EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM April 15, 1982

TO: Craig Fuller

FROM: Michael Horowitz MH

RE: Ancient Indian Land Claims Settlement Act of 1982

SUMMARY OF THE OMB POSITION

1. We agree with Justice's legal analysis that the Lee bill will most likely be upheld by the courts.

2. We strongly oppose Justice's suggestion that the states, the tribes and the federal government attempt to "negotiate" a solution, but instead believe that the Lee bill provides the only framework that will permit fair and non-coercive negotiations. We believe that negotiations along the lines proposed by Justice would be fiscally and politically uncontrollable, and would be likely to expose the federal government to unnecessarily high liability as the deep pocket target of all parties. Such an outcome would be particularly unacceptable, given the fact that the pending Indian lawsuits against innocent land holders in no way allege federal responsibility for the 18th Century sales which form the subject of their complaints.

DISCUSSION

The Justice Department has now concluded that Congressman Lee's proposed Ancient Indian Land Claims Settlement Act of 1982 will most likely be upheld by the courts as constitutional. There is thus no need to comment on that analysis, since OMB shares Justice's overall conclusion. The Justice memorandum also raises other issues of a policy nature, however, and this memo sets forth OMB's views on those issues.

The most important issue raised by the Justice memorandum is whether there should be "consultation and negotiation with the parties affected." Of course, under the Lee bill there would be negotiations between the Department of Interior and affected tribes over a just settlement of tribal claims; thus, the question is not whether, but when negotiations should take place. Justice apparently is taking the position that settlement negotiations be held with affected Indian tribes

before legislation is passed, indeed before Administration support for a bill is determined, while the Lee bill would legislatively establish a framework for subsequent negotiations. We strongly believe that negotiations with the affected tribes will be more evenhanded and less costly if they take place pursuant to a reasonable statutory framework rather than under the duress caused by the pending lawsuits for repossession of lands held by innocent third parties. We understand the Department of Interior -- the agency with the greatest experience and responsibility in this area -- to share this view.

If negotiations are undertaken before legislation is passed, our bargaining posture is likely to be weak. The Indian tribes presently have lawsuits pending against thousands of innocent third party landowners. These suits, if successful, would result in the dispossession of these people. Even the mere pendency of the lawsuits has clouded the landowners' titles, with grave consequences for the economic health of the affected areas and the security of the individuals involved. In political terms, the pressure on the States and the federal government could be irresistible to reach a settlement, possibly at exorbitant terms, since the alternative to settlement -- the risk of dispossession of innocent landowners -- will be politically hard to sustain. In the absence of legislation, therefore, the tribes would hold the clear upper hand in settlement negotiations. Moreover, State pressures for the federal government to assume ever greater financial responsibility are likely to increase substantially under the procedures urged by Justice. The States are now delighted with the modest level of federal support set forth in the Lee bill -- their major interest, federal validation of prior land sales under the Nonintercourse Act, is a major feature of the bill. Once tripartite "negotiations" begin, however, the States may increasingly side with Indian representatives on the question of an enhanced federal contribution beyond that established under the Lee bill. Such an outcome would be particularly inappropriate because that the federal government is not and never has been the cause of the problems complained of by the Indians in the pending lawsuits.

Experience bears out that negotiation in advance of legislation leads to Indian claims settlements that are unnecessarily costly to the taxpayers. The Carter Administration's Maine settlement, for example, cost the United States $81.5 million dollars -- far more in our view, than fairness demanded.

A current controversy over the water rights claims of the Papago Indians in Arizona -- discussed at page 4 of the Justice memorandum -- is a further instance of the dangers of the "negotiations-first" approach. Like the Eastern land claims cases, the Papago controversy is between the Indians on one side, and private and local governmental parties on the other. Stimulated in part by the filing of a federal lawsuit on behalf of the Papagos, talks were conducted between the Indian and non-Indian parties in Arizona, with technical guidance and observation by the federal government. These talks resulted in a proposed settlement that would cause the federal government to guarantee the Papagos an increased water supply in perpetuity -- or be solely liable for replacement cost and consequential damages. At the same time, the settlement would relieve the Arizona non-Indian parties from any liability.

This negotiated settlement, which was opposed by OMB and Interior, was so costly, and so expansive of future liability, that the Administration was forced to reject it. Nonetheless, the settlement has been approved by the House (by a 311-50 vote), and has been introduced in the Senate by Senators DeConcini and Goldwater. The Administration has thus been placed in the awkward position of fighting in Congress against an exorbitant settlement that is cloaked with the aura of legitimacy derived from the negotiation process. Here, Senator DeConcini's rhetoric is particularly instructive:

> "[T]hrough years of determined effort by a small but intelligent and patient group of individuals, we believe we now have legislation which will avoid the many years of expensive, time-consuming and debilitating litigation that at one time seemed inevitable. This proposal has been hammered out word by word, line by line, by the Pima County Water Resources Coordinating Committee. The committee is comprised of individuals representing the interests of the Papago Tribe, the City of Tucson, Pima County, the agriculture industries, the mining industries, the individual landowners and the federal government." 128 Cong. Rec. S 862 (daily ed. Feb. 11, 1982).

To make matters worse, the Papago settlement is being hailed as a "model" for resolution of similar disputes in the future. See "Parties to Water Dispute in Arizona Find Solution That Could Be Model," Washington Post, March 30, 1982, p. A8.

The federal government should learn from these experiences not to commit itself to "negotiations" as a deep pocket mediator, where such negotiations are likely to be impossible to control.

In contrast to the Justice approach, the Lee bill would exercise Congress's power (as recognized in the Justice memorandum) to ratify and approve the original land transfers immediately, and would set up a framework for subsequent settlement negotiations to determine monetary compensation that would fairly reflect the injury done to the tribes. Neither side would have the advantage of time; neither side would wield the threat of extensive injury to innocent third parties.

Moreover, the bill would guarantee the Indians fair treatment, by permitting them to reject the Secretary's settlement offers and obtain redress in court -- indeed, in the Court of Claims, a forum that has historically been very sympathetic to Indian interests. The formula to be used by the Court of Claims would be the standard formula that has been applied in Indian compensation cases in the past: the difference between the value of the land and the payment received at the time of the transfer, plus interest. (It is worth emphasizing that this formula is the fair and logical remedy for Nonintercourse Act violations. Since the purpose of the Act is to protect the Indians from unfair land sale terms imposed by fraud or duress, a formula for compensation based on the original sales terms is a make-whole remedy.)

Naturally, Indian groups have launched a campaign to block passage of this legislation, under the banner of the need for "consultation" and "negotiation." This merely reflects their recognition that their bargaining position is much stronger while they hold the threat of lawsuits against innocent landowners. In addition, in some instances Indian opposition may be generated by the preference of tribal leaders for a "land base" settlement controlled by tribal governments rather than the award of monetary compensation that might be distributed to individual tribal members.

The Justice memorandum also raises a number of subsidiary issues.

On page 6, Justice argues that allowing recovery against the United States, with interest, for the loss of "aboriginal" title creates cause for concern. The Supreme Court has held that there is no constitutional requirement of compensation for governmental taking of aboriginal title, and under the Indian

Claims Commission Act, awards for claims based on aboriginal title did not carry interest. Thus, the Lee bill provision goes beyond legal requirements and precedent in this respect. (It should be noted, however, that while lower courts have held that there is no constitutional obligation to compensate tribes for trespass claims arising from aboriginal lands after transfer had been retroactively validated by Congress, this issue has not reached the Supreme Court. The 2% interest on aboriginal claims, therefore, should be seen in part as an award in lieu of trespass claims.) We have no reason to believe that there are significant unknown aboriginal claims in New York or South Carolina that might lead to unexpected liability of the United States under the Lee bill -- and Justice cites none -- but we would have no objection to eliminating the provision for compensation for aboriginal title, or to eliminating the award of 2% interest for claims based on aboriginal title. Indeed, this might prevent creation of a costly precedent for future settlements. We suggest, however, that the political consequences of such a change -- even further limiting awards under the Lee bill -- should be studied prior to any Administration decision.

