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HW 9/22

THE WHITE HOUSE
WASHINGTON

Creighton

no agreement
re the law

Final brief agreed to





**NATIONAL
CONGRESS
OF
AMERICAN
INDIANS**

SUITE 700, 1430 K STREET, N.W., WASHINGTON, D.C. 20005 (202) 347-9520

*Assumed in good faith as NCAI
Convention 10/19. Split Brief
procedure will continue.*

August 30, 1976

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Rachel Nabahe
Shoshone/Paiute

SOUTHEAST AREA

Jonathan Ed Taylor
Cherokee

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D.C.

Attention: Bradley H. Patterson, Jr.

Dear Mr. President,

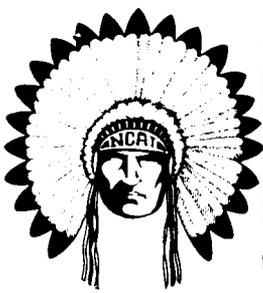
On behalf of the Indian tribal and individual membership of the National Congress of American Indians, we wish to express our deep concern over recent covert negotiations involving the Agreement of February 28, 1972, regarding representation of Indian natural resource trust interests pending the creation of an Indian Trust Counsel Authority.

We were astonished to learn of the Department of Justice request that the White House relieve it of the 1972 Agreement, under which the Department of Justice is required to state separately the views of the Department of Interior, when requested to do so by that Department, in cases where the Justice Department intends to take a position in conflict with the Interior Department's view of the rights of Indians.

We simply cannot understand how serious consideration could be given to this request, particularly in light of the Administration's announced policy of continued support of the proposal for the establishment of an Indian Trust Counsel. The basic idea of the Indian Trust Counsel is to provide a means whereby the United States Government's responsibility to Indians, in its role as trustee, can be discharged without regard to the Government's obligation to advocate the general public interest. This necessarily presupposes a procedure whereby the United States--in its different functions--will take conflicting positions in court.

Under the 1972 Agreement the Department of Interior has the right to have its views included in a split brief. We are not necessarily committed to the continuation of the split brief procedure, as such. It may be preferable for the Department of Interior to have an option to present a separate brief when it wishes to communicate the views of the United States, in its role as trustee, to a court in which litigation is pending.





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Correspondence / President Ford / 1972 Agreement
8/30/76 page 2

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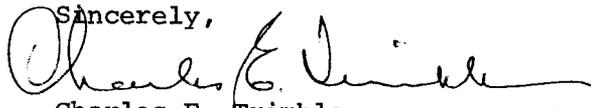
Rachel Nabahe
Shoshone/Paiute

SOUTHEAST AREA

Jonathan Ed Taylor
Cherokee

We hope that the reports of the level of consideration of the Justice Department's request are exaggerated and that changes in the direction suggested by the Department are not anticipated. It is of utmost importance that the 1972 procedures, carefully developed to discharge (at a minimal level) the Government's trust responsibility, will not be abandoned cavalierly. If new procedures are being considered, we believe that the Indian Tribes and Indian legal community should be accorded the opportunity to review and comment on the procedures and amendments before drastic change is made.

Finally, we hope to find agreement in the White House that the time has come to formalize and publicize the procedures set out in 1972, along with any amendments. We respectfully suggest that serious consideration be given to the promulgation of an Executive Order to this effect. The procedures formalized in this fashion may serve to remove future temptation for the Department of Justice to seek a change, in secret, in announced policies for the protection of Indian rights.

