IN DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SAN JUAN

STATE OF NEW MEXICO on the relation of S. E. REYNOLDS, State Engineer, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	No. 75-184 MOTION FOR LEAVE TO FILE BRIEF and BRIEF AS AMICUS CURIAE OF THE UTE MOUNTAIN TRIBE OF INDIANS (IN SUPPORT OF THE POSITION OF THE UNITED STATES).

INTEREST OF AMICUS CURIAE

The Ute Mountain Tribe of Indians is beneficial owner of Indian reservation lands within the San Juan River basin in New Mexico. Plaintiff seeks to adjudicate the Tribe's water rights in this proceeding. The Tribe agrees with the position of the United States as asserted by its pending motion to dismiss for failure to join indispensable parties, specifically that:

1. The Ute Mountain, Navajo, and Jicarilla Apache Indian Tribes have claims to water rights in the San Juan River basin in New Mexico.

2. These claims conflict with each other and with the proprietary and reclamation project claims of the United States.

3. There is insufficient water in the basin to satisfy all claims.

4. For these reasons the United States as trustee for the three tribes has conflicts of interest among the claims of the three tribes and with its own proprietary and reclamation claims. These conflicts preclude the United States from fully and adequately representing the tribes in this action, and make the tribes indispensable parties to this action.

5. The sovereign immunity of the tribes precludes their joinder as parties; therefore the tribes' claims must be dismissed from this proceeding.

MOTION FOR LEAVE TO FILE BRIEF

Based on the foregoing statement of interest, the Ute Mountain Tribe hereby respectfully moves this Court for leave to file the following brief in support of the motion by the United States to dismiss the Indian trust claims from this proceeding for failure to join indispensable parties. The Brief of the Ute Mountain Tribe responds to some of the arguments advanced by the plaintiff State of New Mexico and certain defendants in their opposition to the motion to dismiss. While the Ute Mountain Tribe supports the government's position, it believes that there are certain important arguments and authorities that are not mentioned in the government's memoranda but that should be brought to the Court's attention.

By the filing of this motion and by requesting leave to file its brief amicus curiae, the Ute Mountain Tribe is not submitting to the Court's jurisdiction. The Tribe's attorneys have not been authorized to enter a general appearance on the Tribe's behalf or in any manner whatsoever to waive the Tribe's sovereign immunity.

ARGUMENT

I

PLAINTIFF'S BRIEF CONFUSES INDISPENABLE PARTIES WITH SUBJECT MATTER JURISDICTION

Plaintiff's brief[1/] erroneously assumes that the United States' motion is predicated on the absence of subject matter jurisdiction. This is the basis for plaintiff's claim

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[1/] This refers to the memorandum by plaintiff and certain defendants in opposition to the motion by the United States. For convenience it will be referred to as plaintiff's brief.

that other cases and the law of this case holding that state courts have jurisdiction to adjudicate Indian water rights require that the motion to dismiss for failure to join indispensable parties be denied.

The motion to dismiss for failure to join indispensable parties assumes that the Court has subject matter jurisdiction and that the complaint states a claim upon which relief can be granted. If the Court does not have subject matter jurisdiction or cannot grant any relief, there is no occasion to reach the indispensable party issue. Bourdieu v. Pacific Western Oil Co., 299 U.S. 65 (1936); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, n.7 (1968). Indeed, one of the primary reasons for the 1966 amendments to Federal Rule 19 was to prevent courts and litigants from being "misled" by what the Advisory Committee on the Federal Rules referred to as "the jurisdiction fallacy." Quoted at 3A Moore's Federal Practice § 19.01 [5.-2] [1974 Ed.]. An absent party can never deprive the court of the power to adjudicate as between the parties already joined. Id.

Provident Tradesmens Bank, supra, is the leading case interpreting the 1966 amendment to Rule 19 of the Federal Rules of Civil Procedure. Rule 19 of the New Mexico Rules of Civil Procedure, adopted in its present form in 1969, is identical to the federal rule except that New Mexico Rule 19(a) omits the phrase "and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action." This exception in the federal rule is intended to deal with diversity jurisdiction, and its absence from the New Mexico Rule highlights the point made here--that an indispensable party motion is completely independent of subject matter jurisdiction.