On page 7, in the second paragraph, the Justice memorandum asserts that there is an "internal contradiction" between the definition of "transfer" in §3(f) and the provision of recovery against the United States in a more narrow set of circumstances. We do not view this as a contradiction, since it makes sense to use the broadest possible language to clear the titles of innocent landowners, but to restrict monetary recovery against the United States to the narrow set of cases in which there has been a violation of the Nonintercourse Act. If, for some technical reason, the bill does not succeed in accomplishing this, we would support any necessary modification.
Also on page 7, the Justice memorandum states that the Secretary of Interior should be given authority to determine which tribal entity is empowered to represent a tribe's interest. We defer to Interior's judgment on this point, but understand that it is Interior's view that the Secretary's existing authority is sufficient.

On page 8, the Justice memorandum recommends that a new clause be added to the final sentence of §6(a), precluding the Court of Claims from awarding monetary compensation for a claim with respect to which a final judgment had previously been entered by the Indian Claims Commission. Although we would have no objection to the addition of such a clause, we note that the

first sentence of §6(a) already contains the limitation Justice has proposed.

One final issue merits consideration. Under the Lee bill, the United States bears the entire cost of settlements, while New York, South Carolina, their affected citizens, and the title companies reap the benefits. (The United States is not a defendant in the pending lawsuits, which are solely against private landowners, localities, and States.) This situation is particularly ironic since such Nonintercourse Act violations, as may have occurred (if in fact they did) were committed by the States alone. We therefore recommend that during hearings, or at some other appropriate time, the Administration request inclusion of a provision that would require State participation in the settlement liability.

In conclusion, OMB recommends that the Administration support the Lee bill, with any necessary modifications, and opposes Justice's suggestion that "negotiations" with Indian tribes be conducted prior to Administration support for the legislation.

IB77040 (ISSU) For Further Info Call 287-5700 ISSUE UPDATED: 04/30/82
Indians: Land Claims by Eastern Tribes
LEGISLATION: ITEM 1 OF 1 IN SET 1

H.R. 1815 (Lee)

Amends the Indian Self-Determination Act to provide that grants under the act may not be made to a tribal organization for proceedings the tribal organization initiates based on the claim that land was acquired without compliance with the laws of the United States relating to conveyances by any Indian, Indian nation, or tribe or Indians. Introduced Feb. 6, 1981; referred to Committee on Interior and Insular Affairs.

H.R. 5494 (Lee et al.)

Ancient Indian Land Claims Settlement Act. Ratifies all prior transfers of land or natural resources located within the States of New York and South Carolina from, by, or on behalf of any Indian tribe effected before Jan. 1, 1912, and extinguishes aboriginal title to such land or natural resources as of the date of such transfer. Declares that "no action by the United States, any State or subdivision thereof, or any other person or entity ... shall be regarded as giving rise to a claim of trespass ... in favor of any Indian tribe that may have formerly occupied or held any claim to such land or natural resources ...." Exempts from these provisions those lands located within the Allegany and Cattaraugus Reservations of the Seneca Nation of New
PAGE 1 OF 3. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):


York State, which were leased under authority of the Act of Feb. 19, 1875 (18 Stat. 330). Directs the Secretary of the Interior to publish in the Federal Register as soon as practicable after the date of enactment of this Act a notice specifying that any Indian tribe whose transfer of land or natural resources has been ratified by this Act may submit to the Secretary of a claim for monetary award. Within 180 days of such a submission, the Secretary must determine whether such tribe has a credible claim, and if so, the fair and equitable monetary award he believes should be made to such tribe. Such determinations shall not be subject to judicial review by any court. Upon acceptance by the Indian tribe, the determination of the Secretary shall become final and binding upon the parties concerned. The Secretary is authorized to assist any Indian tribe receiving such monetary compensation in using such funds to purchase land or natural resources. Any land or natural resources so acquired would be subject to the civil and criminal jurisdiction of the State, to all laws of the State, and to the civil and criminal jurisdiction of the courts of the State. Such land or natural resources would be acquired by the tribe in fee simple and would not be held by the United States in trust for the benefit of the tribe. Any Indian tribe that occupied or possessed land or natural resources within the States of New York or South
LEGN, PAGE 2 OF 3. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):


Carolina and has never obtained a final judgement on a claim filed in the Indian Claims Commission or the U.S. Court of Claims with respect to the transfer of such land or natural resources, may file within one year of the date of enactment of this Act a claim against the United States in the U.S. Court of Claims, which shall have exclusive original jurisdiction over such claim. In the case of an Indian tribe that has submitted to the Secretary a claim for monetary award pursuant to this Act, such tribe may so file in the Court of Claims within 180 days following the Secretary's determination, if such tribe has not accepted and agreed to a determination of the Secretary regarding such claim. The Court of Claims shall grant no award with respect to any claim by any Indian tribe which has agreed to and accepted a determination of the Secretary of the Interior, as provided by this Act.

of the United States ...shall have jurisdiction in any action or proceeding by or on behalf of any Indian tribe with respect to the invalidity of any transfer of land or natural resources that has been ratified by this Act or involving any claim ...arising from the alleged invalidity of the transfer ...." Introduced Feb. 9, 1982; referred to Committee on Interior and Insular Affairs.

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Indians: Land Claims by Eastern Tribes
CHRONOLOGY OF EVENTS: ITEM 1 OF 1 IN SET 1

10/10/80 -- P.L. 96-420, to settle claims of Maine Indians, signed into law.

08/20/79 -- Interior Solicitor Leo M. Krulitz announced that a tentative agreement has been reached on a proposed legislative settlement which would give the Cayuga Indian Nation in New York a 5,481-acre reservation and an $8 million trust fund in return for extinguishment of the Cayugas' claim to 64,000 acres in Seneca and Cayuga Counties (New York).

05/04/79 -- The State of Rhode Island enacted legislation to establish the Narragansett Indian Land Management Corp.

02/13/79 -- The First U.S. Circuit Court of Appeals in Boston upheld the Federal District Court jury decision of Jan. 6, 1978, that the Mashpee Wampanoag Indians are not an Indian tribe and thus are not within




protective coverage of the Indian Trade and Intercourse Act.

09/30/78 -- P.L. 95-395 signed into law to settle claims of Narragansett Indians in Rhode Island.

04/17/78 -- Interior Secretary Cecil D. Andrus announced formation of a task force to develop a proposed legislative settlement for the Catawba Indians' land claims in South Carolina. The task force is to be comprised of Interior Solicitor Leo M. Krulitz; James Mormon, Assistant Attorney General; and Eliot R. Cutler, Associate Director, Office of Management and Budget.

01/06/78 -- The jury in the Massachusetts Federal District Court trial to determine whether the Mashpee are a legally constituted tribe decided that the Wampanoag Indians of the Mashpee do not meet the legal definition of a tribe. The jury determined that the Wampanoags were




not an American Indian tribe in 1790, that they were a tribe in 1834 and 1842, but that they are not now.

07/12/77 -- The Federal District Court for the Northern District of New York held (1) that the Oneida Tribes of New York and Wisconsin and the Oneida of the Thames Bank Council of Ontario, Canada, have established that a transfer of land by a 1795 treaty with the State of New York was in violation of the Trade and Intercourse Act; (2) that defenses asserted by the defendants (the Counties of Oneida and Madison, New York) have not been established; and (3) that said

from their (the counties') use and occupancy of the land in question during 1968 and 1969.

