to enact the restoration bill for this tribe.

E. Mississippi Choctaw State Tax Litigation

The United States filed a lawsuit in the early 1970s against the Mississippi State Tax Commission to bar the state from imposing sales taxes on transactions involving a construction company connected with the Mississippi Choctaw Tribe. This tribal group had remained in Mississippi in the 1830s when most Choctaws were forcibly removed by the United States to Oklahoma, and the Mississippi Choctaws had been recognized by the Secretary in the 1930s under the Indian Reorganization Act of 1934.

In December 1974, the Fifth Circuit affirmed a decision by the federal district court that the Tribe did not exist, despite federal recognition and proclamation of a reservation for the Tribe on lands purchased for it under the Indian Reorganization Act, and that its members were subject to full state jurisdiction.³⁸ At our urging, the Justice Department moved for rehearing, and when the panel denied that motion,³⁹ Justice sought rehearing en banc, which the full court denied.⁴⁰ Justice did not seek Supreme Court review in this case, fearing that the fact that the tribe’s corporation was chartered by the State of Mississippi might persuade the Supreme Court to uphold state jurisdiction. My friend, Harry Sachse, worked on these appeals as an Assistant to the Solicitor General. After I left office, the United States Supreme Court held in another case – a federal criminal prosecution of a tribal member – that the reservation existed and the federal government,

38. United States v. Miss. State Tax Comm’n, 505 F.2d 633 (5th Cir. 1974).

39. United States v. Miss. State Tax Comm’n, 535 F.2d 300 (5th Cir. 1976).

40. United States v. Miss. State Tax Comm’n, 541 F.2d 469 (5th Cir. 1976).

not the state, had jurisdiction over felony crimes committed by tribal members on the Tribe's reservation.⁴¹ That decision removed any question about the Mississippi Choctaws' status as a federally recognized Indian tribe, or that federal law applied to the reservation.

F. Reservation Boundary Cases

While the Mississippi Choctaw case involved whether the Choctaw Reservation existed at all, a number of cases concerning state jurisdiction during the 1970s concerned whether the boundaries of particular reservations had been diminished by Congress. In the decades around the turn of the nineteenth into the twentieth century, congressional Indian policy had favored assimilating Indians into the American "melting pot" by converting them from hunters into farmers and ranchers. The method for doing that, embodied in the General Allotment Act of 1887,⁴² was to first allot each Indian head of household an individual parcel to which the United States would hold title in trust for him as an "allotment." The policy then entailed opening the rest of the reservation to non-Indian homesteaders. The theory was that the non-Indians would teach farming to their Indian neighbors. Typically, the period of trust title for the Indian allotments was set to expire in twenty-five years, after which Congress presumed the Indians would be assimilated.

The policy did not work well in practice and Congress extended the twenty-five-year trust period on many reservations (though it was shortened for some Indians during the Wilson Administration). The trust period was indefinitely extended for all remaining allotments by the Indian Reorganization Act of 1934.⁴³ In the 1970s, nearly a century after many reservations were opened to non-Indian settlement, those reservations had a checkerboarded pattern of land ownership, with tribal and allotted trust lands interspersed with non-Indian fee lands. In the early 1970s, there were about ten million acres of Indian allotments in the United States still held in trust by federal law or prohibited by federal statutes from being sold by the Indian allottees.

Since Congress had initially expected the period during which allotments would be held in trust to be only twenty-five years, it typically did not specifically address whether the boundaries of a reservation for which it passed an allotment statute continued intact or what the jurisdictional consequences would be during the transition period until all the land within the reservation, including Indian land, would no longer be held in trust status, at which point state jurisdiction would extend over all those lands.

In 1962, the Supreme Court had considered the status of the Colville Reservation, where a 1906 statute had provided for allotments to be made and other lands opened to settlement by non-Indian homesteaders. The Court determined in *Seymour v. Superintendent*⁴⁴ that the entire reservation remained under federal jurisdiction. The Court rejected the argument by the State that "the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends

41. *United States v. John*, 437 U.S. 634 (1978).

42. Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).

43. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

44. 368 U.S. 351 (1962).

upon the ownership of particular parcels of land.”⁴⁵ If that were the case, the Court in *Seymour* stated, the result would be “an impractical pattern of checkerboarded jurisdiction” where “law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the state or federal government.”⁴⁶

Harry Sachse, Assistant to the Solicitor General in the Justice Department, argued and won two cases holding that reservations had not been terminated by statutes opening reservation lands to homesteaders – one in the Supreme Court, *Mattz v. Arnett*,⁴⁷ involving the Klamath River Reservation in California and one in the Ninth Circuit, *United States v. State of Washington*,⁴⁸ involving the Puyallup Reservation in Washington. Both of these cases also involved tribal fishing rights on their reservation lands as well, and in both cases the Interior Department had urged that the government support the continued reservation status of the land.

However, the conceptual clarity of the *Seymour* decision was eroded by two Supreme Court decisions involving South Dakota tribes, where – despite the government’s support for continued reservation status – the Court held that the Lake Traverse Reservation of the Sisseton-Wahpeton Tribes and three-quarters of the Rosebud Sioux Reservation had been terminated by statutes opening lands to homesteaders.⁴⁹ On the Lake Traverse Reservation and the portions of the Rosebud Reservation opened by statute to settlement by non-Indian homesteaders, these decisions did create the checkerboarded jurisdiction which had been rejected by the Court in *Seymour* – federal criminal jurisdiction over trust, tribal, and allotted lands, state jurisdiction over fee lands. After those two decisions, the question of continued reservation status has been litigated over the past four decades on a reservation-by-reservation basis, and an uncertain and somewhat confusing pattern has resulted – with reservation status being upheld for some reservations but not for others.

III. TRIBAL GOVERNMENTAL AUTHORITY OVER NON-INDIANS

A major issue that came before the Department in a number of contexts during my tenure was the extent of tribal governmental authority over non-Indians. In the early 1970s, tribes exercising the powers of self-determination with growing support of the government were becoming increasingly assertive of their governing authority over activities on all reservation lands. First, a number of tribes asserted jurisdiction over all misdemeanor crimes occurring on reservation lands, including by non-Indians. Some tribes began to impose taxes on non-Indian activities on their reservations. Some tribes adopted land use and zoning ordinances that applied to all reservation lands, including those owned by non-Indians. Since many tribal constitutions required the Secretary to approve tribal ordinances of this sort, the BIA sought direction from the Solicitor’s Office as to what tribal ordinances asserting jurisdiction over non-Indians it could legally approve.

45. *Id.* at 358.

46. *Id.*

47. 412 U.S. 481 (1973).

48. 496 F.2d 62 (9th Cir. 1974).

49. *DeCoteau v. Dist. Ct.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

As matters stood in the early and mid-1970s, I believed the preponderance of existing case law supported the proposition that tribal sovereign authority extended over activities by Indians and non-Indians on all reservation territory. The major Indian law treatise, written by Felix S. Cohen, who had served in the Solicitor's Office through the New Deal and was a legendary scholar in the field, stated that Indian tribes inherently possessed all powers of a sovereign except to the extent those powers had been altered or retracted by Congress.⁵⁰ It seemed clear that tribes' governmental powers over non-Indians on their reservations had rarely if ever been expressly diminished by Congress.

The few cases that had addressed the question over the previous several decades generally supported tribes' governmental authority over non-Indians within their reservation territories. One Supreme Court decision, *Morris v. Hitchcock*,⁵¹ had upheld a tax by the Chickasaw Tribe on non-Indians grazing cattle on allotments within reservation boundaries. One Eighth Circuit decision of the same era had sustained tribal taxation on activities by non-Indians on reservation lands, including fee lands.⁵² There were also two Eighth Circuit decisions during the 1950s that, like *Morris*, sustained the power of a tribe (the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota) to tax non-members who leased trust land for grazing and farming purposes.⁵³ I was aware of two district court decisions in Arkansas concluding that tribes lacked criminal jurisdiction over non-Indians, *Ex parte Morgan*,⁵⁴ and *Ex parte Kenyon*,⁵⁵ but I considered them to be weak authority against my position for two reasons. First, neither opinion contained any reasoning to support the conclusion. Second, the conclusion was just an observation in both cases – it was not necessary to the holding of the case.

The case of *United States v. Mazurie*,⁵⁶ decided by the Supreme Court in early 1975, also seemed to furnish some support for my position. In *Mazurie*, the Supreme Court in a unanimous opinion by Justice Rehnquist sustained the power of Congress "to regulate the sale of alcoholic beverages to tribal Indians" on fee land within the Wind River Reservation in Wyoming and held that Congress could permissibly delegate some or all of that power to Indian tribes.⁵⁷ Reversing the holding of the Tenth Circuit that an Indian tribe was merely a "voluntary association" which cannot exercise governmental authority over persons who do not belong to it and who cannot participate in tribal government, the Court observed "that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," and that tribes are a "separate people" with power to regulate their internal and social relations, including those with non-Indians.⁵⁸

While the Court in *Mazurie* declined to discuss the *extent* of the Tribe's authority to

50. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

51. 194 U.S. 384 (1904).

52. *Buster v. Wright*, 135 F. 947, 951–52 (8th Cir. 1905).

53. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

54. 20 F. 298, 308 (W.D. Ark. 1883).

55. 14 F. Cas. 353, 355 (W.D. Ark. 1878).

56. 419 U.S. 544 (1975).

57. *Id.* at 554.

58. *Id.* at 557.

regulate the distribution and use of liquor, it did confirm the existence of such governmental power as being inherent in the Tribe. The Court also relied upon *Williams v. Lee*⁵⁹ for the proposition that the jurisdiction of tribal courts can extend over non-Indians who enter into transactions on a reservation with Indians. *Mazurie* involved a statutory delegation of authority by Congress to tribes, and thus was not a direct assertion of a tribe's inherent sovereignty, but I concluded that the decision supported at least some degree of tribal authority over non-Indians on reservations.

A few years earlier in 1970, a previous Solicitor had written a rather cursory opinion concluding that tribes had no criminal jurisdiction over non-Indians. When I became Associate Solicitor, the Suquamish Tribe in Washington was engaged in litigation defending its authority to arrest and prosecute a non-Indian who had disturbed the peace at the Tribe's pow-wow. I persuaded Kent to withdraw his predecessor's negative opinion and to ask the Justice Department to file an *amicus* brief supporting the Tribe's jurisdiction before the federal district court in a case the non-Indian defendant had filed against the Tribe to enjoin the tribal prosecution. The Justice Department filed the brief and the district court held that the Tribe did have jurisdiction in a case called *Oliphant v. Suquamish Indian Tribe*.

Attorneys in the Portland Regional Solicitor's Office, particularly Dick Neely, advised Kent against the position I was urging – cautioning that tribal governments seeking to impose their authority on non-members on reservations would lead to pressure on Congress to restrict tribal jurisdiction. If the Tribe's jurisdiction was sustained, the Portland Office was concerned that Congress might then even allow non-Indians living on reservations to vote in tribal elections and participate in tribal governments. Dick, and as I recall the Regional Solicitor Bob Ratcliffe as well, argued that tribal sovereign authority should be limited in its exercise to the internal affairs of a tribe and its members.

Dennis Ickes, who had become the chief of a section in the Justice Department's Civil Rights Division handling Indian civil rights matters, also opposed assertion of tribal jurisdiction over non-Indians, on the ground that such jurisdiction abridged the due process rights of the non-Indians who could not participate in the tribal governments. I recognized that the precedents I was relying on were relatively few and not sufficient to be conclusive or definitive. Pam Sayad of my staff surveyed all the western reservations to identify roughly twenty major reservations that had fairly large non-Indian landholdings and populations living on them. We recognized that resistance to this exercise of tribal jurisdiction over non-Indians would likely be most pronounced on those reservations.

After the Justice Department filed the *amicus* brief in the *Oliphant* case and Kent withdrew his predecessor's contrary opinion, my Deputy Associate Solicitor Alan Plamer, Peter Taylor (another attorney who joined the Division), and I drafted a Solicitor's opinion concluding that tribes did have criminal jurisdiction over non-Indians on their reservations. Kent thought it was premature to issue an opinion and that the Department should let this issue percolate in the courts first. Kent was especially concerned with issuing an opinion concluding that tribes have jurisdiction to prosecute crimes by non-Indians occurring on fee lands within reservations. Alan, Peter, and I considered his objection but concluded

59. 358 U.S. 217 (1959).

that we couldn't fashion a principled distinction that allowed tribal criminal jurisdiction over non-Indians only on trust lands from the existing case law. Since we started with the premise that tribes possessed inherent sovereignty over reservation lands except where that sovereignty had been limited by Congress, we knew of no statutes that expressly abrogated tribal authority over fee lands only. Also, the dominant case law at the time (although this changed somewhat after I left office) was that statutes opening reservations to non-Indian settlement did not alter reservation boundaries or federal jurisdiction over the entire reservation. Since a checkerboard pattern of jurisdiction based upon land ownership tract-by-tract had been rejected by the Supreme Court in the *Seymour* case in favor of federal jurisdiction over the whole reservation, we did not see a principled basis for adopting a checkerboard pattern with respect to tribal jurisdiction.

In October 1976, Greg Austin – who had replaced Kent – issued a Solicitor's opinion I had written, along with Anita Vogt of my staff in the Indian Division, concluding that Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho possessed inherent sovereignty to enact a zoning ordinance covering all reservation lands, including the relatively small amount of fee land on that reservation owned by non-Indians. Greg's opinion relied principally on *Mazurie*, *Iron Crow*, *Barta*, *Buster*, and *Morris*. The Fort Hall Reservation was mostly tribal and allotted trust lands, with only a few non-Indian landowners.

When the non-Indian appealed the *Oliphant* case to the Ninth Circuit,⁶⁰ the Solicitor's Office again asked Justice to file an *amicus* brief. Since the case was on appeal, that required the approval of the Solicitor General of the Justice Department. Assistant Solicitor General Harry Sachse supported filing an *amicus* brief, but another attorney in the Solicitor General's office, Ray Randolph, now a federal circuit judge, and the Justice Department's Criminal Division, resisted it. After a conference with all the differing lawyers, Solicitor General Robert Bork ultimately decided to take no position in the appeal. Nonetheless, in August 1976 the Ninth Circuit affirmed the district court.⁶¹

During 1976, Harry Sachse chaired an Interior-Justice Department Committee to consider and issue a report on issues of jurisdiction on Indian reservations. In the summer of 1976, Harry, Pam Sayad, and I concluded that both Interior and Justice should carefully try to select cases in which to litigate tribal jurisdiction over non-Indians where a factual showing could be made that the non-Indian activity infringed on the tribe's governmental interests. We believed that many, perhaps most, land use and zoning regulations and regulations over hunting and fishing could be sustained by showing such an infringement, and that this concept might serve as an alternative to the inherent sovereignty position we had been advocating.

After I left the Department, the Ninth Circuit's *Oliphant* decision was appealed to the Supreme Court, where the new Solicitor General in the Carter Administration, Judge Wade McCree, approved the filing of an *amicus* brief supporting the Tribe's jurisdiction. The Court, however, rejected the position of the United States and reversed the Ninth Circuit, holding that no tribes have criminal jurisdiction over non-Indians.⁶² I thought that

60. *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976).

61. *Id.* at 1009.

62. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

the Supreme Court struggled to reach that conclusion. The Court wrestled with the earlier cases I described above and cited no treaty or statute where Congress expressly stated that a tribe lacked criminal jurisdiction over non-Indians. It nevertheless determined that Congress had *implicitly* divested tribes of that jurisdiction.⁶³

When the issue of tribal taxing authority over non-Indians first came before the Supreme Court in the early 1980s, the Court did not apply *Oliphant* to civil jurisdiction; it sustained tribal civil jurisdiction, relying essentially on the precedents set forth in Greg's 1976 Fort Hall Solicitor's opinion.⁶⁴ The Court also differentiated between tribal jurisdiction over non-Indians on trust lands and on fee lands – as Kent had wanted to do – holding that the allotment and opening statutes should be read as implicitly limiting tribal authority on fee lands to certain exceptional circumstances – as where non-Indians had entered into consensual arrangements with tribes or tribal members concerning activities on those lands.⁶⁵ More recent Supreme Court decisions on the subject have generally held against tribal civil jurisdiction over non-Indians, but each case has been decided in the context of the particular factual circumstances involved. In each of these cases, the Court has concluded that the tribe's government interests were not sufficiently important to justify assertion of tribal civil jurisdiction.

IV. INDIAN RIGHTS TO NATURAL RESOURCES

In the three years I served as Associate Solicitor, we increased – roughly doubled – the number of cases filed in which the United States was supporting tribal claims to water and hunting and fishing rights. Some existing cases – particularly cases concerning tribal land ownership that had been pending in 1973⁶⁶ – were terminated, usually successfully, by 1976.

A. *Indian Water Rights*

As matters stood in the 1970s, Indian tribes had large claims to federally protected water rights, particularly in western states. However, very few of these claims had actually been adjudicated, and very few tribes had actually put their water rights to use.

The landmark Indian water rights decision – then as now – was the Supreme Court's decision in *Winters v. United States*.⁶⁷ The case was an exemplar of (and precursor to) the

63. A week later, however, in *United States v. Wheeler*, 435 U.S. 313 (1978), the Supreme Court held that tribes *were* inherent sovereign governments and did have broad civil and criminal authority over their members. Thus, the concept that tribes have “inherent sovereignty” seemed – and seems today – secure.

64. *See, e.g.*, *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

65. *See, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981).

