Maine Indian Land Claims : Letter to The Honorable William B. Gunter, from Archibald Cox, With Accompanying Background Documents

1977

List of Miscellaneous Documents: Letter to Mr. Justice William B. Gunter 3/22/1977

A. Letter from Archibald Cox to Justice Williams B. Gunter, March 22, 1977 (6 p.)

B. 25 USCA 177 Purchase or Grants of Lands from Indians

C. Original Indian Title, by Felix S. Cohen. (32 Minnesota Law Review 28, 1947)

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F. Narragansett Tribe v. So. Rhode Is. Land Development Corp. (418 F. Supp. 798)

G. Letter from Joint Tribal Council, Passamaquoddy Indian Reservations to Louis R. Bruce, Commissioner, Bureau of Indian Affairs, Feb. 22, 1972 (Exhibit B;, p. 14-17)

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K. Dept. of Interior Litigation Report in U.S. v. Maine (letter to Peter R. Taft, U. S. Ass't AG), 1/10/77 (14 p.) Passamaquoddy

L. Same (7 p.) Penobscot

M. Congressional Record S5696-5698 (Bound Cong. Rec.), March 1, 1977. Memo from Peter R. Taft to Peter Mills

N. Memo from Me. AG (Brennan) to Gregory Austin, Dept. of Interior Re U.S. v. Maine, 12/8/76 (4 p.)

O. Memo from Me. AG (Brennan) to Gov. Longley Re Indian Land Claims Litigation, 12/7/76 (56 p.)

P. Memo from Me. AG (Brennan) to Gregory Austin : Comments on Dept. of Interior: Historical Summary Relating to Passamaquoddy and Penobscot Tribal Land Claims 12/7/76 (94 p.)

Q. Memo from U.S. dept. of Interior, Review of Materials Provided us by the Maine AG Re U.S. v. Maine [Signed Lawrence A. Aschenbrenner, n.d. 1977?], (15 p.)

R. Congressional Record S5693-5695 (Bound Cong. Rec.), March 1, 1977. Memo of Me AG (Brennan) to Members of the Maine Legislature (3 p.)

S. Letter from Gov. James B. Longley to Thomas Tureen, Esq., 1/12/77 (1 p.)

T. Letter from Francis Nichols, Gov., Pleasant Point Passamaquoddy Reservation, Nicholas Sapiel, Gov., Penobscot Nation, John Stevens, Gov., Indian Township Passamaquoddy Reservation and Thomas Tureen, Counsel for the Passamaquoddy Tribe and Penobscot Nation to Gov. Longley, 1/18/77 (3 p.)

U. Senate Concurrent Resolution 212 (94th Congress, 2nd Session) Submitted by Sen. Hathaway and Sen. Muskie, (2 p.)

V. Committee on Interior and Insular Affairs (U.S. House) release: "Udall, Roncalio Suggest Congress Stay Out of Indian Claims Case." 3/12/77

MAINE INDIAN LAND CLAIMS

Letter to the Honorable

William B. Gunter

from

Archibald Cox

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March 22, 1977

Mr. Justice William B. Gunter
The Supreme Court of Georgia
Supreme Court Building
Atlanta, Georgia 30334

Dear Mr. Justice:

I am writing at the suggestion of Robert Lipshutz, Esquire, Counsel to the President, to provide you with some background information and materials which may be of assistance to you in your new assignment concerning the Passamaquoddy and Penobscot tribes.

The claims of the Passamaquoddy and Penobscot tribes are founded upon the following basic propositions:

(i) Under the Indian Nonintercourse Act [25 U.S.C. §177 (Attachment A)] any conveyance involving any interest in Indian property which is not approved by the federal government is void ab initio. It is now settled law that this provision applies both to recognized and unrecognized tribes, and to tribes located within the original thirteen states as well as other parts of the country.

(ii) By virtue of aboriginal use and occupancy, Indian tribes obtain an interest in land known as aboriginal title (See Attachment B).

(iii) The Passamaquoddy and Penobscot tribes of Maine can prove that as of 1790 they held unextinguished aboriginal title to between five and ten million acres in Maine, and that their rights in all but approximately 20,000 acres of these lands were taken in transactions subsequent to 1790 which violated the Nonintercourse Act (Attachments C and D).

(iv) It is settled that rights acquired by virtue of such occupancy are protected by the Nonintercourse Act, and that state law defenses such as statute of limitations, laches and estoppel are not a bar to the assertion of a claim under the Indian Nonintercourse Act (Attachment E).

With these central propositions in mind, I would like to review briefly the events leading up to your own appointment.

On February 22, 1972, the Passamaquoddy tribe asked the federal government to institute litigation on its behalf to rectify violations of the Indian Nonintercourse Act of 1790 (hereinafter "the Act")(Attachment F). It was the Passamaquoddy tribe's view that the 1794 treaty between the Commonwealth of Massachusetts and the Passamaquoddys was in violation of the Act in that no federal approval had ever been given to this transaction, which resulted in the possessory rights to all but 23,000 acres of the tribe's land being extinguished.

While the Commissioner of the Federal Bureau of Indian Affairs (to whom the tribe had directed its request) recommended favorable action, the Department of the Interior took none. Lack of a response became critical as a federal statute of limitations on ancient Indian trespass claims was due to expire on July 18, 1972 (Attachment G). In order to force the federal government to act, the tribe, on June 2, 1972, brought suit in the United States District Court for Maine against the Secretary of the Interior and United States Attorney General seeking a declaration of their rights under the Act.

The tribe alleged that the unreasonable delay in responding to their request constituted a denial and that the federal government had committed legal error if it had acted on the assumption that the Indian Nonintercourse Act did not apply to the tribe. The tribe also asked that the federal government be directed to file a protective complaint against Maine so that the issues they raised would not be mooted by the running of the federal statute of limitations.

Before ruling on the tribe's motion, the court directed the government to respond to their request. The government responded, stating that the Act did not protect the tribe and, therefore, it had no trust responsibility to assist the tribe. The court thereafter ordered the federal government to file the protective complaint against Maine on behalf of the Passamaquoddys. A similar suit was then filed by the government on behalf of the Penobscot Nation in accordance with a stipulation with that tribe. Further proceedings in the protective actions against Maine were stayed pending a resolution of the declaratory judgment issues.

The Passamaquoddy case took three and one-half years to litigate, and resulted in a decision from the District Court in February, 1975, holding that the Act applies to all tribes, including those which are not "recognized" by the government, and creates a trust relationship between the federal government and all tribes to which it applies (Attachment H). In unanimously affirming, the First Circuit stated that the trust relationship created by the Act includes at minimum an obligation on the part of the federal government to investigate and take such action as is warranted under the circumstances when an alleged violation of the Act is brought to its attention (Attachment I).

Neither the federal government nor the State of Maine, which had intervened in the Passamaquoddy case as a party defendant, applied for a writ of certiorari, and the appellate decision became final last spring when the time for appeal expired. Since that time, the Interior and Justice Departments have done what the court told them to do; namely, investigate and determine what action was appropriate under the circumstances. As you are aware, after conducting an independent review, both Interior and Justice have concluded that the two tribes have legally and factually valid claims to between five and ten million acres, and the Department of Justice has indicated it is prepared to proceed to litigation on the tribes' behalf if a negotiated settlement is not reached in the near future. (Attachments J, K, L, M.)

In reporting to the court on February 28, 1977, the Department of Justice set forth the action it proposes to take unless there is an out-of-court settlement of the claims. The Department will seek possession of, and damages for, the illegal occupation of at least five million acres. This action will be against the State of Maine (which currently occupies between 500,000 and 700,000 acres in the claim area) and other large landowners. As a direct result of a suggestion made by Mr. Lipshutz that both sides lay aside their weapons as a first step toward a negotiated settlement, the tribes offered to accept a substitute claim against an "appropriate sovereign"for the monetary value of their claim in the heavily settled coastal areas and those areas inland which are presently held by homeowners and small property owners.

In reaching its conclusions, the federal government was confronted with the following basic arguments put forth by the State of Maine:

1. The tribes lost their aboriginal territory or parts thereof through settlement and/or intrusion prior to 1790.

2. The tribes did not have sufficient population to establish aboriginal title to the territory in issue.

3. Pre-1820 transactions with the tribes were ratified via federal approval of the Compact of Separation between Massachusetts and Maine.

4. Transactions which were not ratified in the Compact of Separation were subsequently implicitly ratified through federal action, acquiesence, or delegation of responsibility for Indians to the State of Maine.

5. The Nonintercourse Act is not applicable within the original thirteen states.

6. Both the Passamaquoddys and Penobscots were conquered by Massachusetts Colonial Governor Pownal in 1759 and lost their aboriginal territory accordingly.

The first four of these arguments were presented to the Department of the Interior in a letter and two memoranda (Attachments N, O, P) and are dealt with in Interior's draft litigation reports dated January 10, 1977 (Attachments J, K), and an appendix thereto (Attachment Q). The final two arguments were first raised in a February 18, 1977 letter which the Maine Attorney General submitted to the Maine legislature (Attachment R), and are answered in the Justice Department's memorandum of February 28, 1977 (Attachment M).

On several occasions in recent months, Maine Governor James B. Longley has asked the tribes to surrender their claims for return of land (Attachment S). While the tribes have indicated their willingness to negotiate, they have refused to give up their claims for return of the unoccupied portions of the claim area (Attachment T). On two occasions, legislation seeking to bar the tribes from recovering possession of land have been introduced in Congress. The first was a proposed congressional resolution which urged the courts of the United

States to refuse to hear the tribes' claims for land (Attachment U). The second was a bill which would have retroactively ratified the transactions by which the tribes lost their land, thereby defeating not only the claim for recovery of land, but assuming the measure could withstand constitutional challenge, the tribes' trespass claims as well (Attachment M). The resolution died with the end of the Ninety-Fourth Congress. The bill remains alive, although the chairmen of the committees to which it was referred have indicated that they will not hold hearings on the measure until you, as the President's special representative, have had an opportunity to consider the matter (Attachment V).

All of which brings us to the present and the question of where we go from here. Our position is that we are prepared to take part in good-faith negotiations in an effort to secure a fair out-of-court settlement. We believe a sincere and honest effort should be made by all parties to this dispute to settle the issue and avoid the inevitable consequences of litigation. Any such settlement, in our view, should embody three aspects of the public interest:

(i) the land titles of homeowners and small landowners should be cleared;

(ii) both the State of Maine and the large private landowners, on the other hand, should expect to participate in a settlement in some manner; and

(iii) the federal government, because of its historic failure to fulfill its fiduciary responsibility toward the tribes, is primarily responsible not only for the landlessness of the Indians, but the trespassory presence of the non-Indians, and must assume liability for a major portion of any out-of-court settlement.

Within this framework, many things are possible. The only condition which the tribes have placed on such negotiations is that the ultimate settlement must include a significant landbase for the tribes. Fortunately, 80 percent of the claim area is uninhabited, and thus potentially available.

It would seem that these cases should not have to proceed further in court. While our clients are obviously prepared to go forward, they have clearly indicated their willingness to consider a negotiated settlement.

I am sorry that I will not be able to attend the meeting at the White House on March 29. My classroom schedule interferes; and to attempt to reschedule a class this late in the year puts quite a burden upon the students. I hope to meet you soon. My colleagues and I welcome your appointment and stand ready to assist you in every way.

Very truly yours,

Archibald Cox

Land Office, fixed the lines which controlled the court when a question arose as to whether a claimant was within or without the particular reservation at the time of alleged depredation. French v. U. S., 1914, 49 Ct.Cl. 337.

3. Division of tribal lands among members, surveys for

To accomplish the object of legislation by which Congress provided for the eventual dissolution of certain tribes such as the Creek nation and the division of a large portion of the tribal lands among the members of the tribe, it was necessary under this section to survey and subdivide such lands, in like manner as public lands are divided. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137.

4. Title to Arkansas River bed, grant to Creek tribe as carrying

The grant of lands in Indian Territory to the Creek Tribe of Indians by patent of Aug. 11, 1852, did not vest the tribe with any right or title to the bed of the Arkansas river between high-water marks, but the same remained in the United States and passed to the state of Oklahoma on its admission, subject to such rights as were given by its laws to owners of lands bordering on the stream but the purpose of such grant to the Creeks was to provide them a home in the then far West so long as they should exist as a tribe and continue to occupy the lands granted and to construe such grant as not conveying the bed of such river interferes with no object or purpose of the grant. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137, appeal of certain parties dismissed 216 F. 129, 132 C.C.A. 373, and decree reversed on other grounds 216 F. 126, 132 C.C.A. 370.

5. Errors in surveys

Where in making the survey of the land ceded by the United States to the Choctaw Nation under the treaties of 1820 and 1825, 7 Stat. 210, 234, an error was made in running the eastern boundary of said lands in that the surveyor bore to the west and did not cover in the actual survey all the lands ceded to the Choctaws; and where said error was not discovered until a resurvey was made in 1857 pursuant to the provisions of the Treaty of 1855, 11 Stat. 611, the tract of land was not legally taken until after the Treaty of 1855. Chickasaw Nation v. U. S., 1942, 94 Ct.Cl. 215.

Where the Commissioner of Indian Affairs, after the report of the error in the 1825 survey as discovered in the survey of 1857, decided to stand by the original survey; and where Congress by Act Mar. 3, 1875, 18 Stat. 476, ratified the original marking, because the original erroneous boundary was to be recognized by the Government it was not intended by Congress that the Government should not account to the rightful owners for the property wrongfully taken. Id.

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. § 2116.

Historical Note

Derivation. Act June 30, 1834, c. 161, § 12, 4 Stat. 730.

Cross References

Patents to be held in trust; descent and partition, see section 348 of this title.

Notes of Decisions

Library references

Indians ⇐11, 15(1), 16(1).
C.J.S. Indians §§ 30 et seq., 37, 53 et seq.

1. Power of Congress to legislate for protection of Indians

Congress has power to reimpose restrictions on alienation of land by Indian tribe while tribe is still ward of the nation. Alonzo v. U. S., C.A.N.M.1957, 249 F.2d 189, certiorari denied 78 S.Ct. 429, 355 U.S. 940, 2 L.Ed.2d 421.

The title to land held in trust for benefit of Indian Tribe under guardianship of federal government could not be divested except in accordance with the laws of the United States. U. S. v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, C.C.A.N.C.1938, 97 F.2d 417.

Indians are wards of nation, and general acts of Congress do not apply to them, unless clearly so intended. McCandless v. U. S. ex rel. Diabo, C.C.A.Pa.1928, 25 F.2d 71. See, also, U. S. v. 2,005.32 Acres of Land, More or Less, Situate in Corson County, S. D., D.C.S.D.1953, 160 F.Supp. 193.

Congress is not without power to legislate for the protection of Indians within

a state. Sunderland v. U. S., C.C.A.Okl. 1923, 287 F. 468, affirmed 45 S.Ct. 64, 260 U.S. 226, 69 L.Ed. 239.

Neither the Constitution of a state nor an act of its legislature can prevent the application of an Act of Congress to the Indian tribes residing in the state, but subject to the control of the general government. U. S. v. Boyd, N.C.1897, 83 F. 547, 27 C.C.A. 592.

Statute permitting Choctaw and Chickasaw Freedmen to purchase unallotted lands at appraised value was valid though not ratified or approved by such Indian nations. Smith v. Williams, 1928, 269 P. 1067, 132 Okl. 141.

2. Construction

Statutes concerning the rights of Indians are to be liberally construed in their favor. U. S. v. 2,005.32 Acres of Land, More or Less, Situate in Corson County, S. D., D.C.S.D.1958, 160 F.Supp. 193.

Acts of Congress relating to Indians are construed in such manner as to give the greatest protection possible to Indians. U. S. v. Drummond, D.C.Okl.1941, 42 F. Supp. 958, affirmed 131 F.2d 568.

3. —— With other laws

Legislative history of that portion of New Mexico Enabling Act providing that inhabitants agree to disclaim all right and title to all lands lying within boundaries owned or held by any Indians or Indian tribe, indicates that the purpose was to preclude any possible challenge by the state of titles acquired therein to grants made by the Governments of Spain or Mexico, and there was no intent to limit the provisions of this section providing that no purchase, grant, lease, or other conveyance of land from any Indian nation or tribe shall be of any validity unless made by treaty or convention entered into pursuant to Constitution. Alonzo v. U. S., C.A.N.M.1957, 249 F.2d 189, certiorari denied 78 S.Ct. 429, 355 U.S. 940, 2 L.Ed.2d 421.

Contracts of the character described in this section are not included within the provisions of section 81 of this title. 1885, 18 Op.Atty.Gen. 235.

4. Purpose

The purpose of this section providing that no purchase, grant, lease or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent. Federal Power Commission v. Tuscarora Indian Nation, App.D.C.1960, 80 S.Ct. 543, 362 U.S. 99, 4 L.Ed.2d 584, rehearing denied 80 S.Ct. 858, 362 U.S. 956, 4 L.Ed.2d 873 (2 mems).

Reasons for imposition of restrictions against alienation is not related to the manner in which Indians have acquired their lands, since purpose of restrictions is to protect the Indians against loss of their own lands by improvident disposition or through overreaching by members of other races. Alonzo v. U. S., C.A.N.M. 1957, 249 F.2d 189, certiorari denied 78 S. Ct. 429, 355 U.S. 940, 2 L.Ed.2d 421.