-- The Federal District Court in Massachusetts refused to dismiss the suit of the Mashpee Tribe, rejecting defenses set forth by defendants. The Court noted



Indians: Land Claims by Eastern Tribes

that in order to establish a prima facie case, "plaintiff must show that ... it is or represents an Indian tribe within the meaning of the Trade and Intercourse Act."

01/11/77 -- The Department of the Interior submitted litigation reports on the land claims of the Passamaquoddy Tribe and the Penobscot Nation to the Department of Justice. The reports recommended litigation be filed on behalf of the Indians' modified claims.

12/10/76 -- The Town of Gay Head Massachusetts, voted to deed certain lands claimed by the Gay Head Tribe to such Indians. This action must receive approval by the Massachusetts legislature, however.

08/28/76 -- The Wampanoag Tribe of Mashpee, Massachusetts, filed suit in Federal District Court in Massachusetts, seeking recovery of lands in the Town of Mashpee allegedly



Indians: Land Claims by Eastern Tribes

alienated in violation of the Trade and Intercourse Act.

12/23/75 -- The First Circuit Court of Appeals upheld the ruling of the Federal District Court in Maine that the U.S. cannot refuse to sue the State of Maine on behalf of the Passamaquoddies on the sole ground that no trust relationship exists ( Joint Tribal Council of Passamaquoddy Tribe v. Morton ) (528 F 2nd 370) (1st Cir. 1975.)

02/11/75 -- The Federal District Court in Maine ruled that the U.S. cannot refuse to sue the State of Maine on behalf of the Passamaquoddies on the sole ground that no trust relationship exists (38 F. Supp. 649) (D. Me. 1973).

01/08/75 -- The Narragansett Tribe of Rhode Island filed suits in Federal District Court in Rhode Island, seeking recovering of lands allegedly alienated in violation



Indians: Land Claims by Eastern Tribes

of the Trade and Intercourse Act.

12/23/74 -- The Wampanoag Tribe of Gay Head, Massachusetts, filed

recovery of lands allegedly alienated in violation of the Trade and Intercourse Act.

02/01/73 -- The Passamaquoddies and Penobscots filed an amended complaint seeking a declaratory judgement that they are entitled to protection of the Indian Trade and Intercourse Act.

06/29/72 -- The U.S. filed protective actions on behalf of the Passamaquoddies and Penobscots to toll the statute of limitations (to prevent the statute of limitations on such claims from running out).

06/23/72 -- The U.S. was ordered by the court to file such protective actions.

CHRN, PAGE 6 OF 7. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

06/20/72 -- The U.S. refused to file a protective action on the ground that there is no existing trust relationship with the Passamaquoddies (see entry below).

06/02/72 -- The Passamaquoddies filed an action in Federal District Court in Maine seeking a declaratory judgement that the Tribe is entitled to Federal protection under the Indian Trade and Intercourse Act and a preliminary injunction ordering the U.S. to file a protective action against the State of Maine.

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Indians: Land Claims by Eastern Tribes

REPORTS: ITEM 1 OF 1 IN SET 1

State of Maine Aborisinal Claims Act of 1977. In Remarks of William D. Hathaway. Congressional record daily ed. v. 123, Mar. 1, 1977: S3205-S3212.

Contains memorandum of the Department of the Attorney General, State of Maine, February 18, 1977; and memoranda of the U.S. Department of Justice, in support of Plaintiff's motion for further extension of time to report to the court.

PAGE 1 OF 1. READY FOR NEW COMMAND(FOR NXT OPTN, XMIT):

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Indians: Land Claims by Eastern Tribes

HEARINGS:

ITEM 1 OF 1 IN SET 1

U.S. Congress. House. Committee on Interior and Insular Affairs. Settlement of the Catawba Indian land claims. Hearings, 96th Congress, 1st session, on H.R. 3274. June 12, 1979. U.S. Govt. Print. Off., 1979. 474 p.

------ Settlement of the Cayuga Indian Nation land claims in the State of New York. Hearing, 96th Congress, 2d session, on H.R. 6631. Mar. 3, 1980. Washington, U.S. Govt. Print. Off., 1980.
Serial No. 96-35

----- Settlement of Indian land claims in the State of Maine. Hearings, 96th Congress, 2d session, on H.R. 7919. Aug. 25, 1980. Washington, U.S. Govt. Print. Off., 1980.

U.S. Congress. Senate. Select Committee on Indian Affairs. Mashpee lands. Hearings. 95th Congress, 1st session, on S.J.Res. 86, to extinguish any right, title, or interest to

PAGE 1 OF 3. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

certain lands, in the Commonwealth of Massachusetts, and for other purposes. Oct. 21, 1977. Washington, U.S. Govt. Print. Off., 1977. 72 p.

------ Proposed settlement of Maine Indian land claims. Hearings, 96th Congress, 2d session, on S. 2829. July 1 and 2, 1980. Washington, U.S. Govt. Print. Off., 1980. vol. 2.

------ Statute of limitations extension for Indian claims. Hearings, 95th Congress, 1st session, on S. 1377. May 3 and 16, 1977. Washington, U.S. Govt. Print. Off., 1977. 130 p.

------ Statute of limitations extension. Hearings, 96th Congress, 1st session. Dec. 17, 1979. Washington, U.S. Govt. Print. Off., 1980. 380 p.

U.S. Congress. Senate. Select Committee of Indian Affairs/ House. Committee on Interior and Insular Affairs.

HRNG, PAGE 2 OF 3. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

Subcommittee on Indian Affairs and Public Lands. The Rhode Island Indian Claims Settlement Act. Joint hearings, 95th Congress, 2d session, on S. 3153 and H.R. 12860. June 20, 1978. Washington, U.S. Govt. Print. Off., 1978. 123 p.

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CRS Issue Brief

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Indians: Land Claims by Eastern Tribes

BACKGROUND AND POLICY ANALYSIS: ITEM 1 OF 1 IN SET 1

The issue of recent land claims asserted by Indians in the eastern United States against States, municipalities, and private landowners has received national attention resulting in the introduction of legislation in both houses of Congress. The matter has received widespread publicity and become the focus of Congressional concern because of the unprecedented legal issues it has raised and the unusual nature of the claims themselves. Such claims are against States, cities, and individuals, rather than against the Federal Government, and are based solely on the allegation that the Federal Government did not give its approval to the conveyance of these lands by Indians to non-Indians. This approval is allegedly required by a 1790 statute, the Indian Trade and Intercourse Act (as amended). The Indians claim that U.S. approval to the transactions was not given as required by the 1790 law.

The matter has generated publicity and concern because the Indian Claims Commission Act of 1946 was thought to have settled once and for all the matter of Indian claims by creating a Commission empowered to adjudicate all Indian land claims against the United States which had arisen before 1946 and which were based on allegedly unfair takings and/or inadequate compensation for takings of Indian lands by the U.S. Such claims were to be filed by 1951 or





forever barred. (Any such cases arising after 1946 are heard by the U.S. Court of Claims.) Consideration was not given by this legislation to the possibility of claims arising against States, cities, or individuals under the alleged protection of the Indian Trade and Intercourse Act.

At present, there are numerous land claims ranging up and down the length of the eastern seaboard, in various degrees of progress, all invoking protection under the Indian Trade and Intercourse Act and seeking damages and the return of lands alleged to have been illegally conveyed without U.S. approval.

Precedent-setting legislation to settle the claims of the Narragansett Indians in Rhode Island was enacted by Congress on Sept. 30, 1978 (P.L. 95-395). (On May 4, 1979, the State of Rhode Island enacted legislation to effectuate relevant portions of the settlement.) This legislation implements, with certain modifications, a previously agreed upon settlement signed by representatives of the Narragansett Indians, the State of Rhode Island, the town of Charlestown, R.I. (where these land claims are located), and specified private landholders owning lands to which the Indians laid claims. Negotiations leading to the agreement were carried out in consultation with the Carter Administration.





