George Kielman
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**DECISION** THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

006144

FILE: B-114868 DATE: December 6, 1976

MATTER OF: Expenditures for legal expenses of Indian Tribes

DIGEST: 1. Snyder Act, 25 U.S.C. § 13, provides discretionary authority for Secretary of the Interior to use appropriated funds to pay for attorneys fees and related expenses incurred by Indian tribes in administrative proceedings or judicial litigation, for purpose of improving and protecting resources under jurisdiction of Bureau of Indian Affairs. Attorneys fees and expenses incurred in judicial litigation may only be paid where representation by Department of Justice is refused or otherwise unavailable, including situation where separate representation is mandated by Court.

2. Attorneys fees and related litigation expenses incurred by Northern Pueblo Tributary Water Rights Association, prior to decision by Court of Appeals that private attorneys may intervene in suit in which U.S. District Court denied intervention may be paid from appropriations of Department of the Interior because Department of Justice conceded before Court of Appeals that its representation would constitute conflict of interest, and allowed private attorneys to cooperate in preparation and presentation of Northern Pueblo position despite failure of Court to permit intervention.

3. Secretary of Interior is not obligated to pay for attorneys fees and related expenses incurred by Indian tribes, but may within his broad discretion to make expenditures he deems necessary for protection of Indian resources, make such payments on basis of factors he concludes should be considered, including relative impecuniousness of tribe. Determinations, however, should be made on uniform basis. B-114868, May 30, 1975, modified.



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This decision to the Secretary of the Interior responds to two separate submissions from the Solicitor, Department of the Interior, with enclosures, concerning the payment of attorneys fees and related expenses incurred or potentially to be incurred by the Northern Pueblo Tributary Water Rights Association, the Northern Cheyenne Tribe, and the San Pasqual Band, in separate litigation and administrative proceedings.

The Solicitor requests, in effect, that we reconsider the position taken in Expenditures for the legal expenses of Indian tribes, B-114868, May 30, 1975, in which we stated:

> "* * * the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to the limitations set forth below. In cases where the opposing party is not the United States, 25 U.S.C. § 175 (providing for representation by United States attorneys) would bar the use of appropriated funds, except in cases in which the Attorney General refused assistance or in which his assistance was not otherwise available."*

The Solicitor has apparently taken the position that the Secretary has discretion to pay Indian tribes' attorneys fees and related expenses, and to institute litigation prior to consultation with the Attorney General and irrespective of the Attorney General's determination as to whether or not to represent the Indians involved, if he determines that such representation is necessary for the protection of Indian resources, and essential to the "* * * fulfillment of the trust obligations of the United States to protect its Indian wards and their property."

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*25 U.S.C. § 175 (1970) provides as follows:

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

This duty has been construed as a discretionary one, and the Attorney General has been held to have properly refused to represent tribes in cases presenting a conflict of interest, both where the United States was a party and where it was not. See B-114868, May 30, 1975, and court cases cited therein.

We have also been requested to clarify or reconsider our position in B-114868, supra, in which we stated that the Secretary of the Interior should make a finding, before expending funds for attorneys fees for Indian tribes, that they do not have sufficient funds to otherwise obtain such services.

NORTHERN PUEBLO TRIBUTARY WATER RIGHTS ASSOCIATION

In B-114868, supra, we indicated, with regard to the payment of attorneys fees and related expenses incurred by the Northern Pueblo Tributary Water Rights Association (Northern Pueblo) as follows:

> "* * * we question the availability of appropriated funds to retain private attorneys to, in effect, review the Justice Department's preparation of the case involving the Northern Pueblo Tributary Water Rights Association."

Since the Justice Department had agreed to represent the Northern Pueblo, we reasoned that the Department of the Interior could not also expend funds to review that case.

It now appears, from the material provided in the Solicitor's current submission, that the contract providing for the payment of attorneys fees and related litigation expenses in the subject case was to pay for attorneys to participate as intervenors in litigation entitled State of New Mexico v. Aamodt (Nos. 75-1069 and 75-1106), filed in the United States District Court for the District of New Mexico, adjudicating the rights of certain Pueblos to the use of water of the Nambe-Pojoaque River System.