66. Many of the land ownership cases pending in 1973 involved tribal title to lands on the Colorado River Reservation. In January 1969, President Johnson's Solicitor, Edward Weinberg, had issued an opinion that the boundary of that reservation included a number of lands where non-Indians had built cabins near the Colorado River, and the United States subsequently filed numerous trespass claims against them. Typically, the Government settled these cases in exchange for leases by the Tribe for a period of years. During my time in office, we also successfully defended several suits brought by the City of Mesa and various non-Indians interests challenging a 1969 opinion by Solicitor Weinberg that ruled that the boundary of the Salt River Reservation in Arizona included lands claimed by the City of Mesa and various non-Indians, and that the Tribe owned these lands.

67. 207 U.S. 564 (1908).

kind of Indian litigation the United States increasingly filed in the 1970s to protect the rights of Indian trust beneficiaries. In this case, the United States had filed suit as a plaintiff and trustee for the Fort Belknap Indian Tribe in northern Montana to enjoin Henry Winters and other non-Indians from diverting water for irrigation upstream from the Tribe's reservation, because insufficient water was reaching lands on the reservation which the Tribe and BIA wanted to develop for agriculture and related uses. An agreement between the Tribe and the United States ratified by an Act of Congress in 1888 had established the Fort Belknap Reservation "as and for a permanent home and abiding place of the [Tribes]."⁶⁸ In the agreement, the Tribes also ceded territory outside the reservation to the United States. These lands were quickly opened to non-Indian settlement. Non-Indians like Mr. Winters acquired tracts of ceded land upstream from the reservation, irrigated the land, and obtained water rights under the laws of the State of Montana.

Mr. Winters and the other non-Indian irrigators argued that the Indians had reserved no water rights for the reservation because the ceded lands would be useless if the Indians had also reserved the water for the reservation lands they retained. The Court rejected their arguments:

We realize that there is a conflict of implications, but that which makes for retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?⁶⁹

The Court answered these rhetorical questions in the negative and held the Indians did not give up their water, rejecting the supposition that the Tribes had given up most of their land and kept their reservation without the water to develop "agriculture and the arts of civilization."⁷⁰

The legal systems of most western states – including Montana – where the great majority of Indian reservation lands are located generally follow the doctrine of "prior appropriation" in recognizing water rights. Under this system, a person acquires a right to use water by actually diverting it and putting the water to a beneficial use. Under the prior appropriation system, the water use is assigned a "priority date" – the date the diversion commences. This right is legally junior to the rights of all earlier appropriations, but legally senior to all subsequent appropriations. In times of short water supply, a senior appropriator is entitled to his full diversion before a junior user gets any water. If these state law principles had applied to the Tribe in *Winters*, of course, the non-Indians would have prevailed by virtue of their earlier actual uses.

The Supreme Court's decision in *Winters* held, by contrast, that the agreement and federal statute creating the Fort Belknap Reservation exempted the Indians from these state law limitations by reserving water rights for Indians to use on the reservation. The case holds that the Tribes' water rights were reserved when the reservation was established, and not by actually diverting water for a beneficial use. The Court held the priority date of the

68. *See id.* at 565.

69. *Id.* at 576.

70. *Id.*

right was the date the reservation was set aside, not the date water is first used. Legally, then, the rights reserved for an Indian reservation under federal law are prior to most if not virtually all non-Indian water rights.

Given this legal framework, one might expect Indian reservations would have received plentiful amounts of water during the decades between the *Winters* decision and the 1970s. However, that is not at all what happened in the decades after *Winters* was decided. Indeed, the opposite occurred.

In 1909, after the *Winters* decision, the United States negotiated the Boundary Waters Treaty with Canada, one purpose of which was to augment the flows of the Milk River (which enters the United States north of the reservation from Canada) to replenish the water uses of the non-Indians through a federal reclamation project. This was a typical pattern in western states for the first seven decades of the twentieth century. Congress appropriated millions of dollars each year to construct water projects operated under federal reclamation laws on the Milk River and elsewhere in the west, largely to provide water to non-Indians. Indians' legally prior water rights on these same river systems, recognized in *Winters*, were largely ignored.⁷¹ And the Bureau of Reclamation, an Interior Department agency, constructed and operated most of these non-Indian irrigation systems, or contracted with irrigators within each project to administer it.

Congress, by contrast, had generally appropriated paltry sums of money for developing water infrastructure on reservations. On the Fort Belknap Reservation, virtually no funds were appropriated so actual water use had not increased since the 1910s, a few years after *Winters*.⁷² Pyramid Lake represented a similar circumstance – where a federal reclamation project was constructed upstream of a reservation despite the reservation's prior water rights under federal law as established in *Winters*. The National Water Commission's Final Report summarized the situation in 1973:

During most of this fifty-year period [following the decision in *Winters*], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior – the very office entrusted with protection of all Indian rights – many large irrigation projects were constructed on streams that flowed through or bordered Indian reservations, sometimes above and more often below the reservations. With few exceptions the projects were planned and built by the federal government without any attempt to define, let alone protect, prior rights that Indian tribes have had in the waters used for the projects. . . . In the history of the United States government's treatment of Indian tribes, its failure to protect Indian water

71. When I began to teach Indian Law at UCLA Law School in the early 1970s, I decided I should read all the cases citing *Winters v. United States*. I cringed as I considered that forbidding task – since this was a landmark Supreme Court decision over six decades old, I feared I would have to read dozens of cases. I nevertheless determined to sit in the faculty library and devote whatever time it took. To my amazement, I was able to complete this task in one afternoon. This landmark Supreme Court decision had been rarely cited by either the Supreme Court or lower courts; as I recall there were only ten or twelve cases citing it. This seemed to me a measure of how the principles of the case had been largely ignored.

72. Norris Hundley, Jr., *The Winters Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17, 41 (1982).

rights for use on the reservations it set aside for them is one of the sorrier chapters.⁷³

One reason for the government's failure to assert, protect, and develop Indian water rights can be traced to its conflicts of interest identified in President Nixon's Message to Congress, which recognized the conflict of interest between Indian rights and the interests of other federal agencies and noted that "[t]here is considerable evidence that the Indians are the losers when such situations arise."⁷⁴ As President Nixon recognized, Congress and the Interior and Justice Departments have responsibility to advance, at the same time, the national interest in land and water use as well as the interests of Indians for whom the government acts as trustee. Disputes often arise between the BIA and other agencies such as the Bureau of Reclamation within the Department of the Interior. An Indian tribe often has claims to water rights, which are needed for a reclamation project or other federal uses. When the competing claims are resolved within the Department, too often the result had been that the Indian claims tend to be compromised or defeated.

I had written about these conflicts of interest firsthand in my years as a law professor, as had others.⁷⁵ One of my major goals as Associate Solicitor was to enforce the promise of the *Winters* decision for tribes. This course of action produced repeated disputes with the Bureau of Reclamation, a powerful and well-staffed Interior Department agency and the attorneys within the Interior Solicitor's Office who represented it – as well as a number of other Interior agencies such as the BLM and Fish and Wildlife Service. As I discuss below, much of my time as Associate Solicitor was consumed by these disputes with other Interior agencies and the lawyers serving them.

1. *Arizona v. California*

After *Winters*, the landmark modern Supreme Court decision involving Indian reserved rights was *Arizona v. California* in 1963.⁷⁶ The Court in *Winters* had placed no limit upon the amount of water to which the tribes were entitled in the future. The Court had simply issued an injunction prohibiting the defendants from interfering with water uses the Indians planned to make; future interferences could also presumably be enjoined if they occurred. The decrees were thus open-ended, in that the Indians' rights were not quantified.

Arizona changed the open-ended uncertainty of *Winters* and other prior court decrees concerning Indian reserved rights⁷⁷ and established a standard for quantifying Indian

73. NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE – FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474–75 (1973).

74. H.R. REP. NO. 363, 91st Cong., 2d Sess. 10 (1970), reprinted at 116 CONG. REC. 23258, 23261 (1970).

75. REID PEYTON CHAMBERS, DISCHARGE OF FEDERAL TRUST RESPONSIBILITY TO ENFORCE LEGAL CLAIMS OF INDIAN TRIBES: CASE STUDIES OF BUREAUCRATIC CONFLICT OF INTEREST (1971). See also WILLIAM H. VEEDER, FEDERAL ENCROACHMENT ON INDIAN WATER RIGHTS AND THE IMPAIRMENT OF RESERVATION DEVELOPMENT (1971).

76. 373 U.S. 546 (1963).

77. For example, in *Conrad Investment Company v. United States*, 161 F. 829 (9th Cir. 1908), the Ninth Circuit enjoined an upstream non-Indian user from interfering with planned water uses on the Blackfeet Reservation in Montana. In discussing the quantity of water reserved for the Indians, the court said:

What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water . . . may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms

reserved water rights where the primary purpose of the reservation is agricultural.

In 1952, the State of Arizona had filed suit in the United States Supreme Court to determine its share of water from the Colorado River. Without such a determination, Arizona believed it could not obtain federal assistance in building the long-coveted Central Arizona Project to bring Colorado River water into the populated portions of central Arizona. The United States intervened, asserting, among other things, reserved water rights for Indian reservations located in the Lower Colorado River basin. The case was referred to a Special Master, who held lengthy hearings on the issues presented.

The Master concluded that an open-ended decree of water rights to the Indians, as in *Winters*, would put all junior water rights forever in jeopardy and severely hamper financing of non-Indian irrigation projects, because current Indian populations and needs could change.⁷⁸ At the urging of the Justice Department, the Master determined the future needs of each reservation by deciding which reservation lands were practicably irrigable, and entered a quantified water right for five Indian reservations on the mainstem of the Colorado River – Chemehuevi, Cocopah, Colorado River, Fort Mohave, and Fort Yuma – in his proposed decree. The Supreme Court, after extensive briefing on the issues, specifically affirmed the Master’s reasoning and decree:

[The Master] found that the water was intended to satisfy the future as well as the present needs of the Indian reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. . . How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on different reservations we can find to be reasonable.⁷⁹

The five Lower Colorado River tribes in *Arizona* were decreed 905,496 acre feet a year (“AFY”)⁸⁰ for 135,636 practically irrigable acres, even though in the early 1960s, these tribes were actually irrigating less than 36,000 acres. The quantification of 905,406 AFY for the five tribes – over twelve percent of the total dependable water supply of the entire Lower Colorado River – had represented a very significant success for those tribes.

of the treaties as construed by the Supreme Court in the *Winters* case.

Id. at 832. The court’s decree was specifically “subject to modification, should the conditions on the reservation at any time require such modification.” *Id.* at 835. In *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), the Ninth Circuit had limited the Walker River Paiute Tribe’s reserved right to an amount of water based on their past irrigation needs, and assumed that the Tribe’s future needs would be satisfied by that amount. But in *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the Ninth Circuit discussed *Walker River*, but followed *Conrad*, holding that “the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow.” *Id.* at 327.

78. Special Master’s Report at 264 (Dec. 5, 1960), available at <http://lawcollections.colorado.edu/allfile/201635.pdf>.

79. *Arizona*, 373 U.S. at 600–01.

80. An acre foot is 325,900 gallons – enough water to cover an acre with one foot of water. This amount of water is generally enough to supply all the municipal and drinking water needs of a family of five in a city or suburb. However, a farmer must generally divert about four acre feet to grow crops on one acre of farmland (more if the climate permits a longer growing season).

Although the Supreme Court's decision was more than a decade old, implementing the decision consumed a great deal of my attention and that of attorneys in the Indian Division. In June 1974, the Deputy Assistant Attorney General of the Justice Department's Lands Division, Walter Kiechel, presented the Interior Department with a draft of the final stipulated decree in the case he had negotiated with the states and recommended that the United States execute. This draft stipulation raised several concerns in the Department.

a. Priority Date of Indian and Non-Indian Uses

The stipulation would have ordered the priorities of all water rights in the Lower Colorado River, Indian and non-Indian. If there were a shortage – below 7,500,000 AFY in the Lower Colorado River – the stipulated decree would have provided which users would be cut off. The Indian reservations would have a priority date of their creation, but some non-Indian users asserted priority dates that preceded the creation of some of the reservations.

Several large non-Indian irrigation districts based their early priority date claim in part on the so-called “relation back” doctrine. This doctrine, grounded in state law, allowed a water user – such as a major irrigation district – to claim a priority date as of the date its project was planned or authorized. That date might be years, even decades, before the water was actually used on the land. BIA Commissioner Morris Thompson and I saw reliance on this doctrine as defeating the early priority dates of the tribes under the *Winters* doctrine and objected to any subordination of Indian rights to those of non-Indian rights. Walter Kiechel had been one of the attorneys in the Justice Department who had handled the *Arizona v. California* case before the Supreme Court and he was justifiably proud of the generally successful result in the case. As I recall, Walter resented our resistance to the stipulated decree he had negotiated.

b. Reservation Boundary Issues

i. Colorado River and Fort Mohave Reservations

In addition, the Supreme Court's decree in *Arizona v. California* in 1964 had left open whether tribal water rights would be increased if the boundaries of two of the reservations – Colorado River and Fort Mohave – were adjusted by the United States to include more lands. Before the Special Master and the Supreme Court, the Justice Department had argued that these two reservations *did* actually include lands outside their recognized boundaries, but the Court had not decided that issue, leaving it open.

In 1969, Interior Solicitor Edward Weinberg had issued an opinion adjusting the boundaries of the Colorado River Reservation to include some lands previously considered public lands administered by the BLM. And at my urging and that of the Fort Mohave Tribe, in June 1974, Kent had issued an opinion which the Indian Division had authored concluding that the “hay and wood reserve” on that reservation had been erroneously surveyed in the 1920s and the Tribe beneficially owned 3500 acres that were being unlawfully administered as public lands by the BLM.

The Fort Mohave Tribe's attorney, a colorful, somewhat flamboyant lawyer from Los Angeles named Ray Simpson, asked Kent to consider the boundary question in March

1974, and Kent promised him a decision within six weeks. Somewhat to my dismay, Kent directed me to draft the Indian Division position within three weeks of our meeting with Ray, and then gave Jack McHale, the Assistant Solicitor for Public Lands, three weeks to respond to whatever the Indian Division proposed. As I recall, two other attorneys – Scott Keep, a young attorney in the Indian Division, and John Griggs, a recent law school graduate rotating through the Division that spring – and I worked almost full-time on our draft during the three weeks Kent gave us. I remember telling John to do nothing else during those three weeks and our putting all the relevant documents in an empty office – where I went whenever I could to work on the draft opinion for Kent favoring the Tribe.

The facts were complicated. An executive order by President Grant had originally set aside a “hay and wood reserve” for the military when it occupied old Fort Mohave in 1870 to provide lands for the soldiers to gather hay and wood. In 1890, the entire Fort together with the hay and wood reserve were transferred to the Interior Department for an Indian school, and added to the Indian reservation. There were latent ambiguities in the description of the western boundary of the reserve when it was established. The western boundary of the hay and wood reserve in the 1870 executive order was set as the Colorado River. But the executive order also stated the area of the reserve contained 9114 acres – an impossibility under the courses and distances set forth in the order and the survey the Army had conducted in 1869, upon which the order was based. If the reserve stopped at the river as it flowed at that time, it would encompass 3500 acres *less* than the acreage specified in the order. We discovered some field notes of the original surveyor in 1869 that helped persuade Kent that the courses and distances and acreage set forth in the order – which increased the size of the hay and wood reserve by 3500 acres – accurately reflected the order’s original intent. After considering Jack McHale’s contrary views, Kent approved our draft opinion.

In June 1974, shortly before Walter Kiechel presented the negotiated decree in *Arizona v. California* to Interior, Kent signed the opinion we had drafted and Secretary Morton directed that Kent’s opinion should be implemented. The draft decree did not provide water for the lands Solicitors Weinberg and Frizzell had determined were part of these two reservations, and Kent told Walter these needed to be added, which the states and non-Indian irrigators vigorously resisted.

In addition, there were problems with the boundaries of two other reservations involved in *Arizona v. California* which I describe next.

ii. Chemehuevi Reservation

At the urging of the Indian Division and BIA Commissioner Thompson, Under Secretary John Whitaker on August 15, 1974, issued a decision determining that the Chemehuevi Tribe held beneficial title to eighteen miles of riparian lands along the Colorado River (Lake Havasu) in California. These 2500 acres of land had been administered since 1941 as public lands and as a wildlife refuge, and certain of these lands had been under permit to non-Indian persons for businesses and residences. The Under Secretary’s decision extended some of these permits, but recognized the Tribe’s underlying title. The decision resolved a dispute of several years’ duration between BIA, the Tribe, and the Indian Division, all of which supported the Tribe’s title, and the Bureau

of Sport Fisheries and Wildlife, Bureau of Reclamation, and BLM, which had opposed it.⁸¹

iii. Fort Yuma Reservation

A final reservation boundary dispute involved the Quechan Tribe of the Fort Yuma Reservation. The Tribe, Indian Division, and Phoenix Field Solicitor Bill Lavell believed the Tribe was entitled to 25,000 acres of land in California and Arizona. These lands had been administered as public lands by the BLM pursuant to an opinion by President Franklin Roosevelt's Solicitor, Nathan Margold, in 1936. Prior to Solicitor Margold's opinion, however, the 25,000 acres had been administered as trust lands owned by the Tribe. I traveled with Field Solicitor Bill Lavell to the reservation shortly after I joined the Department in the summer of 1973, where I met with the Tribe's Chairman Elmer Savilla. When I returned to Washington, my staff and I began an intense study of the problem and after several months of work and research drafted an opinion that reversed Solicitor Margold's opinion.