In effect, P.L. 95-395 extinguished all land claims of the Narragansett Indians in exchange for approximately 1,800 acres of land -- approximately 900 acres to be donated by the State of Rhode Island and approximately 900 additional acres to be purchased for the Indians from specified landholders at Federal expense. (The effect of the Act was contingent upon establishment by Rhode Island of a State corporation to acquire, manage, and hold the lands for the Indians.) A settlement fund of $3.5 million was established in the U.S. Treasury for the purpose of implementing the Act.

On Oct. 10, 1980, President Carter signed into law P.L. 96-420, to settle claims to the Penobscot, Passamaquoddy, and Maliseet Indians to up to 12.5 million acres in Maine. This is by far the largest claim settled to date.

P.L. 96-420 contains provisions of a previously negotiated settlement

--- Declare the purpose of ratifying the Maine Implementing Act (enacted by the State of Maine on Apr. 3, 1980). (A summary of the provisions of the Maine Implementing Act is contained in S.Rept. 96-957, at p. 35).

-- Retroactively ratify, in accord with State and Federal law, any prior transfer of Indian land in the State of Maine, and extinguish Indian aboriginal title to such land and all claims arising therefrom.



Indians: Land Claims by Eastern Tribes

--- Direct the Secretary of the Treasury to establish in the U.S. Treasury a $27 million trust fund, one half of which would be held in trust for the benefit of the Passamaquoddy Tribe, the other half of which would be held in trust for the Penobscot Nation (to be known as the "Maine Indian Claims Settlement Fund.")

-- Direct the Secretary of the Treasury to establish an account in the U.S. Treasury to be known as the "Maine Indian Claims Land Acquisition Fund," into which would be transferred $54.5 million from the general funds of the U.S. Treasury.

Of this amount, $900,000 is to be held in trust for the Houlton Band of Maliseet Indians.

$26.8 million is to be held in trust for the Passamaquoddy Tribe.

$26.8 million is to be held in trust for the Penobscot Nation.

The Secretary of the Interior is authorized and directed to expend, at the request of the affected tribes, such funds for acquiring lands for such tribes.

Designated portions of such lands are to be held in trust by the United States and are subject to specified restrictions on alienation.

-- Place all Indians and Indian lands within the State of Maine under the civil and criminal jurisdiction and laws of the State, except where



Indians: Land Claims by Eastern Tribes

specifically provided otherwise, and except where declared otherwise with regard to the Passamaquoddy Tribe and Penobscot Nation by the Maine Implementing Act.

-- Declare that, as federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and Houlton Band of Maliseet Indians are eligible to receive "all financial benefits which the United States provides to Indians, Indian nations, and tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations, or tribes or bands of Indians."

-- Declare that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians are to be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation, and any lands of said Indians that are held in trust or subject to restrictions on alienation are to be considered Federal Indian reservations for the purposes of Federal taxation.

--- Declare that except as otherwise provided, the laws and regulations of the United States which are "generally applicable" to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians, are applicable in the



Indians: Land Claims by Eastern Tribes

State of Maine.

However, no law of the U.S. that "relates or accords special status or rights" to such Indians or Indian lands, or which affects or preempts" the

within the State of Maine.

Pending land claims include those of the Wampanoas Tribe of Gay Head, Mass., which seeks 5,000 acres in the town of Gay Head; the Schaghticoke and Western Pequot Tribes in Connecticut, which are claiming some 2,000 acres in that State; the Oneida, St. Regis Mohawk, and Cayuga Nation in New York, claiming, respectively, in excess of five million, up to 14,000, and up to 64,000 acres; the Catawba Tribe in South Carolina, seeking the return of some 140,000 acres; and the Chitimacha Tribe in Louisiana, seeking the return of some 2,000 to 3,000 acres.

The Maine case, discussed hereunder, has been defined by the Department of Justice as "potentially the most complex litigation ever brought in the Federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties." This case was initiated in 1972, when the Passamaquoddy Indian Tribe asked the Federal Government to sue the State of Maine on its behalf, contending that in 1794





the State of Massachusetts (Maine succeeded to the obligations of Massachusetts toward the Indians by the Act of Separation of 1820) had obtained much of the tribe's aboriginal territory by terms of a treaty which, they alleged, was in violation of the Indian Trade and Intercourse Act; i.e., that such treaty was not approved by the Federal Government. The Government refused to sue on the grounds that no trust relationship existed between it and the Passamaquoddies, and that it therefore had no trust obligation to sue on the Indians' behalf (the Passamaquoddies are recognized as Indians by the State of Maine and receive certain services from the State on the basis of this relationship). The tribe then sued the Government, challenging its refusal to recommend suit and claiming entitlement to protection under the Indian Trade and Intercourse Act. Shortly after suing the Government, the Tribe obtained a court order requiring the U.S. to sue Maine so that the statute of limitations on the tribe's claim would not run out. Two suits were then initiated -- one on behalf of the Passamaquoddies, and one on behalf of the Penobscots.

In 1974 the U.S. District Court in Maine issued a decision in the Passamaquoddy case, holding that the Indian Trade and Intercourse Act does apply to the Passamaquoddies, thus establishing a trust relationship with the





tribe. The court did not hold that the U.S. must sue the State of Maine -- only that the U.S. may not decline the Indians' request on the ground that there is no trust relationship between the U.S. and these Indians . The District court decision was upheld by the First Circuit Court of Appeals in 1975 ( Passamaquoddy v. Morton ).

In response to these decisions of the court, the Department of the Interior prepared litigation reports for the Department of Justice recommending that amended complaints (refined and more detailed suits) be filed on behalf of both the Passamaquoddies and the Penobscots against the State of Maine. (The Penobscots' status regarding the Indian Trade and Intercourse Act was not adjudicated as was that of the Passamaquoddies; however, the litigation report concluded that they are also covered by the Indian Trade and Intercourse Act and that there is, therefore, a trust relationship between them and the U.S. Government. The Penobscots, like the Passamaquoddies, were recognized as Indians by the State and received certain services from the State on the basis of this recognition. The Penobscots' lands were transferred by a 1796 deed by the tribe to the State of Massachusetts, an 1818 treaty with Massachusetts, and a purchase of land by

this period.)

The Department of Justice was granted repeated extensions of time before advising the Court of its intentions with respect to the case. This was in order to fully study the case, as well as to allow for a possible out-of-court settlement and/or Congressional action. Justice nevertheless indicated that it believed "a valid cause of action exists for possession and trespass damages for those lands actually used and occupied by the Penobscot and Passamaquoddy Tribes as of 1790, and thereafter taken from them in violation of the Trade and Intercourse Act of 1790, as amended." The elements cited as a "cause of action for recovery of Indian Land" included the following: (1) that the claimant is a "tribe of Indians" within the meaning of the Indian Trade and Intercourse Act; (2) that the land claimed is covered by the Act as tribal land; (3) that the U.S. has never consented to its alienation (i.e., transference); and (4) that the presumed trust relationship between the U.S. and the tribe (established by the Trade and Intercourse Act) has never been terminated.

The State of Maine argued that (1) the Indian Trade and Intercourse Act was never intended to apply to the original thirteen colonies after they became States; (2) that, in any event, the Indians transferred the lands in




question before the Revolution and thus before 1970; and (3) that in ratifying the Articles of Separation, by which Maine was separated from Massachusetts and admitted to the Union in 1820, Congress implicitly approved all treaties concluded by Massachusetts up to that time.

What are the prospects for solution to the remaining claims? In the first place, negotiated, out-of-court settlements between the executive branch and the tribes (subject to approval by Congress) are being explored, and in the two instances cited above -- Rhode Island and Maine -- were agreed to and confirmed by congressional legislation. Second, congressional action, independent of negotiation, is possible, and legislation has been introduced to this end. Third, resolution through the courts remains as an alternative should the first two avenues not be pursued to successful conclusion. Briefly, the potential of each avenue is summarized below:

(1) Out-of-court settlement between the Administration and the tribes.

