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THE WHITE HOUSE

WASHINGTON

October 14, 1982

Mr. Steven M. Tullberg
Indian Law Resource Center
601 E Street, S. E.
Washington, D. C. 20003

Dear Mr. Tullberg:

Thank you for sending me Bob Coulter's statement regarding the Ancient Indian Land Claims Settlement Act. We are well advanced toward a formal draft on a Presidential statement of Indian Policy.

As you know, the role of our office is to facilitate communication between the Administration and groups in society. I would suggest that you contact Ken Smith directly on matters involving the Indian Policy Task Force. He chairs this group.

Sincerely,

Morton C. Blackwell

Morton C. Blackwell
Special Assistant to the President
for Public Liaison

INDIAN LAW RESOURCE CENTER
601 E STREET, SOUTHEAST, WASHINGTON, D.C. 20003 • (202) 547-2800

July 2, 1982

Mr. Morton Blackwell
Old Executive Office Building,
Room 191
The White House
Washington, D.C. 20500

Attn: Doug Martin

Dear Mr. Blackwell:

Tim Coulter asked me to send you for your files the enclosed description of our Center.

I am also enclosing for your information a copy of the statement which we presented to the congressional committees considering the Ancient Indian Land Claims Settlement Act (H.R. 5494; S. 2084). We are, frankly, dismayed by the Administration's testimony in support of that extinguishment bill. We know of no other occasion during this century when an Administration has advocated unilateral extinguishment of present Indian land rights without compensation. Hopefully, future announcements of this Administration's policies on Indian affairs will not be made until there has been full and fair consultation with Indians and with Indian rights advocacy organizations such as ours.

With that objective in mind, we would like to know whether there is any truth to the report that a White House task force on Indian legal issues is presently considering proposals to expand federal remedial authority under the Indian Civil Rights Act. Such an important issue -- which could have serious adverse impact on Indian self-determination -- should be carefully examined with maximum Indian input before any Administration position is finalized. We would be pleased to cooperate fully by providing legal and policy analysis if such a task force has been formed.

Thank you for your consideration.

Sincerely,

Steven M. Tullberg

Enclosures

INDIAN LAW RESOURCE CENTER

601 E STREET, SOUTHEAST, WASHINGTON, D.C. 20003 • (202) 547-2800

The Indian Law Resource Center is a non-profit, public interest, legal organization devoted to the protection of the legal rights of American Indians. The Center has tax-exempt status as a charitably-funded organization under Section 501(c)(3) of the Internal Revenue Code. The Center's program is directed by an Indian controlled Board of Directors. The Center receives no funds from any government, either state or federal.

The goal of the Center is to assist Indian people to achieve self-sufficiency and to overcome the terrible poverty and suffering characteristic of reservation life. To this end, the Center gives legal help, free of charge, to Indian communities and governments in order to secure human and legal rights such as the right to own property, the right to self-government, the right to freedom of religion and the right to cultural survival. Through a coordinated program of research, public education and litigation, the Center seeks to enable Indian people to survive as distinct peoples with unique, living cultures. The leading Indian journal, Akwesasne Notes, called the Indian Law Resource Center:

> [T]he only national organization which responds to the serious legal needs of native peoples and governments which insist on asserting their sovereigty, their treaty rights, and their human rights.

The program of the Center is national in scope. The Center represents Indian tribes and governments throughout the country, including Seminoles in Florida, the Iroquois in New York, traditional Hopis in Arizona, Western Shoshones in Nevada and the Sioux in South Dakota. The Center's law reform efforts are also national in scope and are designed to change the fundamental legal disabilities facing Indians and to combat discrimination and injustice in the law.

The Center carries on a program of public education directed nationwide to foster understanding and support for Indian needs, to combat discrimination and to bring about much-needed changes. The Center has consultative status with the United Nations Economic and Social Council, enabling the Center to extend its educational efforts in behalf of Indian people. Public education to eliminate race discrimination and injustice and to make it possible for Indian cultures and religions to survive benefits all citizens and Indian people throughout the United States.

INDIAN LAW RESOURCE CENTER
601 E STREET, SOUTHEAST, WASHINGTON, D.C. 20003 • (202) 547-2800

Statement of

Robert T. Coulter,

Executive Director

Indian Law Resource Center

in opposition to

S. 2084,

"Ancient Indian Land Claims Settlement Act"

submitted to

U.S. Senate Select Committee

on Indian Affairs

June 23, 1982

My name is Robert T. Coulter. I am executive director of the Indian Law Resource Center, a non-profit organization which promotes the rights of Indian peoples in the courts, and through educational and law reform work. Among our Indian clients are the Six Nations Iroquois Confederacy, the Haudenosaunee, whose New York land claims would be extinguished by this bill, the "Ancient Indian Land Claims Settlement Act."

We strongly oppose this bill and we condemn in general this approach to Indian rights. Although on its face the bill only addresses particular Indian land rights and legal claims in the states of New York and South Carolina, it is in fact far-reaching legislation in the sensitive and volatile area of United States-Indian relations.

This bill is termination-style legislation. It is a bill which addresses a complex Indian rights problem by simply legislating away the Indians' most important rights. It is a potentially chilling precedent. Many wonder whether this bill will signal a new era of general disregard for Indian rights by the federal government.

We are convinced that the bill would not pass constitutional scrutiny. We believe it would ultimately, after extensive new litigation, be exposed as racially discriminatory

and violative of fundamental constitutional guarantees of due process and equal protection. But, even if the courts were not to declare it unconstitutional, it would not put an end to the Indians' claims.

On an immediate, practical level the bill is also unacceptable because it would poison efforts to negotiate amicable settlements of Indian claims. It is difficult to see how fair and forthright negotiations could proceed in a setting where one party points the gun of unilateral extinguishment at the other's head.

We urge this Committee to soundly reject this measure.

Nature of The Bill: Unilateral Extinguishment Of Indian Legal Rights

It must be emphasized that the bill known as the "Ancient Indian Land Claims Settlement Act" is not in fact a "settlement" bill. It is an extinguishment bill. It would extinguish Indian legal rights and legal claims to Indian homelands.

There has been some effort by the bill's supporters to deny that fact and to characterize it instead as a bill which protects Indian rights just as it protects the rights of "innocent" -- which means non-Indian -- property owners[1] whose legal rights are being contested by Indians. However, the Justice Department admits that "this bill would extinguish claims by various Indian tribes to lands and natural resources in New York and South Carolina."[2]

This is a unilateral extinguishment approach to the well-known legal dispute between Indians and non-Indians over ownership of certain lands in two eastern states. The bill

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[1] Among the many insults to Indians in this bill is the use of the term "innocent" in reference to non-Indians only. Of what, one might ask, are the Indians guilty? New York State and the federal government are the largest land owners in the claims areas. They are not innocent, as at least two federal court decisions have held.

[2] Letter of April 8, 1982 from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to David A. Stockman, Director, Office of Management and Budget.

attempts to put an end to that legal dispute by having Congress formally declare through this bill that the non-Indians win and the Indians lose. The rights of the Indians would be extinguished, whether those rights have already been established in litigation now pending in federal courts or whether they are rights which are otherwise a matter of dispute between Indians and the present federal, state, municipal and private possessors of those lands.

The Paramount Issue: Will Law Or Politics Govern?

This dispute has festered for a long time. For most of that time, over a century, Indians were simply forbidden to assert their legal claims to these lands in United States courts. In recent years, many of the legal barriers to adjudication of those claims were slowly removed, and some Indians began to make progress in establishing their legal property rights. This extinguishment bill would turn back the clock and once again slam the courthouse door on Indians.