5. Sovereign exclusion

This section providing that no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under Federal Power Act, section 814 of Title 16, and therefore this section was not applicable to the taking of lands owned in fee simple by Tuscarora Indian Nation for a licensed Niagara power project. Federal Power Commission v. Tuscarora Indian Nation, App.D.C.1960, 80 S.Ct. 543, 362 U.S. 99, 4 L.Ed.2d 584, rehearing denied 80 S.Ct. 858, 362 U.S. 956, 4 L.Ed.2d 873 (2 mems).

6. Consent of United States

Regardless of how title to land may have been acquired by tribe, consent of United States is prerequisite to alienation. Tuscarora Indian Nation v. Federal Power Commission, 1959, 265 F.2d 338, 105 U.S.App.D.C. 146, reversed on other grounds 80 S.Ct. 543, 362 U.S. 99, 4 L.Ed.2d 584, rehearing denied 80 S.Ct. 858, 362 U.S. 956, 4 L.Ed.2d 873 (2 mems).

7. Definitions

The expression "under the authority of the United States" means the constitutional authority of the United States. 1796, 1 Op.Atty.Gen. 65.

8. Indians within section

Although this section limiting alienation of Indian lands except by treaty or convention pursuant to constitution, and extending over Indian tribes of New Mex-

ico in 1851, 9 Stat. 587, § 7, does not expressly refer to Pueblo Indians, it nevertheless includes them, since "Indian tribe," used therein, means body of Indians of same or similar race, united in community under one leadership or government, and inhabiting particular though sometimes ill-defined territory. U. S. v. Candelaria, N.M.1926, 46 S.Ct. 561, 271 U. S. 432, 70 L.Ed. 1023. See, also, Pueblo of Santa Rosa v. Fall, 1927, 47 S.Ct. 361, 273 U.S. 315, 71 L.Ed. 658.

Where Indians of each pueblo in New Mexico collectively as a community, have a fee simple title to lands of the pueblo, their lands owned in fee under patents from the United States are subject to legislation of Congress enacted in the exercise of the government's guardianship over Indian tribes and their property. Alonzo v. U. S., C.A.N.M.1957, 249 F. 2d 189, certiorari denied 78 S.Ct. 429, 355 U.S. 940, 2 L.Ed.2d 421.

Lands acquired by Pueblos Tribe through purchase were subject to restrictions against alienation as were lands acquired by the pueblo in any other manner. Id.

This section affected land held in trust by United States for Eastern Band of Cherokee Indians under guardianship of federal government, notwithstanding that such Indians were citizens of North Carolina and were subject to North Carolina law and that the band was incorporated under a state charter and attempted to take action thereunder. U. S. v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, C.C.A.N.C.1938, 97 F.2d 417.

9. —— Seneca Indians of New York

The State of New York exercises the exclusive sovereignty and jurisdiction over the Seneca nation of Indians, and Laws N.Y.1902, c. 296, entitled "An act to amend the Indian law in relation to the erection of poles and wires on the Tonawanda reservation," is therefore not unconstitutional and void, as conflicting with this section. Jemison v. Bell Telephone Co. of Buffalo, 1906, 79 N.E. 728, 183 N.Y. 493.

10. Operation of section as dependent on character of title of tribe

The operation of this section does not depend on the nature or extent of the title of the tribe or nation, and it applies whether the title is fee simple or merely a right of occupancy. 1885, 18 Op.Atty. Gen. 235.

This section is broad enough to include a tribe holding lands by patent from the United States. 1857, 9 Op.Atty.Gen. 24.

11. Nature of title or interest of tribe in tribal lands

A title to land under grant to private individuals made by Indian tribes or nations northwest of the Ohio river in 1773 and 1775, was void as against the title of a grantee from the United States. Johnson v. McIntosh, Ill.1823, 21 U.S. 543, 8 Wheat. 543, 5 L.Ed. 681.

The fee in unsold lands is either in the federal or state governments and the Indians have only a right of use. Godfrey v. Beardsley, C.C.Ind.1841, Fed.Cas. No.5,497. See, also, Goodfellow v. Muckey, C.C.Kan.1881, Fed.Cas.No.5,537.

The seisin of lands of Indian tribes is in the sovereign. Jackson v. Porter, C.C. N.Y.1825, Fed.Cas.No.7,143.

12. Contracts affecting rights of Alaska Indians to possess lands, validity of

The rights of the Indians of Alaska to possess their lands cannot be disturbed by force or contract, and any contract affecting such right, made by any Indian of the native Alaska tribes, is void. U. S. v. Berrigan, 1905, 2 Alaska 442.

13. Grants—Validity of deed induced by fraudulent representations as to character of instrument

Where illiterate Indian was induced by fraud to sign deed, believing that he was signing contract authorizing employment of attorney, in absence of negligence on his part deed is void, conveys no title, and will be reformed in equity to speak the truth. Thompson v. Coker, 1925, 241 P. 486, 112 Okl. 268.

14. —— Color of title, deed in violation of restriction on alienation as

A deed by an Indian in contravention of a legislative grant, which withholds or restricts the power of alienation, is not color of title. Smythe v. Henry, C.C.N. C.1890, 41 F. 705. See, also, Sunol v. Hepburn, 1850, 1 Cal. 254; Taylor v. Brown, 1883, 40 N.W. 525, 5 Dak. 335.

Under Act May 27, 1908, § 4, providing that allotted lands shall not be subjected or held liable to any form of personal claim or demand against allottees prior to removal of restrictions, administrator's deed in pursuance of sale of Indian citizen's allotment of land for debts in violation of such provision cannot be deemed color of title so as to bar claim of minor heir by limitations under Comp. St.Okl.1921, § 183, subd. 2, and section 184. Dawes v. Brady, 1925, 241 P. 147, 112 Okl. 289.

15. —— Quitclaim, with covenant of further assurance when title should be acquired from Government, as within prohibition of section

Where Sioux half-breed, and beneficiary under the treaties and acts of Congress

setting apart the half-breed reservation near Lake Pepin, being in possession of certain lands within the reservation, quitclaimed, with covenant of further assurance, and surrendered possession, to defendant, who quitclaimed to A., with covenants of further assurance when he should thereafter acquire title of the United States, the deed from defendant to A. was not void as against public policy, nor in contravention of this section. Hope v. Stone, 1865, 10 Minn. 141 (Gil. 114).

16. Leases

McKinney's N.Y.Indian Law, § 85, authorizing leases and the leases for mining of gypsum on Tonawanda Reservation of Indians in New York state on lands which had been conveyed by Secretary of the Interior to Comptroller of the state of New York in trust for Tonawanda Indians are not void as violating this section, providing that no conveyance of Indian lands shall be valid unless made by treaty or convention pursuant to the Constitution. U. S. v. National Gypsum Co., C.C.A.N.Y.1944, 141 F.2d 859.

A lease of Indian lands to a white man without the consent of the Indian agent and the Commissioner of Indian Affairs, and without authorization by act of Congress or treaty obligation, was void. Coey v. Law, 1904, 77 P. 1077, 36 Wash. 10. See, also, Light v. Conover, 1901, 63 P. 966, 10 Okl. 732; Cherokee Strip Live Stock Ass'n v. Cass Land, etc., 1897, 40 S. W. 107, 138 Mo. 394; Coey v. Low, 1904, 77 P. 1077, 36 Wash. 10.

Indian tribes cannot lease their reservation without the authority of some law of the United States. 1885, 18 Op.Atty. Gen. 235.

No general power appears to be conferred by statute upon the President, the Secretary of the Interior or any other officer of the government to make, authorize or approve leases of lands held by Indian tribes. Id.

17. —— Grazing leases

A lease of land for grazing is within this section, the duration of the term is immaterial and neither the President nor the Secretary of the Interior has authority to make a lease, for grazing purposes, of any part of an Indian reservation, nor will their approval of any lease made by Indians render it valid. 1885, 18 Op.Atty. Gen. 235.

18. —— Mining leases

Under this section and Act Mar. 1, 1889, c. 333, 25 Stat. 784, repealing all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding 10 years, leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining of coal for a period not exceeding 10 years. McBride v. Farrington, N.Y.1906, 149 F. 114, 79 C.C.A. 56.

Since the passage of Act July 1, 1902, providing for the allotment of the lands of the Cherokee Nation, Cherokee citizens have the power to lease their allotments when selected for mineral purposes with the approval of the Secretary of the Interior. 1904, 25 Op.Atty.Gen. 168.

Mining leases made by citizens of the Choctaw Nation of Indians, in the Indian Territory, and the Osage Coal and Mining Company, a Missouri corporation, for the mining of coal, etc., in said territory, were not such as could properly receive the approval of the Secretary of the Interior under former laws. 1888, 18 Op. Atty.Gen. 486.

19. —— Subletting

Where a party holds a lease of Indian lands approved by the Interior Department and providing that he will not at any time sublet or transfer any of his interest to any person without the consent of the lessor and the approval of the Secretary of the Interior, a subletting without the consent of such Secretary conveys no interest. Reeves & Co. v. Sheets, 1905, 82 P. 487, 16 Okl. 342.

20. —— Rights and liabilities under illegal leases

One who takes leases of Indian lands, knowing them to be illegal, and relying on the difficulties in the way of the Government's enforcing its rights, is not entitled to the aid of equity to restrain any action the Government may see fit to take to oust him. Beck v. Flournoy Live-Stock & Real-Estate Co., Neb.1894, 65 F. 30, 12 C.C.A. 497, appeal dismissed 16 S.Ct. 1201, 163 U.S. 686, 41 L.Ed. 305.

An action for rent on behalf of the Cherokee Nation could not be maintained on a lease of lands made by such nation in violation of this section. Mayes v. Cherokee Strip Live Stock Ass'n, 1897, 51 P. 215, 58 Kan. 712.

One in possession of land in the "Cherokee Outlet" may recover as upon a quantum meruit for pasturing thereon cattle delivered to him for that purpose, if there is no showing that he held the land without consent of the Indians, regardless of the question whether his lease, if he had one, was valid as against

the Indians or the Government. Kansas & N. M. Land & Cattle Co. v. Thompson, 1897, 48 P. 34, 57 Kan. 792.

A lessee of lands in Indian Territory cannot avoid payment of rent because the lessor obtained the land under a lease by the Cherokee Nation, which was void, because not executed as required by this section, where such lessee took possession and enjoyed the benefits of the lease. Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co., 1897, 40 S.W. 107, 138 Mo. 394.

21. Purchases and sales—Effect on right of individual members of tribe to sell

Under this section declaring that no conveyance from an Indian tribe shall be of any validity unless authorized by treaty, where a tribe could not sell, individual members could not; for they had neither an undivided interest in the tribal land nor any vendible interest in any particular tract. Franklin v. Lynch, Okl. 1914, 34 S.Ct. 505, 233 U.S. 269, 58 L.Ed. 954.

The omission of the words "any Indian" from the prohibition of purchases and leases "from any nation or tribe of Indians," while former statutes extended the prohibition to purchases or leases from "any Indian," shows an intention to remove the general restriction on alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. Jones v. Meehan, Minn.1899, 20 S.Ct. 1, 175 U.S. 1, 44 L.Ed. 49.

Under the treaties with the Creek Nation, lands were conveyed to the nation as a tribe, and not to the individual members thereof, or to them in common, and the nation has no power of alienation, and an individual can acquire no vested interest in any specific tract. Tuttle v. Moore, 1901, 64 S.W. 585, 3 Ind.T. 712.

The prohibition has the same application to individual Indians that it has to Indian nations and tribes. 1886, 18 Op. Atty.Gen. 486.

22. —— Force or fraud, invalidity of sales because of

Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void as are sales approved by President where the reservee was personated by other Indians, and patents may be withheld. 1837, 3 Op.Atty.Gen. 259.

23. —— Rights of purchasers of Indian lands generally

Purchasers take with notice of treaties and with knowledge that they can only occupy by permission from the Indians. 1900, 23 Op.Atty.Gen. 214.

Where property on a reservation was vested by law in an Indian tribe as a community, transfers thereof by individual Indians being invalidated, it is no defense to an action by the tribe for conversion of such property that defendant had acted as agent for another, or had in good faith and without notice, purchased it from one who had purchased it from an individual Indian. Seneca Nation of Indians v. Hammond, N.Y.1874, 3 Thomp. & C. 347.

24. Sale or transfer of allotted lands of individual Indians—County court order based on Act removing restrictions passed after filing of petition for sale

Where petition for decree of sale of allotted lands of Indian minor of less than half Indian blood was filed before Act May 27, 1908, removing restrictions, became effective, but not acted on till after such Act went into effect, county court had power and authority to consider and act upon it as if it had been filed after Act became effective. Luker v. Masterson, 1925, 234 P. 727, 109 Okl. 75.

25. —— Effect of declaration of heirship by prospective allottee before selection of allotment

Under this section and Act July 1, 1902, §§ 12, 15, 16, 42, three-fourths blood Choctaw Indian had no individual alienable right or interest in allotment before she selected it, and her written declaration of heirship, under Mansfield's Dig.Ark.1884, §§ 2544, 2545, made two months before she selected her allotment, did not vest any title or right to possession in person designated as her heir at law; Act May 2, 1890, § 31, putting in force in Indian Territory certain provisions of the laws of Arkansas being inapplicable as in conflict with the Act of 1902. Arnold v. Ardmore Chamber of Commerce Industrial Corporation, C.C.A.Okl.1925, 4 F.2d 838.

26. Trustee, title of State as

Under Laws N.Y.1860, c. 439 authorizing acceptance of deed to land from Secretary of the Interior in trust for Tonawanda Indians, trust assumed by New York Comptroller was not a dry or passive trust because of New York statute relating to permissible trusts, so as to vest title thereto in the Tonawanda Band itself, where said chapter authorizing taking of the trust concluded with the words "Anything in the Act of the legislature of this state, defining the purpose for which trusts may be created to the

contrary notwithstanding". U. S. v. National Gypsum Co., C.C.A.N.Y.1944, 141 F. 2d 859.

27. Adverse possession

A state cannot affect the interest of the United States through statutes of limitation or adverse possession. U. S. v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, C.C.A.N.C.1938, 97 F.2d 417.

If land is not alienable by Indians, title cannot be obtained as against them by adverse possession. Id.

Adverse possession under a state statute of limitations will not give title to lands held in trust for the common benefit of an Indian tribe over which the United States exercises guardianship. Id.

Code N.C.1935, § 429, requiring persons suing for recovery or possession of realty to have been seized or possessed of realty within 20 years before commencement of action did not preclude United States from asserting as against a power company claiming title to North Carolina land by adverse possession that title to such land, which had not been in actual possession of Eastern Band of Cherokee Indians, was held by United States in trust for such Indians, since adverse possession could not operate to divest the title held for the Indians, and constructive possession followed the title. Id.

28. Noncitizens, conveyances to

Land held in trust by United States for Eastern Band of Cherokee Indians under guardianship of federal government could not be taken by contract, adverse possession or otherwise without the consent of the United States, notwithstanding that title to the land was originally obtained by grant from the state of North Carolina, or that the Indians were citizens of North Carolina and subject to North Carolina laws. U. S. v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, C.C.A.N.C.1938, 97 F.2d 417.

The law did not permit a white man to acquire the title to land held by an Indian in the Choctaw or Chickasaw Nation. Turner v. Gilliland, 1903, 76 S.W. 253, 4 Ind.T. 606.

The purchase of an improved farm from a Choctaw Indian by one not a citizen of the Choctaw Nation did not give the grantee the right of possession and occupancy as against a citizen of the Choctaw Nation who subsequently purchased the land from the grantor. Rogers v. Hill, 1901, 64 S.W. 536, 3 Ind.T. 562.

With respect to certain tribes and in certain jurisdiction the rule has been that a noncitizen of the tribe cannot acquire any title by purchase of Indian lands. Hockett v. Alston, 1900, 58 S.W. 675, 3 Ind.T. 432.

Where the laws of the Creek Nation authorized citizens of the nation to make contracts securing them certain special rights in communal pastures, the right could not be secured by or in conjunction with persons who were not citizens of the nation. Turner v. U. S., 1916, 51 Ct.Cl. 125.

29. Extinguishment of rights of Indians in tide lands under treaty giving authority to relocate reservation

The executive order of the President in 1857, setting apart lands bordering Commencement Bay in Oregon Territory for the Puyallup Tribe of Indians, did not grant right or title to shore lands, which could only be done by Congress for some national purpose; and in any event, under the provision of the Treaty of Dec. 26, 1854, 10 Stat. 1132, vesting in the President power to change and relocate the reservation, the subsequent allotment and conveyance in severalty of lands therein in accordance with a survey made under Act May 29, 1872, c. 233, 17 Stat. 186, in which the shore line was meandered and the lands allotted extended only to line of ordinary high tide, had the effect of extinguishing rights of the tribe as a community to tide lands, if any such previously existed. U. S. v. Ashton, C.C.Wash.1909, 170 F. 592, appeal dismissed 31 S.Ct. 718, 220 U.S. 604, 55 L. Ed. 605.

30. Compensation—Officials

Under an appointment of defendant by the Secretary of the Interior as an Indian commissioner to study the needs of and negotiate treaties with certain Indian tribes as directed, at a salary of $8 per day and actual traveling expenses, the salary to begin when defendant left his home and to be paid while "actually engaged" in the performance of his duties, he was entitled to salary so long as he remained away from home at the places to which he was assigned, performing such duties as directed and reporting regularly, and not merely for the days on which he was actively engaged in the performance of some duty, and especially where that was the practical construction placed upon the contract by both parties. U. S. v. Hoyt, Wash.1909, 167 F. 301, 93 C.C.A. 53.

