Indian Message

THE WHITE HOUSE

WASHINGTON

June 13, 1970

ACTION
Indian Policy and an
Indian Message

MEMORANDUM FOR THE PRESIDENT

Your Administration is in a position -- right at this moment -- to open up a new deal for the American Indians. Announcements are pending, initiatives are being taken, policies are being defined which make this month -- admittedly late in the season -- a unique time for a Presidential Message on Indian Affairs. By speaking out now, you can make these promising new initiatives your own and wrap all of these individual innovations into a Presidential new direction.

With the initiative and help of the Vice President's office, we have jointly identified this group of proposals, now fortuitously grouped together; he and I recommend a Special Message to the Congress.

Except for a rifle-shot recommendation about funds for special health needs, this Message would not call for money; the recommendations we make here do not cost big program dollars. What the Vice President and I aim for is: changed policies and organization to get more results from the money we spend already.

An underlying theme: the restoration of power and responsibility to the Indian people to the maximum extent. These proposals affirm your belief in the importance of letting people participate in shaping their own lives and destinies -- even if that means taking some risks.

This Action Memorandum is in two parts

I - A brief summary of items on which there is interagency agreement -- and which can be included in a Special Message with your concurrence.

II - A "pro" and "con" analysis of seven policy questions with respect to which there are significant choices to be made -- and some interagency disagreements.

PART I - Agreed Proposals

A. Blue Lake

The decision has been made to announce our support for H. R. 471

which would give title to claimed land to the Taos Pueblo Indians and sequester that land for tribal, religious and wilderness use only.

This is a decision of great symbolic as well as substantive significance to Indians everywhere; it is a key part of the Message and is one of the reasons a Message should be now rather than next winter. In fact the McGovern Subcommittee of the Senate Interior Committee has agreed to hold hearings on this Bill July 9.

Interior funds subsidizing the loans

7- B. Economic Development Legislation - ASH detailed questions on this Ass.St Sec. Loesch says Hickel for it, Russell says NOT.

An "Indian Financing Act of 1970" has been drafted and is being cleared. It broadens existing Revolving Loan Fund Authority to apply to all instead of just a few tribes, and authorizes $75,000,000 more for the Fund (now down to $27,000,000). The bill also provides incentives (i.e. guarantees, insurance and interest subsidies) to private lenders to increase their resources for loans to Indians.

I thought we were against this

Treasury has agreed (through its own sales mechanisms) to subsidize whatever the difference is between the rate at which Indians could raise money through tax-exempt bonds and the rate it must pay in the open market (currently 7 1/2% and 10% respectively). - Patterson says this agreed to in a meeting by Treasury, BoB, Interior

HARPER says CASSELMAN feels we can also go now with PLANNING GRANTS WHAT about MANAGEMENT ASSISTANCE.

For the interest subsidy below the tax-exempt bond rate (i.e. between 7 1/2% and zero), the bill will provide for the Secretary of the Interior to give grants (from funds from annual appropriations) to Indian tribes as the form of this subsidy, but since this will affect the FY 1972 budget totals, the Bureau of the Budget is making a further review of this part of the proposal.

The statutory ceiling on the outstanding amount of guaranteed loans is being negotiated with Treasury; Treasury prefers $200,000,000; the Vice President strongly prefers $500,000,000. Interior can live with $200,000,000 as a first-year figure. BOB

Ok - C. A New Assistant Secretary for Indian and Territorial Affairs

in place of Commissioner?

The Commissioner of Indian Affairs reports to the Secretary of the Interior through the Assistant Secretary for Public Land Management -- an officer who has many competing concerns. In its examination of the Interior Department, the Ash Council concluded that a separate Assistant Secretary for Indian and Territorial Affairs was truly justified to separate this important human resources function from purely natural-resources-oriented areas. The Indians themselves have long recommended this. There is clear inter-agency agreement about it (including Mr. Loesch, the present Assistant Secretary for Public Land Management, and the Bureau of the Budget).

BEYOND THIS AN INDEPENDENT SOLICITOR ADVOCATE, ASH COUNCIL RECOMMENDATIONS WERE DISMISSED OUT OF HAND. RUMSFELD WAS PARTICULARLY ANNOYED AT SUMMARY DISMISSAL OF RECOMMENDATION FOR SEPARATION OF LAND & PEOPLE FUNCTIONS.