Solicitor Margold's 1936 opinion had addressed the question of whether the Tribe was entitled to compensation by the Bureau of Reclamation for a right-of-way across these lands for construction of the All-American Canal, a major reclamation project constructed during the New Deal to transport Colorado River water into southern California. Solicitor Margold concluded that an 1894 statute had worked an immediate cession of these lands to the United States, severing the lands from the reservation and terminating the Tribe's title to them.

As we studied the matter, we concluded that the 1894 statute⁸² – which was based on an 1893 agreement⁸³ with the Tribe – had never been implemented. The 1894 statute authorized allotment of lands along the Colorado River to Indians and the construction of a canal by a private company to provide irrigation water to these allotments. The allottees were not to be required to reimburse the company for the canal's construction costs and were to receive free water for ten years. Other irrigable lands on the reservation were to be sold to non-Indians after appraisal at a public auction, and the proceeds were to be paid into an interest-bearing fund for the Tribe. The 25,000 acres of mostly uplands and mesa were also to be opened for settlement by non-Indians and the proceeds of their sale were also to be paid to the Indians.

We discovered that none of these conditions were carried out. The private canal to provide irrigation water to the lands was not built within the time period set in the statute, so the rights granted to the company by the 1894 statute were forfeited. No allotments were made, and no irrigable lands were sold to non-Indians at auction. The non-irrigable lands were never opened to settlement. We concluded that all of these provisions were a condition precedent to the cession of the 25,000 acres, and that therefore no cession under the 1894 statute had been carried out.

81. This decision led to litigation against the Department by some of the non-Indian permittees on the shoreline, which the United States successfully settled on terms that resulted in dismissal of the case.

82. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 332.

83. Agreement with the Yuma Indians in California, U.S.-Yuma, Dec. 4, 1893, 28 Stat. 286, available at http://digital.library.okstate.edu/kappler/Vol1/HTML_files/SES0520.html#sec17.

Instead, we believed the 1894 statute had been completely replaced by a 1904 statute (the “1904 Act”) which set forth an entirely new and different statutory scheme for irrigating the Fort Yuma Reservation lands near the Colorado River.⁸⁴ The 1904 Act applied to lands on the Colorado River Reservation and to a number of non-Indian lands outside any reservation, and under the Act, different quantities of land on different terms were allotted on the Fort Yuma Reservation. The 1904 Act authorized a federal reclamation project, not a private canal and irrigation system.

The 1904 Act provided that the Indians were to be responsible for operation and maintenance costs of the reclamation project, and received no free water as provided in the 1894 statute. The non-Indians paid the value of irrigable lands on the reservation opened to settlement on the basis of their pre-reclamation value, not pursuant to a public auction as provided in the 1894 statute. And these amounts were paid into a reclamation fund to reimburse the United States for constructing the reclamation project on the Indian allotments, with any amounts remaining after construction to be held by the Secretary and expended for the benefit of the Indians.

As noted, other lands on the reservation, mostly uplands and mesa, were not opened to settlement by non-Indians under the 1904 Act, and we found numerous instances between 1904 and Solicitor Margold’s opinion in 1936 where they had been treated by Interior as tribal trust lands. There was no reference in the 1904 Act or its legislative history to the 1893 agreement or to the earlier 1894 statute, and no suggestion that Congress was implementing them or amending the earlier statute.

When Kent and his Deputy Solicitor Dave Lindgren studied our draft opinion, they concluded that it was a reasonable analysis of the two statutes and that because of the Department’s trust responsibility to the Tribe, Kent was inclined to sign the opinion. When Kent discussed the draft opinion with Secretary Morton in August 1974, however, the Secretary directed that it be shared and discussed with the Bureaus of Reclamation and Land Management. He also wanted the Department to inventory all private uses of the land that BLM had authorized and to discuss with the Tribe its consenting to continuing those private land uses. BLM did not ultimately oppose the new opinion and the Tribe consented to continuing all but one of the uses that BLM had permitted.

Heavy resistance to our proposed opinion, however, came from the Bureau of Reclamation, Riverside Field Solicitor Milt Nathanson, the States of Arizona and California, and major water users in these states – because of the likelihood that a Solicitor’s opinion that the Tribe owned these lands would also result in increasing its water rights under the *Arizona v. California* decree. The Department had determined that about 5000 acres – twenty percent of the area claimed by the Tribe – were practicably irrigable.

In February 1975, Kent and the Assistant Secretary for Land and Water, Jack Horton, met with the major water users, shared the draft opinion with them, and invited their comments. By the time these comments were received, Secretary Morton had been appointed Secretary of Commerce. His ultimate replacement, Thomas Kleppe, did not take office until the fall. Since the Under Secretary, John Whittaker, had resigned, Kent served

84. Appropriations, Indian Dep’t, ch. 1402, § 25, 33 Stat. 224 (1904). The 1904 Act extended the recently enacted Reclamation Act of 1902 to the Fort Yuma Reservation.

as Acting Secretary for much of 1975, and action on the opinion was deferred. Kent then became Under Secretary and Greg Austin succeeded him as Solicitor in December 1975.

Since action on the opinion had been so long delayed, this was one of the first Indian issues that came before Greg. He studied the draft opinion, and then Secretary Kleppe, Greg, other Department officials and I met on separate days both with Tribal Chairman Savilla, his attorneys, the major water users, and Representative John Rhodes, the House Republican leader who was from Arizona. Representative Rhodes expressed special concern about the recognition of any additional tribal water rights because of possible impacts on the Central Arizona Project, which, in light of *Arizona v. California*, held rights junior to the Indians' rights. The major California water users – particularly the Coachella Valley Irrigation District and the Metropolitan Water District – also opposed any increase in the Tribe's water rights since those increases would reduce water available to non-Indian California water districts. Chairman Savilla spoke fervently of the Tribe's need for the lands and water for economic development and the Tribe's long quest to reverse the Margold opinion. He recalled that, as a boy in the 1930s, he had attended meetings where coins were deposited in coffee cans to send a tribal leader back to Washington to seek reversal of the Margold opinion. After these meetings, BIA Commissioner Thompson, the BIA Director of Trust Responsibility Martin Seneca, and I believed that Greg and Secretary Kleppe seemed to support issuing the opinion.

In late January, however, Greg advised Secretary Kleppe that he thought the Margold opinion was legally correct. The Department so advised the Tribe and the other interested parties. Because the decision on the opinion was made so quickly after he took office, Greg recalls that I had not adequately briefed him on the effects of the opinion – especially its effects on water rights. Greg's decision, of course, was a bitter disappointment to me and the attorneys on my staff who had worked so long and hard on the issue, and to Commissioner Morrie Thompson and Martin Seneca as well.

Title to these lands had become a major issue among Indian leaders as well, and the Subcommittee on Indian Affairs of the Senate Interior Committee held oversight hearings on the issue in May and June 1976.⁸⁵ At the close of those hearings, Secretary Kleppe committed the Department to issuing a new written opinion reaffirming Solicitor Margold's conclusions. Greg did not ask the Indian Division or me to work on this opinion, which I understand he researched and wrote himself. Greg signed his new opinion on January 18, 1977, shortly before leaving office.

c. Omitted Lands

A third problem with the draft stipulation in *Arizona v. California* was that the Tribes

85. When the Carter Administration took office, Forrest Gerard, who had been the staff member of the Senate Subcommittee that handled the oversight hearings, was appointed Assistant Secretary for Indian Affairs at Interior. Forrest asked Tom Fredericks, the Director of NARF, who had become my successor as Associate Solicitor, to reconsider Greg's opinion. Senator Henry Jackson, Chairman of the Senate Interior Committee, also asked the new Solicitor, Leo Krulitz, to reexamine the issue. In December 1978, Solicitor Krulitz issued a new opinion reversing both Greg's and Solicitor Margold's opinions on essentially the same grounds the Indian Division had developed in our draft opinion. Ultimately, after more than two decades of litigation, the *Arizona v. California* decree was amended to award the Tribe several thousand additional acre feet of water a year based on Solicitor Krulitz's opinion. See *Arizona v. California*, 530 U.S. 392, 419 (2000).

believed that some lands on their existing reservations that were practicably irrigable had been omitted from the Justice Department's claim in the trial of the case before the Special Master. The Tribes believed they were entitled to water rights for these lands. An attorney working as a water rights specialist in the BIA named Bill Veeder supported that claim and ultimately convinced Commissioner Thompson to support it as well. Bill had been a long-time water lawyer in the Department of Justice who had worked on the *Arizona v. California* case initially, but was later removed. Bill believed *Arizona v. California* had been mishandled.

Bill also had written about the conflict of interest in the Interior Department's protection of Indian water rights; Bill believed the Department often minimized Indian water rights claims because of the demands of federal reclamation projects, a claim that had considerable merit as a matter of history.⁸⁶ Bill also had a large and loyal following among many tribal leaders. Ultimately, the government and the Tribes sought unsuccessfully to reopen *Arizona v. California* to claim additional water for these lands after my tenure in office.

d. Conclusions on the Draft Stipulation

BIA asked in June 1974 for time to study the effects of the draft stipulation on the Tribes, and Kent granted them six months – until the end of 1974 – and then an additional six months to complete their study. As the BIA study progressed and the various reservation boundary issues were considered within the Department, the draft stipulation in *Arizona v. California* remained unresolved in the Interior Department for two years – from 1974, when Walter Kiechel first recommended it to the Department, until the spring of 1976. At that time, Greg – at the urging of the Indian Division and BIA Commissioner Thompson – told the Justice Department that Interior would not agree to signing the stipulated decree without adding water rights for the Colorado River and Fort Mohave Tribes and without a first priority being accorded to all Indian rights to avoid any application of the state law relation back doctrine to the tribal water rights. Greg, I and other attorneys in the Solicitor's Office presented this position to attorneys for the States of Arizona and California and attorneys for the major non-Indian water users in the Lower Colorado River at a meeting in Phoenix in June 1976. They resisted our proposal, so no stipulation was signed. Some years later, during the Carter Administration, a stipulated decree was finally signed that I believe embodied the conditions Greg presented at the June 1976 meeting.

2. The Pyramid Lake Controversy

The Pyramid Lake Paiute Reservation had been established by executive order in 1859 as a doughnut of land surrounding the beautiful Pyramid Lake, a rare desert lake in western Nevada. The reservation had been located there because the Paiutes for whom it was set aside relied on the fish in the lake for their livelihood. The lake was the terminus of the Truckee River that arises in Lake Tahoe with inflows from the Sierra Mountains in California.

86. See VEEDER, *supra* note 75.

Shortly after Congress passed the Reclamation Act in 1902, it appropriated funds to construct the Newlands Reclamation Project upstream from the lake. The project was named after Nevada Senator Newlands who had sponsored the Reclamation Act. The Newlands Project – originally operated by the Interior Department’s Bureau of Reclamation – began to divert thousands of acre feet a year out of the river to irrigate crops on over 50,000 acres of land located far enough from the Truckee River that there was little or no return flow – indeed, some of the irrigated lands on the Project were entirely outside the Truckee watershed. Gradually, the area of the lake shrunk and its depth was diminished by about seventy feet. The number of fish in the lake decreased substantially – its most famous species, the Lahontan cut-throat trout, even became extinct – as the water grew more saline and the fish could no longer swim upstream to spawn.

As mentioned above, in the early 1970s the Justice Department had tried at long last to remedy the problem. First, it filed suit as trustee for the Tribe in the Supreme Court against the States of Nevada and California asserting the Tribe’s *Winters* doctrine rights to preserve its fishery. Justice asked the Court to hear the case under its original jurisdiction to hear cases brought by the United States against states and to appoint a Special Master to determine the Tribe’s rights, as the Court had done in *Arizona v. California*. The Supreme Court, however, declined to take the case.

Thus, around the time I became Associate Solicitor in 1973, the United States filed suit in the federal district court in Nevada against the Truckee-Carson Irrigation District and about 14,000 individual non-Indian water users along the Truckee River in Nevada, asserting the seniority of the rights the United States held in trust for the Tribe to protect the lake and preserve its fishery. The theory of the case was that the United States (and the Tribe as its trust beneficiary) had a prior water right dating from the establishment of the reservation in 1859.

Shortly after I became Associate Solicitor, Secretary Morton also terminated the contract under which the Truckee-Carson Irrigation District, a private association of irrigators within the Newlands Reclamation Project, had the right to manage and administer the project. The Secretary took this action on Kent’s recommendation, which I had strongly supported, principally because the District was exceeding the quantity of diversions from the Truckee River permitted by the Department’s regulations. The Bureau of Reclamation and Sacramento Regional Solicitor Chuck Renda strongly opposed terminating the contract.

The Secretary’s action, in turn, led to a suit the District filed in federal court challenging the Secretary’s termination of its contract. Throughout my three years as Associate Solicitor, a good deal of my time and that of my staff was devoted to Pyramid Lake. (The Division actually assigned one of our attorneys, an experienced water law attorney named Harold Ranquist, to relocate to Nevada to work on the various Pyramid Lake matters, including overseeing preparation of an environmental impact statement on the impacts of enforcing the Department’s regulations limiting the Newlands Project’s diversions.)

3. Pueblo Water Rights Case

A major pending case when I became Associate Solicitor was a suit the State of New

Mexico had filed in 1965 in federal district court to determine the water rights of four Indian Pueblos near Santa Fe – the Nambe, Pojoaque, San Ildefonso, and Tesuque Pueblos. The district court concluded in August 1973 that Indian Pueblos had no federally protected water rights, but were only entitled to use water they had actually appropriated under state law – like any non-Indian user. The district court ordered a Special Master in the case to determine the rights of each Pueblo by the amount of lands it had actually irrigated. The court's theory – that Pueblos did not have *Winters*-type reserved water rights because they had no treaties with the United States but had simply been included in the country by virtue of the Treaty of Guadalupe Hildalgo – seemed clearly contrary to prior Supreme Court cases treating the Pueblos as subject to normal federal laws that apply to Indian tribes. The district court had also denied the Pueblo's private counsel the right to participate in the case or develop evidence independent of the Justice Department as the Pueblo's trustee.

This set of rulings produced great alarm among (and united action by) all the Pueblos in New Mexico, who feared that the Pueblos would lose their invaluable water rights under federal law and also believed the Justice Department had not been adequately protecting their water rights. I traveled to New Mexico along with the Secretary's Assistant for Indian Affairs, Marvin Franklin, in October 1973 to meet with the Pueblo leaders. A large group of Pueblo leaders thereafter traveled to Washington in December 1973 to press the Justice and Interior Departments to take stronger action to protect their water rights, to support the Pueblos' intervention in the case, and to fund their own attorneys' work on the case. The State of New Mexico was represented in this case by Paul Bloom, a very able water lawyer who also taught water law at the University of New Mexico Law School.

Kent and I and BIA Commissioner Morris Thompson strongly supported the participation of the Pueblos' attorneys in the case. BIA actually contracted with the attorneys to develop evidence and legal theories in the case, concluding that this was necessary to protect the Pueblos' water rights – in part because the United States had conflicts of interest since certain non-Indian federal interests were claiming water in the case which the Pueblos also claimed to own. Attorneys in our Division and I devoted a lot of time to legal research and developing evidence for the trial of the case and to the appeal of the district court's decision.

This effort was ultimately successful. In 1976, the Tenth Circuit reversed the district court on all issues.⁸⁷ First, the Tenth Circuit held that the Pueblos were entitled to intervene in the case, that BIA in the exercise of its fiduciary obligations to the Pueblos could provide funds by contract to their attorneys, and that those attorneys could participate in the case. Second, the Tenth Circuit upheld the Pueblos' position on the merits, ruling that the Pueblos' water rights are governed exclusively by federal law and not limited by their prior historic appropriations. The Pueblos' attorneys, especially Bill Schaab, were extremely instrumental in this important legal victory. So was a young and very able government attorney named Nick Estes whom Justice added to its legal team on the case.

4. State Versus Federal Court Jurisdiction Over Indian Water Rights

In conjunction with the Papago Tribe and its attorneys, the Indian Division prepared

87. *New Mexico v. Aamodi*, 537 F.2d 1102 (10th Cir. 1976).

and the Justice Department filed in February 1975 a suit in federal court in Tucson, Arizona to adjudicate the reserved water rights (especially the groundwater rights) of the Papago Tribe on its San Xavier Reservation. We also prepared two other water rights adjudications, both in Montana, which the Justice Department filed in April 1975: one on behalf of the Crow Tribe to the Big Horn River system and one on behalf of the Northern Cheyenne Tribe to the Tongue River system.

We prepared the Montana suits with considerable urgency because the Montana State Legislature during the winter of 1975 was considering a statute that would have allowed its state court system to adjudicate the rights of all water users in southeastern Montana, including Indian users, such as the two tribes in the Big Horn and Tongue River systems. We wanted to get these suits filed in federal court before the state legislation passed. My recollection is that United States Attorney Otis Packwood in Montana resisted filing the federal court suits, and I successfully pleaded with Assistant Attorney General Wally Johnson and his principal Deputy, Walter Kiechel, to direct the United States Attorney to act before the state legislation became effective.

The United States' and tribes' sovereign immunity generally bars state court jurisdiction over cases where the United States or tribes are defendants. However, in 1971 the Supreme Court construed an Act, which waived the United States' sovereign immunity to permit it to be sued in state court suits to adjudicate all water rights in a stream system, as extending to reserved rights claimed by the United States for a national forest.⁸⁸ Although that case did not involve Indian reserved rights and the statute did not mention Indian rights or waive tribes' sovereign immunity from suit, states nevertheless began to try to adjudicate Indian water rights in state courts.