The bill would attempt to override all laws which would otherwise govern rights to those disputed lands. Treaty rights would be abrogated, long-established federal statutes would be twisted beyond recognition with a legalistic sleight of hand called "retroactive ratification", and Indian claims cases pending in federal courts would be dismissed by

congressional fiat rather than by judicial rulings on the legal merits. To effect the extinguishment of Indian property rights, Congress is being asked to destroy wholesale the established rule of law and to provide in its place a new, arbitrary rule which declares that possession is the law when possession is held by non-Indians whose legal right to possession is challenged by Indians. This new rule is doubly arbitrary because it would apply only in two states where certain non-Indian political leaders insist upon it. In all other states the established rule of law would continue to apply.

This bill is a classic in the troubled history of United States-Indian relations because it so clearly raises the yet unsettled question whether those relations will be governed by law or simply by the political power of a particular Congress of the United States. Such raw, unchecked political power -- known as "plenary power" in the jargon of lawyers and judges -- has since the founding of the Republic been a threatening presence which Indians have sought again and again to restrain with the rule of law. Usually the federal courts have declined to intervene when the political powers of Congress have been asserted to deny Indian rights. Time and again Indians have lost to those overwhelming political forces, and the result has been destructive anti-Indian federal policies such as Removal, Allotment and Termination. These policies and a

host of other federal acts of "plenary power" have eroded and denied Indian peoples their fundamental rights to land, natural resources and self-determination.

There have, of course, been other historical occasions when treaty rights and the rule of law were honored and Indian rights were protected. For example, just this term Congress refused to approve a bill calling for abrogation of Northwest Indian treaty rights to Steelhead trout. Congress, the Executive and the federal Judiciary have often taken the higher road and refused to dispose of Indian rights by submitting to the will of a non-Indian majority bent on denying Indian rights. But, sadly, the spectre of plenary power remains a real threat to all Indian rights today.

Viewed from the perspective of Indians and Indian rights advocates, this extinguishment bill is seen to present a test of the United States government's commitment to the rule of law. At first the Congress and the Executive will be asked to take a stand on this bill. If the bill is enacted, the Judiciary would then pass its judgment on the many constitutional challenges which would unquestionably be made in the federal courts. But as this political and legal testing process goes forward, all involved must be mindful that the paramount issue is not about technical rules of federal law or about various Supreme Court decisions, important as they

are. Rather, this is another historic test of the question whether, as a general proposition, it is law or raw political power which will govern this Nation's Indian relations.

With this central issue in mind, Congress must ask not only whether this bill would arguably survive Supreme Court review. Congress must also ask the more important question whether it wishes to embark again on the lawless course of pure political expediency which has always proven disastrous to Indians and, ultimately, disgraceful to the United States itself.

Origin Of The Bill: Special Interests and Unjustified Fear

For many years the American Land Title Association and other non-Indian special interest groups have worked doggedly to defeat all eastern Indian land claims. The American Land Title Association has even published a legal primer on congressional extinguishment power. Their lobbying efforts and the model extinguishment legislation found in the appendix to their primer are clearly reflected in this extinguishment bill and in the various other extinguishment bills which have been introduced to wipe out other Indian land claims from time to time during the past few years.

Pressure for this extinguishment bill has also been generated by some non-Indians who possess lands in Indian

claims areas and by other non-Indian interests. In response to these pressures, some non-Indian public officials have determined to press for this bill, confident no doubt that it is to their immediate political advantage to appeal to a perceived anti-Indian claims sentiment among their non-Indian constituents.[3]

One of the primary sources of this extinguishment bill is Congressman Gary Lee from New York who two years ago almost singlehandedly defeated a proposed negotiated settlement of the Cayuga claims. This bill would extinguish those Cayuga claims, yet Mr. Lee's congressional district has reportedly just been redrawn so that his constituents are no longer those affected by the Cayuga claims.

In fairness it should be noted that some who support or who have failed to register their opposition to this bill have done so out of frustration with the slow pace of settlement efforts rather than out of animus towards the Indian claims. In fairness to the Indian claimants, it should be noted that there were no significant settlement talks during the last year and a half of the Carter administration because of administrative disarray in the Interior Department, and that there

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[3] In assessing the strength of anti-Indian sentiment, it should be recalled that Congressman Jack Cunningham, the lead sponsor of a series of Indian treaty abrogation bills known as the "Cunningham bills" of a few years ag o, was unable to ride the anti-Indian "backlash" wave to re-election. He was defeated.

has been no effort on this negotiation front to date by the present administration. Much time has been lost through no fault of the Indian claimants.

There was no prior consultation with Indians about this bill. Its drafting was kept secret from Indians, and its contents were not revealed to Indians until a draft copy leaked out shortly before its introduction, when it was being reviewed by the Administration. It was also reportedly kept secret from most personnel in the Bureau of Indian Affairs and from others within the government who might be considered too pro-Indian. It is a top-down measure with support in high places within OMB and Interior, but there is no groundswell of support elsewhere within the Administration. The dominant Justice Department view is that consultation and settlement negotiations with all the affected parties, including the Indians, is the preferable approach.

One of the most obvious problems with the bill has been the total absence of prior consultation and negotiation with the affected parties. That problem has been noted with concern by Justice Department officials:

> "We are most concerned with the fact that the bill attempts to settle these claims without prior consultation and negotiation with the affected parties, including the private landowners, the States, and the Indian tribes."[4]

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[4] McConnell letter, note 2 , above.

Notwithstanding this secrecy, it is now quite clear that all of the other eastern states facing Indian claims similar to those being faced by New York and South Carolina were asked to join in this extinguishment bill but rejected the invitation. The overwhelming majority of affected states have decided to continue to work towards a settlement of Indian claims through the more honorable means of litigation and negotiation. For example, the Governor William A. O'Neill of Connecticut issued a statement which explained that extinguishment of Indian claims is contradictory to his state's Indian policy:

> "Historically, Connecticut has strongly supported the ability of the tribes within our State to rebuild their reservations into self-sufficient and equally viable communities. This legislation seems contradictory to our State's policy toward the Indian people."

This statement should give pause to all who mistakenly believe that there is a non-Indian stampede to extinguish Indian land claims.

There have also been vigorous statements of opposition to this bill by a number of New York public officials, including the New York State Black And Puerto Rican Legislative Caucus and prominent leaders of the New York legislature. The Buffalo (N.Y.) Courier Express condemned the bill in an editorial captioned "Forked Tongues."

Taking all of these factors about the origin of this bill into consideration, it is fair to conclude that the proponents of this unilateral extinguishment approach to eastern Indian claims speak for only a small minority of those affected by the claims.

There is one additional key factor which has fueled this extinguishment bill. That factor is fear, unjustified fear that there is about to be a mass dispossession of non-Indians by Indians. Some of the bill's supporters have traded and built upon this fear by suggesting that whole communities of "innocent" non-Indians are about to have their homesteads taken over by Indians.

Anyone even marginally familiar with the Indian land claims litigation and negotiations knows that this fear is unfounded. None of the claims litigation is even close to conclusion. There are no removal injunctions pending or even close to being drawn. Years of trials and appeals are still ahead in all of the claims, should negotiated settlements not be reached in the meantime. And in most of the claims litigation, non-Indian homeowners have been expressly excluded by the Indian claimants from the Indian claim area.

Neither is there any reason to believe that Indian claimants have been unreasonable in their negotiations or that they have insisted on settlements requiring mass removal of non-

Indians. Where in the Maine settlement, the Rhode Island settlement and the proposed Cayuga settlement are non-Indians being thrown out of their homes? Since mass non-Indian removal is not in those settlements, one must question the motives of those who state that mass non-Indian removal is the inevitable consequence of Indian land claims. Such fear tactics are simply irresponsible. Those who use those tactics generate unnecessary anxiety and social polarization which leads to social conflict and to political overreaction such as this very extinguishment bill. Reasonable Indian negotiation positions should be met with reasonable counter negotiation positions rather than with extinguishment threats.