Sincerely,

Charles E. Trimble
Executive Director



CET/ssh

- cc: The Honorable Edward H. Levi, Attorney General
The Honorable Thomas S. Kleppe, Secretary of the Interior
The Honorable Philip W. Buchen, Counsel to the President
The Honorable Peter R. Taft, Assistant Attorney General, Lands
The Honorable H. Gregory Austin, Solicitor, Interior Department
The Honorable James O. Eastland, Chairman, Judiciary Committee
The Honorable Henry M. Jackson, Chairman, Interior Committee
The Honorable James Abourezk, Chairman, Indian Affairs, Senate
The Honorable Peter W. Rodino, Jr., Chairman, House Judiciary
The Honorable James A. Haley, Chairman, House Interior
The Honorable Lloyd Meeds, Chairman, Indian Affairs, House
Members, National Indian Litigation Committee
The Honorable Wendell Chino, President, National Tribal
Chairmen's Association

Acknowledged & discussed by Mel Tonasket 9/3/76



**NATIONAL
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SUITE 700 1430 K STREET, N.W., WASHINGTON, D.C. 20005 (202) 347 9520

SEP 1 10 58 AM '76

August 30, 1976

DEPT. OF JUSTICE
MAIL ROOM
The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D.C.

EXECUTIVE COMMITTEE

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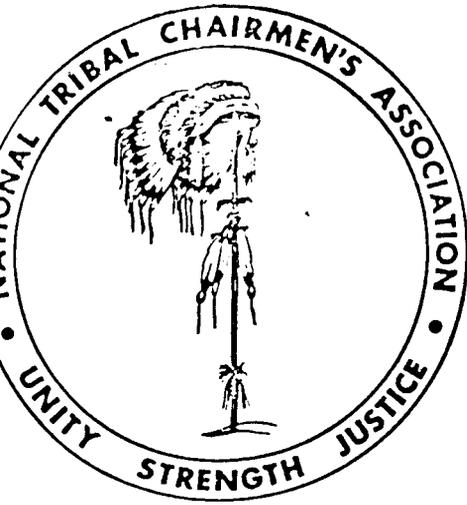
Sincerely,


Charles E. Trimble
Executive Director

CET/ssh

- cc: The Honorable Edward H. Levi, Attorney General
- The Honorable Thomas S. Kleppe, Secretary of the Interior
- The Honorable Philip W. Buchen, Counsel to the President
- ✓ The Honorable Peter R. Taft, Assistant Attorney General, Lands
- The Honorable H. Gregory Austin, Solicitor, Interior Department
- The Honorable James O. Eastland, Chairman, Judiciary Committee
- The Honorable Henry M. Jackson, Chairman, Interior Committee
- The Honorable James Abourezk, Chairman, Indian Affairs, Senate
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- The Honorable James A. Haley, Chairman, House Interior
- The Honorable Lloyd Meeds, Chairman, Indian Affairs, House
- Members, National Indian Litigation Committee
- The Honorable Wendell Chino, President, National Tribal
- Chairmen's Association

Mr. Taft



NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Suite 207 1701 Pennsylvania Avenue, N.W. Washington, D.C. 20006
202 - 343-9484

September 7, 1976

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D.C.

Attention: Bradley H. Patterson, Jr.

Dear Mr. President:

On behalf of the National Tribal Chairmen's Association, representative of the chairmen of one hundred and ninety federally recognized Indian tribes, I should like to express my concern regarding recent reports that the Department of Justice is seeking to be relieved of its February 28, 1972, agreement, the purpose of which is to provide interim relief, prior to the establishment of the Trust Counsel Authority, in the protection in litigation of Indian natural resource trust interests, when there exists within the Department of Justice a position which conflicts with the Indian rights to such trust interests.

NTCA urges protection of trust resources through the elimination of conflicts of interests by posturing the trustee to advocate fully, vigorously and without reservation the rights and interests of the tribes against threats from any source, by removing any constraints upon those federal officials charged with administering the trust, and by serving as an advocate for the tribes and as an adversary to those interests which conflict with and threaten tribal trust resources. Recently, tribal chairmen in panel/workshop sessions at NTCA's Fourth Annual Convention identified the filing, under the 1972 agreement, of separate positions of the Interior Department in Justice Department briefs in litigation in which Indian trust resources are threatened or challenged, as a significant accomplishment in the recognition by the executive branch of its responsibility to free itself from constraints and to serve as an advocate for the tribes.

