U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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Honorable James C. Miller
Director
Office of Management and Budget
Washington, D.C. 20530

Dear Mr. Miller:

In compliance with your request, we have examined a facsimile of H.R. 278, "The Alaska Native Claims Settlement Act Amendments of 1987." This letter sets forth the views of the Department of Justice on the constitutionality of the bill. We are acquainted with, and defer to, the objections of the Department of Interior concerning the policy underlying the bill.

A major purpose of this bill is to address the so-called "1991" issues -- questions growing out of the expiration in 1991 of restrictions on the alienation of native corporation stock in Alaska. As you know, the Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished native land claims and established corporations governed by state law. ANCSA provided that the land was to be privately owned by the corporations and not held in trust by the United States as in the lower forty-eight states, and that individual would receive stock that would "vest in the holder all rights of a stockholder in a business corporation organized under the laws of the State of Alaska, except [the right to alienate such stock] for a period of twenty years." 43 U.S.C. 1606(h). As 1991 approaches, concern has been voiced in certain quarters that native rights and land will dissipate in widespread sale of their stock. It is primarily this fear that prompts Section 8 of H.R. 278.

We believe the means by which the bill's attempt to encourage native corporations to retain their lands raises serious constitutional concerns under the Takings Clause of the Fifth Amendment, which threaten to expose the United States to enormous financial liability. If the courts find a taking, then the Fifth Amendment would require the United States to pay just compensation to the Alaska natives notwithstanding the bill's

declaration that "No money judgment shall be entered against the United States in a civil action" challenging "the issuance or distribution of settlement Common Stock for less than fair market value consideration" or the "extension of alienability restrictions." The Supreme Court held just last term that, once a taking is found, sovereign immunity is no bar to the "award [of] money damages against the government" since "it is the Constitution that dictates the [just compensation] remedy for interference with property rights amounting to a taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378, 2386 & n.9 (1987). Moreover, Congress could not avoid liability even if it subsequently amended the statute since the Fifth Amendment would require compensation for temporary takings that might occur between December 18, 1991, and the time a court finds the extension of alienation restrictions to be a taking. Id. With this preface, we turn our concerns to the underlying question of takings risks.

First, section 4 of the bill would authorize the Native Corporations to issue new shares (up to 100 per individual) of Settlement Common Stock "for no consideration" to individuals not included in the original settlement and to natives who have attained the age of 65. We believe that this provision, if implemented, would constitute a taking of private property without just compensation and thus would be unconstitutional under the Fifth Amendment. Under the terms of the original Settlement Act, those entitled to participate in the settlement were determined within two years of the date of enactment. Thus, after the individuals determined to be eligible as of December 18, 1973, received their shares, the settlement had been essentially executed.[1] By authorizing the Corporations to issue additional shares for no consideration, H.R. 278 would authorize the Corporations to deprive existing shareholders of part of their interest in the Corporations. This is illustrated by the following hypothetical. Assume the Corporation has one hundred shares of stock outstanding, with 10 shareholders who own 10 shares each. Thus, each shareholder owns 10% of the Corporation. If the Corporation issues an additional one hundred shares of stock to 10 new shareholders for no consideration, then each shareholder will own only 5% of the Corporation. In effect, the Corporation will have transferred half of the original

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[1] We realize that Congress was under no legal compulsion to agree to a settlement, and that the 1971 Act was therefore largely an act of legislative grace. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). Nevertheless, many Alaska natives presumably gave up their right to pursue claims to judgment in favor of the 1971 settlement. In our view, once Congress confers upon Alaska natives certain property rights and interests, it may no longer modify or abrogate those rights free from Fifth Amendment constraints.

shareholders' property to the new shareholders.[2] H.R. 278 would authorize the Native Corporations to effect just such a transfer, exposing the United States to potentially enormous financial liability for compensation.[3]

These difficulties are not alleviated by the fact that the bill would authorize the Corporations, rather than Congress, to dilute the interest of the existing shareholders. Although it is true that if the Corporations never exercise that authority, then no takings claims will arise. If, on the other hand, the Corporations exercise that authority, then a taking would occur no less than if the bill had itself diluted the shares since, in either case, Congress would have authorized the taking. Cf. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a state effects an unconstitutional taking by authorizing cable companies to install cable facilities on private property for inadequate consideration). Thus, H.R. 278 would, in effect, delegate Congress' power of eminent domain to the Native Corporations.

Although the Supreme Court has upheld congressional imposition on Indian allottees of restraints against alienation of their interests or expansion of the class of beneficiaries under an allotment Act, see United States v. Jim, 409 U.S. 80 (1972); Brader v. James, 246 U.S. 88 (1918), it has also consistently recognized that "the wide-ranging congressional power to alter allotment plans [exists only] until those plans are executed." Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 656 (1976) (citing cases). Thus, in Hodel v. Irving, 107 S. Ct. 2076 (1987), the Supreme Court invalidated a measure providing that small, undivided interests in lands previously allotted to Indians could not be devised, but rather would escheat to the tribe to prevent further fractionalization of those interests. Implicit in the Court's holding, therefore, is a finding that the allotment of the lands in question had been

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[2] Of course, whenever a corporation issues new shares, the percentage interest of the original shareholders is reduced. The difference is that in the ordinary case, the new shares are issued for consideration that increases the capitalization of the corporation and thus enhances the value of each share. In the ordinary case, therefore, the only effect on the original shareholders of the new issue of shares is that they will have a smaller interest in a larger pie.