The 1971 Supreme Court decision had set off serious alarms among attorneys in the Justice Department who feared that all federal water rights, including Indian reserved water rights, could be subjected to adjudication in state courts. Deputy Assistant Attorney General Walter Kiechel secured the backing of the Justice Department for proposed legislation he had drafted that would have required all federal agencies owning water rights to inventory those rights within a five-year period. The concept of Walter's proposed legislation was that these administrative determinations would become binding and could only be contested in federal courts. Of course, most of these agencies were in the Interior Department. I persuaded Kent and Deputy Solicitor Dave Lindgren to oppose this proposal on several grounds – including that it would require the Department to inventory the rights of tribes, but gave the tribes no right to appeal that inventory. I also thought the standards for quantifying the rights in Walter's proposed bill were more restrictive than the ones the courts had set forth in *Winters* and *Arizona v. California*.

I did support proposed legislation prepared in the Deputy Attorney General's Office at Justice that would have conferred exclusive jurisdiction on federal courts to adjudicate Indian water rights in streamlined proceedings in which the state where the reservation was located, as a representative of all water users claiming under state law, would be joined as the sole defendant. This legislation would have allowed the United States to remove any state court adjudication involving Indian water rights to federal court. Neither Walter's

88. *United States v. Eagle Cty. Dist. Court*, 401 U.S. 520 (1971) (construing the McCarran Amendment, 43 U.S.C. § 666 (1952)).

bill nor the legislation we favored were ever considered seriously by Congress, and therefore tribes faced a serious risk of being forced to defend their water rights in state court proceedings.

In 1975, when we were rushing to file the Montana cases, litigation was pending before the United States Supreme Court concerning the specific question of whether state general stream adjudications could determine Indian water rights. In *United States v. Akin*,⁸⁹ the Tenth Circuit had foreclosed state courts from deciding Indian water rights where the United States had first filed suit to adjudicate the same water rights in federal court. This is one reason why the Tribes and our Division had rushed to get the Montana cases filed first.

Ultimately, despite our best efforts and those of the Justice Department, the Supreme Court reversed the *Akin* case in *Colorado River Water Conservation District v. United States*,⁹⁰ holding that state courts were the preferred forum to adjudicate Indian reserved water rights. I saw this decision as disastrous, because it meant that most Indian reserved water rights would likely thereafter be determined in state courts, where judges are commonly elected by and thus politically responsive to the non-Indian voters and water users in the state.⁹¹ A later Supreme Court decision, *Arizona v. San Carlos Apache Tribe*,⁹² confirmed that federal courts should ordinarily defer to state court proceedings determining tribal water rights.

5. Water Rights Held by Non-Indian Purchasers of Allotted Lands

When I joined the Department in August 1973, two cases were pending before federal district courts in Washington State involving the water rights of non-Indians who had purchased former trust allotments on the Lummi and Colville Indian Reservations. The United States sought to enjoin the State of Washington from issuing water permits within the boundary of either reservation. The cases were actually being handled by Dick Neely, an attorney in the Portland Regional Office. The Justice Department, with Dick's concurrence and support, was arguing that states had no jurisdiction over all water uses within reservations, and that the Secretary of the Interior had exclusive jurisdiction over all water uses on reservations. Dick had proposed that the Interior Department draft regulations to administer all water uses on these reservations to assist in winning the cases.

In the Lummi and Colville cases, the non-Indian defendants asserted that they were entitled to reserved water rights under federal law. Their theory was that the Indian allotments had been in trust status, and that the federal reserved water right appurtenant to the allotments had passed to non-Indians when they acquired the former allotments. Both tribes, represented by my friend Al Ziontz, were parties to these cases and vigorously resisted the non-Indian claims to reserved water rights. The tribes and Ziontz argued that the tribes owned all reserved water rights on the reservation and had governmental power

89. 504 F.2d 115 (10th Cir. 1974).

90. 424 U.S. 800 (1976).

91. While the *Akin* case was on appeal to the Supreme Court, Paul Bloom, representing the State of New Mexico, brought suit in state court to adjudicate the water rights to the San Juan River system of the Navajo, Jicarilla Apache, Southern Ute, and Ute Mountain Ute Tribes. At our urging, the Justice Department removed the case to federal court, but the federal court remanded it to state court.

92. 463 U.S. 545 (1983).

to control all water uses on the reservation.

In late October 1973, Harold Ranquist of my staff and I attended a meeting of the Northwest Affiliated Tribes in Spokane, along with Dick Neely. Bill Veeder of the BIA also attended this meeting. The tribes asserted that they had jurisdiction over water uses on their reservations and that the Secretary should support tribal administration of all waters on the reservation by approving tribal water codes regulating those uses. That raised the controversial issue of tribes asserting jurisdiction over non-Indians living on the reservations which, as discussed above, the Department was wrestling with in a number of contexts.

In the Pacific Northwest and on most reservations in the northern Great Plains, sizeable non-Indian populations live within reservation boundaries. Some of these non-Indians were the successors of homesteaders who had purchased unallotted, surplus reservation lands after passage of the General Allotment Act of 1887. Other non-Indians living on reservations had acquired ownership of an original Indian allotment – either by descent or by purchasing a former allotment. These non-Indians typically resisted tribal jurisdiction over them.

At the meeting, Harold, Dick, Bill, and I listened to the tribal leaders' views, and together with them developed a concept where the Interior Department would propose administrative regulations that gave tribes the option to develop tribal water codes which the Secretary would approve and enforce. The concept was that these tribal codes would regulate the use of all reserved water rights on a particular reservation, including any rights of allottees or of non-Indians who had succeeded to the ownership of former trust allotments. We proposed that for the codes to receive the Secretary's approval, the code would have to provide due process rights to any individual claiming a right to use reserved waters. The regulations we drafted gave tribes an option to utilize the appeals mechanisms in the Interior Department's administrative regulations. They also would have allowed tribes that did not want to adopt and enforce a tribal water code to defer to the Secretary's development of regulations for water uses on that tribe's reservation if the Secretary decided that regulation of water uses was necessary. We circulated draft regulations to the BIA, to all the Solicitor's regional and field offices, and to all federally recognized tribes and tribal attorneys in March 1974.

Our draft regulations ran into heavy opposition from non-Indian residents of reservations and attorneys representing them because our draft recognized tribal governmental authority over all reserved water rights. Also, attorneys for some irrigation districts on particular reservations pointed out that the statutes creating those districts provided statutory water rights for both Indian and non-Indian lands served by the project, and we revised the draft regulations to specifically exclude those statutory rights.

As we worked on the draft regulations and discussed them with Kent and his Deputy, Dave Lindgren, two other problems arose. First, I and several other attorneys at Interior became skeptical that either the tribes or the Secretary had any authority over water uses by homesteaders on fee lands (which had never been trust allotments) on reservations. We concluded that water rights on those lands were simply covered by the state law prior appropriation system, because non-Indians on lands that had never been allotted were not entitled to any reserved water rights under federal law. We therefore concluded that the

claim by the Justice Department and Portland Regional Solicitor's Office in the Lummi and Colville cases – that the State of Washington had no jurisdiction to regulate those water uses – could not be sustained. (And since the priority date of such uses would be junior to reserved water rights, we did not believe the Indians' senior reserved water rights could be harmed by this degree of state jurisdiction.)

A second problem concerned the claims by the non-Indian defendants in the cases that as successors-in-interest to Indian allottees they had an entitlement to any portion of the reserved water rights of the reservation. I knew that millions of acres of former trust allotments were owned in fee by non-Indians.⁹³ If non-Indians who owned former trust allotments could claim a *Winters*-type reserved water right, that would give them a priority date equal to that of tribal rights and perhaps a right to expand their water uses to fulfill future needs, again with a priority date equal to that of tribal rights.

This prospect also alarmed the tribes and Al Ziontz, as well as BIA Commissioner Morris Thompson and his staff – including the Director of Trust Responsibilities, Martin Seneca, and his colleague, Bill Veeder. Morrie wrote a memorandum to Kent in September 1974 asking him to request the Justice Department to change its position in these cases and support tribal ownership of all reserved water rights on the reservation. Kent asked me to analyze the question, and I prepared a detailed legal memorandum recommending that the Interior Department ask the Justice Department to change the Government's position in the cases and support tribal ownership of all reserved water rights.

I thought the tribal ownership theory was a reasonable legal position that was favorable to the tribes' reserved rights and that the Department should therefore support that concept. I argued that the statute authorizing allotment of tribal lands to individual Indians, the General Allotment Act of 1887, did not transfer the reserved water rights for allotted lands from the tribe to the allottees. The only provision in that Act dealing with water authorized the Secretary "to prescribe such rules and regulations . . . to secure a just and equal distribution" of water for irrigation "among the Indians residing upon" the reservations subject to allotment.⁹⁴ I believed that this provision entitled Indian allottees to a "just and equal distribution" of irrigation water by the Secretary, but not to a proprietary transfer of water rights from the tribe. I also concluded that non-Indian successors-in-interest to allottees had no entitlement to water reserved to the tribe. Section 381 did not empower the Secretary to allow any use of reserved water rights by these non-Indians, since it spoke only of distributing water "among Indians." I thought the non-Indian purchasers of former allotments should be treated just like non-Indians owning homestead lands, and that their water rights arose exclusively under state laws of prior appropriation.

A problem for my position, however, was that the Supreme Court, in *United States v. Powers*,⁹⁵ had ruled that the Secretary of the Interior could not, by constructing an irrigation project on a reservation, deny the water rights of owners of other reservation

93. The American Indian Policy Review Commission's final report in 1977 later reported that over twenty-five million acres of former trust allotments on reservations had been sold to non-Indians by 1934. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977).

94. 25 U.S.C. § 381 (1887).

95. 305 U.S. 527 (1939).

lands – including the defendants who were successors-in-interest to Indian allottees. The Court stated that “we do not consider the extent or precise nature of respondents’ rights in the waters.”⁹⁶ But it also stated that when trust allotments were conveyed in fee, “the right to use some portion of tribal waters essential for cultivation passed to the owners.”⁹⁷ I thought this language was simply dicta – an observation in the opinion that was not essential to the holding. And while I agreed that this dicta certainly was contrary to the tribal ownership concept I was advancing, I thought that the holding of the *Powers* case (as distinguished from the language in the opinion) did not preclude the Department from supporting the tribal ownership concept as a litigating position in the Colville and Lummi cases.

Kent considered the question and met with both the Colville Tribe’s leaders and its attorney, Al Ziontz. We also met with Wally Johnson and his top staff at Justice, who were not receptive to changing the Government’s position in the cases. Ultimately Kent wrote to Al Ziontz in February 1975 stating he could not fully support the tribal ownership of all reserved water rights on the reservation, but that he would instruct the Regional Solicitor and request the Justice Department not to oppose the Tribes’ arguments before the court that they owned all the reserved water rights.

In the meantime, while the draft water regulations took no position on whether allottees or their non-Indian successors-in-interest owned any reserved water rights, some tribes began to adopt water codes claiming the authority to regulate those uses. Secretary Morton, concerned that the Department’s water regulations had not yet been adopted, directed BIA Commissioner Thompson in January 1975 not to approve any tribal water codes until finalization of the Department’s regulations. Within the Department, I unsuccessfully opposed the Secretary taking that action.

In 1976, after Greg Austin became Solicitor and Peter Taft had replaced Wally as Assistant Attorney General, Greg extensively and carefully studied the problems posed by these cases and the draft water regulations. We then met with Peter and his staff. Greg concluded that the allottees and non-Indian successors-in-interest were entitled under *Powers* to some reserved water rights, but that the non-Indian entitlements were limited to the water actually used by the allottees when the lands passed out of trust. Greg relied on an Idaho district court decision, *United States ex rel. Ray v. Hibner*,⁹⁸ for that limitation on expanded non-Indian uses. The district court in *Hibner* had concluded that once the lands passed out of trust status, the purposes of the reservation no longer required a water right that expands to satisfy future needs. Greg also requested the Justice Department not resist the application of the state law prior appropriation system to non-Indian water uses on the reservation, except for the reserved water right component that he believed had passed under the *Hibner* rule to allotment purchasers – measured by the allottee’s actual uses when the lands passed out of trust status.

The Justice Department did not accede to Greg’s request, but he proved to be prescient as to how the Ninth Circuit would ultimately rule in the Colville case. In *Colville*

96. *Id.* at 532.

97. *Id.*

98. 27 F.2d 909 (D. Idaho 1928).

Confederated Tribes v. Walton,⁹⁹ the court ruled that the non-Indian successor-in-interest obtains a reserved right to the quantity of water used by the allottee plus the amount the non-Indian puts to use within a reasonable time after acquiring the allotment. I had thought *Hibner* was a reasonable analysis, but I was worried that the courts would not adopt the *Hibner* rule—it was a single district court decision and several decades old. Both Greg and Peter thought it applied to the situation and they proved to be right. This limitation avoided the “worst case scenario” I had feared in which several million acres of former allotments would be held to have reserved water rights that could be expanded to fulfill future needs of non-Indians owners.

The draft water regulations were not finalized during my tenure in the Department. Similar draft regulations were published in the Federal Register as proposed regulations by the Carter Administration, but no final regulations were ever adopted. And Secretary Morton’s unfortunate January 1975 moratorium on the BIA approval of tribal water codes remains in effect, although the Department has issued exceptions to it for particular tribes, usually in connection with settlements of water adjudications.

6. Other Water Issues Not Involved in Litigation

a. Federal Power Commission License Renewals

The Federal Power Act of 1920¹⁰⁰ authorizes the Federal Power Commission (now Federal Energy Regulatory Commission) to license hydroelectric projects on navigable waters of the United States. Section 4(e) of the Act provides that when these projects utilize Indian reservation lands, the Commission must determine that the license “will not interfere or be inconsistent with the purpose for which such reservation was created” and authorizes the Secretary of the Interior to impose conditions on the license that the Secretary deems necessary for the adequate protection and utilization of the reservation.¹⁰¹ Since these licenses had initial fifty year terms, a number of them were up for renewal in the early 1970s.

The Interior Department intervened in Commission proceedings concerning the renewal of licenses using the reservation lands of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians in Wisconsin, the Muckleshoot and Spokane Tribes in Washington, the Coeur d’Alene Tribe in Idaho, and five Mission Bands along the San Luis Rey River in Southern California. In 1975, the Department also intervened in a renewal proceeding involving the San Geronio Project in California to protect groundwater under the Agua Caliente Reservation from depletion, and a proceeding along the Truckee River in Nevada involving operations of Sierra Pacific Power Company. Charles O’Connell of my staff was primarily responsible for our involvement in these proceedings.

The Indian Division and BIA Commissioner Thompson participated in developing the Department’s conditions under Section 4(e) for the continued operation of those projects, and both Commissioner Thompson and I testified in favor of the conditions the Department set in the San Luis Rey case before a hearing examiner at the Commission.

99. 647 F.2d 42, 51 (9th Cir. 1981).

100. Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920).

101. Federal Water Power Act of 1920, ch. 285, § 4(e), 41 Stat. 1063, 1068 (1920).

Some years later, the Supreme Court held in *Escondido Mutual Water Company v. LaJolla Band of Mission Indians*¹⁰² that the Commission had no discretion to reject the Section 4(e) conditions the Interior Department had prescribed in the San Luis Rey proceeding. This remains the law today.

b. Allocation of Water to Tribes in the Service Area of the Central Arizona Project

In the early 1970s, the Bureau of Reclamation was in the process of constructing the Central Arizona Project (“CAP”), a federally funded project authorized to deliver over 1,400,000 AFY of water from the Colorado River into central Arizona, principally serving areas around the cities of Phoenix and Tucson. The statute authorizing construction of the CAP authorized the Secretary to contract with tribes in the CAP service area to receive project water. The statute provided that tribes—unlike other agricultural users of CAP water—would not be limited to using water on farmlands they had historically irrigated, but the Act did not specify how much water the Secretary should allocate to the tribes. To the extent the tribes did receive CAP water, federal law deferred any repayment of the CAP construction costs apportioned to that water. Consequently, non-Indian water users would not be charged with repaying construction costs for the percent of project water allocated to Indians.

Five tribes in this CAP service area—Gila River, Salt River, Fort McDowell, Ak-Chin, and Papago—had petitioned Secretary Morton to make allocations of CAP water to them, and a vigorous debate ensued within the Department over how large the Tribes’ allocation should be. The Bureau of Reclamation proposed to limit the Tribes to around 250,000 AFY – only enough to irrigate reservation lands which had a history of irrigation. But Reclamation also wanted to limit that allocation after the first twenty years of the CAP’s operation, which was expected to occur sometime in the first decade of the twenty-first century. The Bureau predicted the CAP would receive less than 1,400,000 AFY beginning early in the twenty-first century as various upstream projects were developed, and that average uses by CAP would decline to between 900,000 and 1,100,000 million AFY in the early twenty-first century. In drought years, Reclamation predicted that as little as 500,000 AFY would be available. These predictions have proved far too pessimistic. To date, CAP has never been subject to any water shortage.

The Bureau of Reclamation also wanted to enter into secure long-term fifty year contracts with municipal and industrial (“M&I”) users who would pay premium rates and allow for repayment of the large CAP construction costs. Reclamation considered that at least 308,000 AFY of contracts for M&I uses were necessary to ensure repayment and thus ensure the financial feasibility of CAP. Reclamation wanted all CAP shortages after the year 2000 to fall on all other users, including Indian users.