The recognition of the conflict of interest by President Nixon in his 1970 Message to Congress on Indian Affairs and the commitment to alleviation of that conflict is the avowed policy of the Administration today. Though certainly not the final solution to the conflict of interest, NTCA views the filing of split briefs pending the establishment of the Trust Counsel Authority or something similar in concept as absolutely necessary. In a September 2, 1976, letter to the Secretary of the Department of the Interior, NTCA stated that we would like to discuss the implementation of the trust respon-

Handwritten initials/signature

Honorable Gerald Ford
September 6, 1976
Page two

ibility to protect tribal natural resources and to seek ways that working together we can resolve some of the difficulties which hinder that implementation, for example, the conflict of interest. We have asked for a meeting with the Secretary to discuss possible ways of working together. We have provided your office and the Secretary's office with copies of NTCA's panel/workshop papers which expand upon possible means, even prior to the establishment of the Trust Counsel Authority, to alleviate the conflict, one of which is, of course, the filing of split briefs. We enlist your continued support for the 1972 agreement and your support for the other means explored in the panel/workshop papers. These papers constitute the broad-based recommendations of tribal chairmen across this country who attended the Fourth Annual Convention in February, 1976, and who worked together for the resolution of problems hindering implementation of the trust responsibility to protect Indian natural resources and many other problems.

We do urge that prior to any steps being taken or prior to serious consideration of revocation of the 1972 agreement, Indian tribes be fully advised and given the opportunity to comment. Full disclosure is the first duty of a trustee in dealing with conflicts in the interests of beneficiaries in a fiduciary relationship. In addition, the spirit and principle of the Indian Self-Determination and Education Assistance Act of 1975, and the existing Administrative support of that spirit and principle, requires consultation with Indian tribes affected by the possible revocation of the split brief agreement.

Sincerely Yours,

151

William Youpee
Executive Director

WY/dd

CC: The Honorable Edward H. Levi, Attorney General
The Honorable Thomas S. Kleppe, Secretary of the Interior
The Honorable Philip W. Buchen, Counsel to the President
The Honorable H. Gregory Austin, Solicitor, Department of the Interior
The Honorable Peter R. Taft, Assistant Attorney General, Lands Division

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO:	NAME	DIVISION	BUILDING	ROOM
1.	Brad Patterson			
2.				
3.				
4.				

- | | | |
|-------------------------------------------------------------------|-------------------------------------------|-------------------------------------------|
| <input type="checkbox"/> SIGNATURE | <input type="checkbox"/> COMMENT | <input type="checkbox"/> PER CONVERSATION |
| <input type="checkbox"/> APPROVAL | <input type="checkbox"/> NECESSARY ACTION | <input type="checkbox"/> AS REQUESTED |
| <input type="checkbox"/> SEE ME | <input type="checkbox"/> NOTE AND RETURN | <input type="checkbox"/> NOTE AND FILE |
| <input type="checkbox"/> RECOMMENDATION | <input type="checkbox"/> CALL ME | <input type="checkbox"/> YOUR INFORMATION |
| <input type="checkbox"/> ANSWER OR ACKNOWLEDGE ON OR BEFORE _____ | | |
| <input type="checkbox"/> PREPARE REPLY FOR THE SIGNATURE OF _____ | | |

REMARKS



FROM:	NAME	BUILDING & ROOM	EXT.	DATE
ASSISTANT ATTORNEY GENERAL	Land and Natural Resources	Div.		
	Peter R. Taft			9/10

UNITED STATES GOVERNMENT

Memorandum

TO : Scott P. Crampton, AAG
Tax Division

FROM : Peter R. Taft, AAG
Land and Natural Resources Division
PRC

SUBJECT: Split Briefs

DATE: September 10, 1976

Attached is a letter from the National Tribal Chairman's Association and another one from the National Congress of American Indians which give you some idea of the trouble stirred up by the Deputy's letter to Buchen seeking to abandon split briefs.