[3] Although we do not possess specific data, we assume that a very substantial number of Alaska natives either have been born or have attained the age of 65 since December 18, 1971. If the Native Corporations issue an additional 100 shares of stock to each such native for no consideration, as H.R. 278 would authorize, then the claims of existing shareholders for compensation would be equal to the value of the potentially enormous number of additional shares issued.

fully executed and was no longer subject to congressional revision or abolition.

In this case, the 1971 congressional settlement with Alaska natives appears to have been fully executed.[4] The natives eligible under the Act have now received their stock, and the congressionally authorized issuance of additional shares for no consideration would constitute a compensable taking.

Second, similar concerns are raised by sections 5 and 8, which mandate that restraints on alienation of native stock continue beyond 1991. The latter section provides "opt-out" provisions for corporations wishing to terminate alienation restrictions, giving those corporations one chance to choose this before 1991, and requiring approval by a majority vote of the shareholders. Even so, dissenters' rights under Section 9 apparently arise only in the improbable event that such an amendment to the corporate articles is proposed. In addition, Section 9 devalues the worth of any dissenting stock by allowing the exclusion of nearly all significant corporate assets in assessing its price, by allowing the deferring of payment for it for five years, and by severely restricting its alienation.

In Hodel v. Irving, 107 S. Ct. 2076 (1987), the Supreme Court found that a statute with economic impacts much like those of H.R. 278 -- barring Indian owners from transferring land by devise; land held by the Indian owner at death would escheat to

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[4] It has been suggested that Section 23 of the original Act may be read to preclude a finding that the settlement has been fully executed since that section contemplates the possibility of future legislation. Section 23 provides:

> The Secretary shall submit to the Congress annual reports on implementation of this chapter. Such reports shall be filed by the Secretary annually until 1984. At the beginning of the first session of Congress in 1985 the Secretary shall submit, through the President, a report of the status of the Natives and Native groups in Alaska, and a summary of actions taken under this chapter, together with such recommendations as may be appropriate.

43 U.S.C. 1622.

Although this section appears to contemplate the possibility of additional legislation, that does not establish a congressional intent to retain the authority to alter or abolish the interests conveyed under the terms of the settlement. By definition, an important part of the settlement was executed when eligible natives received their stock. We think the better view is that Congress remains free to enact additional legislation so long as it refrains from interfering with vested property rights.

the Tribe -- constituted a taking in violation of the Fifth Amendment. The Court found this to be "virtually an abrogation of the right to pass on . . . property . . . [a] part of the Anglo-American system since feudal times." Id. at 2083.[5] Each of the elements of H.R. 278 which we have identified, and certainly their aggregate, pose such "takings" risks, and the United States must expect that passage of H.R. 278 would bring down on it an array of such claims.[6]

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[5] In addition, Justice O'Connor's majority opinion in Irving noted that the restriction on transfer by devise was broader than necessary to achieve Congress's purpose of preventing further fractionalization of Indian lands:

> Moreover, this statute abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property -- as for instance when the heir already owns another undivided interest in the property.

Id. (footnote omitted). Similarly, H.R. 278's restrictions on alienation of native stock -- including the prohibition of sale to other natives -- go beyond what is necessary to accomplish Congress' goal of ensuring that natives retain control of their corporations.

[6] The Court's decision in Irving appears to limit its earlier decision in Andrus v. Allard, 444 U.S. 51 (1979) (upholding abrogation of the right to sell eagle parts against Fifth Amendment challenge). In Irving, three members of the Court (Chief Justice Rehnquist and Justices Scalia and Powell) expressly stated in a separate concurrence that the decision "effectively limits Allard to its facts." 107 S.Ct. at 2085. Although three other members of the Court (Justices Brennan, Marshall, and Blackmun) disagreed, the majority opinion itself distinguished Allard with a "But c.f." cite, indicating the majority's recognition that Allard is an analogous decision inconsistent with Irving.

Moreover, although Allard upheld a prohibition on the right to sell eagle parts, the Court stressed that "[i]n this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." 444 U.S. at 65-66. In the case of H.R. 278, however, not only would the bill deprive Alaska natives of the right to sell their shares, but also it would (1) eliminate the right to donate stock except to certain immediate native family members; (2) limit the right to devise shares by removing the voting rights of shares devised to non-natives; and (3) prohibit shareholders from pledging or assigning the right to dividends or other distributions in respect of their shares. These additional deprivations provide grounds for a court to distinguish H.R. 278 from the statute upheld in Allard.

Finally, in addition to extending restraints on alienation, section 5 would automatically cancel the voting rights of shares previously acquired by non-native shareholders. The 1971 Act permitted "transfers of stock pursuant to a court decree of separation, divorce or child support or by stockholder who is a member of a professional organization, association, or board which limits the ability of that stockholder to practice his profession because of holding stock issued under this chapter." 43 U.S.C. 1606(h)(1). In our view, the cancellation of voting rights would constitute an immediate taking analogous to the taking that occurs when a state authorizes a permanent easement across private property. See Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3145 (1987).[7]

For the foregoing reasons, the Department of Justice is of the view that section 4, as well as section 5's provision cancelling the voting rights of shares owned by non-natives, would constitute a violation of the Takings Clause of the Fifth Amendment. Implementation of these provisions, accordingly, would expose the public fisc to enormous potential liability for compensation to existing shareholders. Similarly, we believe that the restraints on alienation of stock prescribed by sections 5 and 8 of the bill would likely also constitute a violation of the Takings Clause of the Fifth Amendment.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

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[7] The automatic cancellation of voting rights is unlike the restriction upheld in Allard because a prohibition on the right to sell property merely restricts the owner's use whereas the cancellation of voting rights for a particular group of shareholders effectively transfers those rights to the remaining shareholders.