Working with Phoenix Field Solicitor, Bill Lavell, and the Tribes’ attorneys – especially a creative, experienced, and charismatic lawyer in Phoenix named Z. Simpson Cox, who represented the Gila River Tribe – I developed the theory that the Tribes should be allocated the amount of CAP water they were entitled to under the *Winters* and *Arizona*

102. 466 U.S. 765 (1984).

v. *California* cases. Using the “practicably irrigable acreage” standard, I argued the Tribes would be entitled to around 900,000 AFY to irrigate roughly 180,000 acres on their reservations. I had visited the Gila and Salt River Reservations and knew they contained large amounts of flat, prime farmlands, together with surface streams. In addition, the Pimas and Maricopas on the Salt River, Gila River, and Ak Chin Reservations had long histories of irrigated agriculture, going back to aboriginal times. But even though these Tribes possessed reserved water rights with early priority dates that predated any non-Indian water uses, the United States had entered into negotiated settlements in two cases after *Winters* was decided that allowed the vast majority of waters in rivers flowing into the reservations to be decreed to non-Indian irrigators, many in federal reclamation projects. As I saw it, once again the conflicts of interest in the Department had worked against the Tribes in those cases. The Tribes’ existing uses under these decrees were between 128,000 and 168,000 AFY, far less than I believed they were entitled to under *Winters* and *Arizona v. California*.

Under our theory, since the Department (the Tribes’ trustee) was now constructing a federally funded project to provide water to the areas in which the reservations were located, the Secretary now had a fiduciary duty to allocate the Tribes’ full reserved rights entitlements under the standards in the *Arizona v. California* case. I argued that the fiduciary duty of loyalty required the United States to subordinate its other interests to full satisfaction of the trust beneficiaries’ legal rights. I conceded that the United States had no legal obligation to import Colorado River water to the reservations – but argued that since it had done so, it needed to first satisfy the Tribes’ legal entitlements before providing water to non-Indians.

The Bureau of Reclamation and State of Arizona, as well as the local governments and existing water users, fiercely resisted our position. Kent also rejected our *Winters* doctrine argument and advised the Secretary that the allocation of Project water was a question of policy, left to his discretion. Ultimately, Secretary Morton in April 1975 allocated essentially what Reclamation proposed – much less water to the Tribes than we urged – 257,000 AFY for the first twenty years of the Project, less in later years. After the first twenty years, the Secretary’s decision provided that M&I contracts would first receive their full allocation and the Tribes would receive twenty percent of all remaining agricultural water, or ten percent of all CAP water, whichever was greater. When I saw how drastically the Tribes would be cut, I argued that all the allocations should be limited to the first twenty years of CAP operations. I thought twenty years would be sufficient for the United States to litigate the Tribes’ *Winters* rights, and that once the rights were determined, the Tribes should receive that amount of CAP water. But this effort was also unsuccessful.

At the time, I saw this decision as a severe defeat for the Tribes.¹⁰³ In retrospect,

103. When we lost an internal battle with a lawyer in another Division in the Solicitor’s Office, the Indian Division sometimes gave that lawyer a painting depicting a dejected Indian which we called the “Custer Award.” The lawyer could keep the painting until some other attorney bested us in a battle between Indians and a conflicting interest within the Department. It was all done with mirth and good spirit. I recall giving Assistant Solicitor Ernie London the Custer Award as we haggled before Kent over the proper CAP allocations for the Tribes. I think the next month we transferred the “Custer Award” from Ernie to Gil Stamm, the Commissioner of Reclamation, as we failed to increase the Indian allocation due to Reclamation’s resistance. After Greg

however, perhaps the Tribes, the Indian Division, and the BIA had actually made a good start in what became a decades long administrative process. First, Secretary Cecil Andrus increased the tribal allocation to 309,000 AFY during the Carter Administration and most importantly provided that this allocation to the Tribes would have co-equal status with M&I contracts. In subsequent decades, it turned out that the shortages Reclamation predicted did not materialize. Although it now seems that some shortages for CAP may occur by 2020, these shortages probably will never be as drastic as Reclamation predicted in the mid-1970s. Finally, the reserved water rights of many tribes in Arizona have now been settled after litigation was filed (in state courts after the *Colorado River* decision), and the amounts of CAP water allocated to those Tribes and others in Arizona as part of settled litigation have actually been closer to the amounts I had fought for in the 1970s – around 650,000 AFY of CAP water, plus some water from other sources.

c. Water Entitlement for the Navajo Irrigation Project

During much of 1974, the Indian Division – together with the BIA and the Field Solicitor in Window Rock – were engaged in a dispute with the Bureau of Reclamation and the Energy and Resources Division in the Solicitor’s Office over how much water the Navajo Tribe was entitled to use for the Navajo Irrigation Project on the San Juan River, a tributary of the Colorado River, a portion of which forms the northern boundary of the Navajo Reservation in New Mexico.

A 1962 Act of Congress¹⁰⁴ authorized construction of the federally funded Navajo Irrigation Project. The Act provided that “the Project’s principal purpose” was “furnishing irrigation water to . . . 110,630 acres of land” and that the Project would “have an average annual diversion of . . . 508,000 acre feet of water” from the San Juan River system. When the Project was planned in the 1950s and authorized by Congress in 1962, it was expected that water would be supplied to the Project by a gravity distribution system. But as construction proceeded, project engineers concluded that a more modern sprinkler system could be installed with minimal increases in construction costs. The sprinkler irrigation would conserve water, so that the 110,630 acres could be irrigated with a diversion of about 370,000 AFY of water.

Larry Aschenbrenner of my staff and I, supported by Window Rock Field Solicitor Dale Itschner believed that the language of the 1962 statute entitled the Project to divert 508,000 AFY. Since the statute provided that irrigation was the “principal” purpose of the Project, we believed the remaining water not needed under the sprinkler system to irrigate 110,630 acres—138,000 AFY—could be diverted by the Navajo Tribe for other purposes, such as M&I uses. We also pointed out that the Tribe’s water rights under the *Winters* doctrine had not been extinguished or modified by the statute – except in two respects which had nothing to do with the amount of water the Tribe could divert.¹⁰⁵ Larry, Dale,

declined to issue the opinion we had authored on the Fort Yuma Reservation boundary, I jokingly suggested the Award should belong to Congressman John Rhodes of Arizona, who had forcefully argued against the opinion. Some months later, the Department’s Legislative Counsel, Ken Brown, told me Congressman Rhodes has somehow learned of this suggestion and was not as amused as Ernie and Gil had been.

104. Act of June 13, 1962, ch. 615, 76 Stat. 96 (1962).

105. First, the Tribe had agreed to a transbasin diversion of some waters out of the San Juan River upstream of the project to supply water to the San Juan Chama Project, a federal reclamation project also authorized by

and I thought the Tribes' water rights under the *Winters* doctrine entitled it to at least 508,000 AFY of water, and that the 1962 Act, in essence, partially implemented the Tribe's *Winters* doctrine rights.

After considering our views and the contrary views of the Bureau of Reclamation and the Energy and Resources Division of the Solicitor's Office, Deputy Solicitor David Lindgren issued an opinion on December 6, 1974, that largely rejected our position and determined that the Navajo Irrigation Project could only divert the amount of water required to irrigate 110,630 acres using the sprinkler system. His opinion relied on another section of the 1962 Act that established procedures for the Tribe to contract for water for M&I purposes so long as the Tribe made repayment of all construction and other costs properly allocated to those water uses. By contrast, the Tribe was not required in the 1962 Act to repay construction and other costs associated with irrigation water.

David's opinion stated that it did not consider the Tribe's *Winters* doctrine rights, and analyzed only the Tribe's rights to the delivery of water under the 1962 Act. It did affirm that the Department had authority under the 1962 Act to contract separately with the Tribe for the delivery of additional M&I water.

David's opinion also relied on the plans for the Project that had been drawn up in the 1950s and some legislative history of the 1962 Act, both of which he concluded focused on the net depletions created by the Project – the amount of water that would be consumptively used for irrigation and would not find its way back into the San Juan River as return flows. The planning report for the Project had estimated that a diversion of 508,000 AFY with a gravity distribution system would cause an average annual stream depletion of 253,000 AFY, and the Secretary of the Interior's letter to Congress supporting the bill that became the 1962 Act described a similar stream depletion. David's opinion also referenced a study of net stream depletions by an engineering consultant retained by the House subcommittee that considered the bill. The study concluded that about 255,000 AFY would return to the San Juan River. Since the entitlement of the State of New Mexico to Colorado River water under applicable interstate compacts is expressed in terms of consumptive uses (i.e., net depletions) to the Colorado River system and not diversions, David concluded that Congress would not have authorized the project if net annual return flows to the river were only 140,000 AFY (since M&I uses typically return no water to a stream). The opinion stated that if that occurred, it was possible that New Mexico would exceed its entitlement to the Colorado River and its tributaries under the compacts.

Larry Aschenbrenner, Window Rock Field Solicitor Dale Itschner, and I were very disappointed with the opinion. As noted, in our view the language of the statute controlled as to Congress' intent, and that language specifically authorized diversions of 508,000 AFY by the Tribe for the Project. The statute did not mention or refer to depletions, which it could have done, as the contemporaneous Master's decree in the *Arizona v. California* case did. We also pointed out that depletions cannot be measured with any precision, that the Bureau of Reclamation had not performed any hydrological studies of the San Juan River to verify its depletion estimate, and that testimony before the congressional

the same 1962 Act of Congress which would deliver water to the Rio Grande Valley of New Mexico. Second, the Tribe had agreed that the Navajo Irrigation Project would share any water shortages equally with the San Juan Chama Project.

committees presented widely varying estimates of average annual return flows to the river by the Project. Many estimates of average annual return flows in the testimony were much smaller than the 250,000 AFY which the Bureau of Reclamation had estimated for a diversion of 508,000 AFY.

B. Indian Rights to Hunt and Fish

It was established law in 1973 (as it is now) that tribes have the right to hunt and fish on reservations and are free to exercise these rights free from any state regulation or limiting restrictions, even if the treaty, statute, or executive order establishing the reservation is silent as to hunting and fishing rights.¹⁰⁶ But major controversies erupted in the 1960s and 1970s between tribes and states about the exercise of tribal hunting and/or fishing rights outside reservations.

Some treaties, such as those with tribes in the Pacific Northwest and many tribes in the Upper Midwest—Michigan, Minnesota and Wisconsin—expressly provide that the tribes retained the right to hunt and/or fish on the land they ceded under the treaty. For example, the treaties with the tribes in Washington and Oregon typically provided that the tribe should have “the right of taking fish at usual and accustomed grounds and stations . . . in common with the citizens of the United States.”¹⁰⁷

After Oregon and Washington became states, they enacted statutes to regulate non-Indian fishing. And as these states became heavily populated and the fish resources decreased with increased fishing, conflicts arose between Indians and non-Indians over the exercise of the Indians’ off-reservation treaty fishing rights.

In a case roughly contemporaneous with *Winters* (and in an opinion authored by the same Justice, Joseph McKenna), the Supreme Court, in *United States v. Winans*,¹⁰⁸ held that the Yakima Indians had an implied easement or servitude under the treaty to cross privately owned lands riparian to the Columbia River to reach their usual and accustomed fishing site on the river, and that the private landowner could not operate a fish wheel on his lands – even though it was licensed by the state – in a manner that captured all the fish and thereby deprived the Indians of any fish. Observing that the fish “were not much less necessary [to the Indians] than the atmosphere they breathed,”¹⁰⁹ the Supreme Court rejected the non-Indian landowner’s argument that he could exclude the Indians from their historic fishing sites as an attribute of his land ownership. The Court instead construed the treaty as imposing “a servitude” on the private non-Indian lands – “the right of crossing it to the river – the right to occupy it to the extent and for the purpose” of taking fish.¹¹⁰ (*Winans*, like *Winters*, was a suit the United States had filed as trustee for the Indian rights, a model for the kinds of cases I worked to increase in the 1970s).

The Pacific Northwest states nevertheless sought increasingly to regulate Indian off-reservation treaty rights in the years after *Winans*. In *Tulee v. Washington*,¹¹¹ the United

106. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

107. Treaty of Point No Point, art. 4, Jan. 26, 1855, 12 Stat. 933.

108. 198 U.S. 371 (1905).

109. *Id.* at 381.

110. *Id.*

111. 315 U.S. 681 (1942).

States Supreme Court struck down a state law requirement that Indians must purchase a state fishing license to exercise their off-reservation treaty fishing rights. But a few years before I became Associate Solicitor, in *Puyallup Tribe v. Department of Game* (“*Puyallup I*”),¹¹² the Supreme Court sustained state regulation of the manner of off-reservation Indian fishing “in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.”

Assertions of state jurisdiction to regulate Indian fishing rights in the 1960s and 1970s led to serious, heated, and sometimes even violent confrontations between tribes and Indian fishermen, on the one hand, and non-Indian commercial and sports fishermen and state law enforcement officers, on the other hand. Tribal fishermen regularly staged “fish-ins” at traditional off-reservation Indian fishing sites and asserted their treaty right to fish outside the state seasons and without obeying any state restrictions. State law enforcement officers responded with arrests, sometimes very harshly. After *Puyallup I*, the states had intensified their enforcement efforts.

Puyallup I had represented a serious setback for tribes and Indian fishermen, who had argued – reasonably, I thought – that states had no authority at all to regulate federal treaty fishing rights of Indians given the line of cases from *Worcester v. Georgia* through *Williams v. Lee*, which seemed to prohibit all state regulation of Indian treaty rights.

The state regulatory systems were also seen as heavily weighted in favor of non-Indian commercial and sports fishermen, who generally located their operations near the mouths of the Columbia River or Puget Sound, downstream from most reservations and off-reservation fishing sites. The salmon and steelhead fish in the Columbia River and Puget Sound on which the tribal fisherman depended for their livelihoods are “anadromous,” meaning they are born in the fresh water streams of the Pacific Northwest, migrate as tiny fingerlings to the ocean, where they live the majority of their lives only to return to the very freshwater stream where they were born to spawn, producing the next generation. In the interest of conservation, the state regulations would typically set escapement goals for each fish run to allow a set number of each salmon and steelhead species to reach the spawning ground. Tribes correctly felt these goals typically left relatively few fish for Indians to catch by the time a particular run reached the Indian fishing grounds, which were generally located upstream near the spawning areas.

1. Oregon and Washington Off-Reservation Fishing Rights Cases

George Dysart, an unusually able and committed attorney in the Portland Regional Solicitor’s Office, along with the Justice Department and the tribes along the Columbia River and their attorneys, had helped to mastermind a remarkable recovery from the Supreme Court loss in *Puyallup I*. George persuaded the Justice Department to intervene in a case brought in federal court in Portland by tribal fishermen and all the tribes in the Lower Columbia River, and to argue that the state regulations of Indian off-reservation fishing permitted in *Puyallup I* were limited to those regulations “necessary to prevent the exercise of [the Indian] right in a manner that will imperil the [fish resource].”¹¹³ George,

112. 391 U.S. 392, 398 (1968).

113. *Sohappy v. Smith*, 302 F.Supp. 899, 908 (D. Ore. 1969).

Justice, and the tribal attorneys convinced Judge Robert Belloni that this was the correct standard in *Sohappy v. Smith*.¹¹⁴ Judge Belloni held that the state regulatory scheme actually operated to allocate the fish resource principally to the non-Indian commercial and sports fishing near the mouth of the river and effectively allocated too few fish to the Indians. The case led to a series of annual and even seasonal disputes about the state's fishing regulations that at least once resulted in Judge Belloni holding a hearing and signing a temporary restraining order on a weekend in the locker room of his golf club. But Judge Belloni, before whom I had the pleasure of appearing in a case when I was with NARF, was resolute in his adherence to the principles of the *Sohappy* decision, which took considerable courage given the vocal opposition of non-Indian fishermen to his ruling.

George Dysart and a number of attorneys representing tribes, such as my friend and former colleague at NARF, David Getches, and a number of tribal attorneys located in Seattle, including my friend Al Zientz, then used Judge Belloni's decision in *Sohappy* as a springboard to initiate a suit in 1970 on behalf of fourteen tribes in the Puget Sound area to determine the allocation of fish to which those tribes were entitled. George devoted almost all of his time to the trial of the case, as did a number of attorneys for the tribes that intervened as co-plaintiffs. Attorneys in the Indian Division and I also worked on the case.

In February 1974, the district court adopted the position of the United States that the tribes were entitled to up to fifty percent of the harvestable fish runs at their off-reservation fishing sites. Judge George Boldt, the federal district judge in Seattle, also agreed with Judge Belloni's decision in *Sohappy* that the state must justify its regulations of Indian off-reservation fishing as "essential to conservation." Judge Boldt held that the state must show that its conservation goals cannot first be accomplished by a restriction of non-Indian fishing.¹¹⁵ The Ninth Circuit affirmed this decision in June 1975.¹¹⁶ Harry Sachse of the Solicitor General's Office argued this case before the Ninth Circuit representing the United States.

At our urging, Kent then recommended that the Justice Department ask the United States Supreme Court to deny the State's petition for writ of certiorari to review the Ninth Circuit's decision, a recommendation Harry supported. The Justice Department followed our recommendation, and the Supreme Court did not review the case at that time.¹¹⁷ This

114. *Id.* at 900.

115. *United States v. Washington*, 384 F.Supp. 312, 342 (W.D. Wash. 1974).

116. *Washington v. United States*, 520 F.2d 676 (9th Cir. 1975).

117. The federal district court then ordered the State to adopt regulations to implement the decision, whereupon the Washington Supreme Court held these regulations were beyond the authority of the State Department of Fisheries. The federal district court, with the assistance of the United States Attorney and various federal law enforcement agencies, thereafter undertook direct supervision of the fisheries in a manner to protect the treaty rights, which the Ninth Circuit affirmed. The Supreme Court during the Carter Administration reviewed both the Ninth Circuit and state Supreme Court decisions "to resolve the conflict between the state and federal courts regarding what, if any, right the Indians have to a share of the fish." *See Washington v. Wash. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979). With some relatively minor modifications, the Supreme Court upheld the decisions of the lower federal courts.