Negotiations are underway in a number of instances, including New York, and South Carolina.

(2) Congressional action, independent of settlement out of court.

At least three potential alternatives are open to Congress, should out-of-court settlements fail. These are (a) extinguishment of the aboriginal title




claimed by the Indians (with the possibility of a cash settlement of the claim in compensation therefor) (b) retroactive ratification of the allegedly illegal treaties and agreements by which the land was transferred, and (c) a settlement similar to the Alaska Native Claims Settlement Act of 1971, whereby the aboriginal land claims of the Alaska Natives were extinguished in return for compensation by means of both a land settlement and a cash payment.

(3) Judicial process: adjudication through the courts.

Judicial process is potentially the most time-consuming method of resolution. The Department of Justice has noted that "it is impossible to

the tribes, would place substantial hardships on innocent parties, who acted largely in good faith in purchasing real estate, investing their funds and improving their property. Only a Congressional resolution of the Indian claims can correct the past injustices to the tribes without creating new hardships for others." It has been the pendency of these suits with their resultant uncertainty which has precipitated economic disruption in the States of both Maine and Massachusetts.

The 96th Congress enacted P.L. 96-217 (S. 2222) to amend Title 28 (sec. 2415) (a) and (b)) of the U.S. Code by extending the time in which the United
BACK, PAGE 11 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

States can bring damage actions on behalf of Indian tribes for claims accuring prior to July 18, 1966. The new deadline is Dec. 31, 1982. This legislation also directs the Attorney General to submit to Congress by June 30, 1981, legislative alternatives to resolve those Indian claims subject to the statute of limitations which the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation.

Other Claims

A brief explication of other similar cases includes the following:

Rhode Island

Two suits were filed in Federal District Court in Rhode Island on Jan. 8, 1975, by the Narragansett Indians, claiming title to lands allegedly alienated in violation of the Trade and Intercourse Act ( Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp ., and Narragansett Tribe of Indians v. Murphy ). The suits were subsequently consolidated and the court has refused to dismiss, rejecting defenses set forth by the defendants (June 23, 1976) (418 F. Supp. 798); (Dec. 1, 1976) (426 F. Supp. 132).
BACK, PAGE 12 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

Legislation settling these claims was enacted by Congress on Sept. 28, 1978 (P.L. 95-395) and by the State of Rhode Island on May 4, 1979. (See above).

Connecticut

A suit was filed in Federal District Court in Connecticut on Apr. 17, 1975, by the Schaghticoke Indians, seeking to recover several hundred acres of land located in the Town of Kent, allegedly alienated in violation of the Trade and Intercourse Act ( Schaghticoke Tribe of Indians et. al. v. Kent School Corp. et. al. ). The court has refused to dismiss, rejecting defenses set forth by the defendants (Dec. 9, 1976) (423 F. Supp. 780).

Other suits filed in Federal District Court in Connecticut by tribes seeking recovery of lands allegedly alienated in violation of the Trade and Intercourse Act are:

Western Pequot Tribe v. Holdridge Enterprises, Inc., et. al. (May 6, 1976);

Mohegan Tribe v. Zauss, et. al. (Aug. 31, 1977); and

Mohegan Tribe v. State of Connecticut (Aug. 31, 1977).

On Jan. 17, 1980, the U.S. District Court for the District of Connecticut
BACK, PAGE 13 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes

thus denying a motion by the State of Connecticut to dismiss, the case ( Mohegan Tribe v. Conn. ). The State had contended that the Nonintercourse Act was not intended to apply to Indians such as the Mohegans who, it was alleged, have never resided in Indian country as defined by Federal law.

Massachusetts

A suit was filed in Federal District Court in Massachusetts on Aug. 28, 1976, by the Wampanoag Indians of Mashpee, seeking to recover some 17,000 acres in the Town of Mashpee allegedly alienated in violation of the Trade and Intercourse Act ( Mashpee Tribe v. New Seabury Corp. et. al. ) The court refused to dismiss, rejecting defenses set forth by defendants (Feb. 28, 1977) (427 F. Supp. 899). The court noted that in order to establish a prima facie case, "plaintiff must show that...it is or represents an Indian tribe within the meaning of the Trade and Intercourse Act...." Thus, on Oct. 17, 1977, trial opened in Federal District Court in Boston to determine whether the Mashpee Wampanoags are in fact a legally consituted tribe and thus eligible for protection under the Trade and Intercourse Act. On Jan. 6, 1978, the jury in this trial determined that the Wampanoags were not an American Indian tribe BACK, PAGE 14 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes
in 1790, and are not today.

On Feb. 13, 1979, the First U.S. Circuit Court of Appeals in Boston upheld the Federal District Court jury decision that the Mashpee Wampanoag Indians are not an Indian tribe and thus are not within protective coverage of the Indian Trade and Intercourse Act.

A similar suit was filed on Dec. 23, 1974, in Federal District Court in Massachusetts by the Wampanoag Tribe of Gay Head, Massachusetts, seeking recovery of some 5,000 acres of land ( Wampanoag Tribe of Gay Head v. The Town of Gay Head ). On Dec. 10, 1976, the Town of Gay Head voted to deed certain of the disputed lands to the Indians; such action must be approved by the Massachusetts legislature, however.

New York

A case of particular importance is that of Oneida Nation of New York, et al. v. County of Oneida, New York, et al. , in which an opinion was delivered on July 12, 1977, in Federal District Court for the Northern District of New York (425 F. Supp. 527). Plaintiffs in this case are the Oneida Indian Nations of New York and Wisconsin and the Oneida of the Thames Band Council of Ontario, Canada. Defendants are the Counties of Oneida and BACK, PAGE 15 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):

Indians: Land Claims by Eastern Tribes
Madison, New York.

The Indians originally filed suit in 1970, seeking damages arising from the allegedly illegal use and occupancy by the State (and hence the counties) of 100,000 acres allegedly comprising part of the Indians' aboriginal lands, purchased by the State of New York in 1795, allegedly in violation of the Trade and Intercourse Act.

The Court held (1) that the Indians have established that transfer of the land by the 1795 treaty with New York was in violation of the Trade and Intercourse Act; (2) that defenses asserted by the defendants have not been established; and (3) that the counties are liable to the Indians for damages resulting from their (the counties') use and occupancy of part of the land in question during 1968 and 1969.

This decision is important because for the first time a court has found: (1) that land was taken in violation of the Trade and Intercourse Act; and (2) that the defendants are liable for damages as a result thereof.

summary judgment in the 1970, and a later 1974, action. The County argued that a ruling in 1978 by the Indian Claims Commission that the U.S. had knowledge of the treaties whereby the Oneida lands were transferred
BACK, PAGE 16 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):


constituted an implied Federal ratification of the State's ownership of the lands so as to satisfy the Trade and Intercourse Act.

On May 17, 1979, the District Court denied the County's motion for summary judgment. An appeal of that denial was dismissed on June 1, 1980, by the U.S. Second Circuit Court of Appeals. The Court held the issue to be "interlocutory" and "not ripe for appeal."

Most recently, a suit was filed in Federal district court in New York in December 1979 by the Oneida Indians, claiming up to 5 million acres -- a claim not backed by the Interior Department ( Oneida Indian Nation v. State of New York et. al. ).

On Aug. 20, 1979, Interior Solicitor Leo M. Krulitz announced that a tentative agreement has been reached on a proposed legislative settlement which would give the Cayuga Indian Nation a 5,481-acre reservation and an $8 million trust fund in return for extinguishment of the Cayugas' claims to 64,000 acres in that State.