The Legal And Constitutional Issues

The Ancient Indian Land Claims Settlement Act raises a number of legal and constitutional issues which go to the very heart of United States-Indian relations. These issues, and most other important issues in federal Indian law, have no absolutely clear answers. There is no certainty as to how the Supreme Court might rule on any of the issues.

All that could be said with certainty is that this bill would generate an immense amount of new, complex and expensive litigation. The only parties who would unquestionably benefit from this lengthy new legal battle would be the lawyers representing the parties to that litigation.

The central issues in this new round of litigation would include the questions whether this extinguishment act constitutes an unlawful taking of property under the Fifth Amendment, whether the act violates the doctrine of separation of powers by usurping and denying judicial power and judicial remedies, whether Congress has some special, unlimited powers to extinguish Indian property rights under doctrines of "plenary power" and the "Indian trust relationship," whether the bill violates Indian rights under international law, and so forth. Although there are a number of different ways lawyers might approach and catalog these issues, all would have to agree that the bill raises very important and very troublesome issues.

Already the federal government has generated some 100 pages of legal analysis on some of these issues. After reading all of these materials (which undoubtedly reflect only part of the legal research which has gone on behind the scenes), one must agree with the Congressional Research Service's final conclusion in its report of April 9, 1981:

> While constitutional issues appear to be present in regard to these bills, the resolution of those issues seems uncertain, because the law in the area is not yet settled.

Rather than address all of the issues in an appellate court style brief, we will highlight some of the most important legal and constitutional issues from our perspective as Indian rights advocates.

those property rights. There is no such provision for present fair market value compensation in the Ancient Indian Land Claims Settlement Act. Rather, that bill attempts to skirt the due process requirement through the novel device of "retroactive ratification" which would try to let the government off the financial hook by paying 18th and 19th Century market value for the Indian property rights which the government would in fact and in law be taking today.

The bill does not mention eminent domain, and its sponsors do not apparently rely on eminent domain power, but the due process restrictions on the use of that taking power would nonetheless apply and would give much strength to the Indians' constitutional challenge to this extinguishment bill.

Violation Of The Separation Of Powers Doctrine

This is a court-stripping bill. The legal rights which Congress would extinguish through this bill are matters which are now within the province of the Judiciary, a separate and equal branch of the federal government. The bill would reach into the Judiciary's domain and would overrule judicial rulings upholding Indian property rights, would direct federal courts to dismiss pending claims cases by denying federal court jurisdiction and federal equitable remedies upon which that litigation is based, and would preclude litigation of all Indian legal claims for possession which have not yet been

likewise dispose of Indian title which is not yet judicially established but which is equally valid and which is now a "chose in action", a right not yet in possession but recoverable through legal action.

Just as it would be an unconstitutional violation of due process for Congress to settle a dispute over property rights between non-Indians by taking title or legal claims from one party and giving them to the other, so too it would be unconstitutional for Congress to transfer Indian property rights to non-Indians. That is because eminent domain power is a limited power which permits the taking of private property rights only for public purposes such as highways, power lines, parks, dams, and so forth. Eminent domain power may not be used simply to take the property rights from one group of persons for the purpose of giving those property rights to others. And it could not be used to transfer the property of one racial group to another without raising questions of racial discrimination in violation of constitutional equal protection.

Moreover, even when eminent domain is available as a source of constitutional power to take private property, the government must give present fair market value compensation for the property taken. A congressional act which takes property rights in 1982 would be constitutional only if it provided for compensation at the 1982 fair market value of

those property rights. There is no such provision for present fair market value compensation in the Ancient Indian Land Claims Settlement Act. Rather, that bill attempts to skirt the due process requirement through the novel device of "retroactive ratification" which would try to let the government off the financial hook by paying 18th and 19th Century market value for the Indian property rights which the government would in fact and in law be taking today.

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brought in federal courts. The bill would slam the courthouse door on all Indians who either have been using or would use the law as a means to seek recovery of lands which have been unlawfully taken from them in those two states. Politics would deny the rule of law.

There is a very strong legal argument that this would be an unconstitutional violation of the separation of powers, the basic constitutional scheme of checks and balances among the three branches of government. It has long been established that Congress does not have the authority to manipulate jurisdictional statutes in order to reverse retroactively the results in particular court cases. As the Supreme Court ruled over a century ago, Congress may not "prescribe rules of decisions to the Judicial Department of the government in cases before it."[6] The independence of the Judiciary would be totally undermined if Congress would grant or remove court jurisdiction depending on whether it approved of a decision, or review decisions within the jurisdiction of the courts, or require the courts to decide pending cases in congressionally specified ways. Since the 1803 Supreme Court decision of Marbury v. Madison,[7] the separation of powers doctrine has

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[6] United States v. Klein, 13 WALL. 128 (1872).

[7] 5 U.S. (1 Cranch), 137 (1803)

been preserved from many political attacks designed to undercut the independence of the Supreme Court and other federal courts.

The Ancient Indian Land Claims Settlement Act is another such political attack on the independence of the Judiciary. It would substitute the whim of the latest political majority in Congress for the rule of law and the judicial process.

It is especially ironic that this most recent political attack on the Judiciary involves an effort to reverse federal court rulings upholding Indian rights, because one of the first major attacks on the independence of the Judiciary was likewise the result of political dissatisfaction with a court ruling in favor of Indians. When President Andrew Jackson reportedly said, "John Marshall has made his decision, now let him enforce it," he was asserting political power to disregard and overrule a final Supreme Court decision upholding the rights of the Cherokee Nation.

Although the extinguishment bill now before Congress uses less blunt and less forthright language, it initiates the same constitutional confrontation. It is hoped that a more mature United States will not once again follow the example of Andrew Jackson by taking the path of political expediency which history has shown threatens both Indian rights and the Nation's most fundamental constitutional principles.

The Question Of Federal "Extinguishment Power", "Plenary Power", and the "Indian Trust Relationship."

To circumvent the legal and constitutional restrictions on its powers to take Indian property, Congress and the Executive have at times asserted that there are extraordinary federal powers over Indians which give the federal government a relatively free hand to dispose of Indian property. Sometimes these powers are referred to as "extinguishment power," "plenary power" and as power arising from the "Indian trust relationship." It is not yet clear whether such powers will be asserted in defense of this extinguishment bill. None of these powers apply to non-Indians, and all would be struck down by the courts if efforts were made to apply them to non-Indians.

The leading cases cited in support of such extra-legal power over Indian property rights are the Supreme Court's decisions in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) and Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). The Lone Wolf case stands for the proposition that Congress can freely abrogate Indian treaties and divest Indians of their property, all without judicial restraint. The Tee-Hit-Ton Indians case says that Indian aboriginal title lands are not protected by the Fifth Amendment. Thus, lands which have been Indian lands from time immemorial but which have not

been formally approved for permanent Indian occupancy by the federal government through treaty or statute may be confiscated with impunity by Congress without due process and without payment of compensation.