The issue raised by an indispensable party motion is resolved by pragmatic considerations. Once it is determined

that the absent party cannot be joined, the question becomes, in essence, whether it is better to proceed to adjudicate with the existing parties or to dismiss the action. The Advisory Committee put it this way:

> The subdivision [19(b)] uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

Quoted in 3A Moore's Federal Practice § 19.01 [5.-4]; also quoted in Provident Tradesmens Bank & Trust Co. v. Patterson, supra, 390 U.S. 102, 119, n.15.

The position of the Ute Mountain Tribe is that the rights of the three Indian tribes to the waters of the San Juan River should not be adjudicated in this action, because the result could not and would not be binding. Hansberry v. Lee, 311 U.S. 32 (1940). It would be senseless, as well as tremendously wasteful of the parties' and the Court's limit- resources, to expend enormous amounts of time, energy and money in the adjudication of water rights that would not be binding on the Tribes.[2/] Plaintiff does not argue to the contrary. He does not contend that the adjudication of the Indian rights should proceed even if the results will not be binding on the three tribes. Instead, his memorandum is directed solely to attempting to find ways and means of insuring that the results will be binding on the Indians. In other words, everyone seems agreed that the Indian tribes should be "regarded as indispensable" if the adjudication of their water

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[2/] Indeed, the United States and the Pyramid Lake Indian Tribe are now engaged in water rights litigation in which it is contended that a water rights decree entered in 1944 (the case was originally brought in 1913) is not binding on the United States (in its fiduciary capacity) and the Tribe because, inter alia, the Indian interests were "represented" solely by Government attorneys who were also representing the conflicting interests of a reclamation project. See United States v. Nevada, 412 U.S. 534 (1973); United States v. Truckee Carson Irrigation District, 71 F.R.D. 10 (D.Nev. 1975). In the latter case, the separate trial on the res judicata and collateral estoppel defenses consumed 43 trial days.

rights cannot be accomplished in a manner that will be binding. See also, People of the State of California v. United States, 235 F.2d 647, 663-664 (9th Cir. 1956); and Hurley v. Abbott, 259 F.Supp. 669 (D.Ariz. 1966), concerning the need to join all affected water users in general stream adjudications in order for the resulting judgment to be both meaningful and binding.

II

PLAINTIFF'S RESPONSE DOES NOT DISPUTE THE EXISTENCE OF SERIOUS CONFLICTS BARRING REPRESENTATION BY THE UNITED STATES OF THE INDIAN TRIBES AS WELL AS THE FEDERAL INTERESTS IN THIS CASE.

The United States' Motion to Dismiss from this case any determination of the water rights of the three Indian tribes located in the New Mexico portion of San Juan River Basin rests on a fundamental recognition that the United States cannot simultaneously represent each of these Indian tribes--whose interests conflict among themselves--and also vigorously defend the water rights of the various programs of the federal government which rely on water from the San Juan River. Basic principles of procedural due process, spelled out perhaps most clearly in the Supreme Court's opinion in Hansberry v. Lee, 311 U.S. 32 (1940), require that each tribe be joined as a party in this litigation, if its own water rights are to be adjudicated. That joinder is impossible in the present circumstances, because neither Congress nor the tribes themselves have waived the tribe's sovereign immunity from suit. Until that problem is addressed specifically by Congress, or until the tribes themselves voluntarily seek to have their water rights in the San Juan determined, no court should proceed with the adjudication of their rights.

Plaintiff does not seriously question the existence of major conflicts between the government's various roles both as trustee for the Indian tribes and as developer of

major water-using projects for the primary benefit of the non-Indian population--such as the San Juan-Chama diversion. These conflicts were noted in detail in the United States' Memorandum in Support of its Motion to Dismiss, including the fact that such conflicts have already led to litigation over water rights between the United States and one of the tribes involved here: the Jicarilla Apaches. (Schutz v. Stamm, U.S.D.C. Colo., No. 74-M-318; Jicarilla Apache Tribe v. United States, U.S.D.C. N.M., No. 75-742 P.)

What plaintiff does overlook, however, is that there is substantial competition for the limited water supply of the San Juan River in New Mexico among the three tribes themselves, as well as between each tribe and the federal government. This situation has not been fabricated to create a courtroom argument; these conflicting interests are the result of harsh physical reality: the ultimate inability of the San Juan River to meet all the claims which can be pressed on its limited supply.