Whereas the predicament may appear anomalous to you, it is an ordinary fact of life for our Division. The problem is that the United States appears in two separate capacities, one a governmental capacity, and the other as trustee for Indian tribes. These two capacities are often in conflict. However, the mere assertion of a major governmental interest or more persuasive legal argument on behalf of the governmental interest has never been an excuse to abandon the trust responsibility.

Usually if the federal agency is sensitive to the Indian problem, it is possible to either avoid or minimize the taking of conflicting positions in court. However where the conflict is inevitable, some means must be found to satisfy the trustee's responsibility. Generally, we have been able to devise such procedures depending upon the particular facts of each case without totally jeopardizing the legal position of the United States in its sovereign capacity. I would suggest that when the problem arises in the future in the Tax field, that either Myles Flint, our Indian Resources Section Chief, or Ed Clark, our Appellate Section Chief, could give helpful advice. However, it is equally important in our experience that the involved federal agency, such as the IRS, accept the fact that they have a serious problem on their hands when major Indian interests are involved, and avoid attempting to steamroller their viewpoint.

cc: Harold R. Tyler, Jr.
Deputy Attorney General



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

ROUTING AND TRANSMITTAL SLIP		ACTION
1 TO (Name, office symbol or location) Brad Patterson	INITIALS	CIRCULATE
	DATE	COORDINATION
2	INITIALS	FILE
	DATE	INFORMATION
3	INITIALS	NOTE AND RETURN
	DATE	PER CON - VERSATION
4	INITIALS	SEE ME
	DATE	SIGNATURE
REMARKS		
<p>For your review and retention.</p>		
<p>Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.</p>		
FROM (Name, office symbol or location) Reid Chambers <i>Bobbie</i>	DATE 9/3/76	PHONE 343-9401

Honorable Harold R. Tyler, Jr.
Deputy Attorney General
Department of Justice
Washington, D.C. 20530

Honorable H. Gregory Austin
Solicitor
Department of the Interior
Washington, D.C. 20240

Gentlemen:

On July 26, Judge Tyler wrote this office concerning the case of Amy Critzer v. United States, now pending before the Court of Claims. This case is the sequel to a criminal prosecution of Ms. Critzer for evasion of federal income taxes. After Ms. Critzer was convicted in District Court, she appealed her conviction to the Court of Appeals for the Fourth Circuit. At that time, the then-Solicitor of the Interior Department requested the Department of Justice to file separately Interior's views that the income received by Ms. Critzer was not taxable because it was derived from her assignment of Indian trust lands on the Eastern Cherokee Reservation in North Carolina.



The Solicitor's request was made pursuant to an agreement contained in a February 28, 1972, letter from the Attorney General to the Assistant to the President for Domestic Affairs. The February, 1972, letter agreed that in litigation handled by the several divisions of the Department of Justice where "Indian natural resource trust interests may be challenged or threatened" by a position taken by Justice, the Department of Justice would include in its brief the separate views of the Interior Department with respect to those trust interests.

On March 25, 1974, Mr. Leonard Garment stated in a letter concerning the Critzer case to Assistant Attorney General Scott Crampton that this arrangement still holds and the case "directly affected Indian natural resource trust interests." The Department of Justice thereafter included Interior's views in its brief before the Court of Appeals, and that court reversed Ms. Critzer's conviction. The present Court of Claims litigation concerns her right to a refund.