D. ~~99~~ 65-Year Leasing S.204

Left out Long-term mortgaging authority by mistake.

Indian people own over 50,000,000 acres of land held in trust by the Federal Government. Existing law limits the length of time for which many tribes can lease their land. To compete in attracting investment capital for substantial commercial, industrial, and recreational development, it is essential that tribes be able to offer long-term leases. The 20 Reservations already given such authority (out of 282 possible) have already greatly benefited from this e. g. Palm Springs, California, Colorado River Reservation, Navajo etc. Long-term leasing, rather than sale of their land will enable the tribes to preserve the trust ownership of their Reservation homelands.

In the past, the Senate has approved such blanket authorizing bills, but the House Interior Committee has always refused to do other than authorize this leasing on a reservation by reservation basis.

You should urge that general legislation be enacted permitting any tribe if it chooses, to enter into leases of its land for up to 99 years.

E. Removal of Superintendents

Mayo approves but Interior sandbagged anyway; I would think.

The Commissioner of Indian Affairs is about to announce a new policy that any local BIA Agency Superintendent (there are 72 of them resident on Reservations) is in effect going to be transferred if his respective Tribal Council enacts a formal Resolution of "no confidence" in him. The policy provides for on-the-scene investigation but the Commissioner has no intention of keeping a Superintendent on the job locally in the face of such a Council Resolution. Where vacancies occur, 5-man lists will be presented to Tribal Councils for review; the Councils will pick three for interviews and the Commissioner will pay great heed to their nominations. Eleven such resolutions of no-confidence are pending on his desk now.

You could make reference to this new policy announcement and endorse it in general terms as being consistent with your overall objective of ending paternalism and giving Indians a greater voice in their own affairs.

F. Elected Tribal Heads

A legislative anachronism places on you the responsibility for appointing the principal chiefs of five Oklahoma Tribes. They should be elected by their respective memberships. We have reported favorably on a bill which provides for elections; it passed the Senate in April; it is pending House hearings. Our support for this is a small thing but is a symbolic action and thus worth brief mention in a Presidential Message.

One-liner in the message — NOT Presidential Level

? — G. Changing Other Archaic Laws

Bills are being drafted to (a) heighten the penalties for cattle trespass on Indian lands from $1.00 a day to $10.00 a day, (b) give Tribes (rather than the Secretary of the Interior) the right to issue traders' licenses and (c) remove an old prohibition against BIA employees trading with Indians. Small but important actions long sought by Indians. You could refer to them in general terms without getting unnecessarily specific.

I not to mention in message — not to trouble them here

OK — H. The New Executive Staff at BIA

The Department of the Interior is ready to announce a new team which Secretary Hickel has recruited to fill the top positions in the Bureau of Indian Affairs under Commissioner Bruce. Almost all of them are Indians. The announcement can be held to coincide with the Message. They are an impressive group and you should say in your Message that you are pleased with their advent and competence, also that you are deferring any decisions on reorganization of BIA internally until you have had the benefit of the views of these new men and women.

? — I. New Indian Membership for the National Council on Indian Opportunity

OK — What does this Council really do !! Do you really want to know!!

This Council is chaired by the Vice President, by Executive Order 11399, has seven Federal Agency Heads and also has six Indian leaders appointed by the President for two-year terms. The Indians' terms have expired and new nominees are being cleared. You can announce the new appointees in or concurrently with your Message.

The Vice President would like to broaden the Indian Membership to eight. In order not to violate what the Bureau of the Budget tells us is a standing policy of keeping Federal membership in the majority in such mixed groups, the Vice President proposes that you, by Executive Order, increase the Council's federal membership by one (the Department of Justice -- and Mr. Kleindienst is willing) and the Indian membership by two. I have no objection, although all of us know that the Council does not operate by head-count votes anyway.

? — J. Promise of Consultation

You should state that you are asking the National Council on Indian Opportunity -- and specifically its six (or eight) Indian Members -- to sponsor field hearings this summer throughout the nation on the matters in your Message and on any other subjects, including BIA reorganization, which the Indians may wish to bring to this Administration's attention. (The NCIO is making plans now for these field hearings.)