The importance of both kinds of conflicts to this case is made clear by the Truckee River litigation in Nevada and California, previously referred to. In the present case, plaintiff at one point suggests that the Government betray its trust to the Indians and subordinate the claims of amicus and the other tribes. Plaintiff's Memorandum, p. 14. However, the Truckee River litigation demonstrates the fallacy in this reasoning. In 1944, the Truckee River waters were allocated in a legal proceeding in which the Indian claims were subordinated by the Government to other claims, as plaintiff suggests be done here. The Pyramid Lake Indian Tribe was thus deprived of its major asset, the Pyramid Lake fishery. However, the 1944 decree is now under review in the Nevada Federal District Court--32 years after the decree. United States v. Truckee-Carson Irrigation District, 71 F.R.D. 10 (D.Nev. 1975).

The implications here are obvious. Unless the Indian interests are properly joined and represented--not only against the plaintiff, other defendants, and the United States as a proprietor, but against each other--then any decree of this Court that purports to adjudicate the Indian rights will be subject to later collateral attack, totally defeating the purpose of the McCarran Amendment.

While plaintiff's Memorandum in Response does not seriously dispute the existence of these conflicts, it does at one point suggest that the factual basis underlying these conflicts must be proven. (Memorandum, page 12.) The Court or the Special Master can, of course, order an evidentiary hearing on this question. But in light of the prima facie showing of such conflicts set forth in the United States' Memorandum and plaintiff's failure to come forward with any credible evidence, by affidavit or otherwise, to the contrary, it is doubtful that an evidentiary hearing would be of much use. It is not the Court's function, as many cases have made clear, to determine the extent to which conflicts would prejudice the government's handling of these various interests, for as Judge Weinfeld of the Federal District Court in New York has stated:

> Once a conflict of interest appears from the facts, and where the matters embraced in the pending action are substantially related to those in other actions, the law will not inquire into the force of the impact or of its potential damage. For the Court to do so would require it to speculate as to the course a litigation would take and would tend to undermine the confidence of clients that their counsel would be constant in their loyalty to their interests, a confidence essential to our adversary legal process . . . . Considerations of public policy, no less than the client's interests, require rigid enforcement of the rule against dual representation where one client is likely to be adversely affected by the lawyer's representation of another client and where it appears he cannot exercise independent judgment and vigorous advocacy on behalf of the one without injuring the interests of the other. A lawyer should not be permitted

> to put himself in a position where, even unconsciously he will be tempted to "soft pedal" his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another, at least in the absence of the express consent of both clients.

Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F.Supp. 93, 98-99 (S.D.N.Y. 1972). See also, Yablonski v. United Mine Workers, 448 F.2d 1175, 1179 (D.C. Cir. 1971); Mac Kenna v. Ellis, 280 F.2d 592, 600 (5th Cir. 1960); Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948). In Glasser v. United States, a criminal case, the Supreme Court determined that an attorney represented two defendants with conflicting interests and then stated:

> To determine the precise degree of prejudice sustained . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

315 U.S. at 75-76, citations omitted.

Plaintiff suggests that the United States does not really owe fiduciary obligations to the three Indian tribes or that even if it does government officials have the discretion to abandon them in favor of other governmental interests. Neither proposition will withstand even the slightest scrutiny. In Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), the Court stated:

> The Federal Government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian--a status accompanied by fiduciary obligations.

And in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), affirming 388 F.Supp. 649 (D.Me. 1975), it was directly held that the Nonintercourse Act, 25 U.S.C. § 177, imposes a fiduciary obligation on the government to protect the property and property rights of all Indian tribes, including those who have not been formally recognized by the federal government. A fortiori the government

has a fiduciary obligation, founded upon a law of the United States, to protect the property rights of the three federally recognized tribes whose water rights are now at issue.

III

PLAINTIFF'S PROPOSED SOLUTIONS TO THE UNITED STATES' CONFLICTS OF INTEREST WILL NOT WITHSTAND ANALYSIS.

Plaintiff asks the Court to imagine what the Congress that enacted the McCarran Amendment could have intended with regard to the situation that is presently before the Court (Memorandum, pp. 14-16). Amicus submits that there is not one iota of evidence in the legislative history of the McCarran Amendment that Congress ever inquired into what would happen when conflicts prevent the United States from representing Indian tribes in water adjudications. There certainly is no indication whatsoever that the usual rules regarding indispensable parties were not to apply when the United States is joined in a general stream adjudication under the McCarran Amendment. Nor did Congress make any effort to alter the standards of due process, res judicata or collateral estoppel or to waive the immunity of Indian tribes. Thus we have here a situation that was not foreseen when the McCarran Amendment was enacted. It is idle to speculate what Congress would have done if the situation had been brought to its attention insofar as any imagined resolution would require measures, such as waiver of the tribes' immunity, that are not included in the statutes.