It is most unlikely that either of these decisions would withstand a frontal constitutional challenge today. One federal judge has already described Lone Wolf as the Dred Scott decision of Indian law, a decision on Indian rights which is as unsupportable as the early Supreme Court decision upholding black slavery. The Lone Wolf decision reflects the jingoism and racism of the Teddy Roosevelt era, and the Supreme Court has already begun, in the recent Sioux Nation decision, to curtail its precedential value. The Tee-Hit-Ton decision has yet to be challenged,but when it is, it too will likely be overruled in light of the due process and equal protection revolution of recent decades which has greatly expanded the nature of "property" protected by the Fifth Amendment and which has greatly restricted the power of the federal government to dispose of property. Critical scholarly analysis and judicial reexamination will, we believe, soon place Tee-Hit-Ton and Lone Wolf in the dust bin of legal history.[8]

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[8] See, e.g., N.J. Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L. J. 1215 (1980).

There is strong reason to believe that legal precedents permitting confiscation of Indian property rights would today be found racially discriminatory. For example, today the racism is quite apparent in the notion that Indians are incompetent wards whose property is rightfully under the control of white, "civilized" people. Yet only a few decades ago that notion was considered fashionable, scientific, and the proper basis for court decisions.

The only proper, non-discriminatory legal basis for dealing with Indian property rights today is agreement. Agreement between the United States and Indians was the basis of treaty cessions and was the basis of the fundamental principles of Indian law as first announced by the John Marshall Supreme Court in the early 1800's. Although it is true that legal authority subsequently developed which diverged from some of those fundamental principles, much of that intervening authority will not be able to pass the test of more enlightened thinking about the rights of non-white peoples.

By rejecting this latest effort to circumvent the regular rules of law through assertions of special powers over Indians, Congress will send a message of its intention to return to the honorable principle of agreement. This message will help resolve the Indian claims, for there will be no hope of negotiated agreement as long as the hope of unilateral extinguishment is held out to those who oppose the claims.

Violations Of International Law

The rights of Indians and other indigenous peoples have increasingly come to be recognized in the international law of the post-colonial era. As standards governing human rights have rapidly evolved and become part of customary international law, the rights of peoples to protect their culture, land and self-determination have become matters of increasing public, international concern. In March of this year, the United States underscored this development when it condemned the violation of Miskito Indian rights in Nicaragua. The United States delegation to the United Nations Commission on Human Rights called the denial of Miskito Indian rights a "human rights problem of utmost seriousness."

A unilateral extinguishment of Indian property rights by the United States government would likewise raise a human rights problem of utmost seriousness. This problem would be taken before international bodies by aggrieved Indians and their supporters, and the international human rights standards forbidding racial discrimination and protecting the rights of indigenous peoples would be applied. It is most unlikely that the United States could withstand the test of international law and international opinion by appealing to precedents and policies from an age when whites labeled Indians as racial inferiors and freely disposed of their lands. To borrow a

phrase from the United States' recent testimony to the U.N. Commission on Human Rights, that approach "may have characterized colonial rulers of a different age," but it does not justify such conduct today.

In short, this extinguishment bill would prove an international embarrassment to the United States as the affected Indians continued to press their claims in the world community.

The Practical Problem: Lack Of Finality

There is no evidence whatsoever that Indians would simply submit to the extinguishment of their land claims and begin pursuing the alternative money claims process which the Ancient Indian Land Claims Settlement Act would provide. All available evidence indicates that the Indian land claims would continue to fester year after year and onto the next generation. Just as the 1877 Congress failed to unilaterally extinguish the Sioux claims to the Black Hills, so this Congress would fail to extinguish the claims of Indians to parts of New York and South Carolina. It would be up to future Congresses and future courts to reexamine what went wrong in 1982, just as the 1980 Supreme Court finally set the record straight on the theft of the Black Hills by the United States in 1877.

As a practical matter, there will be no final settlement of Indian land claims until there is agreement with the Indians about a fair settlement of their land claims.

This lack of finality would present other practical problems as well. Since the Indian claimants would be barred from taking their claims to court, they could continue peacefully asserting their claims only as political matters with Congress or as human rights matters in various international bodies. But almost certainly some Indians would take direct action and seize some lands which they claim to be theirs as a matter of legal right. In the event of such a seizure, the state and federal officials who would rush to the scene to prevent a violent confrontation would quickly realize that the Ancient Indian Land Claims Settlement Act had painted the government into a corner, because it denies recourse to a legal process for redressing this grievance. What would they tell the angry Indians , "Be reasonable and take your claims to court instead of taking the law into your own hands."?

Conclusion

Congress has, in the bill known as the Ancient Indian Land Claims Settlement Act, been asked to take the law into its own hands and to deny the established rule of law which guarantees due process and equal protection of the law for all. Congress should reject this bid for unilateral extinguishment of Indian rights and should instead urge that serious efforts be undertaken to foster settlement negotiations of Indian claims. That is the only constitutional, fair, and honorable approach. And it is the only approach which will finally put these claims to rest.

Department of Justice

FILE COPY

STATEMENT

OF

CAROL E. DINKINS
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION

BEFORE

THE

THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 2084
"THE ANCIENT INDIAN LAND CLIAMS
SETTLEMENT ACT OF 1982"

ON

JUNE 23, 1982

Thank you for the opportunity to testify on S. 2084, the "Ancient Indian Land Claims Settlement Act of 1982." As the previous testimony by the Solicitor indicated, S. 2084 would achieve a legislative solution to ongoing and potential litigation over the disputed land in New York and South Carolina by extinguishing tribal claims based on both recognized and aboriginal title. This would be accomplished through retroactive ratification of any pre-1912 transfer of land by Indian tribes and by the extinguishment of any claims for damage from trespass or mesne profits based on those transfers.

Compensation for the loss of the tribes' right to sue the present landowners would be based on the difference between the fair market value of the land and natural resources at the time of the transfer and the price that the Indians actually received.

The Administration supports the basic legislative solution embodied in S. 2084. We consider the provisions of the bill to be constitutional, but we believe -- as has already been indicated by the previous testimony -- that certain modifications are necessary. One of these concerns aboriginal title.

As the Committee is aware, "aboriginal title" refers to the tribes' right of occupancy of their aboriginal homelands. "Recognized title" refers to lands guaranteed to tribes by treaties, statutes or other action by the sovereign. The Supreme Court has made clear that Congress has plenary authority to extinguish aboriginal title with or without the consent of the tribes.

Moreover, it is well established that the Indian right of occupancy created by aboriginal title is not a vested property right protected by the Fifth Amendment. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), for example, the Supreme Court explicitly held that Congress can constitutionally extinguish any claims based on aboriginal title without the necessity of paying just compensation.

The Administration believes that while there may be a constitutional obligation to compensate for certain interests in land resulting from retroactive ratification of transfers of recognized title, there is clearly no such requirement with respect to aboriginal title. Moreover, compensation for aboriginal title might create an irresistible legislative precedent which could prove extremely expensive. We therefore recomend that the provisions authorizing compensation for extinguishment of aboriginal title be deleted.

With respect to recognized title, S. 2084 essentially replaces the Indians' cause of action against the landowners with a cause of action against the United States in the Court of Claims. The Justice Department believes that this provision comports with the just compensation requirement of the Fifth Amendment. However, the issue of retroactive ratification in this context has never been definitively addressed by the Supreme Court.

S. 2084 would also extinguish Indian claims for trespass damages or mesne profits based on alleged wrongful use or occupancy of Indian lands or natural resources after the date of any allegedly invalid transfer of recognized title. A court construing S. 2084

might conclude that Congress lacked the authority to validate the the original transfer of recognized title interests as of the date they were sold by the tribe. In that event, the tribes might have a cause of action against the United States under the Tucker Act for accrued trespass claims and mesne profits. Also, even if Congress validates the transfer retroactively, these causes of action may be deemed to be vested and thus the tribes would be entitled to compensation under the Fifth Amendment.

We do not believe there is any other potential constitutional problem with the bill.