Relationship to OMB & DC not in message

K. Role of NCIO

You should express your strong interest in the coordination of policies and programs as they affect Indians, and repeat your instruction to the National Council to monitor that coordination in conjunction with the Domestic ~~Policy~~ Council.

As part of the Council's coordinating role, your Message should state that you are asking the Council to inventory federal assistance programs and their statutes to uncover and make recommendations about those for which Indian tribes are not being considered eligible: (The Intergovernmental Cooperation Act, the Aid to Airports Act, the Watershed Protection Act all are reportedly so written that Indian tribes can't quality).

You should also ask that the Council's inventory include an audit, so to speak, of the participation of Indian tribes in the federal assistance programs for which they are eligible.

L. Administration Accomplishments for Indians

You can also take the opportunity of this Message to emphasize program developments already accomplished with respect to Indians: e.g.:

-- The Zuni Program Agreement contracting out all of BIA reservation functions to the Zuni Tribe;

-- The Ramah School contract;

-- Our support for the Navajo Irrigation Project (based on a reanalysis of cost/benefit data, i.e., counting as benefits the number of Indian jobs -- which were once counted as costs);

-- Our support for the Navajo Community College;

-- Our government-wide obligational authority for Indian programs of $625,845,000 for FY 1971 as compared to $598,207,000 in FY 1970;

-- The creation of "Indian desks" in each of the human resources Departments -- to accelerate program decisions affecting the Indians;

-- The significance for Indians of the Family Assistance Program. As of now, only two of the eight states having the largest number of Indians have aid to families with dependent children when the unemployed male parent lives at home.

-- OEO programs

M. One Item Not Included: A White House Conference on Indian Affairs

Such a Conference has been recommended by the Senate Labor Subcommittee on Indian Education and by the National Congress of American Indians. I believe conferences like this tend to produce more noisemaking than policymaking, however, and recommend against it, particularly in view of the consultative arrangements mentioned in J. above.

PART II - POLICY QUESTIONS AND CHOICES

Question A

How can the President propose a more promising direction for American Indian policy?

H. Con. Rec. 108 of August 1953 is still on the books. It tells all Indians that "it is the policy of Congress...to end their status as wards of the United States"; it told a number of tribes that they were to be "freed from Federal supervision and control...at the earliest possible time" and that the Bureau of Indian Affairs Offices which served those tribes "should be abolished".

In subsequent years, formal statutory action did terminate the "ward" status of -- and Federal services to -- two major tribes (Menonimees and Klamaths) following the per capita allocation of large tribal claim awards. The money dribbled away; the tribes are as poor as ever; most observers consider this experiment a failure. The lesson: neither just handing out money -- any more than just handing out services -- is the route to successful Indian community development.

Interior, OEO and, to a lesser extent, HEW have begun to contract out to Indian tribal groups themselves -- by mutual agreement -- the management and administration of Federal programs and services without any implication that the services will be terminated. Example: schools, training programs, a junior college, and even, as in the exemplary Zuni Agreement of May 23, 1970, all BIA programs "currently in operation on the Zuni Reservation".

This is the more promising direction of Indian policy which the President should make his own.

But before the Government can push this approach much more, this Administration must ask for the repeal of H. Con. Res. 108, or else Indian groups will suspect that when we say "contracting out" we secretly mean "termination", and they will be reluctant to take the required initiatives.

A new Concurrent Resolution is suggested in which:

(1) the "termination" idea is disclaimed and repealed;

(2) our basic trusteeship responsibility is reaffirmed;

(3) Indian tribes are encouraged themselves to undertake the management and administration of Federal health, education and similar programs (the fundamental Federal responsibility would continue, as would Federal funds);

(4) Congress admonishes and directs Federal departments to respond to Indian initiatives for the assumption of program administration but consistent with our trust responsibility;

(5) the mode and timing of transfer, and of possible retrocession back to Federal management, is left to Departmental-tribal negotiations;

(6) Federal Departments are to supply training and technical assistance to enable this assumption of program management responsibility to be successful.

A new Concurrent Resolution would only be hortatory of course, but if proposed by the President it would be a clear signal of the new outlook of this Administration, a policy declaration which the Congress would join in making, the sign of a new beginning to the Nation's first Americans and it would be a prod to any of our own bureaucrats who may be reluctant to give up past paternalistic postures.

Recommendation: That the President propose the kind of new Concurrent Resolution outlined here.