31. —— Property

Where the state duly negotiated a treaty with various Indian tribes, in the presence of a federal commissioner, and

thereafter a dispute arose over the meaning and application of the terms of the treaty, the state had the right to settle such dispute under that treaty by a legislative grant of compensation and thus the grant of compensation was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim which had arisen as a result of ambiguous language of a certain treaty in question, and therefore such payment was not in conflict with this section. St. Regis Tribe of Mohawk Indians v. State, 1958, 152 N.E.2d 411, 5 N.Y.2d 24, 177 N.Y.S.2d 289, certiorari denied 79 S.Ct. 586, 359 U.S. 910, 3 L.Ed.2d 573, rehearing denied 79 S.Ct. 1146, 359 U.S. 1015, 3 L.Ed.2d 1039.

A bare right of occupancy by Indians conveyable by them only to the state, is not the kind of property right which must, as a matter of due process, be compensated for by the state upon its taking title to Indian lands unless a statute authorizes it. Id.

Where sovereign has declared that thereafter Indians are to hold certain lands permanently, compensation must be paid for subsequent taking, and while there is no particular form for recognition of the Indian right of permanent occupancy, it may be established in a variety of ways but there must be a definite intention by the constituted authority to accord legal rights not merely permissive occupation. St. Regis Tribe of Mohawk Indians v. State, 1956, 158 N.Y.S.2d 540, 4 Misc.2d 110, reversed on other grounds 168 N.Y.S.2d 894, 5 A.D.2d 117, affirmed 177 N.Y.S.2d 289, 5 N.Y.2d 24, 152 N.E. 411, certiorari denied 79 S.Ct. 586, 359 U.S. 910, 3 L.Ed.2d 573, rehearing denied 79 S.Ct. 1146, 359 U.S. 1015, 3 L.Ed.2d 1039.

In a proceeding by the St. Regis Tribe of Mohawk Indians against the state for compensation for the taking of an island in the St. Lawrence River, where the state contended that any interest the tribe may have had, was extinguished by a treaty and was ceded to the state and the tribe maintained that the island was not ceded, a triable issue on title or interest was presented which could not be summarily disposed of on motion to dismiss. Id.

32. Jurisdiction

Under Manst.DigArk. §§ 3509–3511, as construed by state of Arkansas and made applicable to Indian Territory by Act May 2, 1890, § 31, 26 Stat. 94, court for judicial district where land allotted to Choctaw Indian after her death was situated, had jurisdiction of guardian's petition for sale thereof, in that it was not merely ancillary to original guardianship proceeding in another district, but had status of an independent suit. Joines v. Patterson, Okl.1927, 47 S.Ct. 706, 274 U.S. 544, 71 L.Ed. 1194.

Under Enabling Act, § 19, 34 Stat. 277, and section 20, as amended by Act Mar. 4, 1907, § 3, 34 Stat. 1287, and Const.Okl. Schedule, §§ 1, 2, 23, petition by guardian for minor Choctaw Indians for sale of land, begun in district wherein land was situated, being an original and independent proceeding, was properly transferred to court within such county for further action thereon after Oklahoma's admission into the Union as a state. Id.

33. Summary judgment

The United States which moved for summary judgment in action to invalidate leases in Indian Reservation could raise no question on appeal as to propriety of that mode of procedure. U. S. v. National Gypsum Co., C.C.A.N.Y.1944, 141 F.2d 859.

34. Penalties

The penal part of this section does not reach to the mere inducing or negotiating of a lease of Indian lands for grazing purposes, as the wording of such part of the statute makes the penalty applicable only to treating for the "title or purchase" of any lands. U. S. v. Hunter, C.C.Mo.1884, 21 F. 615.

No private person can procure a conveyance from the Delawares or negotiate for that purpose in view of the treaty with the Delawares of May 6, 1854, without becoming an offender under this section. 1857, 9 Op.Atty.Gen. 25.

§ 178. Fees on behalf of Indian parties in contests under public land laws

In contests initiated by or against Indians, to an entry, filing or other claims, under the laws of Congress relating to public lands for any sufficient cause affecting the legality or validity of the entry, filing or claim, the fees to be paid by and on behalf of the Indian

"[AUTHORIZATION OF APPROPRIATIONS]

"Sec. 7. There is hereby authorized to be appropriated a sum not to exceed $2,500,000 to carry out the provisions of this resolution. Until such time as funds are appropriated pursuant to this section, salaries and expenses of the Commission shall be paid from the contingent fund of the Senate upon vouchers approved by the Chairman. To the extent that any payments are made from the contingent fund of the Senate prior to the time appropriation is made, such payments shall be chargeable against the maximum amount authorized herein."

§ 175. United States attorneys to represent Indians

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1. Construction

To same effect as second paragraph of original annotation, see U. S. v. Gila River Pima-Maricopa Indian Community, C.A.Ariz.1968, 391 F.2d 53.

4. Attorney's fees

District court was without power to award the Pyramid Lake Paiute Tribe of Indians attorney fees for retained counsel in connection with tribe's successful litigation challenging issuance by Secretary of the Interior of regulation establishing the basis for determining the amount of water to be provided the Truckee-Carson Irrigation District, notwithstanding that services of the United States attorney were unavailable to the Tribe. Pyramid Lake Paiute Tribe of Indians v. Morton, 1974, 499 F.2d 1095, 163 U.S.App.D.C. 90, certiorari denied 95 S.Ct. 1351.

Neither sections 81, 81a, and 81b of this title providing for retainer of private counsel for Indians with approval of Secretary of Interior on claims against United States nor this section imposed liability on government for payment of attorney fees to Indians who unsuccessfully requested United States Attorney to represent them before trial of condemnation actions and thereafter retained counsel on approved contingent fee basis. U. S. v. Gila River Pima-Maricopa Indian Community, C.A.Ariz.1968, 391 F.2d 53.

5. Fiduciary standards

The conduct of the United States, as disclosed in the acts of those who represent it in dealings with Indians, should be judged by the most exacting fiduciary standards. Pyramid Lake Paiute Tribe of Indians v. Morton, D.C.D.C.1973, 354 F.Supp. 252, supplemented 360 F.Supp. 669, reversed on other grounds 499 F.2d 1095, 163 U.S.App.D.C. 90, certiorari denied 95 S.Ct. 1351.

6. Discretion

The authority under this section of the United States attorney to represent Indians in all suits at law and in equity is discretionary. Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., D.C.Ariz.1972, 353 F.Supp. 1098.

Where the United States pointed out that alleged trespassers on tribe's land were operating under permits, agreements and licenses issued or ultimately derived through various branches of the United States government, and a letter written by assistant secretary, Bureau of Land Management, supported such allegation, should the United States represent the tribe in such action ultimately a conflict of interest would result, and hence it was within sound discretion of the Attorney General to refuse to do so. Id.

§ 176. Survey of reservations

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6. Expenses of surveys

Where it is provided in a treaty of cession of Indian land that a tract will be surveyed and marked out for the exclusive use of the conveying tribe as an Indian reservation, and that the President might, in his discretion, from time to time, cause the whole or some portion of the reservation to be surveyed into lots [for assignment to individual Indian families as might be willing to locate on them as permanent homes], the parties intended that the surveying should be done at the Government's expense and a later act of Congress requiring the tribes to bear the expense of a later survey violated the earlier treaty provision and took rights away from the Indians who were parties to the treaty. Confederated Salish and Kootenai Tribes v. U. S., 1964, 167 Ct.Cl. 405.

§ 177. Purchases or grants of lands from Indians

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1. Power of Congress to legislate for protection of Indians

Once the United States was organized and the Constitution adopted, tribal rights to Indian lands became the exclusive province of federal law and Indian title, though recognized to be only a right of occupancy, is extinguishable only by the United States, and such rule applies in all the states, including the original 13. Oneida Indian Nation of N. Y. State v. Oneida County, New York, N. Y.1974, 94 S.Ct. 772, 414 U.S. 661, 39 L. Ed.2d 73.

The federal government possesses unquestioned power to convey fee to lands occupied by Indian tribes, although grantee takes only naked fee and cannot disturb occupancy of Indians. Bennett County, S. D. v. U. S., C.A.S.D. 1968, 394 F.2d 8.

All questions with respect to rights of occupancy in land, manner, time and conditions of extinguishment of Indian title are solely for consideration of federal government. Id.

Paramount authority of federal government over Indian tribes and Indians is derived from Constitution, and Congress has power and duty to enact legislation for their protection as wards of the United States. Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood, C.A.Fla. 1966, 361 F.2d 517, certiorari denied 87 S.Ct. 227, 385 U.S. 918, 17 L.Ed.2d 143.

Inclusion within a state of lands of the United States does not take from Congress the power to control their oc-

cupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of the police power. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Mont. v. Calvert Exploration Co., D.C.Mont.1963, 223 F.Supp. 909.

2. Construction

Treaties with Indians must be interpreted as they would have understood them. Choctaw Nation v. Oklahoma, Okl.1970, 90 S.Ct. 1328, 397 U.S. 620, 25 L.Ed.2d 615, rehearing denied 90 S.Ct. 1834, 398 U.S. 945, 26 L.Ed.2d 285.

Any doubtful expressions in treaties with Indians should be resolved in the Indians' favor. Id.

To assure utmost fairness in transactions between United States and its Indian wards, any intent to deprive Indian tribes of their rights in land, or otherwise bring about extinguishment of Indian title, either by grants in abrogation of existing treaties or through other Congressional legislation, must be clearly and unequivocally stated and language appearing in such grants and statutes is not to be construed to prejudice of Indians. Bennett County, S. D. v. U. S., C.A.S.D.1968, 394 F.2d 8.

Plain meaning interpretation of phrase "any * * * tribe of Indians" as used in this section, forbidding conveyance of Indian lands without consent of United States, is the only construction of this section which comports with basic policy of United States as reflected in this section to protect Indian right of occupancy of their aboriginal lands. Joint Tribal Council of Passamaquoddy Tribe v. Morton, D.C.Me.1975, 388 F.Supp. 649.

Court would not decide whether or not this section is applicable to sales or dispositions by Indians to states. Seneca Nation of Indians v. U. S., 1965, 173 Ct. Cl. 917.

4. Purpose

Purpose of this section forbidding conveyance of Indian land without consent of the United States is to protect land of Indian tribes in order to prevent fraud and unfairness. Joint Tribal Council of Passamaquoddy Tribe v. Morton, D.C. Me.1975, 388 F.Supp. 649.

4a. Fiduciary obligation

By virtue of duty imposed by this section, United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though United States did not participate in the unconscionable transaction. Joint Tribal Council of Passamaquoddy Tribe v. Morton, D.C.Me.1975, 388 F.Supp. 649.

Where Congress never expressly terminated its relationship with the Passamaquoddy Tribe, failure of Federal Government to object to Maine's undertaking certain obligations for protection of Tribe did not evidence such a clear congressional intent as would support a finding of a termination of Federal Government's obligation toward the Passamaquoddies. Id.

Prior to 1790 when Congress under the Constitution adopted this section no fiduciary role with respect to Indians had been assumed by the Continental Congress under the Articles of Confederation with respect to Indian lands which were within the borders of the new states. Seneca Nation of Indians v. U. S., 1965, 173 Ct.Cl. 917.

The Treaty of Canandaigua of November 11, 1794, 7 Stat. 44, did not, in itself, vest any fiduciary responsibility or supervisory role in the Federal Government with respect to transfer of Indian lands to others, its purpose being to reconfirm peace and friendship between the United States and the Six Nations, to correct an inadvertent error in boundaries of lands theretofore allotted to the Indians, and to relinquish any rights the United States may have acquired through this error, and there was no purpose to divest New York and Massachusetts of their rights or to supervise sales or transfers of Seneca territory. Id.

This section created a special relationship between the Federal Government and the Indians with respect to the disposition of their lands, in that the United States assumed responsibility to protect and guard the Indians against unfair or fraudulent treatment in land transactions with private individuals. Id.

Fiduciary relationship of the United States to Indian tribes is not the same in the case of every tribe, and when dealing with an organized Indian tribe which customarily takes steps to further its own interests, the Federal Government need not exercise constant supervision over that tribe's affairs, the measure of accountability depending upon the whole complex of factors and elements in the particular case. Seneca Nation of Indians v. U. S., 1965, 173 Ct.Cl. 912.

6. Consent of United States

Third parties, and in particular states and municipalities, acquire only such rights and interests in Indian lands as may be specifically granted to them by federal government. Bennett County, S. D. v. U. S., C.A.S.D.1968, 394 F.2d 8.

This section requires that the United States supervise sales of Indian lands, and approval of such sales may be given by Congress after the sales take place and ratification of the transaction may be implied from some separate action taken by Congress, so that where the State of New York without the contemporaneous approval of Congress took by eminent domain certain Indian land for a price not claimed to have been inadequate, and Congress thereafter provided that New York game laws should apply with respect to lands formerly acquired by New York in condemnation proceedings, the latter Congressional enactment contained implicit ratification of New York's ownership of the tract previously taken by eminent domain. Seneca Nation of Indians v. U. S., 1965, 173 Ct.Cl. 912.

6a. Parties

Secretary of the Interior was proper party to suit by Indian tribe for declaration that this section was applicable to it and established a trust relationship between United States and tribe, since the Department of the Interior was a federal agency primarily responsible for protecting Indian land and administering government policy pursuant to statutes. Joint Tribal Council of Passamaquoddy Tribe v. Morton, D.C.Me.1975, 388 F.Supp. 649.

8. Indians within section

This section, whose literal language used in the ordinary sense clearly encompasses all tribes of Indians, is applicable to the Passamaquoddies, although Federal Government had never entered into a treaty with the Tribe, Congress had never enacted legislation which specifically mentioned the Tribe and the Commonwealth of Massachusetts and the State of Maine had assumed almost exclusive responsibility for protection and welfare of the Passamaquoddies. Joint Tribal Council of Passamaquoddy Tribe. v. Morton, D.C.Me.1975, 388 F.Supp. 649.

This section forbidding conveyance of Indian land without consent of United States, was applicable to the Passama-

quoddy Tribe, although never "federally recognized," and imposed a trust or fiduciary obligation on United States to protect land owned by Tribe. Id.

9. —— Seneca Indians of New York

New York statute, Laws N.Y.1949, c. 787, expanding authority of Seneca Indian Nation to deal with their lands by authorizing them to grant rights of way in addition to leases was not authorized by the Seneca Leasing Act, Act of Aug. 14, 1950, § 5, 64 Stat. 442, and New York could not grant such authority without congressional approval. U. S. v. Devonian Gas & Oil Co., C.A.N.Y.1970, 424 F. 2d 464.

Phrase "as may be permitted" by the laws of the state of New York, in provision of Seneca Leasing Act, Act of Aug. 14, 1950, § 5, 64 Stat. 442, with respect to the leasing lands outside limits of certain villages for such purposes and such periods "as may be specifically permitted" means "as shall not be prohibited", and does not require special implementation by New York. Id.

11. Nature of title or interest of tribe in tribal lands

With respect to land agreements between Indians and United States, fee to lands is vested in federal government, and "Indian title" represents merely right to occupancy of land, until such right has been surrendered to federal government. Bennett County, S. D. v. U. S., C.A.S.D.1968, 394 F.2d 8.

In determining whether or not Indian tribe has compensable interest in lands, two types of title interest have been recognized; they are "recognized title" (by treaty, statute or otherwise), and an Indian or "aboriginal title," (continual occupancy and use to exclusion of other tribes or persons). Id.

21. Purchases and sales—Effect on right of individual members of tribe to sell

An Indian tribe is analogous to a separate nation. U. S. v. Devonian Gas & Oil Co., C.A.N.Y.1970, 424 F.2d 464.

23. —— Rights of purchasers of Indian lands generally

A formal act of cession by tribe, by treaty or otherwise, operates to determine Indian title, and is usual method in which rights have been extinguished. Bennett County, S. D. v. U. S., C.A.S.D. 1968, 394 F.2d 8.

27a. Tax assessments

Where Oneida Indian Reservation was not liable for $48 annual assessment levied by city on each parcel of land adjoining water main extension, and one of the Indians personally agreed with city to pay annual assessment to prevent water to her residence on Reservation from being shut off, but she did not abide by her personal contractual obligation, city would not be restrained from shutting off water supply to her residence. Waterman v. Mayor, City of Oneida, 1967, 280 N.Y.S.2d 927, 53 Misc.2d 1078.

Where city issued municipal bonds to pay for addition to its water system, and, to help amortize bonds, city levied $48 annual assessment on each parcel of land adjoining water main extension, and Oneida Indian Reservation bordered on road where part of water extension was located, the $48 annual assessment was a "tax" which the city could not levy on the Reservation. Id.

29. Extinguishment of rights of Indians in tide lands under treaty giving authority to relocate reservation

Executive establishment of reservation did not extinguish Indian title where it did not appear that Congress authorized the extinguishment or that Indians accepted reservation as quid pro quo for giving up their claims. Turtle Mountain Band of Chippewa Indians v. U. S., 1974, 490 F.2d 935, 203 Ct.Cl. 426.

Under the provisions of this section, only the United States could extinguish Indian title to land, but trade or intercourse among the Indian tribes was not prohibited, since this section was intended primarily to prevent white men from purchasing Indian lands without the sanction of the Government, and, accordingly, intertribal treaties whereby the Menominee Indians in 1821 and 1822 ceded a half interest in their land to the New York Indians were not invalid for lack of congressional sanction since ratification by the Senate of such treaties was not required by statute. U. S. v. Emigrant New York Indians ex rel. Danforth, 1966, 177 Ct.Cl. 263.

31. —— Property

The power of United States to control affairs of its Indian wards is subject to constitutional limitations and does not enable United States, without paying just compensation, to appropriate lands of an Indian tribe. Bennett County, S. D. v. U. S., C.A.S.D.1968, 394 F.2d 8.