If the Committee has any questions that I have not addressed I will be happy to try to answer them.

FILE COPY

STATEMENT

OF

WILLIAM H. COLDIRON
SOLICITOR
UNITED STATES DEPARTMENT OF THE INTERIOR

BEFORE

THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 2084
"THE ANCIENT INDIAN LAND CLAIMS
SETTLEMENT ACT OF 1982"

ON

JUNE 23, 1982

Thank you for the opportunity to testify on S. 2084, the "Ancient Indian Land Claims Settlement Act of 1982." This bill is intended to achieve a legislative solution to complex, costly and damaging litigation resulting from the alleged violations of the Trade and Intercourse Act of 1790. That Act, which is now codified in a slightly revised version at 25 U.S.C. 177, renders ineffective any transfer of interests in land from Indians to non-Indians, regardless of the amount of compensation received, unless Congress has ratified the conveyance.

In essence, S. 2084 would achieve a legislative solution to ongoing and potential litigation over the disputed land in New York and South Carolina by extinguishing tribal claims based on both recognized and aboriginal title. This would be accomplished through Congressional ratification of any pre-1912 transfer of land by Indian tribes as of the date of transfer and by the extinguishment of any claims for damages from trespass or mesne profits based on those transfers. At the same time, the Secretary of the Interior would be authorized to enter into settlement agreements with the tribes to provide monetary compensation for the loss of the tribes' right to sue the present landowners. Compensation would be based on the difference between the fair market value of the land and natural resources at the time of the transfer and the price that the Indians actually received. If the settlement negotiations prove unsuccessful, the tribe would be entitled to sue the United States in the Court of Claims and, if successful, would be compensated on the same formula.

I want to emphasize that this bill is an even-handed attempt to provide relief to both sides of an ancient and intractable controversy. The lands at issue were transferred by Indian tribes to the states of New York and South Carolina many years ago. Since that time thousands of innocent persons have purchased land in good faith, building homes, businesses and lives in total unawareness of any cloud on their title. On the other side are the descendents of the Indians who originally transferred the land.

By the Trade and Intercourse Act, Congress required Congressional ratification of the transfers before the transfers could become effective and to insure the fairness of the terms. This did not take place, leaving open the possibility that the tribes may have been misled or coerced into unfair transactions. As we survey the situation now, in 1982, we see potential injustice on each side -- innocent land owners on the one land, descendents of Indians, denied the protection of the law on the other.

We believe the bill provides a basis for resolving this problem - not perfect justice for all in this imperfect world but a realistic and even-handed effort to provide redress for all. In essence the bill protects the innocent landowners in their peaceful, enjoyment of the land while compensating the Indian tribes for the transfers to the extent the original terms were unfair.

Ordinarily we prefer to see disputes such as these ended through negotiations resulting in fair, reasonable and affordable

settlements. Instead, the parties have proceeded with litigation and no fruitful settlement discussions have developed to our knowledge. A legislative solution is far preferable to burdensome, protracted, and perhaps ultimately inconclusive litigation. The magnitude of these claims is evident given their size, the nature of the legal issues involved, and the nearly two hundred years that have intervened, in some cases, since the original land transfers. It was estimated that litigation of the comparable dispute in the State of Maine which was settled through legislation, enacted in 1980, would have taken between 5 and 15 years. During the litigation the land title of the affected land owners would be clouded, their ability to obtain title insurance or sell their property would be harmed and sale of municipal bonds would be hampered; the affected communities would be severely disrupted.

Of course, the Administration's support for this bill does not preclude the parties from working toward an equitable and affordable settlement. If, before the enactment of this bill, the parties make rapid and real progress toward such a settlement we would wholeheartedly cooperate. However, we do not think it would be appropriate to delay a legislative solution to these disputes while awaiting the uncertainty of settlement negotiations.

Although the Administration supports the basic concept of S. 2084, and regards such a solution as constitutional, we believe that a number of modifications to the bill are necessary in order to obtain a more workable and equitable resolution of these disputes.

I will briefly summarize the most significant changes proposed by the Administration.

1. Contribution by States

Under S. 2084, the entire cost of ending the litigation against the states and private landowners and compensating the tribes is paid by the Federal Government -- even though the United States has not in any way been involved in the transactions in question. While the United States is willing to contribute financially to a resolution of these claims, and will bear the litigation burden in the Court of Claims, participation from the affected states must also be part of the solution. We suggest, therefore, that the bill be amended to provide that extinguishment of aboriginal title and ratification of sales of recognized title would be conditioned on the execution of a contract between the Secretary of the Interior and the affected state, providing for the reimbursement of the United States for one half of the liability resulting from claims under the Act.

2. Aboriginal Title

S. 2084 creates a cause of action to recover the difference, plus interest, between the fair market value of the land and natural resources at the time of transfer and the price actually received. This formula would apply to land held by aboriginal title as well as recognized title, although the interest on aboriginal title would be two percent and the interest on recognized title would be five percent.

As Assistant Attorney General Carol Dinkins will testify in greater detail later, the Administration believes that while there may be a constitutional obligation to compensate for retroactive ratification of transfers of recognized title, there is no such requirement with respect to aboriginal title. More importantly, the complexities of determining the extent and nature of centuries old aboriginal claims, never defined by statute, treaty or title would lead to unwieldy litigation with little probability of reaching a prompt conclusion. Moreover, paying interest on these claims would depart from previous legislative policy such as the Indian Claims Commission Act and would establish a vague but expansive precedent for the future.

3. Scope

In our view, the approach of the bill should be applied to all similar Indian land claims in other states. The Trade and Intercourse Act claims in the Eastern states are in many respects unique and involve a singular balance of equities. Indeed, the Eastern land claims themselves are different from one another and should be individually evaluated. Nevertheless, the Administration urges the Committee to consider expanding the approach of this legislation to include Trade and Intercourse Act claims in states which request such.

In addition to these changes, a number of other modifications are desirable in order to insure that the process of resolving these claims can be accomplished expeditiously and fairly. For example, it is important to insure that retroactive validation of these sales does not create valid title to frivolous or ineffective transactions and to insure that the Act does not interfere with the law of adverse possession in the affected state.

We would also note that under section 5(e) of the bill, land acquired by a tribe in lieu of monetary compensation would be subject to state and local taxes and would not be held in trust by the United States. We note that if a tribe had acquired land through litigation or had retained ownership, the land would be held in trust and would not be taxable. The traditional policy of preventing any possibility of selling or forfeiting Indian land should also be considered in review of this bill.

We would be glad to work with this Committee and interested parties including the affected Indian tribes on this legislation.

Thank you.

Senator Strom E. Thurmond Office

456-2657
Old Exec 17th st. side
Rm 45
Mail Room
for Morton Blackwell

Mr. Morton Blackwell
Public Liaison office
The White House

file

Dear Mr Blackwell:

Attached is a Copy of the Proposed Bill Ancient Indian Land Claims Settlement Act drafted by Rep Gary Lee of New York and supported by Senator Strom Thurmond of South Carolina a statement against the Ancient Indian Land Claims Settlement Act by Many Indian Tribal Leaders attending the 1982 Executive Council Meeting of the National Congress of American Indians in Washington D.C. on June 27-29 1982 we need your support with letters to oppose the Proposed Bill Thanks.

Samuel Beck
SAMUEL BECK
CATAWBA INDIAN NATION
RT#3 Box 324
ROCK HILL, S.C. 29730
PHONE 803 324 0552

STATEMENT AGAINST THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT"

A proposed bill drafted by Rep. Gary Lee (N.Y.) and supported by Senator Strom Thurmond (S.C.) is now being reviewed by the Administration and may be introduced in Congress by the end of January 1982. The bill seeks to resolve all Indian land claims in New York, Connecticut and South Carolina by simply extinguishing or wiping out the Indian land rights. The bill was drafted without Indian involvement, and it has absolutely no Indian support.