Judge Boldt, like Judge Belloni, showed great resolve and courage in enforcing the Tribes' treaty fishing rights, for which he was often reviled and sometimes even burned in effigy by non-Indian fisherman. Oddly, even after his decisions were twice affirmed by the Ninth Circuit and once by the Supreme Court, the case was still referred to as "the Boldt decision," which I have always believed reflected the non-Indians' scornful views that "no judge but Boldt would issue such an opinion." The Supreme Court concluded the fault lay elsewhere when it observed:

was a major victory for tribes in the Puget Sound region, which up to that point in time had been catching about two percent of the fish runs; it resulted in tribes being allocated many times the number of fish they had caught before the decision.

2. Other Hunting and Fishing Cases¹¹⁸

The *United States v. Washington* case was already filed and well on the way to a judgment in favor of the tribal rights when I started work at Interior in August 1973. By the time I left Interior in September 1976, the Justice Department had thirteen cases on file where the United States was suing to protect tribal hunting and fishing rights or participating as *amicus curiae* on behalf of tribes. For example, at the Indian Division's request, the Justice Department filed suit on behalf of the Washoe Tribe against the State of Nevada to halt enforcement of state game laws against tribal members on 61,000 acres in western Nevada called the "Pine Nut Allotments," allotted lands outside the Tribe's reservation. The Justice Department also filed a suit in the Montana federal court to enjoin Montana from enforcing its hunting and fishing laws on the Crow Reservation on the theory that the Tribe had exclusive jurisdiction over all reservation lands, trust and fee. Many years later, the Supreme Court ruled against the United States, holding the Tribe could not enforce its hunting and fishing land against non-Indians on fee lands on the Crow Reservation.¹¹⁹

In 1973, largely because of the active work of the Twin Cities Field Solicitor Elmer Nitzschke and his colleague Mariana Shulstad, the Department of Justice filed suits in Michigan to sustain the rights of the Chippewa Tribes to fish on the Great Lakes and in Iowa to uphold the rights of the Sac and Fox Tribes to hunt and fish free of state regulation. Elmer and Mariana also prepared suits on behalf of the Leech Lake and White Earth Bands of Chippewa in Minnesota and Stockbridge-Munsee Community in Wisconsin.

At the request of the Indian Division, the Justice Department also participated as *amicus curiae* in a case before the Oregon district court and Ninth Circuit, supporting the rights of members of the Klamath Tribe, which had been terminated in the 1950s, to hunt and fish within the boundaries of their former reservation free from state regulation. This resulted in a significant victory for the Klamath Tribe in *Kimball v. Callahan*, which preserved the hunting and fishing rights of members of a terminated tribe. A very capable

The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this Court in the context of events forced by litigants who offered the Court no reasonable choice.

Id. at 696, n.36.

118. In *Department of Game v. Puyallup Tribe Incorporated* ("*Puyallup II*"), 414 U.S. 44 (1973), the Supreme Court adopted the position of the United States as *amicus curiae* that the State could not ban all net fishing of steelhead (the customary means of fishing used by the Tribes) under the standards of *Puyallup I*. By banning all net fishing, the State was in effect attempting to allocate all the fish to non-Indian sports fishermen, who customarily used only hook and line. The Court held that this regulation discriminated against treaty Indians "because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." *Id.* at 48. The Justice Department had filed an *amicus curiae* brief in the Supreme Court in support of the Tribe prior to the time I joined the Indian Division.

119. *Montana v. United States*, 450 U.S. 544 (1981).

young attorney named Don Miller, who worked with the Klamaths, urged us to support the Tribe in the case. Later, I was able to hire Don as an attorney in the Indian Division.

The Division also persuaded the Justice Department to support the exclusive control of other tribes over all hunting and fishing on their reservations – the Colville Tribe in Washington and the Eastern Cherokee Tribe in North Carolina. A number of years later the Supreme Court sustained the exclusive power of tribes to control hunting and fishing on reservations that – unlike the Crow Reservation – contained no substantial fee lands owned by non-Indians.¹²⁰

The Solicitor's position in these cases provoked resistance in some field and regional offices since it departed from prior legal policy – the Department that had earlier supported some state jurisdiction over non-Indians hunting or fishing on reservations. The Billings Field Solicitor Al Bielefeld had issued opinions in the past in favor of state jurisdiction over non-Indian fishing on reservations, and attorneys for the non-Indians in the *Colville* case called these opinions to the district court's attention as evidence of the "Government's confusion" regarding its position on the issues. I accordingly had to issue an opinion reaffirming our current legal position and (with Solicitor Greg Austin's concurrence) withdrawing Al's contrary opinions.

3. Solicitor's Opinion on the Rights of the Colville and Spokane Tribes in Lake Roosevelt

The Colville and Spokane Tribes in Washington asserted that they had the exclusive right to hunt, fish, and boat on the portions of Lake Roosevelt, a lake created on the Columbia River behind the Grand Coulee Dam, that were within the boundaries of their reservations. In October 1973, I accompanied Secretary Morton on a trip to the reservations where the Tribes presented their views to the Secretary and he promised them an answer.¹²¹

In June 1974, Kent issued an opinion concluding that the Tribes possessed those exclusive hunting, fishing, and boating rights, as well as the authority to regulate such activities by non-Indians on the portions of the lake that were within the Tribes' reservation boundaries. Kent's opinion determined that a 1940 statute which authorized the taking of these lands in the aid of the Grand Coulee Dam Project did not alter the boundaries of the reservations or the fishing and regulatory rights of the Tribes. He reversed an earlier contrary opinion Solicitor Werner Gardner had issued in the Truman Administration.

Kent's opinion was hotly resisted by the Divisions in the Solicitor's Office representing the Bureau of Reclamation, the National Park Service, and the Portland Regional Solicitor. An Assistant Solicitor in one of those Divisions (whom I liked and respected) predicted confidently to me that "this opinion will be reversed on March 1, 1977." But the opinion, drafted by me, Hans Walker, and Alan Palmer, remains in effect

120. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

121. My wife, Bobbie, had just moved our furniture back from California alone, and on the day of the Secretary's trip, the moving van was scheduled to deliver it to our new house in Washington. I had promised her I would be there, despite work, stating somewhat facetiously that I would be there – "even if the Secretary himself directed me to work that day." Of course, I never dreamed Secretary Morton would actually direct me to take this trip with him. I had to plead with Bobbie to release me from my promise, which she did.

today, over forty years later.

C. *Land and Minerals Issues*

1. Arctic Slope Trespass Case

The Indian Division devoted major efforts in the preparation and filing by the Justice Department of a suit against over one hundred oil and oil exploration companies, whose activities on the North Slope of Alaska had substantially polluted water supplies and killed and altered the migration patterns of game. In addition, the suits alleged the companies wrongfully appropriated mineral deposits and knowledge about those mineral deposits while the lands were in aboriginal ownership before the Alaska Native Claims Settlement Act (“ANCSA”)¹²² extinguished Native aboriginal title in 1971. The federal district court had held in 1973 that the United States had an obligation to prosecute these claims in *Edwardsen v. Morton*,¹²³ a breach of trust suit brought against the Interior Department by a group of North Slope Natives. The Department did not appeal that decision and the Indian Division then prepared and the Justice Department filed suit as trustee for the Natives against the oil companies. Unfortunately, the Ninth Circuit ultimately held that Congress in ANCSA had retroactively extinguished all pre-1971 claims based on aboriginal title when it extinguished the Natives’ aboriginal title.¹²⁴ Preparing these cases required virtually full-time work over roughly a year by Mariclare Hale of my staff, as well as substantial work by a number of other attorneys in the Division.

2. Omaha Tribe Blackbird Bend Case

In May 1975, the United States filed a suit to quiet its title as trustee for the Omaha Tribe to several thousand acres of farmland in Iowa riparian to the Missouri River, following an opinion Kent had issued in February 1975 concluding that the Tribe had title to the lands. The Tribe also filed its own suit to litigate title to the lands.¹²⁵

The reservation boundary was the middle of the Missouri River. Shifts in the river had left dry land on the eastern side of the original riverbed, and the question in the case was whether the shift had occurred by slow, imperceptible movements (accretion) – in which case the Tribe’s title would move with the river – or by sudden change (avulsion) – in which case title would be frozen as of the date of the avulsion. The Tribe’s case ultimately went to the Supreme Court which ruled in favor of the Tribe.¹²⁶

3. Eastern Tribal Land Claims

In the early 1970s, a number of tribes in the eastern United States were asserting title to lands based on early treaties with the United States or aboriginal Indian title. In the early years of the Republic, a number of eastern states had entered into treaties extinguishing the tribes’ title to these lands, and the tribes were claiming that these state treaties violated

122. 43 U.S.C. §§ 1601–28 (West, Supp. 1971).

123. 369 F. Supp. 1359 (D.D.C. 1973).

124. *United States v. Atl. Richfield Co.*, 612 F.2d 1132 (9th Cir. 1980).

125. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

126. *Id.*

the Indian Nonintercourse Act enacted by the first Congress and still in force.¹²⁷ That Act prohibited any transfer of Indian land except pursuant to a treaty with the United States.

Two tribes in Maine, the Passamaquoddy and Penobscot, had sued the Secretary of the Interior and Attorney General to compel them to bring suit against the State of Maine and private landowners on the ground that the Tribes held title to more than half of Maine, which had never been validly extinguished by a federal treaty. The BIA had declined in 1972 to bring the suit on the ground that these Tribes were not considered “federally recognized.” The federal district court construed the Nonintercourse Act, which prohibited sales of land belonging to “any Indian tribe,” as protecting the lands of these Tribes, irrespective of federal recognition. The Indian Division recommended against an appeal, stating to Kent our view that the district court was correct. Kent disagreed and asked Justice to file an appeal to the First Circuit, but stated that if the Department lost the appeal, he would not recommend asking the Supreme Court to review the case.¹²⁸ In December 1975, the First Circuit affirmed the district court in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*.¹²⁹ Greg Austin, who had replaced Kent, agreed that the Department should not seek Supreme Court review, so the decision stood and the Justice Department and Indian Division began preparing a suit against the owners of millions of acres in Maine. The suit was settled and the settlement – which paid the Tribes over \$80,000,000 and provided them with federal recognition and roughly 300,000 acres of land – was ratified by Congress in the Maine Indian Land Claims Settlement Act in 1980.¹³⁰

4. United States’ Recognition of Tribes

The *Passamaquoddy* case gave rise to intense discussions at the highest levels of the Department over whether the Department had authority to “recognize” tribes and what “recognition” meant. At the same time the *Passamaquoddy* case was before the courts,

127. Act of July 22, 1790, ch. 33, 1 Stat. 137.

128. Kent held a bi-weekly staff meeting with each of his Associate Solicitors to discuss important pending issues. I always submitted an agenda the evening before the meeting, describing items I wanted to discuss. One year, the staff meeting fell on April Fools’ Day. For that meeting, I prepared a bogus agenda, setting out three or four complex and difficult (but false) issues. The last one reported that I had discovered a treaty that gave an Indian tribe a valid land claim to most of Kansas, where Kent had lived before moving to Washington, and stated that I would develop a request asking Justice to file suit against Kansas asserting the Tribe’s title claim. I walked into the staff meeting the next morning with a real agenda, only to find Kent and his Deputy Dave Lindgren engrossed over the first item on my bogus agenda. They had obviously not thought about April Fools’ Day, or that anyone might play an April Fools’ joke at Interior. After several minutes of discussion on the first item, Kent looked down the agenda and said, “Let’s talk about something else.” He then saw the land claim against Kansas and exploded into laughter.

129. 528 F.2d 370 (1st Cir. 1975).

130. Another land claim by an eastern tribe resulted in an appeal to the Supreme Court to decide whether federal courts had jurisdiction over a claim by the Oneida Nation that its title to lands in the State of New York had not been extinguished. The Second Circuit had held there was no federal jurisdiction over the case, but pursuant to the “split brief” policy, the Justice Department submitted to the Court the views of the Solicitor that federal courts did have jurisdiction over the claim. The Supreme Court upheld federal jurisdiction in *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974). The Division then prepared and the Solicitor recommended that the Justice Department file land claims on behalf of two New York tribes – the St. Regis Mohawks and the Oneidas – after the Supreme Court’s 1974 decision. These cases claimed that New York had violated the Indian Nonintercourse Act in the early nineteenth century by obtaining land cessions by these tribes without congressional approval.

tribal groups in Washington, which claimed to be successors of treaty tribes and thus entitled to fishing rights under the *United States v. Washington* case, also filed petitions with the Department to “recognize” them. Kent directed the Indian Division to prepare a research memorandum on the history of federal recognition of tribes. Alan Palmer, Duard Barnes, and Scott Keep conducted in-depth research on this issue over a period of several months, and the Division presented a detailed research memorandum to Kent.

Our research concluded that the United States had for decades recognized tribal groups in a variety of ways: by treaties or acts of Congress providing services or appropriating funds for particular tribal groups, by executive orders setting aside reservations for tribes, and by lesser administrative actions by the Department such as appointing agents, approving or disapproving contracts, or building schools or hospitals for a particular tribal group. We also concluded that the Department in administering statutes providing benefits or services to “Indians” or “Indian tribes” must have the authority generally to determine whether a group is or is not a tribe. Finally, our study revealed that in recent decades the Department had determined that a number of tribes (nine tribes in the twenty years prior to 1975) were entitled to recognition by *ad hoc* determinations by various Interior officials – either an Assistant Secretary, the Solicitor’s Office, the BIA Commissioner or Deputy Commissioner or some combination of those officials and their subordinates – but without any formal process or standards.

The Stillaguamish Tribe in Washington State – a small Tribe with less than one hundred members – had formally petitioned the Secretary to recognize it in 1974, and when the Secretary took no action, the Tribe ultimately sued the Secretary to compel him to recognize it.¹³¹ Kent (and Greg after him) and other high-level officials in the Department deliberated at length about questions such as what recognition meant, whether the Department had authority to recognize a tribe – or whether Congress needed to do that or pass a statute specifically authorizing the Secretary to recognize tribes – and what procedures the Department should adopt if it did decide to recognize tribes in the future. They also considered whether recognition was a “yes-no, all or nothing” concept: whether a tribe could be recognized for some purposes, but not others – say to exercise fishing rights but not receive all federal Indian programs.

The Department did not resolve these issues during my time as Associate Solicitor. After I left the Department, the *Stillaguamish* suit was resolved in favor of the Tribe and the Department adopted formal regulations in 1978 setting up an administrative process to decide tribal petitions for recognition.

My own recommendation to Kent and Greg for future recognition decisions was that recognition should be extended to any group of persons of common Native American ancestry organized collectively in a society that currently exercised political authority over them. I thought that to be recognized, the group should also have to show that it had historically inhabited a common territory and that Congress had not terminated the federal trust relationship with it.

While historically the Department had also considered its past dealings with tribal groups in determining whether a group should be recognized, I thought that such an

131. *Stillaguamish Tribe of Indians v. Kleppe*, No. 75-1718, 1976 U.S. Dist. LEXIS 17381 (D.D.C. Sept. 24, 1976).

additional criterion had a “Catch-22” aspect – a tribe could only be recognized now if the Department had recognized it in the past. In addition to excluding tribal groups like the Passamaquoddy (which would have been recognized under my proposed criteria), I thought the reliance on past dealings suffered because of uncertainties in application of that criterion – questions about what kinds of dealings and how many dealings (and how often) would be sufficient for recognition. I also worried that more traditional and isolated groups, which may have been largely self-sufficient, might have difficulty showing past dealings. Finally, I believed there were significant “horizontal equity” or equal treatment issues involved in recognition. It seemed to me that, especially east of the Mississippi River, tribal groups that were really not distinguishable from recognized tribes in the west had not been treated as recognized because of historic circumstances particular to them – such as that “the frontier” had moved beyond them by the time of American independence.

The criteria the Department adopted for recognition in 1978 during the Carter Administration were considerably more restrictive than my approach in that they required tribes to show they had functioned as a distinct social and political group more or less continuously from colonial times to the present. In my view, these recognition criteria have been unevenly administered by the Department over the last four decades – particularly as recognition came to qualify tribes as entitled to operate profitable gambling enterprises after the Indian Gaming Regulatory Act of 1988. Because the criteria the Department adopted are also more complicated than the ones I had recommended, it has also proven very costly for tribes to prepare and prosecute a petition for recognition and extremely cumbersome for the Department to decide petitions, resulting in unacceptable delays of many years and often many decades between a tribe’s filing a petition for recognition and the Department making a decision.

5. Northern Cheyenne Mineral Leases

One of the major controversies the Department decided during my tenure concerned coal leases on the Northern Cheyenne Reservation in Montana. Pursuant to three coal permit sales by the Northern Cheyenne Tribe and the BIA in 1966, 1968, and 1971, over fifty percent of the surface area of that reservation had been permitted to coal companies for coal exploration. Peabody Coal Company, the successful bidder at both the first and second sales, had acquired six leases on a total of 16,000 acres from the first sale permit, and in December 1973 had requested to lease an additional 25,000 acres from the second sale permit. As a result of the third sale, permits with options to lease were held by four coal companies on a total of 172,000 acres.

The Department’s Indian coal leasing regulations allowed companies to obtain prospecting permits for a period of years together with an option for the company to lease any or all of the lands covered by its permit. During the term of the permit, the company would typically prospect on the land under permit to determine how much land it wanted to lease. The Tribe had consented to the permits and options to lease and had been paid significant bonuses by the companies for entering into the permits. The BIA area office had approved the permits and options to lease.