33a. Declaratory judgment

Indian tribe was not barred from declaratory relief with respect to the applicability of this section to it merely because court might not be able to fashion coercive relief to compel Attorney General to bring suit on behalf of tribe. Joint Tribal Council of Passamaquoddy Tribe v. Morton, D.C.Me.1975, 388 F.Supp. 649.

Political question doctrine did not bar court from granting declaratory judgment that this section did apply to the Passamaquoddy Tribe since only issue before court was whether Congress once having exercised its power to pass protective legislation on behalf of Indians meant to include Tribe and this presented a question of legislative intent for resolution by court rather than a nonjusticiable political question. Id.

Doctrine of action committed to agency discretion by law did not preclude Indian tribe from bringing suit for declaratory judgment that this section applied to it and established a special trust relationship between tribe and United States after Attorney General declined to bring suit on behalf of tribe, since suit did not seek to require Attorney General to bring suit on tribe's behalf and the doctrine of prosecutorial discretion could not shield legal error resulting from the erroneous legal conclusion of official that this section did not apply to tribe. Id.

35. Conveyances

Conveyances of land to Indian nations pursuant to treaties were to the nations as political societies and not as persons and any well-founded doubt regarding boundaries must be resolved in their favor. Choctaw Nation v. Oklahoma, Okl. 1970, 90 S.Ct. 1328, 397 U.S. 620, 25 L.Ed.2d 615, rehearing denied 90 S.Ct. 1834, 398 U.S. 945, 26 L.Ed.2d 285.

36. Treaties, nature and extent of rights acquired under

Where Cherokee and Choctaw nations were granted by treaties vast tracts of land which were described by metes and bounds and through which Arkansas River runs, river bed was not expressly excluded as was other land and grants were accompanied by promise by United States that no part of land granted should ever be embraced in any territory or state, United States conveyed to the Indian nations the title to bed of Arkansas River below its junction with Grand River within the present State of Oklahoma and they were entitled to minerals beneath the river bed and the dry land

created by navigation projects narrowing river and title thereto did not pass to Oklahoma upon its admission to union. Choctaw Nation v. Oklahoma, Okl.1970, 90 S.Ct. 1328, 397 U.S. 620, 25 L.Ed.2d 615, rehearing denied 90 S.Ct. 1834, 398 U.S. 945, 26 L.Ed.2d 285.

This chapter create obligations on part of United States to protect Indian tribes in dealings involving disposition of their lands; however, special relationship created by this chapter, as amended, does not extend to intangible factors of tribal well-being, cultural advancement, and maintenance of tribal form and structure. Fort Sill Apache Tribe of State of Okl. v. U. S., 1973, 477 F.2d 1360, 201 Ct.Cl. 630, certiorari denied 94 S.Ct. 2406, 416 U.S. 993, 40 L.Ed.2d 772.

§ 180. Settling on or surveying lands belonging to Indians by treaty

Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempt to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands. R.S. § 2118.

§ 182. Rights of Indian women marrying white men; tribal property

Supplementary Index to Notes

Purpose ½

½. Purpose

Congress when it undertook to fix the rights, privileges and immunities of Indian women who marry citizens of the United States did not intend to withdraw the protective rights with regard to reservation affairs which Indians enjoy because they are Indians. Hot Oil Service, Inc. v. Hall, C.A.Ariz.1966, 366 F.2d 295.

§ 185. Protection of Indians desiring civilized life

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1. Government protection of Indians in use and occupancy of reservation lands

United States, for protection of its Indian wards, should, in dealing with Indian lands, when called upon to issue permits for use of lands, make all of judgment determinations that natural persons bargaining for use of lands would make, and Congress did not intend that such exercise of judgment would subject United States to liability. Lawrence v. U. S., C.A.Cal.1967, 381 F.2d 989.

United States is not under any duty to litigate all title problems which may be created by emancipated Indian dealing with lands which are subject to a state law. Dillon v. Antler Land Co., D.C. Mont.1972, 341 F.Supp. 734, affirmed 507 F.2d 940, certiorari denied 95 S.Ct. 1998.

3. —— Consent of United States

United States' failure to act to set aside conveyance of Indian lands made by Crow Indian did not entitle Indian to bring action for damages against United States. Dillon v. Antler Land Co., D.C. Mont.1972, 341 F.Supp. 734, affirmed 507 F.2d 940, certiorari denied 95 S.Ct. 1998.

5. Summary judgment

Issue of the alleged duty of the United States to assert action to set aside Indian's deed which was voidable for fraud and for violation of section 348 of this title, applicable to conveyances by Crow Indians, was clearly before the district court, and its disposition of said claim by way of summary judgment against the Indian was thus made in spite of its consideration of her contentions and was neither prejudicial nor erroneous. Dillon v. Antler Land Co. of Wyola, C.A.Mont. 1974, 507 F.2d 940, certiorari denied 95 S. Ct. 1998.

§ 200. Report of offense or case of Indian incarcerated in agency jail

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CHAPTER 6.—GOVERNMENT OF INDIAN COUNTRY AND RESERVATIONS

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ORIGINAL INDIAN TITLE*

By FELIX S. COHEN**

I. *Indian Clouds on Land Grant Titles.*

RECENT decisions of the Supreme Court recognizing the validity of original Indian title[1] make the existence and extent of such aboriginal ownership a relevant issue in title examinations whenever a chain of title is traced back to a federal grant or patent. Grantees who have relied on the Great Seal of a federal department as assuring the validity of land grant titles have not infrequently discovered to their sorrow the truth of the old French saying, "Même le plus belle fille du monde ne peut donner que ce que l'à." Not even the Federal Government can grant what it does not have. The nature of Indian title and its extinguishment thus becomes, in those states that have been carved out of the Federal public domain, a matter of concern to real property lawyers generally.

The leading Supreme Court case that establishes the invalidity of federal grants that ignore Indian title is the case of Moose Dung[2] (such being the polite English translation of Chief Monsimoh's Chippewa name). Here a federal lease which appeared on its face to be perfectly valid, and which had been specially confirmed by a joint resolution of Congress,[3] was held invalid by the Supreme Court, on the ground that neither the Secretary of the Interior nor the Congress of the United States had constitutional power to disregard Indian property rights. The right to dispose of this property, the Court held, was vested in the Indian owner, Chief Moose Dung the Younger. By tribal custom he was entitled to the land that had been promised[4] to his father, Chief Moose Dung the Elder. The Court accordingly held that Jones, the lessee under a lease executed and approved by the Department of the

*The views herein expressed are only those of the writer and do not necessarily reflect the views of any Government department or agency. F.S.C.

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1. United States as Guardian of the Hualpai Indians v. Santa Fe Pacific R.R., (1941) 314 U. S. 339; United States v. Alcea Band of Tillamooks, (1946) 329 U. S. 40.
2. Jones v. Meehan, (1899) 175 U. S. 1.
3. Joint Resolution of August 4, 1894, 28 Stat. 1018.
4. By Section 9 of the Treaty of October 2, 1863, 13 Stat. 667, 671.

Interior,[5] could be evicted by the Meehans, who had relied on an unapproved lease, allowing the use of land for lumbering purposes, granted by the Indian owner, the younger Moose Dung. The Supreme Court summed up its decision in these words:

"The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments." (At p. 32.)

Standing by itself, the decision in *Jones v. Meehan* might be narrowly interpreted as applying only where Indian land rights were assured and recognized by treaty. But the case of *Cramer v. United States*,[6] decided 24 years later, made it plain that the Supreme Court would not so limit the rule of respect for Indian title. For in the *Cramer* case the Indian title had never been recognized by treaty, act of Congress, or Executive order. What was involved was an area claimed by Indians by right of occupancy initiated before 1859. Yet the Supreme Court held that the Indian right of occupancy, even though it had not been formally recognized, was not terminated by a subsequent statutory grant. In this case the Court did not face the constitutional question of whether a valid grant divesting Indian title could have been made to the railroad, since it was able to put upon the Congressional grant a narrow construction that saved the land rights of the Indians. The railroad land grant statute[7] in the Cramer case had excepted from the scope of the grant all lands "reserved . . . or otherwise disposed of." The Department of the Interior, in 1904, issued patents to the Central Pacific Railway Company, on the assumption that there was no reservation or other encumbrance to prevent the passage of full title to the grantee. Yet the Supreme Court, in

5. The Interior lease of 1894 had the approval of all the descendants of Moose Dung the Elder, but the Court considered this irrelevant, on the ground that the Interior Department had no authority to disregard tribal customs on questions of inheritance and that, according to Chippewa custom, the eldest son took the land and had full power to dispose of its use. The Court quoted with approval (at p. 31) the comment of Justice Brewer (then Circuit Judge) in a somewhat similar case, that the Secretary of the Interior "had no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent." Richardville v. Thorp, (C.C., D. Kans., 1866) 28 Fed. 52, 53.

6. (1923) 261 U. S. 219.

7. Act of July 25, 1866, 14 Stat. 239.

1923, held that this departmental action disregarding Indian rights was erroneous. "The fact that such [Indian] right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy." (at p. 229).

The policy on which the Supreme Court based its decision in the Cramer case it spelled out in these words:

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby,* 95 U. S. 517, 525; *Minnesota v. Hitchcock,* 185 U. S. 373, 385. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co. v. Eaton,* 183 U. S. 602, 609; *Hastings & Dakota R. R. Co. v. Whitney,* 132 U. S. 357, 366. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. See 3 L. D. 371; 6 L. D. 341; 32 L. D. 382. In *Poisal v. Fitzgerald,* 15 L. D. 19, the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. In *State of Wisconsin,* 19 L. D. 518, there had been granted to the State certain swamp lands within an Indian reservation, but the right of Indian occupancy was upheld, although the grant in terms was not subject thereto. In *Ma-Gee-See v. Johnson,* 30 L. D. 125, Johnson had made an entry under Par. 2289, Rev. Stats., which applied to 'unappropriated public lands.' It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. In *Schumacher v. State of Washington,* 33 L. D. 454, 456, certain lands claimed by the State under a school grant, were occupied and had been improved by an Indian living apart from his tribe, but application for allotment had not been made until after the State had sold the land. It was held that the grant to the State did not attach under the provision excepting lands 'otherwise disposed of by or under authority of an act of Congress.' Secretary Hitchcock, in deciding the case, said:

'It is true that the Indian did not give notice of his intention

to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made.'

"Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands 'owned or *held* by *any Indian* or Indian tribes.' See 25 Stat. 676, c. 180, Par. 4, par. 2; 28 Stat. 107, c. 138, Par. 3, par. 2.

"The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation."

As against these general indications of a policy to respect Indian occupancy rights, the defendant Cramer, the railroad's assignee, argued that in this particular case the Interior Department had concluded that the Indians had no rights to the land, had recognized the title of the railroad grantee, and had in fact negotiated a lease of the land from the defendant. This argument the Court rejected, with the comment:

"Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights." (At p. 234.)

The lower court was accordingly instructed "to amend its decree so as to cancel the patent in respect of the lands possessed by the Indians." (At p. 236.)

Such was the state of the law when, in 1925, the Department of the Interior sought to patent half of the Hualapai Indian Reservation in Arizona to the Santa Fe Pacific Railway. The theory of this transaction was that when the reservation was established in 1883 half of the land, i.e., the odd-numbered sections, already

belonged to the railroad grantee under the act of July 27, 1866 (14 Stat. 292). Congress implicitly ratified this view of the situation when it authorized the Secretary of the Interior to arrange an exchange of Indian and railroad lands within the reservation which would simplify the boundaries between railroad and Indian lands.[8] But when the Interior Department tried to carry out the mandate of Congress, the Indians and their friends[9] objected on the ground that the railroad, rightfully, had no lands to exchange, since aboriginal title long antedated the railroad grant. After some years of protests, charges, counter-charges, and administrative opinions rejecting the Indians' contentions,[10] a suit was instituted in 1937 to vindicate the possessory rights of the Indians. (Here, as in the *Cramer* case, there was no treaty or act of Congress confirming or defining the Indians' rights). When the case reached the Supreme Court in 1941, after two decisions against the Indians in the lower courts, the Attorney General of Arizona filed a brief urging that "Any suggestion by this Court that Indian tribes might have rights in property enforcible in a court of law by the mere fact of occupancy would at least cast a cloud upon the title to the major portion of Arizona."[11]

Despite this warning, the Supreme Court unanimously decided the issue in favor of the Indians, holding that Indian occupancy, even though unrecognized by treaty or act of Congress, established property rights valid against non-Indian grantees such as the defendant railroad. The Court did not have to face the constitutional issue which it decided in *Jones v. Meehan,* because here, as in the *Cramer* case, there was language in the Congressional granting act which could be interpreted as protecting and safeguarding Indian rights.

While the Court did not therefore pass on the validity of any legislation, it did necessarily pass on the validity of departmental action purporting to recognize railroad rights to the exclusion of Indian rights. With respect to this, the unanimous opinion of the Court declared:

"Such statements by the Secretary of the Interior as that 'title

8. Act of February 20, 1925, 43 Stat. 954.

9. See letters and resolutions of Indian Rights Association and other organizations printed in Walapai Papers, (1936) Sen. Doc. No. 273, 74th Cong., 2d sess., at pp. 251, 254-271, 308-315.

10. See Opinion of E. C. Finney, Solicitor of the Department of the Interior, dated September 16, 1931, and letter of Assistant Attorney General Richardson, dated Nov. 12, 1931, printed in Walapai Papers, supra note 9, at pp. 319-327.

11. Brief for the State of Arizona, *et al.,* p. 2.

to the odd-numbered sections' was in the respondent [railroad] do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer v. United States, supra.*" (at p. 355).

At the same time the Court rejected various other contentions advanced by the railroad, such as the argument that Indian land rights had been wiped out by the Mexican cession treaty[12] or by acts of Mexican or Spanish sovereignty, or by a long course of Congressional statutes opening western lands to settlement. The upshot of the case was that on March 13, 1947, the trial court entered a decree, consented to by all parties, establishing Indian title to some 509,000 acres of land which two Departments of the Government had promised to the defendant railroad. Notwithstanding the fears expressed by the Attorney General of Arizona, there has been no substantial decline in Arizona realty values as a result of the decision.

The fears expressed by the Attorney General of Arizona were not, on the surface, unreasonable. Concern lest arguments in favor of the Indians might result in imposing vast liabilities on the Federal Government led the Attorney General of the United States in 1941, to decline to argue the case, so that the Indian side of the case had to be presented by the Solicitor of the Department of the Interior.

A similar fear was recently expressed by the three justices of the Supreme Court who dissented from the decision of the Court in the Alcea case[13] on the ground that this decision, awarding compensation for a taking of original Indian title, would set a precedent compelling the United States to pay other tribes for other areas so taken, which "must be large" (at p. 56).

The fear that recognizing Indian title, or paying Indians for land, would unsettle land titles everywhere and threaten the Federal Government with bankruptcy would be well grounded if there were any factual basis for the current legend of how we acquired the United States from the Indians. If, as the cases hold, federal grants are normally subject to outstanding Indian titles, and if, over extensive areas where such grants have been made, Indian title has in fact never been lawfully extinguished, then a vast number of titles must today be subject to outstanding Indian possessory rights. The fact, however, is that except for a few tracts of land

12. Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922.
13. Cited supra note 1.

in the Southwest, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians. It was only because the Hualapai case fell within an area where no Indian land cessions had been effected that the railroad title was held invalid. This means, of course, that the titles of railroads and other grantees of the Federal Government elsewhere in the United States may likewise depend upon whether the Federal Government took the precaution of settling with Indian land owners before disposing of their land.

Fortunately for the security of American real estate titles, the business of securing cessions of Indian titles has been, on the whole, conscientiously pursued by the Federal Government, as long as there has been a Federal Government. The notion that America was stolen from the Indians is one of the myths by which we Americans are prone to hide our real virtues and make our idealism look as hard-boiled as possible. We are probably the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical.

It is, in fact, difficult to understand the decisions on Indian title or to appreciate their scope and their limitations if one views the history of American land settlement as a history of wholesale robbery. The basic historic facts are worth rehearsing before we attempt analysis of the cases dealing with the character and scope of original Indian title.

II. *How We Bought the United States*[14]

Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia, and that for all the continental lands so purchased we paid about 50 million dollars out of the Federal Treasury. Most of us believe this story as unquestioningly as we believe in electricity or corporations. We have seen little maps of the United States in our history books and big maps in our geography books showing the vast area that Napoleon sold us in 1803 for 15 million dollars and the various other cessions that make up the story of our national expansion. As for the original Indian owners of the continent, the common impression is that we took the land from them by force and pro-

14. Some of the material in this section appears in "How We Bought the United States," Collier's, Jan. 19, 1946, pp. 23, 62, 77, and in an adaptation thereof in This Month, May, 1946, pp. 106-110.

ceeded to lock them up in concentration camps called "reservations."

Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.[15] What we acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all of the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession.[16] What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.

It may help us to appreciate the distinction between a sale of land and the transfer of governmental power if we note that after paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory we proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell. And while Napoleon, when he took his 15 million dollars, was thoroughly and completely relieved of all connections with the territory, the Indian tribes were wise enough to reserve[17] from

15. This discrepancy between common opinion and historic fact was commented upon by Thomas Jefferson:

> "That the lands of this country were taken from them by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchases made in the most unexceptional form." (Thomas Jefferson, "Notes on the State of Virginia, 1781-1785," reprinted in Padover, The Complete Jefferson, (1943) p. 632.)

16. The Treaty of April 30, 1803, for the cession of Louisiana, provided:

"Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

"Art. VI. The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon."