Legislation to implement this proposal has been introduced (H.R. 6631). The bill would provide for relinquishment of the Cayugas' claims to 64,000 acres in the State of New York and related damages; for extinguishment of alleged aboriginal title of such Indians to such lands; and for validation of
BACK, PAGE 17 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):


any previous transfers involving such lands.

The State of New York would transfer to the Interior Department at no cost the 1,852-acre Sampson State Park, to be held in trust for the Cayuga Nation. The Department of Agriculture would transfer 3,629 acres of National Forest Land to the Interior Department to be held in trust for the Cayugas. These lands would constitute the "Cayuga Reservation."

$2.5 million of the $8 million trust fund, established by H.R. 6631, could be used by the Secretary of the Interior for acquisition of additional trust lands for the tribe.

The tribe would consent to State criminal and civil jurisdiction on these lands, with limited concurrent tribal criminal jurisdiction as specified.

On Mar. 18, 1980, the House voted on, and failed to pass, H.R. 6631.

The Cayugas are reported to have filed suit on Nov. 19, 1980, in the Federal District Court of New York, asking for return of the 64,000 acres in question and damages.

In April 1980, a proposed settlement of the claims of the St. Regis Mohawks was reported, whereby the Indians would receive 9,750 acres of New York State land and a trust fund of $7.5 million in Federal funds. In addition, the State of New York would sell the St. Regis Mohawks 250 acres at
BACK, PAGE 18 OF 22. READY FOR COMMAND, OPTION OR PG #(FOR NXT PG, XMIT):


fair market value.

Claims by the Oneidas of up to 250,000 acres, by the St. Regis Mohawks to 14,000 acres, and the Cayugas to 64,000 acres have been termed "credible" by the Interior Department, as have claims by the Catawba Indians in South Carolina to 140,000 acres in that State. However, the Interior Department is now backing negotiated settlements in these cases.

South Carolina

On Apr. 17, 1978, Interior Secretary Cecil D. Andrus announced the formation of a special task force to develop a proposed legislative settlement for the Catawba Indians' land claims in South Carolina. Members of the task force are Interior Solicitor Leo M. Krulitz; James Mormon, Assistant Attorney General; and Eliot R. Cutler, Associate Director, Office of Management and Budget (see above).

On Oct. 28, 1980, the Catawba Indians filed suit in U.S. District Court for the District of South Carolina, seeking return of 140,000 acres and trespass damages thereon ( Catawba Indian Tribe v. State of South Carolina et. al. ).





Louisiana

Another case involves the Chitimacha Tribe of Louisiana, which filed suit in Federal District Court (Western District of Louisiana) in August 1977, for recovery of 2,000 to 3,000 acres of land allegedly alienated in violation of the Trade and Intercourse Act ( Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., et al. ).

The claim was dismissed on April 24, 1980, by the District Court. The Court held that the Louisiana Land Claims Acts, under which nonindian title had been recognized, established exclusive procedure for claiming title to the land within the Louisiana Purchase. The Court held, further, that time limitations for filing claims under such Acts precluded the Tribe's claim.

The Department of the Interior has recommended that the Department of Justice sue on behalf of the Chitimachas for the return of a separate 800-acre parcel of land.

Florida

In 1978 the Seminole Tribe of Florida filed suit in U.S. District Court for the Southern District of Florida "to establish the rights of the Seminole Tribe... in 16,000 acres of reservation land... subject to the protection of





the Indian Non-Intercource Act..." ( Seminole Tribe of Indians of Florida v. State of Florida, et. al .)

In 1979 the Miccosukee Tribe of Florida filed suit in the U.S. District Court for the Southern District of Florida for "a declaratory judgment that Plaintiff Miccosukee Tribe... is the beneficial owner of certain tracts of land in the State of Florida.... The lands in question consist of a tract of approximately 49,920 acres set aside by the State as part of a reservation for the Miccosukee Tribe and a tract of about 5 million acres set aside by Executive Order of the President of the United States as a reservation for the Tribe." ( Miccosukee Tribe of Indians of Florida v. State of Florida, et. al .) The suit alleges that the lands were alienated in violation of 25 U.S.C. 177, the Indian Trade and Intercourse Act.

Virginia

Legislation to ratify a negotiated settlement of a claim by the Pamunkey Indians of Virginia against the Southern Railway Co. was enacted on Nov. 24, 1980 (P.L. 96-484).

The Pamunkeys' claim involves 20 acres of land which the Richmond and York River Railroad "purported to condemn" in 1855, without consent of the Virginia

Indians: Land Claims by Eastern Tribes
Assembly, as allegedly required by State law, or of the United States, as allegedly required by the Indian Trade and Intercourse Act. In 1894 the Southern Railway acquired the track built over the land in question (H.Rept. 96-1144).

The legislation provides for payment of $100,000 by the Southern Railway to the Pamunkey Tribe in exchange for a waiver of the Tribe's claim for any past trespass damages and for use by the railway of the right of way over the land for the next ten years. The legislation also provides for a lease agreement for future use by the railway of the right of way, whereby the railway would compensate the Tribe annually for such use beginning in 1989. If the right of way were abandoned and the track removed, full possession and exclusive use of the right of way would revert to the Tribe.

The legislation also provides for acceptance by the United States of a waiver and release signed by the tribe waiving all tribal claims against the United States, the State of Virginia, or any other person or entity, which might arise out of the use or disposition of the lands in question.
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- Nonintercourse Act 1790
- 1871 act requires legislation

NY

area - 1/2 State of Mass.
Indians seek "immediate possession"
+ damages = fair rental value
for entire period of dispossession

① 1978 Oneida Indian Nation of NY v. NY;
NY Thruway Auth., Counties
6,000,000 acres

② 1979 Oneida Indian Nation of Wisc. +
Oneida of the Thames Band
similar claim against ~~Same~~ As

③ 1980 Cayuga Nation
64,000 plus promised 3,000,000

| Tribe | Claim/Transfer Date | Estimated Value of Land at Time of Transfer ($/acre) */ | Interest to Jan. 1, 1984 (2% simple interest-aboriginal title 5% simple interest-recognized title Ø interest for pre-1790 transfers) | Total Award (2% interest) | Total Award (5% interest) |
|---|---|---|---|---|---|
| Cayuga | 62,100 acres/1795 | $ 279,450 ($4.50/acre) | $ 1,050,732 (2% x 188) | $ 1,330,182 | |
| | | | $ 2,626,830 (5% x 188) | | $ 2,906,280 |
| | 1,900 acres/1807 | $ 11,400 ($6/acre) | $ 40,128 (2% x 176) | $ 51,528 | |
| | | | $ 100,320 (5% x 176) | | $ 111,720 |
| Oneida | 100,000 acres/1795 | $ 450,000 ($4.50/acre) | $ 1,692,000 (2% x 188) | $ 2,142,000 | |
| | | | $ 4,230,000 (5% x 188) | | $ 4,680,000 |
| | 140,000 acres/1800-40 | $ 1,120,000 ($8/acre) | $ 3,651,200 (2% x 163) | $ 4,771,200 | |
| | | | $ 9,128,000 (5% x 163/1820) | | $ 10,248,000 |
| St. Regis Mohawk | 10,500 acres/1820-30 | $ 105,000 ($10/acre) | $ 331,800 (2% x 158/1825) | $ 436,800 | |
| | | | $ 829,500 (5% x 158/1825) | | $ 934,500 |
| Shinnecock | 3,200 acres/1859 | $ 64,000 ($20/acre) | $ 158,720 (2% x 124) | $ 222,720 | |
| | | | $ 396,800 (5% x 124) | | $ 460,800 |
| Catawba | 144,000 acres/1840 | $ 864,000 ($6/acre) | $ 2,471,040 (2% x 143) | $ 3,335,040 | |
| | | | $ 6,177,600 (5% x 143) | | $ 7,041,600 |