The bill must be opposed and condemned for the following reasons:

1. The bill would destroy present Indian legal rights to land, would violate ratified treaties with the United States, and would dishonorably violate the most basic Indian rights. The bill literally steals land from Indian nations and tribes and approves earlier thefts and frauds. This confiscation of land rights is in complete violation of treaties which the United States has made guaranteeing land rights. To return to taking Indian land is shameful and contrary to national and moral principles.

2. The bill would deny Indians Due Process of Law. This bill is not an act of eminent domain for a public purpose, and it does not provide for present-day fair market value compensation. Indian people would be subject to arbitrary and jerry-rigged proceedings. The bill is clearly unconstitutional for this reason.

3. The bill is discriminatory and denies equal protection of the law because it is aimed solely at taking land rights from Indians for the benefit of others. No other people in the United States could be treated this way, especially not a racial minority. The bill is unconstitutional for this reason as well.

4. The bill will lead to many more years of litigation and may result in multi-billion dollar liability on the part of the United States for the taking of Indian lands. The bill won't effectively stop the court cases because of the serious constitutional questions raised.

5. This bill would suddenly close the courts to Indian land rights cases and unfairly change the rules in the middle of ongoing cases which Indian people have only recently been able to bring to court after generations of being barred from legal remedies. Now, just as a few Indian nations have been able to prove their rights legally in court under United States law, this bill would destroy those rights and throw the Indian people once again out of court. These are not "ancient" claims -- they are no more ancient than the United States law, the Constitution and the treaties that establish and protect these Indian rights. This bill is an inept and unfair effort, drafted in secret without the consent or involvement of Indian people.

6. The bill would violate fundamental human rights of Indian people. The bill would violate the high principles established by the Universal Declaration of Human Rights and the Helsinki Final Act to which the United States has ascribed. This bill would be an embarrassment to the Congress, to the Administration, and to the nation as a whole.

7. The bill will not settle the Indian claims involved. History has shown that such claims never die and never dim until they are justly and honorably resolved. This bill does not do that.

INDIAN LAW RESOURCE CENTER
601 E STREET, SOUTHEAST, WASHINGTON, D.C. 20003 • (202) 547-2800

January 22, 1982

MEMORANDUM/ALERT

SUBJECT: "Ancient Indian Land Claims Settlement Act of 1981"

We have just obtained a draft of a major new legislative threat to Indian land claims and to Indian rights in general. It is extremely important that all concerned about the protection of Indian legal rights immediately inform themselves about this threat and begin to take action to stop it before it gains momentum in Congress.

That threat is the attached draft bill entitled "Ancient Indian Land Claims Settlement Act of 1981." It would, if enacted by Congress, extinguish all Eastern Indian land claims, including those pending claims which have been fought in the federal courts for many years. It would categorically deny Indians any recovery of lands illegally lost to non-Indians in violation of the 1790 Nonintercourse Act, Indian treaties, and the U.S. Constitution. It would make legal today, by congressional ratification, earlier illegal takings of Indian lands by states, municipalities and private individuals.

The Indian rights extinguished would include all Indian legal claims for loss of land, minerals and other natural resources, and for trespass and waste. It would also extinguish Indian water rights and hunting and fishing rights on Indian-claimed lands now in the possession of non-Indians. All Indian claims to land in New York, Connecticut and South Carolina would be summarily wiped out.

Through this bill Congress would "substitute" an "exclusive monetary remedy" for the extinguished right of Indians to recover their lands by court action and by negotiation. In exchange for the taking of Indian land rights Congress would offer Indians only a right to apply for some money damages from the federal government.

The money damages would come from one of two possible federal sources. First, any Indian tribe which has never obtained a final judgment on a claim filed in the Indian Claims Commission or Court of Claims, could file a new claim for money damages in the Court of Claims. Second, the draft bill proposes the establishment of a new Claims Settlement Committee to which Indians could, in the alternative, submit their claims. This Committee would be composed of the Attorney General, the Director of the Office of Management and Budget, and the Secretary of the Interior. The decisions of this new Claims Settlement Committee would be final and "not subject to judicial review by any court."

The money damages which the Settlement Committee or the Court of Claims could award the Indians would be based on the difference between the money Indians received for the loss of their lands (whether received at the time of the taking or later) and the value of the lands when taken. The damages would be based on the 18th or 19th century depreciated value of the lands, not on the fair market value of those lands today when the formal taking of Indian title would actually be accomplished by this new act. Damages for trespass, waste, and so forth could not be awarded.

The damages would include an additional 2% simple interest if the lands taken were "aboriginal title" Indian lands (Indian homelands from time immemorial) and 5% simple interest if they were so-called "recognized title" Indian lands (Indian lands which had been guaranteed by U.S. treaty or statute for permanent Indian occupancy). Adding further insult to further injury, the bill provides for payment of the damages in three equal annual installments, thereby allowing the federal government to cut its loss by paying out dollars which are devalued by inflation over time.

Immediate Action Needed

This draft bill is the work of Congressman Gary A. Lee (N.Y.), Senator Strom Thurmond (S.Car.) and others. The Reagan administration is now considering whether to endorse the bill, and the President's Office of Management and Budget (OMB) is in the final stages of the administration's review process. The Reagan administration may announce its position on this bill as early as the end of this month. If the bill has administration support, it is obviously more likely to be passed by this Congress. According to OMB, there has been no Indian input into this bill.

This is clearly not a "settlement" bill. It is an extinguishment bill. Efforts must be undertaken at once to try to defeat it before it picks up any steam in Congress. It is not difficult to show that it is blatantly discriminatory. Congress would never consider imposing such a denial of land rights and legal claims on whites. This discriminatory legislation would be an exercise of unprecedented political control over legal rights. If the Eastern Indian land claims can be successfully disposed of by such raw political power, then all other Indian rights and legal claims to land, water, resources and self-government are also in jeopardy.

A special meeting has been called for Wednesday, January 27, 1982, 9:45 a.m., at the United Methodist Building, 100 Maryland Avenue, N.E. (next to the Supreme Court building), Washington, D.C., to begin organizing efforts to turn back and defeat this bill. Please make every effort to attend.

For more information, call Steve Tullberg or Tim Coulter, (202)547-2800.

Robert T. Coulter
Executive Director

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

January 6, 1982

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-

Department of the Interior
Department of Justice

Other Department's Program
OMB

SUBJECT: A draft bill, dated December 4, 1981, entitled the "Ancient Indian Land Claims Settlement Act of 1981."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than noon on January 15, 1982.

Questions should be referred to Jim Murr (395-3386), the legislative analyst in this office, or to Ron Cogswell (395-4993).

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

INTERIOR DEPT.

JAN - 7 1982

Enclosures

Sue Rosenberg

DRAFT
12/4/81

97TH CONGRESS
1st SESSION H.R. _____

IN THE HOUSE OF REPRESENTATIVES

Introduced the following bill; which was referred to the Committee on Interior and Insular Affairs.

A BILL

To establish a fair and consistent National Policy for the resolution of claims based on a purported lack of Congressional approval of ancient Indian land transfers and to clear the titles of lands subject to such claims.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Ancient Indian Land Claims Settlement Act of 1981".