17. "Indian reservations" acquired their name from the fact that when Indians ceded land they commonly made "reservations" of land to be retained in Indian ownership. This practice goes back at least to 1640, when Uncas, the Mohican chief, deeded a large area to the Colony of Connecticut, out of which he carved a reservation for himself and his tribe. See 1 Trumbull, History of Connecticut, (1818) p. 117.

their cessions sufficient land to bring them a current income that exceeds each year the amount of our payment to Napoleon. One of these reservations, that of the Osages, has thus far brought its Indian owners 280 million dollars in oil royalties. Some other Indian tribes, less warlike, or less lucky, than the Osages, fared badly in their real estate transactions with the Great White Father. But in its totality the account of our land transactions with the Indians is not small potatoes. While nobody has ever calculated the total sum paid by the United States to Indian tribes as consideration for more than two million square miles of land purchased from them, and any such calculation would have to take account of the conjectural value of a myriad of commodities, special services, and tax exemptions, which commonly took the place of cash, a conservative estimate would put the total price of Indian lands sold to the United States at a figure somewhat in excess of 800 million dollars.

In some cases payment for ceded land has been long delayed. Most of the State of California falls within an area which various Indian tribes of that region had undertaken to cede to the United States in a series of treaties executed in the 1850's. The treaties called for a substantial payment in lands, goods, and services. The Federal Government took the land but the Senate refused to ratify the treaties, which were held in secret archives for more than half a century. Eventually Congress authorized the Indians to sue in the Court of Claims for the compensation promised under the unratified treaties,[18] and that Court found that the Indians were entitled to receive $17,053,941.98, from which, however, various past expenditures by the Federal Government for the benefit of the California Indians had to be deducted. The net recovery amounted to $5,024,842.34.

The settlement of the California land claims closes a chapter in our national history. Today we can say that from the Atlantic to the Pacific our national public domain consists, with rare exceptions,[19] of lands that we have bought from the Indians. Here and there we have probably missed a tract, or paid the wrong Indians for land they did not own and neglected the rightful owners. But the keynote of our land policy has been recognition of

18. Act of May 18, 1928, 45 Stat. 602.

19. The most significant exception is Alaska, where the Federal Government has not yet acquired any land from any of the native tribes. *Cf.* Miller v. United States, (C.C.A. 9th, 1947) 159 F. (2d) 997. Other areas for which no compensation appears to have been made are found in Southeastern California, Southern Nevada, Arizona and New Mexico. See Frontispiece to 4th ed. of Cohen, Handbook of Federal Indian Law (1945).

Indian property rights.[20] And this recognition of Indian property rights, far from hampering the development of our land, was of the greatest significance in such development. Where the Govern-

20. The Report of the Commissioner of Indian Affairs for 1872 contains the following illuminating comments:

"Such being the right of the Indians to the soil, the United States for more than eighty-five years pursued a uniform course of extinguishing the Indian title only with the consent of those Indian tribes which were recognized as having claim by reason of occupancy: such consent being expressed in treaties, to the formation of which both parties approached as having equal rights of initiative, and equal rights in negotiation. These treaties were made from time to time (not less than 372 being embraced in the General Statutes of the United States) as the pressure of white settlements or the fear or the experience of Indian hostilities made the demand for the removal of one tribe after another urgent imperative. Except only in the case of the Indians in Minnesota, after the outbreak of 1862, the United States Government has never extinguished an Indian title as by right of conquest; and in this latter case the Government provided the Indians another reservation, besides giving them the proceeds of the sales of the lands vacated by them in Minnesota. So scrupulously up to that time had the right of the Indians to the soil been respected, at least in form. It is not to be denied that wrong was often done in fact to tribes in the negotiation of treaties of cession. The Indians were not infrequently overborne or deceived by the agents of the Government in these transactions; sometimes, too, unquestionably, powerful tribes were permitted to cede lands to which weaker tribes had a better claim, but, formally at least, the United States accepted the cession successively of all lands to which Indian tribes could show color of title, which are embraced in the limits of any of the present States of the Union, except California and Nevada. Up to 1868, moreover, the greater portion of the lands embraced within the present Territories of the United States, to which Indians could establish a reasonable claim on account of occupancy, had also been ceded to the United States in treaties formally complete and ratified by the Senate

* * * * *

"This action of Congress [terminating the process of making treaties with Indian tribes] does, however, present questions of considerable interest and of much difficulty, viz: What is to become of the rights of the Indians to the soil, over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses? How are Indians, never yet treated with, but having every way as good and as complete rights to portions of our territory as had the Cherokees, Creeks, Choctaws, and Chickasaws, for instance, to the soil of Georgia, Alabama, and Mississippi, to establish their rights? How is the Government to proceed to secure their relinquishment of their lands, or to determine the amount of compensation which should be paid therefor? Confiscation, of course, would afford a very easy solution for all difficulties of title, but it may fairly be assumed that the United States Government will scarcely be disposed to proceed so summarily in the face of the unbroken practice of eighty-five years, witnessed in nearly four hundred treaties solemnly ratified by the Senate, not to speak of the two centuries and a half during which the principal nations of Europe, through all their wars and conquests, gave sanction to the rights of the aborigines.

"The limits of the present report will not allow these questions to be discussed; but it is evident that Congress must soon, if it would prevent complications and unfortunate precedents, the mischiefs of which will not be easily repaired, take up the whole subject together, and decide upon what principles and by what methods the claims of Indians who have not treaty relations with the Government, on account of their original interest to the soil, shall be determined and adjusted * * *."

ment had to pay Indians for land it could not afford to give the land away to favored retainers who could, in turn, afford to hold the land in idleness. Because land which the Government had paid for had to be sold to settlers for cash or equivalent services, our West has escaped the fate of areas of South America, Canada, and Australia, which, after being filched from native owners, were turned over, at the same price, to court favorites, Government bureaus, or other absentee owners incapable of, or uninterested in, developing the potential riches of the land.

Granted that the Federal Government bought the country from the Indians, the question may still be raised whether the Indians received anything like a fair price for what they sold. The only fair answer to that question is that except in a very few cases where military duress was present the price paid for the land was one that satisfied the Indians. Whether the Indians should have been satisfied and what the land would be worth now if it had never been sold are questions that lead us to ethereal realms of speculation. The sale of Manhattan Island for $24 is commonly cited as a typical example of the white man's overreaching. But even if this were a typical example, which it is not, the matter of deciding whether a real estate deal was a fair bargain three hundred years after it took place is beset by many pitfalls. Hindsight is better than foresight, particularly in real estate deals. Whether the land the Dutch settlers bought would become a thriving metropolis or remain a wilderness, whether other Indian tribes or European powers would respect their title, and how long the land would remain in Dutch ownership were, in 1626, questions that were hid in the mists of the future. Many acres of land for which the United States later paid the Indians in the neighborhood of $1.25 an acre, less costs of surveying, still remain on the land books of the Federal Government, which has found no purchasers at that price and is now content to lease the lands for cattle grazing at a net return to the Federal Government of one or two cents per annum per acre.

Aside from the difference between hindsight and foresight, there is the question of the value of money that must be considered wherever we seek to appraise a 300-year-old transaction. There are many things other than Manhattan Island that might have been bought in 1626 for $24 that would be worth great fortunes today. Indeed if the Indians had put the $24 they received for Manhattan at interest at 6 per cent they could now, with the accrued interest, buy back Manhattan Island at current realty valua-

tions and still have four hundred million dollars or more left over. Besides which, they would have saved the billions of dollars that have been spent on streets, harbors, aqueducts, sewers, and other public improvements to bring the realty values of the island to their present level.

Again in appraising the value of $24 worth of goods in 1626 one must take account of the cost of delivery. How much did it cost in human life and labor to bring $24 worth of merchandise from Holland to Manhattan Island across an almost unknown ocean? What would $24 worth of food f.o.b. New York be worth to an exploring party at the South Pole today that needed it?

These are factors which should caution against hasty conclusions as to the inadequacy of payments for land sales made hundreds of years ago, even when such sales were made between white men. But in the earliest of our Indian land sales we must consider that representatives of two entirely different civilizations were bargaining with things that had very different values to the different parties. It is much as if a representative of another planet should offer to buy sea water or nitrogen or some other commodity of which we think we have a surplus and in exchange offer us pocket television sets or other products of a technology higher than our own. We would make our bargains regardless of how valuable nitrogen or sea water might be on another planet and without considering whether it cost two cents or a thousand dollars to make a television set in some part of the stellar universe that we could not reach. In these cases we would be concerned only with the comparative value to us of what we surrendered and what we obtained.

So it was with the Indians. What they secured in the way of knives, axes, kettles and woven cloth, not to mention rum and firearms,[21] represented produce of a superior technology with a use value that had no relation to value in a competitive market three thousand miles across the ocean. And what is probably more important, the Indians secured, in these first land transactions, something of greater value than even the unimagined products of European technology, namely, a recognition of the just principle that free purchase and sale was to be the basis of dealings between the native inhabitants of the land and the white immigrants.

Three years after the sale of Manhattan Island the principle

21. In addition to the items listed above, items commonly listed in the earliest treaties are: flints, scissors, sugar, clothing, needles and hoes. Later treaties commonly mention horses, cattle, hogs, sheep, farm implements, looms, sawmills, flour mills, boats, and wagons.

that Indian lands should be acquired only with the consent of the Indians was written into the laws of the Colony of New Netherlands:

"The Patroons of New Netherlands, shall be bound to purchase from the Lords Sachems in New Netherland, the soil where they propose to plant their colonies, and shall acquire such right thereunto as they will agree for with the said Sachems."[22]

Connecticut, New Jersey, and Rhode Island were quick to adopt similar laws and within a short time all of the colonies had adopted laws in the same vein. Only in Massachusetts and North Carolina were there significant departures from this just and honorable policy. In North Carolina generally anarchic conditions left individual settlers relatively free to deal with or dispose of Indians as they pleased, with the result that less than half of the State was actually purchased from the natives. In Massachusetts, although Plymouth Colony "adopted the just policy of purchasing from the natives the lands they desired to obtain" (Royce, *op. cit.* p. 601), Puritan Massachusetts, with much pious citation of Old Testament precedents, asserted the right to disregard Indian claims to unimproved and uncultivated lands. Despite this claim, the Puritans were prudent enough to purchase considerable areas of land from the native inhabitants.

In 1636 one of the most famous real estate transactions in American history took place when Chief Canonicus of the Narragansetts granted to Roger Williams and his 12 companions,

"all that neck of land lying between the mouths of Pawtucket and Moshasuck rivers, that they might sit down in peace upon it and enjoy it forever."

Here, as Williams observed to his companions,

"The Providence of God had found out a place for them among savages, where they might peaceably worship God according to their consciences; a privilege which had been denied them in all the Christian countries they had ever been in."

Perhaps it was only natural that the first settlers on these shores, who were for many decades outnumbered by the Indians and unable to defeat any of the more powerful Indian tribes in battle, should have adopted the prudent procedure of buying lands that the Indians were willing to sell instead of using the more direct methods of massacre and displacement that have commonly prevailed in other parts of the world. What is significant, however,

22. New Project of Freedoms and Exemptions, Article 27, reprinted in Royce, Indian Land Cessions in the United States (18th Annual Report, U. S. Smithsonian Institute, 1900) p. 577.

is that at the end of the 18th Century when our population east of the Mississippi was at least 20 times as great as the Indian population in the same region and when our army of Revolutionary veterans might have been used to break down Indian claims to land ownership and reduce the Indians to serfdom or landlessness, we took seriously our national proclamation that all men are created equal and undertook to respect the property rights which Indians had enjoyed and maintained under their rude tribal governments. Our national policy was firmly established in the first great act of our Congress, the Northwest Ordinance of July 13, 1787, which declared:

"Art. 3. * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Here was a principle of government far higher than contemporary standards of private dealing. During much of this period pioneers were shooting Indians and denouncing the long arm of the Federal bureaucracy that tried to protect Indian lands from trespass and Indians from debauchery.[23] The most famous of all Indian cases[24] was one in which the Supreme Court of the United States denied the power of the State of Georgia to invade the territory of the Cherokees, guaranteed by Federal treaty, and the State of Georgia defied the mandate of the Court, whereupon the tough Indian fighter in the White House grimly declared: "John Marshall has made his decision; now let him enforce it."[25] But the Congress and the Federal Courts stood by the principle of respect for Indian possessions until it won common acceptance.

As far back in our national history as 1794 we find the United State agreeing to pay the Iroquois, for a cession of land, the sum of $4,500 annually forever, in "clothing, domestic animals, implements of husbandry, and other utensils * * * and in compensating useful artificers who shall * * * be employed for their benefit."[26]

23. This refrain is still heard in remote mining towns of Arizona and in Alaska, particularly among survivors of the Alaskan Gold Rush, who knew what to do when they saw an Indian.

24. Worcester v. Georgia, (1833) 6 Pet. 515.

25. Greeley, American Conflict (1864), vol. 1, p. 106.

26. Treaty of November 11, 1794, 7 Stat. 44.

The payments are still being made, with much ceremony. In 1835 we find the Federal Government buying a tract of land from the Cherokees for 5 million dollars,[27] a very large part of the annual national budget in those days.[28] In 1904 the Turtle Mountain Chippewa, sold a large part of North Dakota to the United States for one million dollars.[29] To this day we are paying Indians for lands long ago conveyed. Only occasionally does this payment take the form of cash. Far-seeing Indian chiefs knew that cash would soon be dissipated and leave later generations helpless in an alien world that had no place for ancient skills of hunters. Regularly the old treaties called for payments in goods, chiefly agricultural implements and cattle, in services—above all medical services and education—and in such special privileges as exemption from certain land taxes, because of which the Federal Government must now furnish to Indians many services which States and counties refuse to provide. It was to furnish these services that the Indian Bureau was established, and to this day the appropriations to that Bureau go primarily to paying for these promised services. We have already spent at least one and a half billion dollars on our Indian population, and more than half of this sum is traceable to obligations based on land cessions.

This is not to say that our Indian record is without its dark pages. We have fallen at times from the high national standards we set ourselves.

The purchase of more than two million square miles of land from the Indian tribes represents what is probably the largest real estate transaction in the history of the world. It would be miraculous if, across a period of 150 years, negotiations for the purchase and sale of these lands could be carried on without misunderstandings and inequities. We have been human, not angelic, in our real-estate transactions. We have driven hard Yankee bargains when we could; we have often forgotten to make the payments that we promised, to respect the boundaries of lands that the Indians reserved for themselves, or to respect the privileges of tax exemption, or hunting and fishing, that were accorded to Indian tribes in exchange for the lands they granted us. But when Congress has been fairly apprised of any deviation from the plighted word of the United States, it has generally been willing to submit to

27. Treaty of December 29, 1835, 7 Stat. 478.

28. The total expenditures of the Federal Government in 1835 amounted to 17.6 million dollars. See Report of Secretary of the Treasury (1946), p. 366.

29. Act of April 21, 1904, 33 Stat. 189, 195.

court decision the claims of any injured Indian tribe.[30] And it has been willing to make whatever restitution the facts supported for wrongs committed by blundering or unfaithful public servants. There is no nation on the face of the earth which has set for itself so high a standard of dealing with a native aboriginal people as the United States and no nation on earth that has been more self-critical in seeking to rectify its deviations from those high standards.

The 5 million dollar judgment won by the California Indians is only the most recent of a series of awards won by Indian tribes in the Federal Courts. In 1938 the Supreme Court awarded the Shoshone Tribe of Wyoming a judgment of $4,408,444.23, as compensation for the loss of a part of the Shoshone Reservation which Federal authorities illegally (i.e. without the consent of the Shoshone owners of the reservation) assigned to Indians of another tribe.[31] The same session of the Court affirmed a judgment in favor of the Klamath Indians for $5,313,347.32, the value of lands reserved by the Klamaths for their own use which the United States erroneously conveyed to the State of Oregon.[32] What is important about these cases is that they represent an honest, if sometimes belated, effort to make good on the promises that the Federal Government has made to Indian tribes in acquiring the land of this nation. And, as a great leader of the 30 million Indians who dwell south of our borders has said, what is great about democracy is not that it does not make mistakes, but that it is willing to correct the human mistakes it has made.[33]

III. *The Doctrinal Origins of Indian Title.*

The decisions on Indian title can hardly be understood unless it is recognized that dealings between the Federal Government and the Indian tribes have regularly been handled as part of our international relations. As in other phases of law which turn on international relations, common law concepts have become heavily overlaid with continental jurisprudence. Our concepts of Indian title derive only in part from common law feudal concepts. In the

30. For many decades such cases were tried under special jurisdictional acts. By the act of August 6, 1946, all existing tribal claims against the Government were referred to a special Indian Claims Commission, and jurisdiction was granted to the Court of Claims to hear and decide all future tribal claims. See 60 Stat. 1049, 25 U. S. C. A. (1946 Supp.) 70, 28 U. S. C. A. (1946 Supp.) 259a.