* FIGURES DO NOT ACCOUNT FOR SET-OFFS (MONEY RECEIVED)

| | | | | | |
|---|---|---|---|---|---|
| Mohegan | 2,550 acres/1872 | $ 63,750 ($25/acre) | $ 141,525 (2% x 111) | $ 205,275 | |
| | | | $ 353,812 (5% x 111) | | $ 417,562 |
| Schaghticoke | 1,200 acres/ 1801 | $ 3,600 ($3/acre) | $ 13,104 (2% x 182) | $ 16,704 | |
| | | | $ 32,760 (5% x 182) | | $ 36,360 |
| | 100 acres/1900 | $ 3,000 ($30/acre) | $ 4,980 (2% x 83) | $ 7,980 | |
| | | | $ 12,450 (5% x 83) | | $ 15,450 |
| Western Pequot | 80 acres/1800 | $ 240 ($3/acre) | $ 878 (2% x 183) | $ 1,118 | |
| | | | $ 2,196 (5% x 183) | | $ 2,436 |
| | 720 acres/1855 | $ 14,400 ($20/acre) | $ 36,864 (2% x 128) | $ 51,264 | |
| | | | $ 92,160 (5% x 128) | | $ 106,560 |

Cayuga aboriginal (pre-1790) — 3 millions acres/1789 — $6,000,000 ($2/acre)

Oneida aboriginal (pre-1790) — 300,000 /1785 — $450,000 ($1.50/acre)

5,450,000 /1788 — 10,900,000 ($2/acre)

*/ The dollar-per-acre figure used for estimating the value of the land at the time of the transfer is only a very tentative estimate of what the value of the land might have been. Extensive historical research will be necessary to develop a more reliable estimate of the value of the claimed land at the time of the transfer.

1/ Represents estimated total number of landowners only. Does not include total population of claim area.

2/ Attempting to estimate a probable negotiated settlement value is impossible because of the various factual situations and other imponderables. The Maine settlement is not directly comparable since it involved aboriginal claims while claims in New York and the South Carolina claim involve recognized title. A proposed Cayuga settlement was the subject of H.R. 6631 in 1980 and the figures were as noted. The figures for the St. Regis Mohawk are based on a draft bill that apparently was not introduced, at least in part, because of internal tribal dissension.

3/ These values do not reflect offsets that would be allowable under the Bill. For example, the Catawba claim would be worth $210,000 plus interest but the State paid over $200,000 in subsistence payments to the Catawbas through the years as partial recompense for the loss of their land. If this were subtracted the Catawbas would receive nothing under the Bill.

4/ The first figure represents post-1790 transactions and appears to be succeeding in the courts. The second figure represents pre-1790 claims and appears to be losing in the courts.

5/ Three million represents an unfiled potential aboriginal claim. No data has been accumulated on this claim.

6/ Represents value of land without improvements.

7/ Shinnecock is an unrecognized tribe and does not appear to be actively pursuing their claim at this time. Thus, we have no data except as noted.

Other Known and Potential Claims

Connecticut - Western Pequot, Schaghticoke, Mohegan, Eastern Pequot.

Delaware - Nanticoke.

Florida - Seminole, Miccosukee.

Louisiana - Chitimacha, Tunica-Buloxi, Houma.

Maryland - Piscataway.

Massachusetts - Gay Head Wampanoag, Herring Pond, Chappaquiddick, Christiantown, Troy, Mashpee.

17. Uhlmann - 228
file Indian
Land Claims

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM May 10, 1982

TO: Fred Khedouri

FROM: Mike Horowitz MH

RE: Ak-Chin Authorization

You have asked my opinion on whether the United States will be subject to damages under the Ak-Chin Indian Community Water Rights Settlement Act, Pub. L. No. 95-328 (July 28, 1978) (the Act), or the implementing contract between the United States and the Ak-Chin Indian Community signed on May 20, 1980, if the President fails to propose, or the Congress to adopt, authorizing and appropriation legislation sufficient to fund construction of water delivery systems that would provide a full 85,000 acre-feet of ground water annually to the Ak-Chin Indian reservation in Arizona.

I. Background

The Act was the product of a negotiated settlement of a dispute between the Ak-Chins and surrounding land owners in Arizona, arising from the landowners' alleged infringement of the Ak-Chins' water rights. The United States was not responsible for this infringement, nor was it legally liable, except possibly on an attenuated theory that the United States had breached its trust responsibility by not enforcing the Ak-Chins' water rights against the landowners on a timely basis.

Under the Act, the Ak-Chins waived all of their past and future legal claims for infringement of their water rights. In return the United States agreed to conduct a study of possible sources of water for the Ak-Chins, and, if there were a determination that a viable source of ground water existed, to enter into a contract with the Ak-Chins to supply 85,000 acre-feet of ground water from nearby federal lands. Under the Act, the United States would be liable for damages in the event of breach of the contract to deliver water; damages for such breach were set at the replacement cost of water not delivered by the United States. The United States would also be liable for any injury to the water rights or other property of surrounding landowners that might be caused by the Ak-Chin water project. The surrounding landowners and the State of Arizona made no contribution to the settlement.

The Act specifically provided that if the Secretary determined that pumping 85,000 acre-feet of ground water a year from nearby federal lands would not be hydrologically feasible or would diminish the ground water supply in the basin and thereby cause severe damage to other water users, the United States could deliver a lesser amount of water. However, this determination had to be made, if at all, and an alternative plan proposed, within 180 days of submission of the original report -- a period now expired.

Section 5 of the Act provided:

> "Notwithstanding any other provisions of this Act, no authorization to make payments under this Act, or to enter into contracts, shall be effective except to such extent or in such amounts as are provided in advance in appropriations Acts."

By early 1980, the Secretary had completed engineering and hydrological studies of the Ak-Chin area, and determined that sources of water existed on federal lands near the Ak-Chin reservation, which could be provided to the Ak-Chins. A contract between the United States and the tribe was negotiated and signed, establishing a schedule for phased water delivery. The plan is for the United States to construct a new well field on BLM land 30 miles from the Ak-Chin reservation to tap deep ground water, and to provide additional water from the Central Arizona Project (CAP). The contract provides for damages against the United States upon breach of contract. Section 14 of the contract states, however, "This contract is subject to the availability of appropriations pursuant to Section 5 of the Act."

## II. Analysis

In my opinion, the obligations of the United States under the contract and under the Act are expressly limited by the authorization-appropriations process. There is little doubt that the Ak-Chins will sue if the United States fails to provide less than 85,000 acre-feet of water per year. It is always possible that a sympathetic court would rule in the Ak-Chin's favor. However, I believe that the United States has a substantial defense to such a lawsuit, and thus that the Ak-Chins would not be entitled to damages caused by failure to enact sufficient authorizations or appropriations.

No authorizations to enter into contracts are "effective except to such extent or in such amounts as are provided in advance in appropriations Acts." Pub. L. No. 95-328, §5. I interpret this language to mean that any authority to contract with the Ak-Chins (and any contract with other parties to effectuate the Act) must be made through the appropriations process. This apparently was the view of the Department and the Ak-Chins as well, since the contract of May 20, 1980 stated, "This contract is subject to the availability of appropriations pursuant to Section 5 of the Act."