In May 1973, the Tribe changed its policy about coal leasing and petitioned the Secretary to cancel these leases and permits. In late 1973, the Tribe presented a lengthy

and exhaustive petition to the Secretary cataloguing the grounds on which the Tribe believed the leases and permits were invalid. Those grounds were that: (1) several of the Bureau regulations governing mineral leases had not been complied with; (2) the National Environmental Policy Act (“NEPA”) and other federal statutes had not been complied with; and (3) the Secretary had violated his duty as trustee in approving the leases and permits. The Tribe was represented by Al Ziontz, an experienced and respected attorney in Seattle who had been instrumental – with George Dysart, David Getches, and others – in the spectacular victory in the Washington fishing rights case. Al and his partner Steve Chestnut had developed a very strong, extensively documented petition. Kent directed the Indian Division to review the petition and the lengthy set of documents the Tribe had presented.

The terms of the leases provided a flat monetary royalty payment of 17.5 cents a ton to the Tribe for the first ten years, then twenty cents a ton for the second ten years, regardless of the value of the coal. As I and my staff began to review the petitions, we initially thought the Tribe might be primarily seeking a lease or leases with higher monetary compensation. But our meetings early on with the Tribe’s Chairman Allen Rowland and other leaders convinced us that the Tribe’s overriding concern was preserving the pristine nature of its reservation, and that the Tribe desperately feared it would have little land left for ranching, hunting, fishing, and recreation if half the reservation were strip mined. The tribal leaders emphatically denied they were seeking more money and instead complained that the BIA had not advised them of the social and environmental dangers the mining posed.

As David Jones and I (and later Alan Palmer when he joined us in April 1974) went over the voluminous documentation, we concluded that there were a number of potential legal defects in the permits and leases. First, NEPA seemed clearly to apply to at least the third lease sale, which occurred after NEPA had become effective in 1970. Although the Department had originally taken the position that its approval of tribal leases in its trusteeship capacity did not constitute the kind of federal action covered by NEPA, the Tenth Circuit had held otherwise in *Davis v. Morton*.¹³² Since no environmental impact statement had been prepared when the permits were approved after the third sale, we concluded those approvals had violated NEPA and were at least voidable depending on the results of the NEPA studies. While the permits for the two earlier coal sales had been approved before NEPA took effect, the leases had been issued after NEPA’s effective date, so we concluded it was also likely that an environmental impact statement was required for any of those leases to be valid. Both Al Ziontz and his colleagues and the Indian Division in our legal research had discovered cases holding that a lease obtained in violation of a federal statute or regulation was void.

Second, as we reviewed the Department’s regulations, it seemed to us a strong case could be made that no technical examination of the environmental impacts of the mining had been undertaken as required by Section 177.4 of the regulations.¹³³ We also focused on an Interior Department regulation that limited the size of any coal lease to 2560 acres.

132. 469 F.2d 593 (10th Cir. 1972).

133. This regulation was adopted after the lease for the first coal sale, so the absence of a technical examination seemed a problem confined to the two later sales only.

The leases all substantially exceeded that acreage. While the Secretary possessed the power to waive this acreage limit regulation if he finds the waiver is in the best interest of the Indians and if the larger acreage were necessary to support construction of a thermal plant producing electricity on or near the reservation, we could not discover any document by the Department expressly waiving the acreage limitation regulation. In addition, while the possibility of constructing a thermal plant near the Northern Cheyenne Reservation had been discussed, there were no concrete plans to build such a facility.

As I and my staff discussed the petition with Kent, he expressed concern with the extent of the possible strip mining over large portions of the reservation and the problems posed by the Tribe's claims that NEPA and the Department's regulations had not been complied with. But he was also concerned with the Tribe's proposed remedy – which was that the Secretary cancel the permits and leases. The companies had paid several million dollars in bonuses to the Tribe, much of which had been spent (although the remaining amounts had been escrowed by the Tribe). Kent (and Secretary Morton as well) also expressed concern that cancelling the leases and permits could serve to discourage companies from relying on the Department's approval of other Indian leases.

If the Secretary cancelled the leases and permits without giving the companies any hearing or opportunity to respond, the Department feared it could be liable to the companies for denying them due process of law. The Tribe believed, however, that its petition had been a confidential submission to the Secretary as a trustee from the beneficiary of the trust and vigorously resisted our sharing its contents with the companies. We also feared that if the courts held the cancellation was unlawful, the United States could be liable to the companies for a taking of their property.

At Kent's direction, we explored some alternate options. One possibility was to state that a full environmental impact statement needed to be done and the leases and permits should be held in abeyance until after that occurred. A second option was to submit the Tribe's petition to the Department's Office of Hearings and Appeals for an adversarial administrative hearing in which the companies could participate. A variant of that option was for the Solicitor's Office to hold a hearing where the Tribe and companies presented oral arguments on legal (and perhaps factual) issues raised by the petition. A third option we considered was asking the Justice Department to file suit against the companies for a declaratory judgment that the leases and permits were invalid because they violated NEPA and the regulations. That option would give the companies a fair hearing before the courts and place the Department on the Tribe's side of the controversy without risking liability for the United States for cancelling the leases and permits. As we deliberated about these options we concluded that an administrative hearing would likely only delay an ultimate court appeal. We therefore inclined toward the declaratory judgment option. The Indian Division even drafted a litigation request to Justice to file such a suit.

Secretary Morton, Kent, and I met successively with the Tribe and the companies on May 15, 1974 before the Secretary reached a decision. When the Tribe met with the Secretary, it indicated it would accept the results of a court review of the validity of the leases and would intervene and participate in any case the United States filed for a declaratory judgment. The companies also agreed this would be a preferable course to a protracted administrative hearing. However, I continued to search for an option where the

Department could itself resolve the problem without litigation. One disadvantage I saw to the declaratory judgment action was that the BIA area office personnel were opposed to the Tribe's petition and might testify that they had complied with the regulations, which could undercut or at least complicate the United States' case.¹³⁴

Ultimately, in what I have always considered one of Kent's most courageous decisions, he told me he would recommend that the Secretary decide in favor of the Tribe if he could avoid cancelling the leases. In the middle of one night in late May, as I thought about the problem during a fitful sleep, it occurred to me how this might be accomplished, and I tiptoed downstairs to draft a structure for the decision. Kent liked it and presented it to Secretary Morton, who adopted it.

In a decision issued in June 1974, Secretary Morton held that as to the first lease sale to Peabody Coal Company of over 12,000 acres, there was no clear evidence that the regulation limiting a lease to 2560 acres had been explicitly waived, and directed Peabody and the Tribe to conform the lease acreage to 2560 acres or jointly show why that limitation should be waived. The decision held the second sale request by Peabody to lease in excess of the acreage limitation in the regulations in abeyance, and the Secretary stated he would take no action until the transaction complied with the acreage limitation regulation and NEPA. A request by a permit holder from the third sale to lease tracts in excess of the limitation was likewise held in abeyance pending NEPA review and compliance with the acreage limitation. Other issues raised by the petition were denied or held in abeyance for further action.

All further action was halted until environmental impact studies were completed, and the Secretary directed that these be completed, to the fullest extent possible, by independent, non-governmental entities. Moreover, the Secretary reiterated that any coal development must be in strict compliance with all applicable environmental constraints and any future action would only be taken by the Department with the joint agreement and support of the Tribe and coal companies involved. Essentially, I saw Secretary Morton's decision as designed to give both Tribe and the companies control over any future coal development on the reservation – which could proceed only if they jointly cooperated.

6. Ownership of Northern Cheyenne Minerals

In the 1926 Northern Cheyenne Allotment Act, Congress provided that the surface of most of the reservation was to be allotted but that the coal and other minerals were reserved in the Tribe for fifty years, provided that at the expiration of the fifty year period

134. The BIA Area Director, Jim Canan, vehemently opposed the Tribe's petition. Jim had been the Area Director for many years and had approved the coal permits and the first lease sale. He said he had given his approval because the Tribe strongly urged him to do so, and he resented the Tribe's change in policy. Jim was also surprised and upset that I did not view the Indian Division's role simply as his lawyer, charged with finding ways to defend his actions, but instead saw our role as the lawyers for the Secretary's trust responsibility, required to support reasonable legal positions of tribes. Jim was vocally (but I also thought understandably) upset – feeling he had been hung out to dry by the Tribe and Department and by our changed concept of the Indian Division's role. Jim was especially troubled by the Tribe's charge in the petition that the BIA had violated its trust responsibility in approving the permits and leases. Kent also sympathized with Jim's predicament and directed the Billings Field Solicitor's Office to develop legal arguments in support of the validity of the leases and permits and present those arguments to him. Field Solicitor Al Bielefeld and his colleague Ted Meredith did this.

the minerals “shall become the property of the respective allottees or their heirs. . . .”¹³⁵ In 1968, Congress extended the reservation of the minerals in the Tribe in perpetuity, divesting the allottees of any interest, but provided for a suit to be brought by the Tribe against the allottees concerning the ownership question.¹³⁶ The Tribe filed this suit and in May 1976, the Supreme Court unanimously held in *Northern Cheyenne Tribe v. Hollowbreast*¹³⁷ that the Tribe, not the allottees, held title to the subsurface minerals beneath allotments on that reservation. The Court determined that the 1926 Act had not granted a vested future interest in the allottees, relying in part on Congress’ retention of such “control and management [of the lands] as Congress may deem expedient for the benefit of said Indians.”¹³⁸

In a “Memorandum for the United States” to the Court in this case, the Justice Department had filed a separate statement by the Solicitor supporting the Tribe’s petition for writ of certiorari pursuant to the “split brief” agreement. (Justice took no position itself on behalf of the United States before the Court.) We filed the split brief because we thought continued tribal ownership promoted unified control by the Tribe over mineral development on the reservation. As noted, the Court heard the case and ruled in favor of the Tribe, essentially accepting our arguments.

7. Other Lands Issues

The Department decided in 1973 to recommend that the Justice Department file suit against Southern Pacific Railroad to invalidate its use of lands on the Walker River Reservation in Nevada. The Tribe had sued the railroad for trespass on the ground that its right of way – granted by the Department in the nineteenth century under the public land laws – was invalid since the lands were Indian owned. The Justice Department filed a companion case as trustee for the Tribe, and the Ninth Circuit upheld the position of the United States and Tribe in *United States v. Southern Pacific Transportation Company*.¹³⁹

In July 1975, Kent issued an opinion that the Quileute Tribe in Washington held title to 220 acres that a 1953 executive proclamation by President Truman had set aside for Olympic National Park. Kent reached this conclusion based on the theory that President Truman’s Proclamation including the tracts within the Park had excluded any lands within the boundaries of the Quileute Reservation, and an earlier 1889 executive order issued by President Cleveland had included these lands within the reservation. The Department thereafter took the lands into trust for the Tribe pursuant to a transfer by the Park Service.

V. CONCLUDING THOUGHTS

When I left the Department at the end of September 1976, I was particularly pleased with the Indian Division’s record in preparing and helping the Justice Department to litigate a substantially increased number of cases where the United States sued as a plaintiff-trustee protecting Indian resource rights and immunities from state jurisdiction.

135. Act of June 3, 1926, ch. 459, § 3, 44 Stat. 690, 691.

136. Act of July 24, 1968, ch. 323, 82 Stat. 424.

137. 425 U.S. 649 (1976).

138. *Id.* at 658.

139. 543 F.2d 676 (9th Cir. 1976).

Increasing the number of these cases had been one of my major objectives when I took the job. Kent and Greg rarely turned down our recommendation to forward a case to Justice or to adopt a particular litigating position we favored either as a plaintiff or *amicus curiae*, and Wally Johnson and Peter Taft usually accepted Interior's recommendations on Indian litigation.

As discussed in Parts II–IV, the cases we forwarded to Justice were met with mixed success. The courts upheld our positions in cases involving Pueblo water rights, the Northwest fishing rights (and most other fishing rights) cases, and the *Bryan* case narrowly construing the grant of civil jurisdiction in Public Law 280 states.¹⁴⁰ Indeed, I felt when I left office that the law was securely established barring state regulatory and taxing jurisdiction over reservation Indians, and that the law was similarly established protecting Indian treaty hunting and fishing rights from undue state interference. In the water area, however, the Pyramid Lake case ultimately lost in the Supreme Court and the *Colorado River Water Conversation District* case and subsequent Supreme Court decisions allowed state courts to adjudicate virtually all Indian reserved water rights. I correctly predicted in September 1976 to Larry Aschenbrenner who took over for me as Acting Associate Solicitor that a major – perhaps *the* major – litigation activity of the Indian Division in the years ahead would be preparing to litigate Indian reserved water rights cases throughout the western states. This continues to be true today, over forty years later.

The cases we referred to Justice involving Indian lands also had a mixed outcome. The Arctic Slope trespass case failed, although the Omaha Blackbird Bend case succeeded in the Supreme Court. Some of the eastern land claims like the case for the tribes in Maine and some other states led to successful congressional settlements, but other tribes, like the Oneida Indian Nation, have failed in court after decades of contentious litigation. Another significant loss was the Supreme Court's holding in *Oliphant* that tribes have no criminal jurisdiction over non-Indians.¹⁴¹

While I was highly pleased with the Division's success in forwarding cases and litigating positions to Justice, our record on administrative conflicts with other agencies within the Interior Department was a more checkered one. The Indian Division's position prevailed in Secretary Morton's termination of the Truckee-Carson Irrigation District's contract to operate the Newlands Project and divert excessive amounts of water away from Pyramid Lake, in the Colville-Spokane Lake Roosevelt Solicitor's opinion, and in the decisions on the Fort Mohave and Chemehuevi boundaries. The Division's position did not prevail on the Fort Yuma boundary question, on the CAP water allocation, or on the Navajo Tribe's water entitlement for the Navajo Irrigation Project.

We certainly faced very formidable opposition within the Solicitor's Office and from other Department agencies in these inter-agency controversies. Most of the attorneys who generally represented the Bureau of Reclamation or BLM in disputes with tribes over lands or water rights were actually located in the regional and field Solicitor's Offices outside of Washington, D.C., where a large number – I think about half – of the attorneys in the Solicitor's Office worked. These attorneys were generally long-time government attorneys in the civil service. And generally, the top attorneys in these offices – the Regional or Field

140. *Bryan v. Itasca Cty.*, 426 U.S. 373 (1976).

141. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Solicitor, for example – had built their careers and earned their appointments principally by their representation of reclamation or public power projects in their region. These officials were generally unreceptive to protecting Indian rights.

For example, the Regional Solicitor in Sacramento, the region where the Newlands Project was located, was a highly experienced and skillful lawyer named Chuck Renda, who had over the years specialized primarily in reclamation law. The Regional Solicitor in Portland, Bob Ratcliffe, another very experienced and able lawyer, had built his career and developed his expertise primarily in counseling Bonneville Power Administration. Even the attorney in the Portland Regional Office most involved in actively supporting Indian rights, George Dysart, had a background in the legal problems of Bonneville.¹⁴²

Within the Interior Department in the 1950s and 1960s, attorneys who worked principally on reclamation and public power issues generally benefitted most in terms of career advancement. This central focus of the Department on reclamation and public power probably had its roots even earlier. The longest serving Secretary of the Interior – Harold Ickes during the New Deal – had during his thirteen years in office spearheaded the development of large dams, hydroelectric power, and reclamation projects in an effort to economically develop western states, irrigate dry lands, and provide electric power to cities and rural areas. The Bonneville Power Administration, for example, produced such abundant and cheap hydroelectric power that for decades it had a surplus of cheap power to export to California. While the New Deal Interior Department had also been the first to support and nurture the exercise of tribal self-government under the Indian Reorganization Act of 1934, Secretary Ickes' successors in the late 1940s and 1950s had championed the termination policy. Men (there were few women lawyers in the regional or field offices) such as Chuck Renda and Bob Ratcliffe who had built their careers in the Solicitor's Office facilitating these economic development and public power projects during the 1950s and 1960s generally saw that work as central to the Department's mission and to their careers in public service. Indian rights and interests had usually been considered more peripheral, and thus specializing in Indian law within the Solicitor's Office had generally not been similarly rewarded. There were some exceptions: the Field Solicitors in Phoenix and the Twin Cities – Bill Lavell and Elmer Nitschke – both actively and very ably concentrated on promoting Indian rights. George Dysart in Portland was another exception. But generally, the offices outside of Washington were oriented principally toward serving the other Interior agencies.

More broadly, the dominance of reclamation, public power, and other interests for the career staff in regional and field Solicitor's offices reflected a historic dominance of those interests in the structure of the Interior Department. In 1969, shortly before I took office, Dr. Edgar Cahn wrote in his classic study of the BIA, *Our Brother's Keeper*:

The Department of the Interior is a chamber of the mighty. . . . Interior's

142. Almost all attorneys in the regional and field offices, like George Dysart, were responsible for representing the multiple Interior agencies with programs that often conflicted with the Indian rights I was singularly charged with protecting. By contrast, the Washington, D.C. staff of attorneys representing reclamation and public lands interests was relatively small – just one or two attorneys in each area as contrasted with the ten or more lawyers on my staff in the Indian Division. Thus, for example, when we drafted the Fort Mohave opinion, I was helped by two of my staff and also assisted by Bill Veeder of the BIA. Jack McHale, the Assistant Solicitor for Public Lands, worked largely alone in responding.

jurisdictions include the Bureau of Commercial Fisheries, the Bureau of Sport Fisheries and Wildlife, the National Park Service, Bureau of Mines, U.S. Geological Survey, Bureau of Land Management, Bureau of Outdoor Recreation and Bureau of Reclamation – each of them enjoying the support of well-organized and well-formed local interests, with strong congressional liaison.