Plaintiff is led to ask the wrong questions, because he misconceives the nature of the problem. In essence, his argument is that the case cannot be dismissed for non-joinder because Congress has conferred subject matter jurisdiction. But if that were so, no case within the subject matter jurisdiction of any court could ever be dismissed for failure to join indispensable parties. For example, if the federal

courts were required to figure out some way to litigate every case over which Congress had conferred subject matter jurisdiction, no case brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 or the federal question statute, 28 U.S.C. § 1331, would be subject to dismissal for non-joinder. The fact that such suits have been dismissed on numerous occasions[3/] is proof that plaintiff's analysis of the indispensable party issue is fatally flawed.

The largest portion of plaintiff's Memorandum concerns the so-called "issue of counsel." However, the provision of legal representation is not the issue here. If it were, then there would never be a need to get personal jurisdiction over a defendant, since all a court would have to do at the urging of an existing party is to appoint some lawyer to "represent" the absent parties' interests. The Oregon courts would merely have had to appoint an attorney to represent the missing Mr. Neff. Pennoyer v. Neff, 95 U.S. 714 (1887). The Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), could have appointed counsel for the unserved and absent defendants. That, of course, is not the law generally, nor should it be here. Attorneys do not represent views or interests. They are not a hovering omnipresence. They represent clients in an agency relationship. In order for a person to be bound by a judgment, he must have his day in court. Here the only way that this Court can be assured that the Indian interests are fully protected is to join the tribes themselves. That cannot be done here because of the tribes' sovereign immunity, so that the suit must be dismissed insofar as their water rights are concerned.

[3/] See, e.g., Shields v. Barrow 58 U.S. (17 How.) 130 (1854); McShan v. Sherill, 283 F.2d 462 (9th Cir. 1960); State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936); Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974); Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), cert. denied, ___ U.S. ___; and Carlson v. Tulalip Tribe, 510 F.2d 1337 (9th Cir. 1974). The latter three cases involved indispensable and immune Indian tribes, as here.

The choice between these two alternatives is the real issue before this Court, yet it is entirely ignored by plaintiff.

Plaintiff's "solution" to the counsel question is for the Government to provide "independent" legal counsel for the Indian claims, or in the alternative, to have the Court appoint such counsel. Although plaintiff has managed to avoid addressing the conflicts among the three tribes, presumably he would apply the same solution on a grander scale--seeking four sets of attorneys for United States' interests rather than two.

By focusing exclusively on attorneys, plaintiff begs the vital question: Who (i.e. what clients) are the attorneys representing? There are only two alternatives--the United States or the tribes. As for the United States, we do not know of any authority, and plaintiff does not cite to any, in which two or more attorneys were appointed to represent the conflicting interests of the same client, or in which such an arrangement was even sanctioned. As for the tribes, how can attorneys be appointed to represent amicus and the others, when we are not parties, we are immune from suit, and plaintiff does not question our immunity? Courts may have appointed counsel for parties under various circumstances, but not when they recognized no right to join them as parties to the litigation.[4/]

Plaintiff's proposal conveniently overlooks the agency nature of the attorney-client relationship. If the "independent" attorneys represent the United States (as opposed to the Tribes), who would instruct them on what claims to make, what position to take on major issues, whether to appeal, what facts should be admitted, whether to agree to a proposed settlement and so forth? These difficulties

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[4/] In the Aamodt case for example, 537 F.2d 1102 (10th Cir. 1976), the tribes themselves are independent parties to the litigation

are even more apparent should representation come from within the Government itself, be it from the newly created Indian Resources Section of the Justice Department, from the Department of the Interior or any other federal entity. The Government would still have effective control over the legal representation, since the attorneys would still represent the Government in its trust capacity. That is the whole problem with the way the case is currently structured. If their interests are to be affected, the tribes have a right to be heard on their claims and their arguments. If this is not possible, then Due Process requires that those interests be dismissed. The problem here simply is not a problem of attorneys but with who will control the attorneys. In order to be adequately represented, the tribes must be parties to this lawsuit.