The subject litigation was actually initiated in 1966. However, it was not until 1973 that the four Pueblos involved in the Aamodt case--Pojoaque, Nambe, Tesuque, and San Ildefonso--formed the Northern Pueblo Tributary Water Rights Association, because they believed that the court was planning to decide the case against them, even before commencement of the trial (then scheduled several months in the future). Up to this point, the Department of Justice had been representing the Pueblos, and the question of conflict of interest had apparently not been raised. It was at this time that the attorney contract was entered into, and the attorneys, unfamiliar with the work done on the case up to that time, began reviewing the theory, evidence, and trial preparation of the Department of Justice.

The District Court, on its own motion, struck a tendered complaint in intervention, proffered by attorneys for the Northern Pueblo, holding that private counsel "* * * may not separately and independently represent the Pueblos which are already represented by government counsel." Although the Department of Justice was required to remain as nominal counsel for all four Pueblos involved because of the District Court's decision to deny intervention, it conceded before the Court of Appeals that a conflict of interest existed, and that the Pueblos should have been afforded separate representation. Moreover, the Department permitted private counsel to assume a predominate role in the preparation and espousal of the position of the Pueblos.

The Department of Justice had also intervened in the adjudication as the necessary representative of the United States, as owner of the Santa Fe National Forest, the water rights of which were also to be adjudicated in the subject litigation. The Commissioner of Indian Affairs apparently continued to pay for private counsel for the Pueblos, having determined that, under the circumstances, this was the only practical means of fully protecting their rights in the case.

Attorneys for the Northern Pueblo subsequently appealed the denial of intervention. In State of New Mexico v. Aamodt, 437 F.2d 1102 (1976), the Court of Appeals for the Tenth Circuit, held that the denial of the request for intervention was erroneous. The court reasoned, supra at 1106, as follows:

> "* * * The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible."

The Court went on to indicate, supra at 1107, as follows:

> "* * * The United States in the case at bar recognizes and supports the right of the Pueblos to private representation."

In light of the above and the broad authority granted in 25 U.S.C. § 2 to the Commissioner of Indian Affairs to provide for and manage all matters arising out of Indian relations, the Court held that the Commissioner could properly decide that separate representation for the

Pueblos should be provided, and that such a determination would be wholly compatible with the fiduciary obligations of the United States to the Indians. State v. Aamodt, supra at 1107.

As noted above, appropriated funds may be used to pay for attorneys fees and related expenses where representation by the Attorney General is refused or is otherwise unavailable. Accordingly, once the Court of Appeals determined that the failure of the District Court to permit intervention was erroneous, and that the Pueblos' private attorneys should henceforth control the litigation, rather than the Department of Justice, funds appropriated to the Department of the Interior would be available to pay attorneys fees thereafter incurred.

Moreover, in light of the decision by the Court of Appeals that the denial of intervention was erroneous, as well as the determinations by the Attorney General that a conflict of interest existed and that separate representation should have been accorded to the Northern Pueblo, we conclude that appropriated funds may be used by the Department of the Interior to pay for attorneys fees and related expenses incurred by the Northern Pueblo prior to that decision.

NORTHERN CHEYENNE TRIBE

The Solicitor also requests our concurrence with the view that under guidelines set forth in B-114868, supra, appropriated funds may be used to pay attorneys fees and related expenses incurred by the Northern Cheyenne Tribe in connection with a continuing administrative proceeding and possible litigation against various energy companies concerning the validity of certain coal exploration permits and leases on the Northern Cheyenne Reservation.

As noted in our previous decision, the Northern Cheyenne Tribe had petitioned the Department of the Interior to withdraw departmental approval of leases and permits previously granted for the purpose of allowing the stripmining of coal on the Northern Cheyenne Reservation. The Secretary of the Interior, on June 4, 1974, granted the petition in part, denied it in part, referred some questions to an administrative hearing, and held others in abeyance. Moreover, the Secretary stated in that decision that he would support the tribe in a lawsuit against the coal companies or a request that the Justice Department bring a suit in the name of the Tribe to test the validity of the permits and leases under 25 U.S.C. § 175 (1970). In response to the Solicitor's inquiry concerning the Secretary's authority to pay such expenses, we issued our decision of May 30, 1975, B-114868, supra.

In a supplemental decision of September 8, 1975, the then Acting Secretary of the Interior indicated that the GAO decision did not provide clear authority to fund or reimburse the Northern Cheyenne Tribe for the cost of an administrative proceeding or judicial litigation in the instant situation. Accordingly, he directed that specific authorizing legislation and appropriations be sought for the funding of Indian tribal legal expenses in this and similar circumstances.