Concurrences: The Vice President
Secretary Hickel
Under Secretary Van Dusen
Director Rumsfeld
Director Mayo
Secretary Finch

ok w/Hardin?

Partial Dissent: Secretary Hardin -- who would like to keep open the option of termination for very small reservations with a "hopelessly inadequate land base" and who thinks that the right of retrocession could be almost an incentive for poor performance.

* * * *

To leave no doubt as to the employee benefit coverage of Federal civil servants who transfer to the employ of Indian tribal organizations in the process of implementing this new Concurrent Resolution,

oh

NOT CLEAR IN DRAFT STATUTE THAT IS OPTION OF TRIBE TO TAKE EMPLOYEE AND VISA VERSA

a special statute has been drafted by Interior and agreed to by the Civil Service Commission.

Recommendation: The President should propose this statute in his Message.

Concurrences: The Vice President
Secretary Hickel
The Civil Service Commission
Mr. Mayo
Mr. Rumsfeld

Question B: instead

Should the President go beyond proposing a new Concurrent Resolution and ~~in addition~~ propose an actual statute which requires the Secretaries of Interior and HEW to contract out the management and administration of a directly administered program whenever any Indian tribe indicates that it desires such a contract?

Discussion: Such a statute would:

(1) At this time affect only Interior and HEW programs, and only those which are directly administered (i.e. not those Federally financed through State or local government).

statute should make clear that CON CONTRACT with INDIAN community as well as tribe. - Some Reservations are very Large & problems & approaches NOT same throughout.

(2) Vest in the tribes themselves -- at their initiative -- the right to contract to take over management and administration of such Federal programs and, in order to prevent bureaucratic "foot-dragging", remove from both Secretaries the right to withhold the awarding of such a contract. The contract would of course give the tribes the authority to make substantial program changes (within the total funds budgeted).

(3) Permit tribes to subcontract to other entities of their own choosing.

are other questions to be raised in conjunction with this.

(4) Specify annual review of every contract in order to preserve the prerogative of the President to propose and of the Congress to appropriate funds for Federal programs.

(5) Permit retrocession of program management and administration back into Federal hands at the tribes' option.

(6) In case of violation of rights or of gross mismanagement, permit either Secretary, after hearings, to call back the management and administration of a program in whole or in part -- but without prejudice to the tribe's rights, after a stated time period, to start the process over again.

(7). Require period reporting from the contracting tribe.

WOULD TRIBES OR COMMUNITIES Receive EXTRA Technical assistance from FEOS so this will WORK?

Arguments Pro:

(1) In spite of a welcome policy shift, very little program

administration has actually been contracted to Indians so far.

Of Interior's FY 1971 total of $330,000,000 in direct program services, the management and administration of $5,000,000 or only 1-1/2% of it, is in Indian hands.

Of HEW's FY 1970 total of $107,714,328 in direct Indian health program services, the management and administration of $2,543,000 or only 2.4% of it is in Indian hands.

(2) Interior clearly needs new, statutory authority to contract out its services; what little they have been able to do up to now has been by stretching an 1834 law to its limit.

(3) Big bureaucracies do not respond in the direction of sharing authority unless they are "pushed" -- not only from on top but from their client populations. If contracting programs out is left to the discretion (read sufferance) of the local BIA officials the Indians will know that the "negotiations" are the same old stacked deck, with the Government holding all the hole cards.

(4) We have already had over four years' experience in contracting out programs of significant size to Indian groups: Rough Rock School, Navajo Community College and 66 Community Action Agencies handling $53,000,000. We know that contracting out will work. -cEo

Arguments Con:

(1) The mere desire to take over program administration is far from being the same as the capability. Some tribes are not ready for this; the obligation of a trustee includes resisting a ward's desire unwisely to undermine the substance of a trust. (Rebuttal: That old refrain justifies paternalism forever; the only way to end it is to end it.)

(2) The statute as proposed leaves the Secretaries of Interior and HEW little discretion (none at all during the initial negotiations) and thus lessens their ability to discharge their basic trust obligation to the Indians.

(3) The Commissioner of Indian Affairs and his staff have already exhibited a lively interest in turning over operation and administration

of Federal programs to competent tribes (witness the recent Zuni Agreement); they need no extra prodding now. (Rebuttal: this Commissioner and this Administration are good only until 1976; a statute is needed which permanently confers this right on Indian tribes.