The Indian, however, stands out as the poor relation. . . . The Bureau of Indian Affairs is perhaps the lowliest of agencies housed within Interior, even though it receives a little more than 18 per cent of the Department's budget and employs almost 25 per cent of the Department's staff.¹⁴³

In sum, situations which I saw as presenting conflicts of interest and as annoying refusals of some attorneys in the Solicitor's Office to adapt to the modern Indian policy, other attorneys in the office saw as insurgent deviations on my part from decades of established Department policies and practice. It is certainly true that, with Kent's and Greg's support, I was significantly altering the role of protection of Indian rights and elevating the trust responsibility within the Department. Because I was often changing (or trying to change) the legal position of the Department on a range of issues, the frequent dissonance between my Indian Division and some Regional and Field Solicitors and their staffs was probably inevitable.

The successes I did achieve were in large part due to the heightened interest Kent and Greg had in Indian issues, which they perceived correctly as implementing the policies in President Nixon's Message to Congress. For example, I recall both Kent and Greg stating that about half of their time as Solicitor was devoted to Indian issues. Other institutional changes in furtherance of the Nixon Indian policy assisted as well – such as the interest in Indian legal issues shown by Wally Johnson and Peter Taft at the Justice Department, where Wally established a new section exclusively to litigate cases protecting Indian rights, the elevation of BIA Commissioner Morris Thompson to *de facto* Assistant Secretary status at Interior, as well as the exemplary assistance of Brad Patterson at the White House in coordinating Executive Branch activities to implement the Nixon Message.

I was also greatly aided by Kent and Greg allocating a number of additional positions to the Indian Division. When I became Associate Solicitor in August 1973, the Division had ten full-time attorneys. I recall there was a hiring freeze in the autumn of 1973, so when two attorneys left, I was unable immediately to fill their vacancies. There were also "Solicitors' Program" attorneys – recent law school graduates who rotated through all the Divisions, like John Griggs whom I had pressed into service to produce the Fort Mohave opinion. Fortunately, many of the attorneys on my original staff – Charles Soller, Duard Barnes, Hans Walker,¹⁴⁴ Jim Clear, and Harold Ranquist – constituted a core group with a great deal of experience in Indian law (though Jim did leave in 1974 and joined the

143. EDGAR S. CAHN, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 157 (1969).

144. Hans was one of about two dozen American Indians who were attorneys when he joined the Division in the early 1970s; he was uniquely valuable to the Division because he was knowledgeable about both Indian law and life as it really was on reservations. Hans had grown up and practiced law on the Fort Berthold Reservation in North Dakota before coming to Interior. The number of Indians practicing law began to increase dramatically in the 1970s, in large part because of a special summer program my friend Sam Deloria had established at the University of New Mexico School of Law to prepare Indian college graduates for law school.

Justice Department), but I thought we were still seriously short of staff. In March 1974, I was able to hire Larry Aschenbrenner, an experienced and very able lawyer who had specialized in Indian water and fishing cases from the Pacific Northwest and with whom I had worked when I was handling Columbia River fishing cases for NARF while he was in private practice. In April 1974, Kent gave me another slot to hire Alan Palmer, a law school friend and classmate who had clerked for Judge Barnes on the Ninth Circuit and Justice Stewart on the Supreme Court. Alan was working at Covington & Burling in Washington and I had asked him if any young attorneys at the firm would be interested in joining the Division. I was thinking of attorneys two or three years out of law school. Alan, who was (like me) about seven years out of law school at the time and was a highly gifted attorney, responded that he would be interested.

Later in the spring of 1974, Kent allocated more hiring slots to me. I hired two recent law school graduates, Pamela Sayad and Mariclare Hale (the latter of whom had practiced in Alaska with Alaska Legal Services) and one recent graduate as a part-time law clerk, Elizabeth Horowitz (who was invaluable in researching and drafting the Fort Yuma opinion). During the next year, I was able to add Herb Becker, former Director of California Indian Legal Services and Jamie Linxwiler, a CILS attorney who had been a student of mine at UCLA, as well as Anita Vogt of the Indian Civil Rights Task Force and Scott McElroy, a “Solicitors’ Program” attorney who had rotated through the Indian Division and elected to remain.

The overall increase from ten to sixteen attorneys was an essential help to me, and it produced a vibrant and spirited mix of experienced and novice attorneys, all committed to protecting tribal rights.¹⁴⁵ Our enhanced staff allowed us to focus a number of attorneys on some of the more complex legal issues before the Department and helped us to prevail on a number of the administrative conflicts we worked on. During my final year, Greg also allocated slots that enabled me to hire several other attorneys, two of whom stayed in the Department for many years. The late Tim Vollman, who had been a student of mine at UCLA and worked on the Navajo Reservation, had a long career in the Division, serving twice as Associate Solicitor, once in the Reagan Administration and again at the end of the Clinton Administration. In between he served as Regional Solicitor in Tulsa and then Albuquerque. Likewise, Joe Membrino, who joined us from NARF, worked in the Division for more than a decade. By the time I left, I felt I had bequeathed to the Department an excellent group of attorneys, some of whom I and the senior lawyers had trained, and a lasting tradition of advocacy on behalf of the Secretary’s trust responsibility that largely endured.

Looking back with over four decades of perspective, I confess some disappointment with the mixed record we achieved in Indian litigation and in resolving administrative conflicts between Indian rights and the interests of other Interior agencies. But perhaps the major contribution of my slightly more than three years at Interior may have been putting a structure and a process in place where the Indian Division functioned as an unblemished trustee advocating the reasonable legal positions of tribal and Indian trust beneficiaries

145. The high spirits of our attorneys led to a tradition of wine and beer parties in the Indian Division promptly at 5:00 PM every Friday, despite a formal rule prohibiting alcohol in Federal buildings. Soon lawyers in other Divisions and BIA officials learned where they could find a convivial start to the weekend.

against the other interests within the Department and against states and private adversaries in litigation. Kent gave me the charge and freedom to follow that vision, which Greg maintained. And over the three years I served as Associate Solicitor, they gave me the tools in terms of attorney positions to build a strong and committed group of lawyers dedicated to that mission.

At my farewell party on my last day in office, my splendid staff gifted me a Shetland pony, delivered to my office up a freight elevator in obvious violation of rules barring animals from federal buildings.¹⁴⁶ I took the pony to the Pennsylvania farm my wife and I had just purchased, naming him “Solicitor.” In my farewell speech, I said “nothing so became my tenure at Interior as the manner of my leaving.” I then made a number of humorous bequests, but concluded with one serious one – I bequeathed the Indian Division to the Department. For much of the next four decades it has generally carried out the mission that Kent, Greg, and I established – serving as attorneys for the Department as a fiduciary for the rights it holds in trust for Indians and advocating their reasonable claims in litigation. Of course, the Solicitors who succeeded Kent and Greg have had varying degrees of commitment to that vision of the trust responsibility and have all had their own objectives in the office. But I think our greatest accomplishment may have been not the winning of any case or group of cases or resolving any administrative controversy or controversies but setting in place a structure and template for the Department’s enforcement of its trust responsibility to Indians that future Solicitors could select to follow, and which many of them have followed.

146. Larry Aschenbrenner’s colorful description of this wonderful gift is contained in the Appendix, entitled “The Last Cavalry Charge at the Department of Interior.”

APPENDIX: THE LAST GREAT CAVALRY CHARGE AT THE DEPARTMENT OF INTERIOR¹⁴⁷

This account of an unparalleled episode in the storied history of the Department of Interior brings to life the danger, the emotional highs, the tragic lows, and the courage of that small band of cowboy counselors. Even today, over four decades later, children, grandchildren, and others still ask, “Where were you during the last Great Charge, Daddy?” The history of the last great cavalry charge at the United States Department of Interior began in the summer of 1976 when our boss, Reid Chambers, announced his resignation.

Reid, the Associate Solicitor for Indian Affairs at Interior, was a Harvard Law graduate, liberal Democrat and an ardent native rights advocate. In 1973 he had been hired by Kent Frizzell, the Republican Solicitor under the Nixon Administration. Solicitor Frizzell was a former Kansas Attorney General with little experience in Indian Affairs. He became convinced of the need to reform Indian policy and uphold tribal rights when he negotiated an end to the Wounded Knee Occupation after a month on the Pine Ridge Reservation in the middle of winter. Following his return, instead of selecting someone to be the Department’s top Indian Affairs lawyer based on party affiliation or political contributions, he sought recommendations from respected Indian law professors and advocates across the country. Based on their advice, he chose UCLA Law Professor Reid Chambers. Reid, in turn, hired several bright lawyers, all staunch supporters of tribal self-government and native rights; and all eager to challenge the Interior Department’s often notoriously narrow view of such rights.

With Solicitor Frizzell’s support, Reid’s three years as the head of the Indian Division were filled with significant decisions protecting native resources and advancing tribal powers. Consequently, when he decided to leave the Department, he was held in high esteem by tribes across the country and by his staff, particularly the zealous lawyers he had hired, including me.

A month before Reid’s last day in office, several of us were discussing what might be an appropriate farewell gift. Hans Walker, a Mandan Indian from North Dakota and later a distinguished Associate Solicitor, suggested we honor Reid the way the Sioux Indians traditionally honor one of their leaders. Rather than giving a gift directly to the honoree, they give it to someone particularly close on the latter’s behalf.

This struck a chord. But what to give? And to whom? Reid and his wife, Barbara, had recently bought a farm in Pennsylvania, where they intended to spend weekends with their kids, Megan, nine, and Randy, six. As yet there were no animals on the farm. Someone in our group, probably Don Miller, who was once a Colorado cowboy, or Hans Walker or perhaps Herb Becker, all of whom had grown up with horses, suggested we buy a horse and give it to Reid’s children on his behalf. We enthusiastically agreed. Exercising the prudence and mature judgment that became the hallmark of this endeavor, we first called Barbara who, recognizing genius, proclaimed it a grand idea and became a co-conspirator.

But if the gift was to be given in the traditional manner, it must be presented at a

147. Reprinted with permission of Lawrence A. Aschenbrenner.

ceremony. Merely delivering a bill of sale and horse photograph wouldn't do. Plainly, the horse's presence at a ceremony on the sixth floor of the United States Department of the Interior was mandatory.

For the next three weeks, we checked equestrian ads in the DC area and spent our weekends scouring Northern Virginia and Western Maryland for a good-natured pony. Now horse shopping is not as easy as you might think. Most horses in our price range were in huge pastures and so skittish you couldn't get near them. Four or five of us—none of us in good shape—would chase a horse past cowboy Miller, who would try to lasso it. But a professional roper Miller was not. After several laps around a ten acre field, our round-up crew was ready for the barn or more accurately, a bar.

Finally, a week before the big farewell party, we settled on a good tempered Welsh pony near Upper Marlboro, Maryland. But try as we did, we couldn't approach her. Finally, Vickie Becker, Herb's wife, about 4'10" and not over ninety pounds soppin' wet, who also incidentally was the first Navajo woman to run the Boston Marathon, calmly walked up and halted our elusive steed. Just when we had all but agreed to buy her, the question of her age arose. Someone suggested you could tell a horse's age by its teeth. But when our gifted horsemen looked our gift-horse in the mouth, they could not agree. Miller said she was at least two. Becker thought she was less than fifteen, and Walker took the Fifth. In any event, we bought this prime animal.

The farewell party was scheduled for the following Friday afternoon in Reid's office on the sixth floor of Interior. The tactical problem, of course, was how to get our four-legged friend past the security guards.

There are only three ways to enter the Interior Department: the pedestrian entrances at the first floor lobbies on either end of the building and the basement entrance through the parking garage, all manned by Government Services Administration guards. We had made friends with two young couriers for the Department who drove a van, had security clearance, and were friendly with the guards in the basement. They would show up for a cool-one after work on Friday afternoons and hang out with our good looking young secretaries. A week before the farewell party, after a couple beers, they readily agreed to transport our precious present past the guards and into the garage, at which point we lawyers were to take her up to the party.

On the day of the party, one of our merry band picked up a rental delivery van. Becker and Miller, accompanied by attorneys Scott McElroy and Don Wharton, drove it to Maryland and collected our farewell gift. The details of persuading a very scared pony into a dark delivery van are lost to memory. But it was not easy. In any event, the van arrived at Interior on schedule. Becker, Wharton, and Miller entered the building to alert our couriers that it was time! Again, prudence and mature judgment dictated that McElroy, the youngest, stay in the van parked on Seventeenth Street to comfort our prized pony who whinnied every ninety seconds. With one of our courier friends driving and the other riding shotgun, the van carrying three lawyers and one formerly good-natured pony was casually waived through by the guards at the basement gate. Once inside, it was backed up to the elevators and unloaded by Becker and Miller. Meanwhile, McElroy, having been left with the saddle, decided that he had nothing to lose and carried it to the main pedestrian entrance. When the guard inquired, "What's the saddle for?" McElroy honestly replied,

“It’s for the horse we have upstairs.”

Meanwhile, down in the basement garage, Miller, Becker, and our pony entered an elevator and pressed #6. Now, this was no ordinary elevator. Its walls and ceilings were adorned with ornately carved dark mahogany and its floor with a rich crimson carpet. At this juncture, as if on cue, our gift-horse rewarded us with a gift of her own, an impressive pile of green horse manure. Now if you haven’t been around horses lately, you may have forgotten how fragrant fresh horse pucky can be, particularly in close quarters.

Miller and Becker’s hopes the elevator would shoot straight up to the sixth floor without stopping were of no avail. Three seconds later, the elevator doors opened to a crowd of visitors on the first floor, including McElroy. No one boarded, however. They just stood there in disbelief. Miller, sporting his oldest cowboy hat, dirtiest jean jacket, and guano covered cowboy boots, tipped his hat and suggested they might want to wait for another car. As the doors closed, somebody in the lobby shouted, “Did you see that?” Another inquired, “What was in there?” “A Clydesdale,” McElroy, saddle still over shoulder, calmly replied.

But from there on our luck improved, more or less. The good news was that most of my office where our prized present would be kept had been covered and supplied with water, feed, a shovel, and a bucket. The bad news was, my office was about 120 yards north of the elevator.

As the doors opened on the sixth floor and before a clean-up plan could be devised, Becker, lead rope in hand, bolted out of the elevator and hearing the clarion call, our brave thoroughbred stormed after him. Slipping and sliding on the marble floor, our intrepid warhorse nearly lost its footing as it struggled valiantly to catch up with the fleet-footed Becker. It was the last great cavalry charge at the Department of Interior.

The hallway had superb resonance and the clippity-clop of shod-hoofs on marble along with the high-pitched whinnies are not sounds often heard or easily ignored in a stately government building. As Becker proudly led our bronco down the hall, doors to the right of them and doors to the left of them were opened by curious bureaucrats. It was easily the most exciting event at Interior since Teapot Dome.

Our gift-horse proceeded down the main hallway for almost its entire length, about a block and a half, took a left into a side hall, and then into my office where she would remain until her presentation. Unfortunately, the floor of my office was only partially covered with plastic. Consequently, indisputable evidence of equine presence appeared. The light beige rug was quickly decorated with hoof prints indelibly outlined in horse leakage.

Meanwhile, Miller and McElroy headed back to the basement with shovel and bucket in search of the one out of six elevators that was blithely carrying passengers on its appointed rounds, along with a highly questionable cargo. Things looked up when the first elevator they summoned was strangely aromatic. Miller entered and pushed the hold button, but too late! Just as he started to shovel, the elevator door opened and in walked a gentleman in a serious suit with a briefcase. He pushed the button for the first floor lobby and stepped deftly around the massive mound. Miller said howdy, but the “suit” looked straight ahead with no comment; as if a cowboy and horse manure were routine matters at Interior.

Eventually the climactic moment arrived. Reid was standing on a chair in the hallway outside his office surrounded by sixty or seventy well-wishers. In the midst of his farewell address, our farewell gift approached him from the rear, almost nudging him off his chair. Reid looked down astonished and relinquished his podium. At this juncture, we announced the horse was a gift for his children. Reid was speechless—a rarity in itself.

At the conclusion of the party, Megan and Randy rode their horse down the hall to the flag and totem pole decorated entrance to the office of the Secretary of Interior, where we took their picture. They named their horse “Solicitor,” after Kent Frizzell, and rode him around their farm until they left for college years later. All agreed the party was a grand success, including the new Solicitor, H. Gregory Austin, who was a willing witness, if not an accomplice in this endeavor.

When Reid departed, I became the acting Associate Solicitor and work at our office proceeded as usual, none of us giving a thought to possible repercussions from the most memorable farewell gathering in the history of the Department.

Two weeks later, however, I received a formal complaint from the Director of Administrative Services for the Department charging me with the federal crime of bringing an unauthorized animal into a government building. According to the complaint, this defiled the federal property with “loathsome equine dung,” for which the punishment was a \$50 fine, 30 days in jail or both.

Given the colorful language, I wasn’t sure whether the complaint was serious. Apparently it was. A few days later, Solicitor Austin called to tell me he had received a follow-up message from the Administrative Services Office demanding to know what measures he was taking to ensure this never happened again. “Larry,” he said, “I want you to promise me you’ll never bring another horse into the Department of the Interior.” I said, “Sir, you have my promise.” And I never have.

This historical narrative was compiled from sensitive, secret documents recently released along with the dubious input of Cowboy Miller, Fleet-Footed Becker, and Dangerous Don Wharton. McElroy the Inscrutable, then an eager conspirator, now trying to salvage a heretofore unblemished record, remains in denial; claims it was a seeing eye horse and therefore perfectly legal.

—Larry Aschenbrenner, Conspirator