States and the Legislative and Executive Branches of the Government of the United States were, with respect to certain claimants, unaware that the United States may have had such an obligation and, with respect to other claimants, specifically denied any such obligation, the Federal government may have failed to fulfill this alleged obligation;

(4) Federal courts only recently have begun to address and clarify the nature of the Federal government's historical responsibility to these Indian tribes and, in this process, have created a situation in which, notwithstanding the almost two centuries that have passed since many of these transfers took place and irrespective of the fairness of the consideration received for such transfers, innocent landowners are threatened with the wholly unexpected loss of billions of dollars in property and the imposition of billions of dollars in liability judgments;

(5) generations of landowners, local and State governments, and even the Federal government itself, have justifiably relied on the validity of the original transfers and the chains of title emanating therefrom, and in good faith have made billions of dollars of investments in and improvements upon these lands;

(6) the consequences of judicial determinations that these ancient transfers were invalid, and that current landowners do not have valid title to their lands or are

liable for trespass damages or damages for the use and occupancy thereof to Indian tribes that have not occupied such lands for generations, would be catastrophic in terms of the economic, social, governmental, and public policy problems that would be created for hundreds of thousands of innocent landowners, for numerous communities and State and local governments, and for the Federal government;

(7) the pendency of such claims results in irreparable damage and substantial adverse consequences to the individuals, communities, counties and States involved, and to the United States, and creates an undesirable climate of apprehension and mistrust between the Indian claimants and the landowners, communities, and local and State governments affected by such claims;

(8) the actions and inactions of the Federal government over the decades and centuries since the original transfers have constituted de facto approval of such transfers and have resulted in the justifiable reliance on the part of the landowners, communities, and State and local governments in the integrity of present day land titles and in the belief that the Federal government had fulfilled whatever responsibility it may have had to Indian tribes that generations ago may have lived on the land;

(9) the attempt to remedy any historical injustices suffered by these Indian claimants, or to correct any fail-

ure by the United States to fulfill responsibilities the measure of which is only now being determined by the courts, by means of litigation between such Indians and present landowners cannot result in just and equitable solutions to these claims;

(10) courts and Executive Branch officials, including the Attorney General of the United States, who have examined the nature and consequences of these claims have expressed the view that these ancient Indian land claims should not be resolved through litigation against innocent private landowners;

(11) the magnitude of the hardship created by the present claims and the inability of the courts to take into account the many factors that are beyond the cognizance of the Judicial Branch, but that must be considered in resolving claims of this nature and magnitude in a fair and equitable manner, merit and compel action by Congress;

(12) the primary purpose of the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, which was to ensure fairness in the transactions by which Indian lands were acquired, can be secured by now providing monetary compensation to Indian tribes to the extent that those tribes did not receive fair compensation for the transfer of their lands to non-Indians; and

(13) to the extent that prior actions and inactions

by the United States have not constituted whatever Federal approval or action may have been necessary to validate these ancient land transfers, it is the intent of Congress by means of this Act to provide such approval and validation, and to provide Indian tribes that are affected by such approval and validation a substitute monetary remedy against the United States, which shall be the exclusive remedy for the satisfaction of any claim against the United States, any State or local government, or any other person or entity, that such Indian tribes may otherwise have by virtue of the transfers in question.

(b) Therefore, in the exercise of the full Constitutional authority of Congress, it is the purpose of this Act—

(1) to remove the clouds on the titles to land located within the States of Connecticut, New York, and South Carolina resulting from the claims of Indian tribes or Indian groups that transfers of such lands prior to January 1, 1912, were in violation of the United States Constitution, the Articles of Confederation, the laws of the United States, including the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, or any other legal requirement;

(2) to approve, validate, and ratify all such transfers effective as of the date of such transfers and with the same effect as if such approval, validation, and ratifica-

tion had been given at the time of the transfers; and

(3) to provide Indian nations and tribes of Indians affected by this Act with a means of obtaining fair and equitable compensation for their claims, including a cause of action in the Court of Claims against the United States for monetary compensation.

DEFINITIONS

SEC.3. For purposes of this Act, the term—

(a) "Claims Settlement Committee" means the Secretary of the Interior or his delegate, the Attorney General or his delegate, and the Director of the Office of Management and Budget or his delegate;

DOI
DOJ
OMB

(b) "Indian tribe" includes any Indian nation, or tribe or band of Indians;

(c) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights;

(d) "laws of the United States" means the Articles of Confederation, all Federal, State and Colonial statutes, treaties, proclamations, Executive agreements, orders, regulations, and common law principles, and all judicial interpretations thereof;

(e) the "Nonintercourse Act provision of the Trade and Intercourse Act of 1790" means section 14 of the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138, and all amendments thereto and all subsequent reenactments or versions thereof; and

(f) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

RATIFICATION OF PRIOR TRANSFERS AND EXTINGUISHMENT OF RELATED CLAIMS

SEC. 4. (a) Any transfer of land or natural resources located within the States of Connecticut, New York, and South Carolina from, by, or on behalf of any Indian tribe, including without limitation a transfer pursuant to any statute of or agreement or treaty with any State, made or effected prior to January 1, 1912, was and shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including without limitation the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, and Congress does hereby approve, validate, and ratify any such transfer effective as of the date of said transfer.

(b) To the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which any Indian tribe had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of such transfer.

(c) By virtue of the approval, validation, and ratification of a transfer of land or natural resources (whether such land or natural resources were held under aboriginal or recognized title) effected by this section, or the extinguishment of aboriginal title effected thereby, no action by the United States, any State or subdivision thereof, or any other person or entity at the time of or subsequent to the transfer and involving the ownership, use or occupancy of such land or natural resources shall be regarded as giving rise to a claim of trespass, or for mesne profits or for use and occupancy, in favor of any Indian tribe that may have formerly occupied or held any claim to such land or natural resources, and all actual or theoretical claims against the United States, any State or subdivision thereof, or any other person or entity, by any Indian tribe arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including without limitation claims for trespass damages, mesne profits, or claims for use and occupancy, shall be deemed extinguished

extinguish all claims

as of the date of such transfer.

(d) This section shall not apply to those lands that are located within the Allegany and Cattaraugus reservations of the Seneca Nation in the State of New York and were leased under authority of the Act of February 19, 1875, 18 Stat. 330.

NOTIFICATION OF CLAIMS TO THE CLAIMS SETTLEMENT COMMITTEE; SETTLEMENT AGREEMENTS

SEC.5.(a)(1) As soon as practicable after the date of enactment of this Act, the Claims Settlement Committee shall publish in the Federal Register a notice specifying the type of information that should be supplied by an Indian tribe pursuant to subsection (b) of this section in order to enable the Claims Settlement Committee to determine whether any Indian tribe whose transfer of land or natural resources has been approved, validated, and ratified by section 4 of this Act had in the absence of this Act a credible claim with respect to such land or natural resources, and to determine a fair and equitable award that should be made by the United States to such Indian tribe.

(2) To the extent that, with respect to any particular Indian tribe, the Secretary of the Interior or the Attorney General already possesses information needed to make the determinations specified in subsection (a)(1) of this section, the Claims Settlement Committee shall consult

with representatives of said Indian tribe in order to minimize the burden on said Indian tribe in preparing the submission specified in subsection (b) of this section.

(b) Within 180 days after the publication by the Claims Settlement Committee in the Federal Register of the notice specified in subsection (a)(1) of this section, any Indian tribe whose transfer of land or natural resources has been approved, validated, and ratified by section 4 of this Act may submit to the Claims Settlement Committee such information as may be specified in the Claims Settlement Committee's notice.