Neither the Act nor the contract purports to require the Administration to propose, or Congress to pass, appropriations legislation that would effectuate the contract. Nor could it. Given our constitutional system of separation of powers, Congress cannot compel the President to submit particular legislation, Sierra Club v. Department of the Interior, 424 F. Supp. 172, 175 (D.N.D. 1976), nor, in my opinion, can Executive Branch officials execute binding, judically-enforceable contracts that would restrict the exercise of the constitutional prerogatives of future Presidents and Congresses with respect to the submission or passage of legislation. See National Audubon Society v. Watt, Nos. 81-1641 & 81-1763, slip op. at 11 n.12 (D.C. Cir., May 7, 1982) (raising but not deciding the issue). This understanding of the separation of powers is reflected in the Anti-Deficiency Act, 31 U.S.C. §665(a), which prohibits federal officials from usurping congressional prerogatives by entering into contracts for the payment of money, in the absence of advance appropriations or other legal authority. The May 20, 1980 contract, therefore, cannot be viewed as obligating the United States to make any payment, or engage in any program, the funds for which have not been appropriated by Congress. This interpretation of the Act and the May 20, 1980 contract comports with the usual understanding of federal contractual obligations, since it is standard procedure for the United States to enter into contracts subject to the availability of appropriations. See, e.g., Blackhawk Heating & Plumbing, Inc. v. United States, 622 F.2d 539, 552-553 (Ct. Cl. 1980).

It follows that a decision to seek funding for water projects that would provide less than 85,000 acre-feet of water per year would not constitute a breach of contract or a violation of the Act. Section 4(c) of the Act admittedly states that a "failure to deliver water within the times specified ... shall be deemed a breach of contract," but this language is expressly overridden by the language of Section 5 ("Notwithstanding any other provisions of this Act, no authorizations to ... enter into

contracts shall be effective except to such extent or in such amounts as are provided in advance in appropriations Acts"). The Deputy Solicitor of Interior has informally stated that he shares this interpretation of federal legal obligations under the Act.

Nor do I believe that failure to seek appropriations for full funding of the Ak-Chin project would violate the trust responsibility of the United States to the tribe, though on this point I would defer to the professional judgment of the Lands Division or the Solicitor of Interior.

I would stress, however, that there are high litigation risks to deciding, without agreement with the Ak-Chins, to provide less than 85,000 acre-feet of water per year. Litigation would be time-consuming and expensive, and probably politically damaging as well. The Ak-Chins will present a sympathetic case on the facts, and might well ultimately prevail on the merits. Moreover, the Ak-Chins would in all likelihood be freed from their waiver of suits against the surrounding landowners -- thus recreating the problem that originally spawned the Act. Nonetheless, it is my legal judgment that neither the Act nor the contract requires that the Administration submit a proposal for the funding of a project guaranteed to supply the full 85,000 acre feet of water per year to the Ak-Chin community.

Moreover, as a legal matter I would caution that the decision to fund the Ak-Chin project fully would also pose the risk of substantial future legal liability. The United States will bear legal responsibility for any injury to the property rights of surrounding landowners from construction of the well field. Since the well field is estimated to lower the level of ground water in the Vekol Valley aquifer by 12 feet per year, it is not unlikely that the water rights of surrounding landowners will suffer. Indeed, in the event that the project causes the land above the aquifer to subside, the damage could be severe -- leading to costly litigation and judgments against the United States.

Since the southern part of the Vekol Valley aquifer underlies the Papago Indian Reservation, the Ak-Chin project is likely to generate litigation by the Papago against the United States for violation of its trust responsibility.

Most alarming of all is the prospect of breach of contract actions by the Ak-Chins against the United States if less than the promised amount of water is delivered. So long as any such

failure is attributable to a lack of appropriations, the United States has, as noted above, a substantial defense to any ensuing breach of contract action. If the appropriations are made and the water system constructed, however, the United States may become strictly liable for any shortfall in water delivery -- with damages measured at replacement cost. In light of all the possible contingencies that might affect the delivery of water to the Arizona desert over the life of the contract (i.e., in perpetuity), it seems clear that completion of the proposed project would subject the United States to the likely prospect of indeterminate, potentially mammoth liability in perpetuity.

The legal risks of failure to fund the Ak-Chin project in full must therefore be weighed against the legal risks of doing so -- the prospect of substantial liability to the surrounding landowners, to the Papago Indians, and to the Ak-Chins themselves. In my judgment, completion of the proposed project without modification of future liability would be the greater long-run risk.

I fully share NRD's view that this issue merits high-level attention, because the Ak-Chin settlement is being treated as a "model" for future settlements. If we yield to the considerable pressure we are bound to receive from Interior, Congress, and the Indian community, it will be difficult to draw the line in similar cases in the future. As NRD points out, the Ak-Chin settlement

- is a total federal bail-out of local private parties;

- is inordinately expensive (NRD estimates $865,000 per Indian);

- creates untold -- but potentially devastating -- future liability in the not unlikely event that we are unable to provide 85,000 acre-feet of water per year in the desert in perpetuity;

- creates unpredictable liability for damage to surrounding landowners -- who created the problem in the first place;

- has the potential for causing severe and irreparable environmental damage by substantially lowering the water table;

- may not be technically feasible; and
- may interfere with the water rights of nearby Indian tribes.

The Administration faces a high-risk, no-win situation in this and similar Indian water rights settlements, and in my opinion should use the Ak-Chin situation as an opportunity to reappraise federal policy in this area.

cc: Mike Uhlmann

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 13, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: CCLP Agenda Item - Indian Land Claims Legislation

There is an action-forcing event in late June. The House Interior Committee is scheduling hearings on this legislation on June 22, and I understand the Senate Select Committee on Indian Affairs is considering holding hearings at about the same time.

This will be on the CCLP agenda for the week of June 1.

In the meantime, we are working on this problem at the staff level with OMB, Interior, and Justice. We have also met with some Indian groups who are providing us with a position paper next Monday (May 17) and have scheduled a further meeting with Indian representatives for later next week.

Becky Norton Dunlop
Craig Fuller
Roger Porter

Bill –
How analogous is this to NY?

THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release June 1, 1982

TO THE HOUSE OF REPRESENTATIVES:

I return herewith, without my approval, H.R. 5118, the proposed "Southern Arizona Water Rights Settlement Act of 1982." I take this action with sincere disappointment. I am well aware of the hard work of the Arizona Congressional leaders that went into the development and passage of this legislation. I also understand their desire to resolve the litigation that has hung over the head of the City of Tucson and the many private parties involved for the past seven years.

I strongly believe that the most appropriate means of resolving Indian water rights disputes is through negotiated settlement and legislation if it is needed to implement any such settlement. However, H.R. 5118 is a negotiated settlement with a serious flaw. The United States Government was never a party to the negotiations that led to the development of this proposal. This settlement was negotiated among the Tribe, the City of Tucson, the State of Arizona, the affected commercial interests and other defendants with assistance from the Arizona Congressional delegation. The result of this negotiation was that the United States Government, which was absent from the negotiation table, would bear almost the entire financial burden of the settlement at a potential initial cost of $112 million and a potential annual cost of approximately $5 million.

I cannot support this resolution of litigation on behalf of the Papago Tribe by the United States Government. I can only in good conscience approve legislation intended to implement a settlement if the United States has been a major party in the negotiations and if the contribution by the defendants in the litigation involved is significant.

I pledge the full cooperation of my Administration to the States and local governments that are facing the difficult task of equitably resolving Indian water rights suits. I cannot, however, pledge the Federal Treasury as a panacea for this problem.

H.R. 5118 is a multi-million dollar bailout of local public and commercial interests at the expense of Federal taxpayers throughout the nation. It is a prime example of serious misuse of Federal funds. It asks the Federal Government to pay the settlement share of the mining companies and other local water users whose share should more properly be borne by the defendants themselves.

I therefore must return this legislation to you without my approval. I will only approve legislation that implements a true negotiated settlement. Such a settlement is one in which all parties that are making contributions or concessions have agreed to those contributions or concessions at the negotiating table. I look forward to receiving such legislation from the Congress. I am asking the Secretary of the Interior to coordinate participation by my Administration in any such negotiations.

RONALD REAGAN

THE WHITE HOUSE,
June 1, 1982.

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