31. United States v. Shoshone Tribe, (1938) 304 U. S. 111.

32. United States v. Klamath Indians, (1938) 304 U. S. 119.

33. Padilla, Free Men of America (1943) 71.

main, they are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.[34]

The argument that Indians stood in the way of civilization and that progress demanded that they be pushed from the lands they claimed, fell as lightly from the lips of 16th century pirates and conquistadores as it does from those of the 20th century. The contrary suggestion, first advanced by Vitoria, a university professor at Salamanca, that Indians were human beings and that their land titles were entitled to respect even when not graced by seals and ribbons, was denounced as "long haired idealism" by "practical minded" men in the 16th century, as it is today. But, in the long run, this idealistic and supposedly impractical concept of human rights helped to build the greatest state and the strongest economy in the world. The conquistadores and pirates of 16th century Spain and their lawyer spokesmen, in attempting to justify a wholesale seizure of Indian lands in the New World, urged that Indians were heretics, tainted with mortal sin, and irrational. To this argument Vitoria replied that even heretics and sinners were entitled to own property and could not be punished for their sins without trial, and that the Indians were at least as rational as some of the people of Spain. Vitoria cites as precedents, in support of Indian property rights, cases of heretics and sinners in Europe and in ancient Palestine whose rights were acknowledged by the highest Church authorities. Implicit in the argument is the doctrine that certain basic rights inhere in men *as men* not by reason of their race, creed, or color, but by reason of their humanity.

To the argument that the Pope had given Indian lands to the Kings of Spain and Portugal, Vitoria replied that the Pope had "no temporal power over Indian aborigines" (*De Indis* II, 6). Thus a division of the New World by the Pope could serve only as an allocation of zones for trading and proselytizing purposes, not as a distribution of land (*De Indis* III, 10).

The shibboleth of "title by discovery" Vitoria disposes of sum-

34. James Brown Scott, former Solicitor for the Department of State and President of the American Institute of Law, the American Society of International Law, and the Institut de Droit International, in his brochure on The Spanish Origin of International Law (1928), comments: "In the lecture of Vitoria on the Indians, and in his smaller tractate on War, we have before our very eyes, and at hand, a summary of the modern law of nations." The Seventh Pan-American Conference, on December 23, 1943, acclaimed Vitoria as the man "who established the foundations of modern international law."

marily. Discovery gives title to lands not already possessed. But as the Indians "were true owners, both from the public and the private standpoint," the discovery of them by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property.[35]

The doctrine of Vitoria was given papal support in 1537 by the Bull Sublimis Deus, in which Pope Paul III proclaimed:

"We, who, though unworthy, exercise on earth the power of our Lord and who seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we define and declare by these our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect."

Almost word for word, this declaration of human rights is re-echoed in the first important law of the United States on Indian relations, the Northwest Ordinance of 1787, adopted two years before the Federal Constitution.[36]

Vitoria's doctrine of respect for Indian possessions became the guiding principle of Spain's Laws of the Indies; the parallel promise of the Northwest Ordinance became the guiding principle of our Federal Indian law.[37] Conquistadores, pirates, and even administrative officials sworn to obey the law have not always adhered to this high principle. But if the principle of respect for Indian possessions has not been applied at 100 percent of its face value, it has been applied at least to the extent that $800,-

35. *De Indis II*, 7. *Cf.* Marshall, C. J., in Worcester v. Georgia, (1832) 6 Pet. 515: "It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." (At p. 543.)

36. See supra p. 41.

37. See F. S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, (1942) 31 Geo. Law Jr. 1.

000,000.00 or so of Federal funds has so far been appropriated for the purchase of Indian lands. To pay $800,000,000.00 for a principle is not a common occurrence in the world's history, but in the long run this impractical "long haired" expenditure has probably proved the wisest investment the United States ever made.

Fair dealing by the Federal Government cemented the loyalty of Indians to the United States, a loyalty which has been an important factor in every war we have fought, and as well in all our years of peace. Fair dealing by the Federal Government assuaged the outrages committed on Indians by their neighbors[38] and helped to preserve a people who, without Federal protection, might have succumbed to the rapacity of European civilization. Each year Indian contributions to our economy run to many times the amount we have paid the Indians for their lands, and the Indian contribution to our economy and our American way of life is far from being exhausted. Though we owe to the Indian many of our sports, recreations, highways, drugs, food habits, and political institutions,[39] and most of our agricultural staples,[40] we have still to acquire from the Indian many skills and intangible resources that would be lost forever if Indian cultures were forthwith destroyed, as many chauvinists advocate.[41]

It is against this historical background of fact and doctrine that the cases on Indian title must be viewed if they are to be understood. Only against such a background is it possible to distinguish between those cases that mark the norms and patterns of our national policy and those that illustrate the deviations and pathologies resulting from misunderstanding and corruption. It

38. "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." United States v. Kagama, (1886) 118 U. S. 375, 384. Denial of the right of Indians to vote and receive social security benefits is found today only in the two states most recently admitted to the Union, Arizona and New Mexico. Efforts of the Federal Government to end these discriminations have met much local hostility, as have Federal efforts to protect native land rights in Alaska where the frontier spirit still prevails.

39. See the essay of Lucy M. Kramer on "Indian Contributions to American Culture," in Indians Yesterday and Today, (U.S. Dept. of Interior, 1941).

40. It has been estimated by competent authorities that four-sevenths of the total agricultural production in the United States (in farm value) consists of plants domesticated by Indians and taken over by whites, and it has been noted that where the whites took over plants they also took over Indian method of planting, irrigation, cultivation, storage, and use. See Edwards, Agriculture of the American Indian, (U.S. Dept. of Agriculture, 1933) p. v.; Bureau of American Ethnology Bulletin No. 30, vol. 1, p. 25.

41. The 1890 Census Report on Indians, at p. 57, shows the high-water mark of such chauvinism. See F. S. Cohen, "Indian Claims," (1945) The American Indian, vol. 2, No. 3, pp. 4-5.

is perhaps inevitable that any high ideal should prove too hard to live by in times of stress, but when a principle has survived the stresses of many wars, financial panics, and outbreaks of chauvinism, it becomes important to distinguish the basic principle from the "scattering" forces, just as it becomes important to distinguish in physics between the principle of gravitation and the deflecting forces of air friction, air pressure, terrestrial motion, etc., that make some bodies drop slantwise or rise instead of dropping. Indeed, it is only with some understanding of the norms of institutional conduct that one can determine whether the norms of the past are continuing to exert their influence, or whether the deviations of yesterday will be the norms of tomorrow.

IV. *The Cases.*

The cases on original Indian title show the development across twelve decades of a body of law that has never rejected its first principles. The law of Indian title is thus particularly susceptible to historical analysis. Ten cases fix its outlines.

1. The Sovereign's Title: *Johnson v. McIntosh.*[42]

The first important Indian case decided by the Supreme Court established the proposition that a private individual claiming title to land by reason of a private purchase from an Indian tribe not consented to by the sovereign, could not maintain that title against the United States or its grantees, where the United States had acquired the land in question from the Indians by treaty. The dismissal of the plaintiffs' complaint in this case was not based upon any defect in the Indians' title, but solely upon the invalidity of the Indian deed through which the white plaintiffs claimed title. When the case was decided, the land (on the Wabash River) had not been occupied by Indians for some fifty years. They had received more than $55,000.00 for the land from the original vendees, Moses Franks, Jacob Franks and their associates, they had then sold the same land to the United States,[43] and they had removed from the tract that they had sold. At the time of the Federal grant to the defendants, in 1818, there was no Indian title to encumber the grant. The decision of the court that a private sale of Indian lands not consented to by the sovereign gave the purchaser no valid title against the sovereign, has never been questioned in the years since this decision was rendered, nor has there been any

42. (1923) 8 Wheat. 543.

43. Treaty of August 3, 1795, 7 Stat. 49; Treaty of June 7, 1803, 7 Stat. 74.

successful challenge of the rule which the court then formulated, viz., that Indian title could be extinguished only by, or with the consent of, the Government. Justice Marshall's opinion in the case makes it clear that while the sovereign could extinguish Indian title by treaty or by war, Indian title would not be extinguished by a grant to private parties and that such a grantee would take the land subject to Indian possessory rights.

"* * * the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and *their power to dispose of the soil at their own will, to whomsoever they pleased, was denied* by the original fundamental principle that discovery gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. *These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.*" (At p. 574.)

It is perhaps Pickwickian to say that the Federal Government exercised power to make grants of lands still in Indian possession as a consequence of its "dominion" or "title." A realist would say that Federal "dominion" or "title" over land recognized to be in Indian ownership was merely a fiction devised to get around a theoretical difficulty posed by common law concepts. According to the hallowed principles of the common law, a grant by a private person of land belonging to another would convey no title. To apply this rule to the Federal Government would have produced a cruel dilemma: either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void. The Supreme Court would accept neither horn of this dilemma, nor would it say, as a modern realist might say, that the Federal Government is not bound by the limitations of common law doctrine and is free to dispose of property that belongs to Indians or other persons as long as such persons are paid for their interests before their possession is impaired. But such a way of putting the matter would have run contrary to the spirit of the times by claiming for the Federal Government a right to disregard rules of real property law more sacred than the Constitution itself. And this theoretical

dilemma was neatly solved by Chief Justice Marshall's doctrine that the Federal Government and the Indians both had exclusive title to the same land at the same time. Thus a federal grant of Indian land would convey an interest, but this interest would not become a possessory interest until the possessory title of the Indians was terminated by the Federal Government. The Indians were protected. The grantees were protected,—assuming that the Federal Government went ahead to secure a relinquishment of Indian title. The power of the Federal Government was recognized. And the needs of feudal land tenure theory were fully respected. Even if we are no longer interested in the niceties of theory, the reconciliation of Indian rights and grantee rights which Marshall worked out must command our respect.

2. Indian Title *vs.* Colony and State: *Worcester v. Georgia.*[44]

The second great landmark in the law of Indian title is established by Chief Justice Marshall's opinion in *Worcester v. Georgia,* where the land involved in suit was in the present possession of Indians. The Supreme Court in this case decided that the State of Georgia could not exercise jurisdiction over Indian lands, i.e. that Indian title could not be ignored by a State. The Chief Justice took great care to point out that neither *Johnson v. McIntosh* nor any other decision had denied the validity of Indian title, and that the principle of sovereign title by "discovery" was in no way inconsistent with Indian title.

"This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those [Europeans] who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." (at p. 544)

Much of Chief Justice Marshall's opinion in this case may be dismissed as unnecessary to the decision, and of course, strictly speaking, no opinion or rule is ever logically necessary to any decision.[45] But certainly an important step in the process by which

44. (1932) 6 Pet. 515.

45. See F. S. Cohen, Ethical Systems and Legal Ideals, (1933) 34-35.

the Supreme Court came to its decision in *Worcester v. Georgia* was the conclusion that when the Crown gave to the Colony of Georgia whatever rights and powers the Crown had in Cherokee lands, this did not terminate or alter the Cherokee Nation's original title, which survived the Crown grant and later became the basis of Cherokee treaties with the Federal Government. The case thus stands squarely for the proposition adumbrated in *Johnson v. McIntosh,*[46] that a grant by the sovereign of land in Indian occupancy does not abrogate original Indian title.

3. The Transferability and the Scope of Indian Title: *Mitchel v. United States.*[47]

Whereas *Johnson v. McIntosh* had held that an unauthorized Indian sale could not give a title superior to that later obtained by treaty, the case of *Mitchel v. United States* dealt with the obverse situation where the Indian sale relied upon had been made with the consent of the sovereign. In such case, the Court held, the purchaser from the Indians secured a title superior to any title which the United States could assert. The United States, the Court held, could not acquire from the King of Spain what was not the King's property, and the property of Indians or their grantees could not become royal or government property without formal judicial action.[48] Indian property was no different in this respect from the property of white men:

"* * * One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though *possession could not be taken without their consent.*" (9 Pet. 711, at 745)

What had been conceded, by way of dictum, in *Johnson v. McIntosh,* namely that Indian title included power to transfer as well as to occupy, is the core of the decision in the *Mitchel* case.

Finally the *Mitchel* case clarifies the scope of the rule of re-

46. (1823) 8 Wheat. 543, at 591.

47. (1835) 9 Pet. 711.

48. "If the king has no original right of possession to lands, he cannot acquire it without office found, so as to annex it to his domain." 9 Pet. at 743.

spect for Indian possessions by expressly rejecting the view that such possession extended only to improved lands. Said the Court:

"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." (At p. 745.)

4. Indian Title *vs.* The Sovereign in Louisiana Territory: *Choteau v. Molony.*[49]

The *Choteau* case presents facts very similar to those in *Johnson v. McIntosh,* and reaffirms the holding of that case that one who claims under an unauthorized grant of Indian lands cannot prevail against a grantee whose title is based upon an Indian treaty cession and a subsequent Federal grant. In the *Choteau* case, however, the plaintiff's invalid grant was not invalid because it lacked government consent. It was invalid because it lacked Indian consent. The Court held that under the Spanish law applicable in the Louisiana Territory the possessory rights of the Fox Tribe of Indians in lands aboriginally occupied by them were such that any grants made by the Spanish Governor would be "subject to the rights of Indian occupancy. They would not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it" (p. 239). Thus the case recognizes, as did the *Mitchel* case, that even a king cannot lawfully take possession of Indian lands without Indian consent.

5. Indian Titles *vs.* Homesteaders: *Holden v. Joy.*[50]

The contention that Indian lands are public lands subject to disposition as such, a contention which the Court had squarely rejected in *Worcester v. Georgia, Mitchel v. United States,* and *Choteau v. Molony,* was again made, in a somewhat novel guise, in *Holden v. Joy,* and was again rejected by the Court. In this case the defendant, Joy, claimed under certain Indian treaties, while the plaintiff, Holden, claimed under preemption acts of Congress. On behalf of the plaintiff's claim it was argued that the Constitution expressly vests in Congress control over public property and that a series of treaties made by the President and Senate with Indian tribes could not constitutionally dispose of public land to the de-

49. (1853) 16 How. 203.

50. (1872) 17 Wall. (84 U.S.) 211.

fendant in a manner that conflicted with modes of public land disposition prescribed by Congress and availed of by the plaintiff. The Court, in rejecting that argument, and holding for the defendant, pointed out that the occupancy right in the land in question had been in the Indians from the start and was therefore clearly subject to disposition by Indian treaties.

In upholding the Indian title as a proper subject of treaty-making, the Court characterized aboriginal title in these terms:

"Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs." (At p. 244.)

6. Indian Title and Railroad Grants: *Buttz v. Northern Pacific Railroad.*[51]

Buttz v. Northern Pacific R.R. is the first of the railroad grant cases in which the principles enunciated in *Johnson v. McIntosh* and *Worcester v. Georgia* were applied to the transcontinental railroads that sought passage across Indian lands. Notwithstanding the vital importance of these railroads for the expanding national economy, and the strong legislative backing which the railroads commanded, Congress when it gave millions of acres of public land to the railroads in aid of construction scrupulously respected Indian possessions, whether or not such possessions had been defined by treaty or act of Congress. The statutory grant in the *Buttz* case[52] safeguarded Indian rights in these words:

"The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill."

Other railroad grants even went so far as to provide expressly that such extinguishment of Indian title should be effected only by "voluntary cession."[53]

The interpretation of these grants in the *Buttz* case and suc-

51. (1886) 119 U. S. 55.

52. Act of July 2, 1864, 13 Stat. 365, sec. 2.

53. Act of July 27, 1866, 14 Stat. 292, construed in United States v. Santa Fe Pacific Ry. Co., (1941) 314 U. S. 339, considered *supra* note 1.

ceeding cases adhered to the principle that while a grant of land in Indian possession may convey a legal fee, such a grant does not impair the Indian title, which the grantee must respect until it has been duly terminated by treaty, agreement, or other authorized action of Congress or the Indians. Applying this rule in the *Buttz* case meant that the title originally conveyed to the railroad by the Congressional grant of 1864 and perfected by Indian relinquishment of the land in 1873, for an agreed compensation, prevailed over a settler's preemption title under the act of September 4, 1841, 5 Stat. 453, alleged to have been perfected by actual settlement in 1871. The basis of the Court's decision lay in the determination that "At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished" (at p. 66), that this was still the situation in 1871, and that, "The grant conveyed the fee subject to this right of occupancy" (*ibid.*).

It is to be noted that the Indians' right of occupancy in 1864 had not yet been defined by any treaty. In 1867 a reservation was set aside for the Indians involved, but the Court noted that this did not of itself wipe out aboriginal possessory rights outside of the reservation. The aboriginal Indian title in the area involved in the *Buttz* case never was defined in any treaty or agreement until the agreement of 1873 by which the land was ceded to the United States. The *Buttz* case stands, therefore, as a clear warning that neither settlers nor railroads can ignore aboriginal Indian title.

7. Individual Indian Titles *vs.* The Railroads: *Cramer v. United States.*[54]

The *Cramer* case, which has already been discussed,[55] is important in the development of the law of Indian title in two respects: (1) it establishes the proposition that individual and tribal possessory rights are entitled to equal respect, and (2) it qualifies the suggestion in the *Buttz* case (at p. 71) that "Indians having only a right of occupancy" do not have such "claims and rights" as suffice to exclude lands entirely from a public grant.[56] In the *Buttz* case this dictum was entirely justified since the grant act in question provided that the Indian possession should not be disturbed by a grant of naked legal title. But where, as in the *Cramer* case, there was no such express guaranty, the only way to protect

54. (1923) 261 U. S. 219.
55. See supra pp. 29-31.
56. This dictum provided the main line of argument for the railroad in the Cramer case. See 261 U. S. 219, 220.

the Indian title was to hold that land under Indian title was wholly excluded from the grant. And this the Court did. Taken together, the *Buttz* and *Cramer* cases hold that Indian title survives a railroad grant, either as an encumbrance upon the grant (*Buttz*) or as an exception carved out of it (*Cramer*). In either case the grantee cannot interfere with the Indian title.