Judge Tyler's July 26 letter urged that the Department of Justice should no longer be bound by this agreement. On August 6, Solicitor Austin by letter to me stated the Interior Department's strong opposition to Judge Tyler's proposal. After a meeting with my staff, I understand that the Interior and Justice Departments have agreed to work out a compromise joint position to be taken in the Critzer case. On the broader question of the bifurcated brief procedure, I believe it should be continued in this special area where a position taken by the Department of Justice on behalf of the United States challenges or threatens the rights or reasonable claims of Indians to natural resources held in trust for them by the United States. The reasons for this procedure is that such Indian rights are private property rights; the United States holds them in trust and is not their outright owner. This trust responsibility places the United States in a conflict-of-interest. Given this conflict, I believe that its separate views as trustee ought to be presented to the courts where they differ from the interests of the United States as determined by the Department of Justice.



I would emphasize, however, that this special bifurcated brief procedure ought to be limited to cases involving Indian rights or reasonable claims to natural resources for which the United States has a trust responsibility. Tax cases, for example, may or may not (in particular instances) involve such rights, and this must be determined on a case by case basis. Where an Assistant Attorney General determines that a specific case does not involve such rights, and the Solicitor disagrees with that determination, I believe it appropriate for this office to review that dispute. Otherwise, I do not believe that this office should become involved in the substantive legal issues of these cases.

Sincerely,

Philip W. Buchen
Council to the President



UNITED STATES GOVERNMENT

Memorandum

TO : Bobbie Greene Kilberg
Associate Counsel

FROM : Mary E. Wagner ^{NEW}
Special Assistant to the
Deputy Attorney General

SUBJECT: Split Briefs

DATE: September 20, 1976

Attached is a suggested paragraph for use in responding to correspondence you have received on the above issue. The Department of Justice welcomed the opportunity to review the split brief procedure with you. Since our meeting, the Department's Tax Division has met with appropriate representatives of the Department of Interior to work out the particular problems raised by the Critzer litigation, which prompted the Deputy Attorney General's request for review. At this time, we seek no further review of the split brief policy.

Attachment

cc: Bradley H. Patterson, Jr. ✓



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

September 20, 1976

A meeting was held recently in our office to discuss the Department of Justice request for a review of the policy embodied in the 1972 Agreement. Subsequent to that meeting, representatives of the Departments of Justice and Interior met to see if they could reach a mutually acceptable procedure by which Interior's Indian trust responsibilities can be presented in court. As a result of those meetings, the Department of Justice has informed me that at present it does not desire any further review of the 1972 Agreement, which remains in effect.

THE WHITE HOUSE

WASHINGTON

October 27, 1976

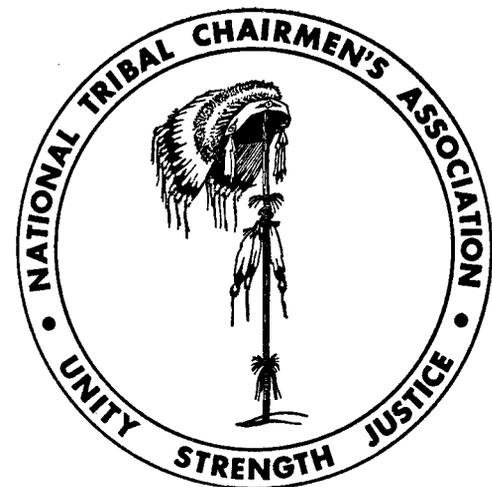
MEMORANDUM FOR: BRAD PATTERSON
FROM: BOBBIE GREENE KILBERG

Bobbie

I am returning the originals of the NCAI and NTCA letters to the President on the split brief issue. I would assume that no further response is needed to the NCAI letter since you attended their convention and addressed the issue there. As to NTCA, I would suggest that you call Bill Youpee and give him our position orally rather than in writing.

Attachments

U.S. GOVERNMENT PRINTING OFFICE



NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Suite 207 1701 Pennsylvania Avenue, N.W. Washington, D.C. 20006
202 - 343-9484

September 7, 1976

The Honorable Gerald R. Ford
President of the United States
The White House
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Attention: Bradley H. Patterson, Jr.

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*Acknowledged
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person 9/7/76*