It is interesting to note that in situations of this kind, i.e. when there are conflicting claims to property between Indians or Indian tribes, Congress has uniformly enacted special legislation to provide for their resolution.

There has been a longstanding dispute between the Hopi and Navajo Tribes regarding the title to large amounts of land originally included in the Hopi Reservation but eventually settled almost entirely by Navajos. In 1958, Congress passed a law authorizing the dispute to be adjudicated by the United States District Court for the District of Arizona with a right of appeal directly to the Supreme Court. Public Law 85-547, Act of July 22, 1958, 72 Stat. 403. See Healing v. Jones, 210 F.Supp. 125 (D.Ariz. 1962), aff'd, 373 U.S. 758.

A second dispute between the Navajo and Hopi Tribes concerns lands within the boundaries of the Navajo Reservation claimed by the Hopis. In 1974, Congress passed a second statute, authorizing adjudication of this dispute by the

United States District Court for the District of Arizona. Section 8 of the Act of December 22, 1974, P.L. 93-531, 88 Stat. 1712. Litigation is now pending in this matter entitled Sekaquaptewa v. MacDonald, U.S.D.C. Ariz.

The Choctaw, Chickasaw and Cherokee Indian Nations of Oklahoma have conflicting claims to the streambed of the Arkansas River. Following the same pattern, Congress enacted the Act of December 20, 1973, P.L. 93-195, 87 Stat. 769, which provided for the dispute to be resolved by a three-judge court sitting in the United States District Court for the Eastern District of Oklahoma with a direct appeal to the Supreme Court. See Choctaw Nation v. Cherokee Nation, 393 F.Supp. 224 (E.D. Okla. 1975).

A dispute between Indian allottees and the Northern Cheyenne Tribe arose in this way. By the Act of June 3, 1926, 44 Stat. 690, Congress arguably gave Northern Cheyenne allottees a vested interest in the mineral deposits underlying their lands to take effect 50 years after the approval of the act, or in 1976. In 1968, Congress determined that it would be fairer and better for the mineral deposits to be owned and controlled by the Tribe. However, Congress did not want to have to pay the allottees if a transfer of the mineral deposits to the Tribe involved a Fifth Amendment taking. So Congress enacted a law that terminated the prior grant to the allottees and reserved the mineral rights in perpetuity for the benefit of the Tribe. But the Act also provided for the nature of the allottees' interest under the 1926 Act to be adjudicated in a suit brought by the Tribe in the United States District Court for the District of Montana. If the courts determined that the allottees were vested with a Fifth Amendment protected property right, the grant to the Tribe would be cancelled and the mineral deposits restored to the allottees. Act of July 24, 1968, 82 Stat. 424. See Northern Cheyenne Tribe v. Hollowbreast, ___ U.S. ___,

96 S.Ct. 1793, 48 L.Ed.2d 274 (1976).

By the Act of February 14, 1968, 82 Stat. 15, Congress authorized the Navajo Tribe to sue the Ute Mountain Tribe, or vice versa, in the United States District Court for New Mexico to resolve a boundary dispute. The case was brought and litigated in an unreported decision.

In McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), the Supreme Court considered the validity of state income tax laws as applied to reservation Indians. During the course of its decision, the Court referred to several narrow statutes "authorizing states to assert tax jurisdiction over reservations in special situations." The Court reasoned that these narrow statutes would be "explicable only if Congress assumed that the states lacked the power to impose the taxes without special authorization."

Similarly, here the five special jurisdictional acts that Congress enacted to resolve disputes between Indians and Indian tribes are explicable only if Congress assumed that the disputes could not be resolved in the courts in the absence of the tribes as parties. These statutes demonstrate that disputes between Indian tribes can be adjudicated only when the tribes themselves are parties and that a congressional waiver of immunity is required in order to subject unwilling tribes to the court's jurisdiction.

There is absolutely no authority to support the proposition that somehow this Court could order the United States to provide separate counsel for each Indian tribe for purposes of this case.

Plaintiff cites 25 U.S.C. §§ 81 and 175 in his effort to find adequate representation for the Indian interests. There is no question that Indian tribes can be adequately represented by the Government under Section 175 when the Government elects to do so and there is no conflict of

interest. Similarly, Indian tribes are empowered under 25 U.S.C. §§ 81 and/or 476 to retain attorneys to represent their interests. But neither statute affords a solution to the problem presented in this case.