8. The Scope of Indian Title: *United States v. Shoshone Tribe.*[57]

Whether original Indian title comprises all elements of value attached to the soil or whether such title extends only to such surface resources as the Indians knew and used was the central question decided in the *Shoshone* case. While the case involved a treaty, the treaty was silent on the question of whether the "lands" which were reserved to the Indians included the timber upon, and the minerals below, the surface. The argument of the case therefore turned primarily on the extent of the Indian tenure prior to the treaty. The Government, represented by Solicitor General (now Mr. Justice) Reed, argued that the Shoshones had a mere right of occupation, which was "limited to those uses incident to the cultivation of the land and the grazing of livestock," and that the Government had an "absolute right to reserve and dispose of the [other] resources as its own."[58] This view was further developed in the Government's main brief, signed by Solicitor General (now Mr. Justice) Jackson, urging that original Indian title was something *sui generis,* comprising only a "usufructuary right," and that such right "to use and occupy the lands did not include the ownership of the timber and mineral resources thereon."[59] This view was considered and rejected by the Court, Mr. Justice Reed dissenting.[60] The Court took the view that original Indian title included every element of value that would accrue to a non-Indian landowner. It concluded that the treaty did not cut down the scope of the title of the Indians, "undisturbed possessors of the soil from time immemorial," and declared:

"For all practical purposes, the tribe owned the land. * * * The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. * * *

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57. (1938) 304 U. S. 111.

58. Brief for United States on petition for certiorari.

59. Brief for United States, pp. 7-24.

60. While Mr. Justice Reed was the sole dissenter from the decision in the Shoshone case, he was joined by Justices Burton and Rutledge in a more recent dissent, involving substantially the same contention that Indians are "like paleface squatters on public lands without compensable rights if they are evicted." United States v. Tillamooks, (1946) 329 U. S. 40, 58.

"Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia,* 5 Pet. 1, 48. *Worcester v. Georgia, supra,* 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial." (At pp. 116-117).

At the same session of court the Supreme Court applied the identical rule, in the case of the Klamath Indians,[61] to Indian ownership of timber. The *Klamath* and *Shoshone* cases, taken together, overturned prevailing views as to the ownership of timber on Indian reservations. Earlier decisions of the Supreme Court in *United States v. Cook,*[62] and *Pine River Logging Co. v. United States,*[63] to the effect that the Federal Government could replevin logs sold without authority or recover the value thereof, had been widely misconstrued as a denial of Indian rights to timber.[64] When this misinterpretation was set at rest in the *Shoshone* and *Klamath* cases, Congress ordered that the proceeds of the judgment in the *Pine River* case, which had been deposited to the credit of the Government, should be transferred to the credit of the Indians.[65] These two decisions delivered a death blow to the argument that aboriginal ownership extends only to products of the soil actually utilized in the stone age culture of the Indian tribes.

9. Indian Title *vs.* Administrative Officials: *United States as Guardian of Hualpai v. Santa Fe Pacific Railroad Co.*[66]

The main facts and the issues of the *Walapai* case have already been noted.[67] The significance of the case in the development of the law of Indian title lies not in the recognition that Indian title does not depend upon treaties nor even in the fact that the doctrine of original Indian title was applied to the Mexican cession area—both principles are established in earlier decisions, e.g. in the *Cramer* case. More important is the fact that the aboriginal occupancy of an Indian tribe was here held to have survived a course

61. United States v. Klamath Indians, (1938) 304 U. S. 119; same case, (1935) 296 U. S. 244.
62. (1873) 19 Wall. 591.
63. (1902) 186 U. S. 279.
64. See 29 Op. Att'y Gen. 239 (1911). And see F. S. Cohen, Handbook of Federal Indian Law, pp. 313-316. The Government's brief in the Shoshone case, incorporated by reference in its Klamath brief, placed chief reliance upon this interpretation of the Cook and Pine River Logging Co. cases.
65. Act of June 5, 1938. 52 Stat. 688.
66. (1941) 314 U. S. 339.
67. See supra pp. 31-33.

of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land. The decision thus stands as a warning to purchasers of real property from the Federal Government, reminding them that not even the Government can give what it does not possess.

10. Indian Title *vs.* The Federal Government: *United States v. Alcea Band of Tillamooks.*[68]

The last large gap in the doctrine of original Indian title was filled in by the Supreme Court's decision in the *Alcea* case, holding that the Federal Government was bound to pay the Indians when it took from them lands which they held under aboriginal ownership.[69] While the disagreements that split the Court three ways in its opinion-writing make it dangerous to rely on anything the Court said in this case, the fact stands out that the United States, after taking land, by Congressional act, from Indians who had nothing more than an unrecognized aboriginal title to it, was required, by a five to three vote of the Supreme Court, to pay the Indians the value of the land so taken. Certainly it can make no difference to the Indians in the case whether, as Justice Black thought, they are to be paid because Congress passed a jurisdictional act allowing them to bring suit, or, as the four other justices in the majority thought, and as the Court of Claims thought, because the action of Congress a century ago established a liability which only came before the Court for adjudication in 1947. The question of whether rights depend upon remedies or vice versa is a metaphysical issue on which lawyers have disagreed for at least two thousand years, and it is scarcely likely that unanimity will be reached in the next two thousand years. As long as the Indian gets paid for aboriginal holdings that the Government takes from him, he will not quibble about the reasons assigned for the decision.[70]

68. (1946) 329 U. S. 40, aff'g (1945) 103 Ct. Cls. 494, 59 F. Supp. 934.

69. That no such liability arises when land not subject to original Indian title is set aside temporarily for Indian use and then restored to the public domain is the holding of two recent cases. Sioux Tribe v. United States, (1942) 316 U. S. 317; Ute Indians v. United States, (1947) 330 U. S. 169. The language and circumstances of the Executive orders setting up Indian reservations vary so widely that generalizations from cases interpreting such orders are of little value. See F. S. Cohen, Handbook of Federal Indian Law, pp. 299-302.

70. The meaning of the decision, from the standpoint of actual administration, is thus set forth in the statement of Commissioner of Indian Affairs William A. Brophy:

"The Supreme Court has now held that original Indian title—even though not accompanied by notary seals and ribbons—is as good as any white

The difference between Justice Black's formulation of the rule of liability and that of the other four justices of the majority is not likely to affect any actual decisions.[71] The Indian Claims Act of August 13, 1946[72] establishes a special forum to hear Indian claims and among the claims assigned to this forum for determination are claims based upon a taking of land held under original Indian title.[73] The same act also provides for future determination of similar claims by the Court of Claims.[74] Since all five members of the majority in the *Alcea* case agreed that the combination of (1) an uncompensated taking, and (2) a proper jurisdictional act, jointly, provided a basis for recovery, and since the second condition has been satisfied by general legislation, it follows that, under the *Alcea* decision, if there has been an uncompensated taking, a recovery may now be had. For reasons already noted, the areas within which such recoveries may be had are nowhere near as great as has been commonly supposed, even by some of the Supreme Court justices when they comment upon matters not of record in the case before them. [75]

The *Alcea* case gives the final coup de grace to what has been

man's title. It is good against the United States as well as against third parties. Under recent legislation opening the courts to Indian grievances, the Indians are held entitled to recover the value of any land that has been taken away from them by the Government. This means the end of a long-standing discrimination which made Indian land in the old days a prey to all sorts of land-grab schemes and denied the Indians any redress or compensation. It is the duty of all employees of the Office of Indian Affairs to see that Indian land ownership is respected to the same degree as any other form of land ownership. As the Supreme Court has said, whether a tract of land 'was properly called a reservation . . . or unceded Indian country . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then only upon such consideration as should be agreed upon.' "

71. It did affect the decision in Northwestern Bands of Shoshone Indians v. United States, (1945) 324 U. S. 335. There a majority of the Court thought that the jurisdictional act did not authorize a suit based on aboriginal title. A four-way split in the Court produced an affirmance of the decision of the Court of Claims below, denying recovery. The limitations of the Shoshone jurisdictional act have now been superseded by the Indian Claims Act, which was passed, very largely, to overcome the injustices which resulted from the Shoshone decision, injustices pointed out by two of the justices (Black and Jackson, JJ.) voting with the majority in that case. The Senate and House Committees which asked the Supreme Court to allow the Indians a rehearing in this case, and were refused, saw to it that the Indian Claims Act allowed such rehearings in all cases heretofore dismissed for jurisdictional reasons. See F. S. Cohen, "Indian Claims," (1945) Amer. Indian, vol. 2, No. 3, p. 3. And see K. J. Selander, Section 2 of the Indian Claims Commission Act, (1947) 15 Geo. Wash. L. Rev. 388, 422.

72. (1946) 60 Stat. 1049, 25 U. S. C. A. (1946 Supp.) 70.

73. See sec. 2, 60 Stat. 1049, 1050, 25 U. S. C. A. (1946 Supp.) 70a.

74. See sec. 24, 60 Stat. 1049, 1055, 28 U. S. C. A. (1946 Supp.) 259a.

75. See note 13 supra.

called the "menagerie" theory of Indian title,[76] the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. The sources of this "menagerie" theory are many and varied and sometimes elegantly pedigreed. There is the feudal doctrine, which has seldom been heard in this country for a century or so except in Indian cases, that ultimate dominion over land rests in the sovereign. There is the echoing of a doctrine that taking land from another nation by the sword creates no justiciable rights—a doctrine that might have been proper enough when the United States was waging war or making treaties with the various Indian tribes, but is hardly relevant to the contemporary scene, when all Indians are citizens and when Congress has provided that these citizens should be fully compensated for confiscated lands that they would own today if the Federal Government had carried out the "fair and honorable dealings" that it first pledged in 1787.

There are other subtler sources of the "menagerie" theory of Indian reservations which are seldom set forth in legal briefs but exert a deep influence on public administration. One of the most insidious of these is the doctrine that the only good Indian is a dead Indian, whence it follows, by frontier logic, that the only good Indian title is one that has been extinguished, through transfer to a white man or a white man's government. And finally there is the more respectable metaphysical doctrine that since government is the source of all rights there are no rights against the Government, from which it may be deduced that Indians who have been deprived of their possessions by governmental action are without redress. All these doctrines, it may be hoped, have been finally consigned to the dust bins of history by the course of decisions of the Supreme Court that cumulates in the *Alcea* case.

That course of decisions now fully justifies the statement made by President Truman some months before the Alcea decision was handed down, on the occasion of his signing the Indian Claims Act on August 13, 1946:

"This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights.

76. See F. S. Cohen, Handbook of Federal Indian Law, p. 288.

Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made."

I INTRODUCTION

The following is a summary of research relative to the Penobscot Tribe.

II TRIBAL EXISTENCE

The Penobscot Nation is part of the Abenaki linguistic group, a collection of tribes which once occupied land as far west as Vermont.[1/] Because of their geographic location, the Penobscots were drawn into contact with non-Indians at an early date, and the record evidence of the tribal existence of the Penobscots is extensive. The tribe entered into treaties with the Colony of Massachusetts in 1693,[2/] 1699,[3/] 1713,[4/] 1717,[5/]

1/ Ernest S. Dodge, "Ethnology of Northern New England and the Maritime Provinces," Massachusetts Archaeological Society, *Bulletin*, CVIII (1957), 68.

2/ Truce between Indian and English, July 21, 1693, *The Baxter Manuscripts: The Documentary History of the State of Maine* [hereafter *Bax. Mss.*] (24 vols.; Portland: Maine Historical Society, 1869-1916), XXIII, 4-5. The Submission and Agreements of the Eastern Indians, Aug. 11, 1693, *ibid.*, X, 9-11.

3/ Indian Treaty, Jan. 7, 1698/99, *ibid.*, XXIII, 19-21.

4/ Treaty of Eastern Indians, July 11--, 1713, *ibid.*, 37-50. *Calendar of State Papers, Colonial Series*, 1574-1733 [CSP] (40 vols.; NCR Microcard Editions, 1965), XXVII, 225.

5/ Indian Treaties in Maine Historical Society, *Collections*, 1st Ser. (Portland: The Society, 1853), III, 373-74.

1725,[6] 1726,[7] 1727,[8] 1749,[9] and 1752.[10] John Allan, the Superintendent of the federal Eastern Indian Agency during the Revolution dealt with the Penobscots as a tribe,[11] as did the

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6/ The Submission and Agreement of the Delegates of the Eastern Indians, Dec. 15, 1725, in Peter Cummings and Neil Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Company, 1972), 300.

7/ Conference with the Eastern Indians, Maine Historical Society, *Collections*, 1st ser., III, 392-93.

8/ Conference with the Eastern Indians at the Further Ratification of the Peace, Held at Falmouth in Casco-Bay, in July, 1727, *ibid.*, 407-47; and Traite de Paix Entre les Anglois et les Abenakis, Aoust, 1727, *Collection de Manuscripts contenant lettres, Memoires, et autre documents historiques relatif a la Nouvelle France* (4 vols.; Quebec: Legislature de Quebec, 1883-85), III, 407-47.

9/ Treaty with the Eastern Indians at Falmouth, 1749, Maine Historical Society, *Collections*, 1st ser., IV, 145-67; and Nathaniel Boulton, ed., *New Hampshire Provincial Papers....* (7 vols.; Concord: George E. Jenks, 1867-73), V, 131-33.

10/ Treaty with the Eastern Indians at St. Georges Fort, 1752, Maine Historical Society, *Collections*, 1st ser., IV, 168-84. For colonial treaties *see* Henry F. Depuy, comp., *A Bibliography of the English Colonial Treaties with the American Indians* (New York, 1917).

11/ *See* Allan's Commissions and Instructions from the Continental Congress and the Government of Massachusetts, *Papers of the Continental Congress* [PCC] (Jan. 15, 1777), Roll 8, Vol. 7, 65-68; May 24, 1783, PCC, Roll 163, Vol. 149, II, 561-62; June 3, 1783, PCC, Roll 26, Vol. 19, 53; Baxter *Bax. Mss.*, XV, 212, 215-16. For additional evidence of Allan's federal relationship with the tribe see: Return of Indians and their Familys that are and have Been in the Service of the United States by order of Colº Allen, Superintendt and Commandr in Chief of Indians, Eastern Department, at Machias, July 28, 1780, Frederic Kidder, *Military Operations in Eastern Maine and Nova Scotia during the Revolution Chiefly Compiled from the Journals and Letters of Colonel John Allan, with Notes and a Memoir of Col. John Allan* (Albany: Joel Munsell, 1867), 52-54.

Commonwealth of Massachusetts which concluded treaties with the tribe in 1796 and 1818.[12] Since its separation from Massachusetts in 1820, the State of Maine has continuously treated the Penobscots as a tribe of Indians,[13] and the Penobscots have continuously occupied the lands which they reserved in their treaties.

The history of the governmental structure of the Penobscot Nation is roughly similar to that of the Passamaquoddy Tribe. Until the nineteenth century the tribe was governed by Sagamores who were selected for life.[14] These Sagamores were responsible for allocation of the family hunting territories, and hence became increasingly more important as the fur trade rose in importance.[15] The Sagamores also played a critical role

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12/ The 1796 treaty is recorded in the Hancock County Registry of Deeds, Ellsworth, Maine, at Book 27, Page 6; for 1818 Treaty, *see* Mary F. Farnham, ed., *Documentary History of the State of Maine*, Vol. III (Lefavor-Tower Company, Portland: 1902), 127.

13/ The State of Maine has enacted a comprehensive set of statutes which purport to regulate many facets of Penobscot tribal life. *See* generally 22 M.R.S.A. § 4761 *et seq.*

14/ Alfred Goldsworthy Baily, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700* (Toronto: University of Toronto Press, 1969), 91-92, and Morrison, *The People of the Dawn*, (Unpub. Ph!d. Diss. Orono: University of Maine, 1975), p. 25, 38-40.

15/ Dean R. Snow, *Wabenaki "Family Hunting Territories,"* American Anthropologist, 70 (1968), 1143-51.

in the Penobscots' rather extensive diplomatic encounters with other governmental entities, both Indian and non-Indian.[16/]

In the early part of the nineteenth century a political split developed within the Penobscot Nation, and the Sachems, who had traditionally been chosen for life, became elective.[17/] Two political parties were formed, and leaders were chosen alternately every two years from each party.[18/] This situation persisted until the present century, when the party system became less evident. Today the governing body of the Tribe consists of a Governor and Lieutenant Governor who are elected every two years, and a 12 member tribal council consisting of members elected for two year staggered terms.[19/]

16/ Frank G. Speck, *The Eastern Algonkian Wabanaki Confederacy, American Anthropologist*, XVII (1915), 492-508, outlined the eighteenth-century alliance system which united the Abenaki peoples. A few short biographies of Penobscot and Maliseet leaders are also suggestive about these developments. *See* Frank T. Siebert, "Wenemouett," in George W.Brown, *et al., eds.* Dictionary of Canadian Biography (Toronto: University of Toronto Press, 1966--), II, 664-66; Kenneth M. Morrison, "Loron Saguaaram," *ibid.*, III, 584-85 for Penobscot biographies and Richard I. Hunt, "Ambrose St. Auban," and "Pierre Tomah," *ibid.*, IV, for Maliseet leaders.

17/ Eugene Vetromile, *The Abenakis and their History: or Historical Notices of the Aborigenes of Acadia* (New York: James B. Kirker, 1866),

18/ *Ibid.*

19/ 22 M.R.S.A. § 4793.

III ABORIGINAL TERRITORY

A. *Nature of Use.*

Penobscot aboriginal territory probably reached its maximum extent by the middle of the eighteenth century.[20] Penobscot land usage patterns were similar to those of the Passamaquoddy.[21] Both tribes were riverine in orientation, and both hunted inland areas during the fall and winter, and spent the summer by the sea shore. Frank G. Speck, who has conducted extensive anthropological research among the Penobscots, describes the pattern as follows:

> Within this stretch of country the Penobscot used to divide their time somewhat regularly, spending the summer months (June, July, August) in the lower coast or salt-water region, then ascending the river to the family hunting territories for the fall hunting (October, November, December), and finally returning to the tribal rendezvous at the main headquarters at Oldtown for the dead of winter (January, February, March).