Favoring a Statute:

Elliot Richardson

The Vice President - Key thing for them
Secretary Hickel
Secretary Finch
Director Rumsfeld

Opposed to Statute:

Director Mayo

Recommendation: I recommend we propose a contracting-out statute.

How do you determine competance

It should have to decide until Hardin states position

Question C

Should this Administration return the Yakima Tribe's land?

Indian land claims are legion, and even those adjudicated as justified by the Indian Claims Commission are compensated in dollars at the "value at the time of taking."

In a few cases, however, Indians who have won claims in the Commission have asked not for dollars, but for the land itself back. Land today, of course, is worth far more than "at the time of taking" a century ago.

Meeting this request for compensation in the form of the land itself is:

(1) Impossible to do if the land has been sold to others subsequently.

(2) Possible to do if title has passed out of Indian hands; but this sets a very undesirable precedent since then we are giving large economic bonuses on an almost capricious basis, i.e. to a certain few tribes. Setting of precedent is obviated only in such a very special case as Blue Lake where the land returned is by law sequestered for religious purposes and wilderness; its "sale" or true economic value is eliminated.)

(3) Possible to do and probably right if the title to the land has never left the Indians' hands. Such is the case with the Yakima claim.

The land: 21,000 acres next to the Yakima Reservation in Washington, was mapped as part of the Yakima Reservation and the map attached to the Treaty of June 9, 1855. In the Government's records, the map became detached and lost.

In March of 1907, the National Forest boundaries were proclaimed

"except all lands which at this date are embraced within any withdrawal for any use or purpose to which this reservation is inconsistent."

In 1930, the map was found -- and the National Forest boundaries were seen to have been drawn by mistake so as to include the 21,000 acres. But since the Proclamation was worded as above, the land was, from the beginning, never intended to be included in the National Forest and, was never actually "taken". The Court of Claims and the Indian Claims Commission have agreed with this point. Legislation is not needed, only an administrative action by the Secretary of Agriculture giving the land back.

Secretary Udall unsuccessfully tried to get Secretary Freeman to give back this land. Secretary Hickel is on the point of making a similar request to Secretary Hardin.

Recommendation: That you arrange for the for the land to be returned to the Yakimas and announce this in your Message.

Concurrence:

Secretary Hickel

Dissent:

Director Mayo -- who is doubtful of the distinction between this case and Blue Lake -- believing that this decision might endanger the Blue Lake position

Where does Hardin stand

Question D

(1) Should there be within the Government some one legal office which singlemindedly pursues the United States' own responsibility as Trustee for Indian land and water rights?

(2) If so, is it reasonable to expect an office within either the Interior or Justice Departments to fulfill this role?

(3) If this expectation is not reasonable, where in the Government should this legal office be located?

Discussion: The United States Government is a three-way trustee: of the common good of all the citizens of the Nation; of the Federal interest in land and water rights, and of the American Indians on Reservations, including their particular land and water rights.

The legal responsibility of a trustee implies a singleminded attention to his ward's interests.

With, in effect, three wards, combining many conflicting interests, the Federal Government has been in an ambiguous if not an unsatisfactory position trying to fulfill three responsibilities.

The Ash Council has been the latest to recommend the establishment of a single legal office which would concentrate on defending just Indian legal rights, because the Federal Government is explicitly the trustee for the Indians. The trustee role is made difficult for either the Secretary of the Interior or the Attorney General to perform, however, because other institutional components within those same Departments make conflicting demands: in Interior, the Bureaus of Reclamation, Sport Fisheries, Mines, Land Management and Outdoor Recreation; in Justice, the necessity of at the same time defending the United States against Indian claims vs. the 77-year old (25 USC 175) obligation to represent Indian interests.

There is documentation to substantiate the allegation that in these clashes of interests, the Indians have lost out.

I conclude that (in answer to the first two questions above) that a legal office is necessary and that it cannot be in either the Departments of Justice or the Interior as presently constituted.

There are two options for establishing thie Office which, under either option, would have to have (a) a staff of legal assistants and researchers; (b) access to files, records and technical advice from Government agencies; (c) the ability to institute suit on behalf of the United States in its Trustee-for-Indians role, against any State or local government or the Federal Government in any court or intervene in any administrative proceeding; and (d) the authority to do so independently of the Secretary of the Interior or the Attorney General.