25 U.S.C. §§ 81 and 476 authorize Indians to retain attorneys. The initiative, the power, reside with the Indians, not with federal government, not with the state, not with any party and not with the court.[5/] Even if the federal government deemed it to be in the Indians' best interests to retain attorneys to represent them in this action, the Government could not compel the tribes to obtain private counsel any more than the Government could lease the Indians' land. Cf., Poafpybitty v. Skelly Oil Company, 390 U.S. 365, 372 (1968); Mott v. United States, 283 U.S. 747, 751 (1931).

25 U.S.C. § 175 authorizes the Government to furnish reservation Indians with legal representation. It does not compel the Government to do so. It does not confer any benefits on anyone else.[6/]

On numerous occasions, Indians and Indian tribes have attempted to require the Government to furnish legal representation or some equivalent pursuant to 25 U.S.C. § 175. In Rincon Band of Mission Indians v. Escondido Mutual Water Company, 459 F.2d 1082 (9th Cir. 1972), the court held that the Government's conflict of interest precluded it from providing legal representation to the Indians.[7/] United States

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[5/] Plaintiff never explains how the court can appoint counsel for a non-party under 25 U.S.C. § 81 or any other statute or its inherent power, yet plaintiff's entire brief is predicated on the assumption that the tribes are not parties. See p. 8 of his memorandum at note 1.

[6/] For this reason, the other parties to this litigation lack standing to enforce any obligations that the Government might have under section 175. Gifford-Hill & Company v. Federal Trade Commission, 523 F.2d 730 (D.C. Cir. 1975); Fallbrook Public Utility Dist. v. U.S. Dist. Ct., 202 F.2d 942 (9th Cir. 1953).

[7/] Plaintiff's preoccupation with lawyers rather than the clients they represent leads it to suggest that the conflict can be resolved if the Indian claims are handled by attorneys in a separate division or section of the Justice Department. As we point out supra, that "solution" will not work here

(continued next page)

v. Gila River Pima-Maricopa Indian Community, 392 F.2d 53 (9th Cir. 1968), held that § 175 did not provide a basis for the Government to pay for the Indians' attorneys when the Government was representing the opposite side in a lawsuit. In Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F. Supp. 669 (D.D.C. 1973), reversed, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962,[8] the district court's award of attorneys fees against the federal government in favor of the Pyramid Lake Tribe, based in part on 25 U.S.C. § 175, was reversed owing to the absence of statutory authority for such an award.

In these cases the Indian tribes unsuccessfully sought either legal representation by the federal government or funds from the Government that would enable the tribes to retain their own counsel. If the Indian tribes, who are the direct beneficiaries of the statute, could not obtain these advantages from 25 U.S.C. § 175, it follows a fortiori that the State Engineers cannot invoke 25 U.S. 175 for the purpose of requiring the Government to furnish legal representation to the Tribes.[9]

(Footnote 7 continued)
because there are overwhelming conflicts between the Indian tribes themselves. Aside from that, the Rincon case also demonstrates that it is the United States that has the conflict and not any particular attorney or set of attorneys. In Rincon, the Government's conflict arose out of a claim brought by the Indians against the United States that was pending before the Indian Claims Commission. That claim was being defended by the Indian Claims Section of the Department of Justice. The Indians wanted the Government to bring a claim against private parties which would have been handled by an entirely different set of Government attorneys; that "distinction" made no difference to the Ninth Circuit Court of Appeals.

[8] See, also, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) particularly 421 U.S. at 265-268 and n.42.

[9] As we point out supra, the Government's conflict of interest precludes it from representing the Indians' interests in any event.

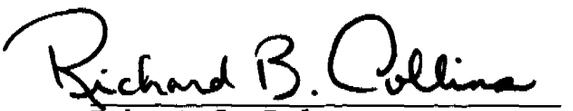
CONCLUSION

For the reasons set out in the two memoranda filed by the United States and in the foregoing brief as amicus curiae, the Ute Mountain Tribe urges the Special Master to grant the United States' motion to dismiss for failure to join indispensable parties. The various alternative proposals by plaintiff would not result in a binding adjudication, consistent with due process of law, of the rights of the three tribes.

Dated:

November 13, 1976

Respectfully submitted,



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