A subsequent decision was issued November 10, 1975, by Secretary Kleppe, in which he determined that despite the lack of clarity which existed concerning the Department's broad authority to pay tribal attorneys fees, he would pay such fees for the Northern Cheyenne Tribe on condition that he receive an opinion from us that such payment is lawful.

With regard to the payment of attorneys fees in possible litigation, we have noted above that 25 U.S.C. § 175 provides for representation of Indians by the United States attorney in all suits at law and in equity. Because the courts have construed this statute as permitting the U.S. attorney to refuse assistance when he determines that a conflict of interest exists, we have determined that private representation could be paid for from appropriated funds where the Attorney General refused assistance or assistance was otherwise unavailable.

As we understand the instant situation, should the Northern Cheyenne ever institute a suit, the Department of the Interior (and hence the United States) would be a necessary party, since the validity of coal leases and permits approved by the Department of the Interior would be the basic issue being litigated. The Department of Interior apparently takes the position that the Department of Justice could not properly represent both the United States and the Northern Cheyenne. Even if this is so, however, the right to make the ultimate determination of whether assistance should be provided is accorded by statute and court cases to the Department of Justice. Neither the statute nor the court cases suggest that any other governmental official has the discretion to decide whether the Attorney General should represent the Indians. To so decide would render the mandate of 25 U.S.C. § 175 a nullity.

State of New Mexico v. Aamodt, supra, decided by the Court of Appeals for the Tenth Circuit, does not as the Solicitor suggests, indicate otherwise. In that case the court noted that the Government not only conceded that there existed a conflict of interest but also

supported the right of the Indians involved to private representation. The court distinguished Pueblo of Picuris in State of New Mexico v. Abeyta, 50 F.2d 12 (10th Cir. 1931), where the private counsel for the Pueblo and counsel for the United States took contrary positions on appeal. The court held in that case that when he is representing the party involved, the Attorney General of the United States, and not private counsel, must control the course of litigation.

We are of the view that if the Department of the Interior wishes to pay attorneys fees from appropriated funds for any litigation which may be brought by the Northern Cheyenne, 25 U.S.C. § 175 would require that the Department of Justice be contacted first, for exploration of the question of whether it would, in the particular circumstances involved, decline to provide representation.

As noted above, the Northern Cheyenne are also involved in a continuing administrative proceeding concerning the validity of certain coal exploration permits and leases. As noted in B-114868, supra, the basic authority for the expenditure of funds appropriated for the benefit of Indians is found in the Snyder Act, ch. 115, 42 Stat. 208 (1921), 25 U.S.C. § 13 (1970), which provides as follows:

> "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
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> "General support and civilization, including education.
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> "For relief of distress and conservation of health.
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> * * * * *
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> "And for general and incidental expenses in connection with the administration of Indian affairs."

The Supreme Court, in commenting on the provision has stated "[t]his is broadly phrased material and obviously is intended to include all BIA activities." Morton v. Ruiz, 415 U.S. 199, 208 (1974). Moreover, as noted in B-114868, supra:

> "Appropriations for the operation of Indian programs are normally available for among other things 'expenses necessary to provide * * * management, development, improvement, and protection of resources and

> appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs.' This appropriation is enacted in the form of a lump-sum with no specific limitations as to use. Thus, the determination of what expenses are necessary for the stated purpose is left to the reasonable discretion of the Secretary."

Accordingly, we continue to be of the view expressed in our prior decision, that:

> "In light of the foregoing, and particularly the broad language and legislative history of the Snyder Act, as well as our obligation to liberally construe statutes passed for the benefit of Indians and Indian Communities (Ruiz v. Morton, 462 F.2d 818, 821 (9th Cir. 1972), aff'd mem., Morton v. Ruiz, supra.), it is our view that the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to [certain limitations]."

The provisions of 25 U.S.C. § 175, discussed above, which require that a request first be made to the Attorney General for his representation in suits at law or in equity would not apply to the subject administrative proceeding, which is being conducted within the Department of the Interior itself.

SAN PASQUAL BAND

The Solicitor also questions whether attorneys fees may be paid by the Department of the Interior in connection with proceedings before an Administrative Law Judge of the Federal Power Commission (FPC) (Project No. 176, Dockets No. E-7562 and 7655). In these proceedings the firm of Garjarsa, Liss & Sterenbuch are representing the San Pasqual Band pursuant to Contract No. 14-20-0550-2406. The Department of Justice does not participate in FPC proceedings. The Secretary of the Interior is a party to them, and is being represented by the Office of the Solicitor. In this regard, the August 2, 1976, submission from the Solicitor indicates as follows:

> "* * * The contract to pay attorneys fees * * * deals only with the proceedings before the Federal Power Commission, which does not involve the Department of Justice in any way.