Provisions under either option would also make it clear that the new arrangement was not at all absolving the Secretary or Solicitor of Interior, or the Attorney General and his staff from continuing to carry out their trust responsibilities to the Indian people.

Option 1: Propose that Congress create an Indian Trust Counsel (with the above-described resources and authorities) as a person of Assistant Secretary rank in the Department of the Interior.

Advantage: Located here, the Counsel could particpate in the internal bargaining short of, and with, the Secretary; he even could, through this bargaining, reduce the necessity for litigation by bringing trustee/legal points to the attention of the Secretary prior to the latter's desision.

Disadvantage: He would still be officer ~~picked~~ President in the first instance by the Secretary of the Interior and thus both de facto and de jure subordinate to the Secretary. This would compromise his ability to act singlemindedly in his wards' interests.

Option 2: Propose to the Congress that it charter a Government Corporation to be known as the Indian Trust Counsel Authority, empowered to bring suits in the name of the United States, financed by Federal funds although authorized to accept contributions and with the Government waiving immunity from any suits originating from this Authority on behalf of Indian trust rights. The Authority would be governed by a three-man Board of Directors, appointed by the President, its full-time officer would be called the Indian Trust Counsel. The Trust Counsel would have a liaison representative in the Bureau of Indian Affairs and both he and the Departments of Interior and Justice would be reminded to work as closely as possible together rathen than at arm's length.

Advantages: This would guarantee for the Indian Trust Counsel substantial independence of judgment and action. By being a part of the Government and acting in the name of the United States, however, the Authority and the Counsel would guarantee the discharging of the Government's trust obligation to Indians with respect to land and water but not absolve Interior and Justice from continuing to discharge theirs also.

Disadvantage: Though perhaps even physically located in the Department of the Interior, the Authority might be somewhat remote from the internal Departmental discussions during which it could make its own views known so as to avoid litigation rather than reply on it. Rebuttal: the certainty of the Authority's ability to initiate later litigation would lead any prudent Secretary or Solicitor of the Interior (or similar officer in the Departments of the Army or Justice) to consult with the Authority ahead of time in the making of natural resources decisions affecting Indian trust rights.

In favor of Option 1: ~~The Vice President~~

In favor of Option 2: Secretary Hickel
Director Rumsfeld
Mr. Krogh
Vice President

No Position: Deputy Attorney General Kleindienst get a position A.G.

Accept Either 1 or 2: Director Mayo

Recommendation: That the President approve Option 2.

What if we don't do either?

Budget est

Question E

This area needs money - school construction funds are low as is road money so kids can get to day schools.

How can the President accelerate the improvement of Indian education?

Discussion: As trustee of Indian lands and of their welfare, the Federal Government is responsible for the education of Indians living on or near reservations.

There are now 221,000 children of school age to which this Federal responsibility extends. 50,500 of them attend schools operated directly by the Bureau of Indian Affairs at a cost of $109.8 million; only 750 go to schools where the responsibility for education has been contracted out by BIA to local Indian school boards.

141,000 Indian children go to public schools near their homes; 89,000 of these go in such concentrations (i.e., near reservations) that the Federal responsibility is discharged by aiding the respective state or local school districts (under the Johnson O'Malley Act) at a FY 1971 level of $19.8 million. The other 52,000 go in smaller densities, and the local school districts absorb them without Johnson-O'Malley assistance.

Local school districts do, however, receive other forms of aid for Indian children: ESEA Act set-asides of $9 million (for specific project grants); P.L. 874/815 "impacted" aid of $20,000,000.

Study after study in recent years has produced a very grim picture of the state of Indian education and a clear bipartisan consensus for reform. Senators Dominick, Murphy, Saxbe and Smith all joined with the Democratic majority to endorse the shocking findings of the recent Senate Labor Subcommittee on Education.

All the recent studies have agreed: provide better educational services, spend more money, and increase Indian involvement and participation.

The amounts of funds judged necessary and available for Indian education I shall leave at this point to the new BIA team and to the FY 1972 working out of the Nation's domestic priorities.

Reform as to Indian participation and involvement in the rearrangement of the funds that are available however can and should be prepared now.