(c)(1) Within 180 days after the date by which submissions must be filed with the Claims Settlement Committee pursuant to subsection (b) of this section, the Claims Settlement Committee shall determine, with respect to each Indian tribe that has made a submission pursuant to subsection (b) of this section, whether such Indian tribe had a credible claim, and, if so, the fair and equitable monetary award that it believes should be made by the United States to such Indian tribe. Such determinations, which shall not be subject to judicial review by any court, shall be published in the Federal Register and shall be communicated to both Houses of Congress.

no judicial review

(2) In determining what it believes is a fair and equitable award that should be made by the United States to

any Indian tribe pursuant to paragraph (1) of this subsection, the Claims Settlement Committee may consider: the fairness of the terms under which the original transfer of the land or natural resources was made by the Indian tribe; whether, through Indian Claims Commission judgments or otherwise, the United States has already paid any amounts to such tribes with respect to the transfer of such land or natural resources; whether State governments have already paid any amounts to such tribes with respect to the transfer of such land or natural resources; the legal strength and validity of the claim; and the legal strength and validity of any defenses that would have been raised in opposition to the claim.

(d)(1) Any Indian tribe with respect to which the Claims Settlement Committee has published a determination specifying the amount of monetary award that should be made by the United States may, within 180 days of the date on which the Claims Settlement Committee publishes its determinations in the Federal Register pursuant to subsection (c)(1) of this section, file with the Claims Settlement Committee a notice indicating its decision to accept such monetary award, or such other amount of monetary award as may be agreed upon with the Claims Settlement Committee. As soon as practicable thereafter, such acceptance shall be embodied in a final settlement agreement between the United

States and the Indian tribe, which shall contain such additional terms and conditions as the Claims Settlement Committee and the Indian tribe may agree upon and shall state that the agreement constitutes the permanent settlement of all claims that such Indian tribe may have under or arising out of this Act, including any rights the Indian tribe may have under section 6. Said settlement agreement shall be transmitted by the Claims Settlement Committee to both Houses of Congress and to the Senate Select Committee on Indian Affairs and to the Committee on Interior and Insular Affairs of the House of Representatives, and shall be deemed approved at the end of the first period of 90 calendar days of continuous session of Congress after such date of transmittal unless both the House of Representatives and the Senate pass a joint resolution during such period stating that they do not favor the settlement agreement.

(2) For purposes of subsection (d)(1) of this section—

(i) continuity of session of Congress is broken only by an adjournment sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than three days to a date certain are excluded in the computation of the 90-day period.

(e) In performing its responsibilities under this

section, the Claims Settlement Committee may adopt such procedures, and utilize such personnel in assisting it in making factual or other determinations, as it deems advisable. The Claims Settlement Committee may permit other interested parties, including States, to provide information relevant to the Committee's determination.

RECOVERY AGAINST THE UNITED STATES IN THE COURT OF CLAIMS

SEC. 6. (a) Any Indian tribe that occupied or possessed land or natural resources within the States of Connecticut, New York, or South Carolina and has never obtained a final judgment on a claim filed in the Indian Claims Commission or Court of Claims with respect to the transfer of such land or natural resources, may, within three years of the date of enactment of this Act, file a claim against the United States in the Court of Claims, which shall be heard, determined, and adjudicated by the Court of Claims in accordance with the provisions of this section. The Court of Claims shall have exclusive original jurisdiction over such claim; provided, however, that the Court of Claims shall grant no award with respect to any claim, and shall immediately dismiss any on the merits pending claim, by any Indian tribe relating to land or natural resources with respect to which a settlement agreement entered into pursuant to the provisions of section 5(d)(1) of this Act has been approved by Congress in accordance with the provisions of section 5(d)(1) of this Act.

Can't hear case against Action

(b) Any claimant that files a claim in accordance

with subsection (a) of this section and proves by a preponderance of the evidence that

(1) the claimant is an Indian tribe,

(2) at the time of the transfer of land or natural resources that is the subject of the claim, the claimant or its predecessor in interest was an Indian tribe,

(3) at the time of the transfer of land or natural resources the claimant or its predecessor in interest had aboriginal or recognized title to the land or natural resources that is the subject of the claim,

(4) if the transfer of land or natural resources took place prior to July 22, 1790, such transfer was invalid unless approved by the United States and that no such approval was obtained, and

(5) the claimant or its predecessor in interest did not receive fair or conscionable consideration for the transfer of the land or natural resources that is the subject of the claim,

shall be entitled to a recovery against the United States in accordance with the provisions of subsection (c) of this section; provided, however, that no recovery shall be awarded with respect to any claim involving a transfer of land or natural resources that took place after July 22, 1790, if the United States establishes by a preponderance of the

evidence that the Nonintercourse Act provision of the Trade and Intercourse Act of 1790 was not applicable to such transfer or that, with regard to such transfer, the requirements of the Nonintercourse Act provision of the Trade and Intercourse Act of 1790 had been complied with prior to the enactment of this Act.

(c)(1) Any claimant entitled to a recovery against the United States in accordance with the provisions of subsection (b) of this section shall be awarded monetary damages equivalent to the difference between the fair market value of the land or natural resources at the time of the transfer and the compensation, if any, actually received by the claimant or its predecessor in interest (whether at the time of transfer or subsequently) for the transfer of such land or natural resources.

(2) Any amount awarded to a claimant pursuant to subsection (c)(1) of this section shall

(i) in the case of an award based on a transfer that took place after July 22, 1790, of land or natural resources held under aboriginal title be increased by simple interest from and after the date of the transfer until the date final judgment is entered in the Court of Claims, with such interest computed at the rate of two per centum per annum, or 2% year

(ii) in the case of an award based on a transfer

that took place after July 22, 1790, of land or natural resources held under recognized title, be increased by simple interest from and after the date of the transfer until the date final judgment is entered in the Court of Claims, with such interest computed at the rate of five per centum per annum.

(3) Except as specified in subsection (c)(1) of this section, no offsets or counterclaims on the part of the United States shall be considered or granted against any amount awarded to a claimant under this section.

(4) Any final award granted by the Court of Claims pursuant to section 6 shall be paid to the claimant in three equal annual installments.

(d)(1) Claims before the Court of Claims brought pursuant to this Act shall, to the extent practicable, take precedence on the docket over all other cases, and shall be assigned for hearing, trial, and argument at the earliest practicable dates.

(2) Review of the judgments of the Court of Claims pursuant to this section may be sought in the Supreme Court of the United States by petition for writ of certiorari in the same manner as such review may be sought for any other judgment of the Court of Claims. The Supreme Court shall accord the highest priority to deciding whether to grant such a writ of certiorari and, if such a writ of certiorari

is granted, to the determination of the matter.

AUTHORIZATION

SEC.7 There are hereby authorized to be appropriated such sums as may be necessary to meet the obligations of the United States as specified in any settlement agreement approved by Congress pursuant to the provisions of section 5 of this Act or to pay any final, non-appealable judgment rendered by the Court of Claims pursuant to section 6 of this Act.

INSEPARABILITY

SEC.8 In the event that any provision of section 4 or of subsections 6(c)(1) and (2) of this Act is held invalid with respect to a particular Indian tribe, it is the intent of Congress that the entire Act be invalidated with respect to such tribe. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.

LIMITATION OF ACTIONS

SEC.9(a) Notwithstanding any other provision of law, any action to contest the constitutionality or validity of this Act shall be barred unless the complaint is filed within 180 days of the date of enactment of this Act.

(b) Except as provided in section 6 or in subsection (a) of this section, no court of the United States,

including the Court of Claims, and no court of any State, territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action proceeding by or on behalf of an Indian tribe with respect the invalidity of any transfer of land or natural resources that has been approved, validated and ratified by section 4 of this Act, or involving any claims, such as claims for trespass damages, mesne profits, or claims for use and occupancy, arising from the alleged invalidity of the transfer, or involving any claims against the United States for compensation as a result of this Act.