"There are several reasons why such a contract is necessary. First, the Justice Department does not participate in FPC proceedings. The Secretary of the Interior is a party to these proceedings, but he cannot without at least the appearance of a conflict of interest represent the San Pasqual Band (or indeed any of the bands). Initially, part of the FPC proceedings entail the assessment of past annual charges against the present licensee. One of the underlying allegations being made in this assessment is the breach of the fiduciary duty by the failure of the Secretary of the Interior to request these annual charges on behalf of the Bands at an earlier date. The annual license fee issue is an awkward one for the Department, because it involves allegations of possible past derelictions of duty by Department officials and a potential monetary liability for the United States in [an Indian Claims Commission proceeding]. Similarly, if the district court [in a related case] or the Federal Power Commission holds that the Bands are entitled to water diverted from the San Luis Rey in the past by non-Indians, the United States could be liable to the Bands for the value of the water diverted in [the Indian Claims Commission proceeding] on the theory that as a trustee the United States should have prevented the diversions. Hence, attorneys for the Justice Department and this Department obviously could be inhibited by this duality of interests from effective representation of the Bands.

"In addition, the five Mission Indian Bands, all of which are located within San Luis Rey River Watershed, have conflicting interests because of the limited amount of water within the watershed and the Escondido watershed. Physically, the San Pasqual Reservation is located along the canal carrying the water away from the San Luis Rey River toward Escondido. In certain respects, it could receive potential benefits from the diversions which would harm the Bands located on the San Luis Rey River. Because of these specific conflicts, it was determined that the Secretary of the Interior would be in a direct conflict of interest where his duties as a trustee would be compromised if it advanced one Band's interest over another. The other Bands in the watershed are represented by counsel associated with the Native American Rights Fund which

cannot represent all of the Bands. Consequently, it was necessary to enter into the contract with Mr. Gajarsa to provide representation to the San Pasqual Band."

It is not our prerogative to determine whether an actual or potential conflict of interest exists in the subject situation. As long as the Secretary of the Interior acts within his broad discretion according to the criteria set forth above with regard to the Northern Cheyenne Tribe, payment for attorneys fees in this situation would be proper.

INDIGENCY OF THE INDIAN TRIBE

The Solicitor of the Interior also questions the determination made in B-114868, supra, that "* * * it would seem appropriate that before * * * expenditures [for attorneys fees] are made by the Secretary there be a finding that the Indians have insufficient funds to otherwise obtain those services." In this regard, the Solicitor argues as follows:

"* * * The United States owes a trust responsibility to Indian tribes irrespective of the assets of the tribe. Nothing in the two operative statutes considered in your May, 1975 opinion--25 U.S.C. § 13 and § 175--limits the availability of federal services to indigent tribes. Nor, so far as we are aware, does any other statute authorizing the United States to provide services to or expend appropriated funds on behalf of Indians require that the tribe be indigent. Regardless of whether the tribe is able to hire its own counsel, the United States (and specifically this Department) has an independent trust responsibility to the tribe. And--where the Department of Justice is unwilling or unable to discharge fully that responsibility by legal representation--this Department as trustee must have the latitude to fund special counsel to represent the tribe. While the ability of the tribe to hire its own counsel may be a factor influencing the Secretary's decision whether to pay such fees in a particular case, in our view he is not absolutely constrained by the operative statutes to limit such payments to impecunious tribes."

We agree that the operative statutes do not limit payments by the Secretary for attorneys fees and related expenses to impecunious tribes. This does not mean, however, that the relative impecuniousness of an Indian tribe may not be a factor for consideration by the Secretary when a determination is being made as to whether expenditures should be made to pay for such expenses incurred by a particular Indian tribe in connection with a particular administrative or judicial proceeding.

The operative statutes accord to the Secretary broad discretion to pay expenses deemed necessary by him for the protection of Indian resources. While he could determine that payment for attorneys fees incurred by an Indian tribe should be paid in a particular instauce, he is under no obligation to make such payment. Under these circumstances, the Secretary, within his broad discretion, could determine that the relative impecuniousness of tribesshould be considered in deciding whether to make payments for attorneys fees and related expenses. If this factor is to be considered, however, it should be applied uniformly in similar situations.

B-114868, May 30, 1975, is modified to the extent inconsistent herewith.

Deputy Comptroller General
of the United States