20/ *See* discussion of the corresponding summary of the Passamaquoddy claim.

21/ *The Jesuit Relations*, June 20, 1677, Vol. 60, 263-64, refers to the riverine orientation of the Penobscots. On the nature of Penobscot aboriginal title within their own sense of law *see:* Lt Governor Dunbar to Mr. Popple, Nov. 17, 1730, CSP, XXXVII, 345-46. The secondary literature is extensive. *See:* James Phinney Baxter, *"The Abnakis and their Ethnic Relations,"* Maine Historical Society, *Collections*, 2nd ser., III, 13-40; Fannie H. Eckstorm, "The Indians of Maine," in L.C. Hatch, ed., *Maine: A History* (New York: The American Historical Society, 1919), I, 43-64; Dodge, "Ethnology of Northern New England and the Maritime Provinces," 68-71; Frank G. Speck, *Penobscot Man: The Life History of a Forest Tribe in Maine* (Philadelphia: University of Pennsylvania, 1940), 7ff.; and Dean R. Snow, "Wabanaki 'Family Hunting Territories,'" *American Anthropologist*, 70 (1968), 1143-51.

> The early spring months (April, May) were spent drifting down toward the ocean and hunting through the neighboring streams and in the main river for eels. This, it should be understood, is only a general outline of the movements of the people; many of them would spend longer periods in the interior, while some "lazy" families would remain most of the time at salt water, gaining an easy though monotonous living from the sea.[22]

Dr. Speck also notes that the Penobscots hunted seals during the summer from the islands adjacent to their territory,[23] and that the members of the tribe were strict conservationists.[24] The Tribe's conservation practices were described in 1764 as follows:

> They said it was their custom to divide the hunting grounds and streams among the different Indian families; that they hunted every third year and killed two-thirds of the beaver, leaving the other third to breed; beavers were to them what cattle were to the Englishmen, but the English were killing off the beavers without any regard for the owners of the lands.[25]

B. *Evidence of territorial location and extent.*

Much of the extent of the aboriginal territory of the Penobscot Nation is indicated in the many negotiations which

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[22] Frank G. Speck, *Penobscot Man*, 26.

[23] *Ibid.*, 35.

[24] *Ibid.*, 207.

[25] Joseph Chadwick, "An Account of a Journey from Fort Pownal -- Now Fort Point -- Up the Penobscot River to Quebec, in 1764," *Bangor Historical Magazine*, IV (1889), 143.

accompanied the various treaties and agreements by which the bulk of the Tribe's territory was ceded. Since these negotiations will be discussed in some detail in the following section, those events will not be separately discussed here. This section, rather, will highlight the anthropological research which has been completed on Penobscot aboriginal hunting territories.

As was indicated above, the Penobscot Nation, like the other tribes in the area, was riverine in orientation, and divided its overall territory into smaller family hunting territories. The Tribe's aboriginal territory consisted primarily of the drainage basin of the river which bears its name.[26/] The principal villages of the tribe were all located on the Penobscot River. The following villages were occupied until well into the present century: Indian Island, opposite Old Town, Maine; Olemon, some twelve miles up-river; Long Island, opposite Lincoln, Maine. Other large camps, possibly towns, were situated on the Penobscot River at the Mattawamkeag River and the Passadumkeag River, and at Castine on the eastern shore of Penobscot Bay.[27/] These villages served as staging grounds from which the family hunting groups would move to their respective territories in the fall.[28/]

26/ Frank G. Speck, *Penobscot Man*, 7.

27/ *Ibid.*, 25-26.

28/ *Ibid.*, 22.

Practically the entire Penobscot watershed, an area encompassing 5,303,511 acres, was divided into family hunting territories. Several Penobscot family hunting territories covered the area above the Penobscot watershed.[29] The northernmost of these, which Speck describes as "perhaps the largest and most active family of hunters in the tribe," occupied land in the St. John watershed reaching to Maine's northern border with Canada.[30]

IV LOSS OF ABORIGINAL TERRITORY

The Penobscots' aboriginal lands were protected in the Tribe's colonial treaties. The Treaty of Portsmouth in 1713, for example, guaranteed the Penobscot "their own Grounds" and defined that territory as lands held as of 1693.[31] In all her dealings with the Abenaki peoples in general, and with the Penobscots in particular, Massachusetts held to the practice of purchase or cession to establish English title.[32] Indeed,

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29/ For map *see ibid.*, p. 6.

30/ *Ibid.*, 229.

31/ Frederic Kidder, ed., "The Abenaki Indians; their Treaties of 1713 and 1717," Maine Historical Society, *Collections*, 1st ser., VI, 251 and 260.

32/ An Act to Prevent and make void clandestine and illegal purchase of lands from the Indians, June 26, 1702, *Acts and Resolves, Public and Private of the Province of the Massachusetts Bay* (21 vols.; Boston: Wright and Potter, 1869-1922), I, Chap. 11. *See also* text of the Treaty of 1717, *ibid.*, 260, as examples.

throughout the early colonial period, land conflicts between the Penobscots and Massachusetts revolved only around the issue of the legality of several seventeenth-century land deeds covering but a tiny fraction of the Tribe's aboriginal territory.

Land conflicts between Massachusetts and the Kennebecs, on the other hand, were more severe and resulted in war in 1722. Though the Penobscots abandoned the Kennebecs' cause in 1725, they realized that peace was impossible without some basic agreement about land.[33] The status of the English presence at St. Georges, in the extreme southwestern corner of the Penobscots' aboriginal territory, was a troublesome issue during the subsequent negotiations. In a preliminary meeting in November, 1725, the Penobscot negotiator, Loron Sauguaaram, urged the English to abandon their fort at St. Georges River. Massachusetts refused to do so. In negotiations that followed in 1726, Sauguaaram again pressed for the removal of the English fort, suggesting that the issue was the only one preventing peace.[34] After continued fruitless discussion, that included discussion of the seventeenth century land deeds, Sauguaaram suggested a compromise solution that called for the conversion of the fort at St. Georges into a truck house.[35] Massachusetts, however, remained adamant.

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[33] The following discussion is based on Morrison, pp. 389 ff.

[34] Morrison, p. 394.

[35] *Ibid.*, p. 395.

Realizing that Massachusetts would not compromise, the Penobscots signed a treaty in 1726.[36] A year later the Kennebecs and several Canadian Indians joined the Penobscots in ratifying this treaty, which is known as Dummer's Treaty.[37] and which defined legal relations between the Penobscots and Massachusetts until 1755. Dummer's Treaty confirmed Massachusetts' "Rights of Lands and former Settlements." At the same time, however, the treaty reserved to the Penobscots "...all their lands, Liberties and Properties, not by them conveyed or Sold to or Possessed by any of the English subjects as aforesaid, as also the Privilege of Fishing, Hunting, and Fowling as formerly."[38]

By failing to specifically define the "Rights of Lands and former Settlements," which were to be confirmed to non-Indians, Dummer's Treaty sowed the seeds of subsequent dispute. For example, the Penobscots opposed,

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36/ Conference with the Eastern Indians, Maine Historical Society, (July, August-1726), *Collections*, 1st ser., III, 377-405.

37/ Dummer was Lieutenant Governor of Massachusetts Bay.

38/ Maine Historical Society, *Collections*, 1st ser., III, 418.

and halted, the eastward expansion of the Crown settlement called Georgia on Pemaquid peninsula,[39] and they asserted that Samuel Waldo illegally took their lands on the St. Georges River.[40] Governor Belcher assured them that the Crown protected their title. In February, 1735, he declared that he would treat them "with Reason and Justice and in the same Manner with the rest of King George's Subjects."[41] When the Penobscots complained, he promised that the land article of Dummer's Treaty would be "punctually observ'd on the part of this Government, who will not push on the settlement of those Lands, 'till they are satisfy'd, that those, who at present pretend to be the Proprietors, have obtain'd the native right from the true Owners."[42]

It is not necessary to detail the precise nature of these conflicting claims, for the Penobscots and Massachusetts reached a compromise. The Penobscots accepted the *de facto* legality of several of the early deeds and, in 1736, ran a boundary northeast of St. Georges between their own and English lands. Further settlements, the Indians declared, would not be tolerated.[43] In Feb-

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[39] Penobscots to Dunbar, Nov. 14, 1729, Baxter, *Bax. Mss.*, X, 44546 and CSP, XXXVI, 574; Dunbar to Gov. Phillips, Sept. 16, 1730, *ibid.*, XXXVII, 369, Dunbar to Lt. Gov. Tailor, Nov. 12, 1730, *ibid.*, 348.

[40] Mass. Council, May 17, 1736; Indian Conference, June 25, 1736, Baxter, *Bax. Mss.*, XXIII, 23641.

[41] J. Belcher to J. Gyles, Feb. 28, 1734/35 Belcher Letterbooks, Mass. Historical Society, Film IV, 50506.

[42] J. Belcher to J. Gyles, Apr. 14, 1735, *ibid.*, Film 4, 565.

[43] Conference with the Penobscot & Norridgewalk Indians in July, 1738, Baxter, *Bax. Mss.*, XXIII, 252.

ruary, 1737, Belcher ordered his agent, John Gyles, to encourage new settlement provided that the settlers conformed to this agreement.[44/]

The land article of Dummer's Treaty was reinacted in the 1749 treaty which ended King George's War. Land was not an issue in that conflict and was not discussed during the conference.[45/] Although land was discussed during the 1752 treaty negotiations, the 1749 treaty was ratified unaltered.[46/] Wishing to prevent a Penobscot - French alliance, Massachusetts carefully recognized Penobscot title. In the early 1750's, for example, the Penobscots complained about, and Massachusetts

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44/ J. Belcher to J. Gyles, Feb. 25, 1736/37, Belcher Letterbooks, Film V, 157-58.

45/ Treaty with the Eastern Indians at Falmouth, 1749, Maine Historical Society, *Collections*, 1st ser., IV, 162.

46/ Louis, a Penobscot speaking on behalf of his own tribe and the Norridgewocks and Maliseets said: "...we are for proceeding upon Governour Dummer's Treaty, by which it was concluded, that the English should inhabit the lands as far as the salt water flowed, and no further; and that the Indians should possess the rest." These boundaries are not at all clear. Perhaps Louis referred to the Kennebec River, and it is likely that he was describing the agreed upon boundary at St. Georges. It is certain that he was not referring to the Penobscot, as English settlement was far from that river in 1752. The English assured the Abenaki that their lands would be protected: "Upon the third article in the aforesaid Treaty, the Commissioners said, if there be any encroachments made upon your lands by the English, let us know it; we will inform the Government of it, so that justice may be done you." *See* Treaty with the Eastern Indians at St. George's Fort, 1752, *ibid.*, quotes at 174 and 177.

ordered removed, an English trespasser on Matinicus, an island south of Penobscot Bay.[47/]

Before the outbreak of the Seven Years' War between France and Great Britain, the Penobscots worked carefully to preserve peace with Massachusetts. When Massachusetts declared war against the Abenaki tribes on June 10, 1755, the Penobscots were excepted on condition that they join the English against hostile Abenaki as Dummer's Treaty required.[48/] The Penobscots accepted this condition but refused to move their families near the English settlements for the duration of the war as Governor William Shirley requested.[49/] Massachusetts persisted in the de-

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47/ In Aug. 1751 Governor Phips appointed Commissioners to confer with the Abenaki. He instructed them to "Avoid controversy about Lands." *See* Instructions in re Treaty with Indians, Aug. 15, 1751, Baxter, *Bax. Mss.*, XXIII, 412. During the meeting Loron Sauguaaram, the Penobscot negotiator, complained about a squatter on Matinicus. The commissioners replied: "Our Governour knows nothing of this matter, but we will inform him of it. Gov^{r} Dummer's Treaty shall be complyed with." Report of Conference, August, 1751, *ibid.*, 416. After repeated complaints from the Penobscots, Massachusetts ordered the Matinicus squatters removed. In Council, June 12, 1753, Baxter, *Bax. Mss.* XXIII, 448-49; S. Phips to Jabez Bradbury, *ibid.*, 449.

48/ Declaration of war, June 10, 1755, Baxter, *Bax. Mss.*, XII, 408-11; also *ibid.*, XXIV, 30-32.

49/ Reply of Penobscot Indians, June 27, 1755, *ibid.*, XXIV, 34.

mand that the Penobscots settle among the English[50] and, after claiming without evidence that the Penobscots participated in an attack on Fort St. Georges, declared war against them on November 3, 1755.[51] The war involved no real military engagements with the Penobscots, and the Penobscots occupied the same land after the war as they had before.

After the war, Governor Bernard saw the need for a treaty with the Penobscots, but was thwarted in his efforts to obtain one. In September, 1762, the Massachusetts House and Council opposed Bernard's proposal to travel to Maine to conclude a peace on the grounds that the Indians had not formally asked for a treaty.[52] On July 23, 1763, Bernard instructed Captain Sanders to invite the Penobscots to send two or three of their chiefs to Boston to discuss scheduling for a treaty conference.[53] Three Penobscots arrived a month later and discussed

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50/ Action of House, August 8, 1755, *ibid.*, 46-47; In Council, August 8, 1755, *ibid.*, XII, 454; Final Vote, August 14-15, *ibid.*, XXIV, 48-49; Governor to Penobscots, August 18, 1755, *ibid.*, 51-53.

51/ In Council, Oct. 3, 1755, *ibid.*, 58; Phips to Bradbury, Oct. 3, 1755, *ibid.*, 59; Bradbury to Phips, Oct. 24, 1755, *ibid.*, 61; Proclamation S. Phips, Nov. 3, 1755, *ibid.*, 62-64.

52/ Message, Sept. 14, 1762, *ibid.*, XIII, 294.

53/ Instructions to Capt. Sanders, July 23, 1763, Baxter, *Bax. Mss.*, XXIV, 116.

renewing the Tribe's former treaties with Massachusetts; however, no agreement was reached, and no date for a conference was set.[54] In a message delivered on June 5, 1764, Bernard stressed the strength of the Penobscots and again urged that a treaty be concluded with the Tribe.[55] Still no action was taken.

This, then, was the state of affairs in the closing years of the colonial era. The Indians continued to occupy their principal hunting grounds. Governor Bernard continually agitated for a treaty with the Tribe. At a conference held in 1769, three delegates from the Tribe sought to retain aboriginal title to their hunting grounds and to have fee title to a tract for planting:

> We should be glad of a sufficiency at present for our hunting but as hunting is daily decreasing we would be glad of a tract of land assigned us for a Township settled upon us and our posterity for the purposes of husbandry.[56]

Although no townships were ever set off to the Tribe in fee, indeed no further colonial treaties were concluded with the Tribe,

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54/ Indian Conference, August 22, 1763, *ibid.*, 116-23. In his reply to the Indians the following day, Bernard said that he would not permit the soldiers at Fort Pownall to hunt beaver or other furs, and that he would only permit them to hunt deer or moose in the vicinity of the fort. *Id.*, 121-122.

55/ Message, June 5, 1764, *ibid.*, XIII, 341-45.

56/ *Ibid.*, 157-158.

the townships which were proposed by Bernard at the conference were to be on either side of the Penobscot village of Old Town, just above the head of the tide.[57/]

At the opening of the American Revolution, the Massachusetts Provincial Congress quickly recognized the military importance of the Penobscots. On June 21, 1775, a delegation of Penobscots (who had been brought to Watertown for the purpose) addressed the Provincial Congress. Land problems were clearly the Indians' primary concern. Their comments, as reported by the Committee which was appointed to confer with the Tribe, were as follows:

> They have a large Tract of Land, which they have a right to call their own, and have possess'd accordingly for many Years.
> These Lands have been encroached upon by the English, who have for Miles on end cut much of their good Timber.
> They ask that the English would interpose, and prevent such Encroachments for the future; and they will assist us with all their Power in the common defense of our Country; and they hope if the Almighty be on our side the Enemy will not be able to deprive us of our Lands.[58/]

[57/] *Ibid.*, 158.

[58/] L. Kinvin Wroth, *Province in Rebellion: A Documentary History of the Founding of the Commonwealth of Massachusetts 1773-1775* (Harvard Univ. Press, 1975), 2294.

Thus, as of the time of the Revolution, the Penobscots still occupied and claimed their lands. More importantly, the Provincial Congress recognized their claims also. On the same day that the above report was read, the Provincial Congress passed a resolution which:

> ...strictly forbid any person or persons whatsoever from trespassing or making waste upon any of the lands and territories or possessions beginning at the head of the tide on Penobscot River, extending six miles on each side of said river now claimed by our brethren the Indians of the Penobscot tribe, as they would avoid the highest displeasure of this Congress.[59]

The records of the Provincial Congress do not explain why the resolution was limited to the head of the tide. Nor is the reason for the six-mile corridor clear. The riverine orientation of the Penobscots clearly did not limit them to an arbitrary European measure such as the mile. Their territory was delineated by the heights of land which defined their hunting streams. The Provincial Congress obviously recognized that the Tribe claimed land on both sides of the Penobscot River. Not knowing the precise outer limits of the claim, the Congress may have adopted the twelve-mile wide corridor simply as a matter of convenience. In all events, it is important to note that in adopting its resolution the Provincial Congress did not say that the Penobscots did not own any land outside of the twelve-mile corridor; it only forbade trespass within the corridor.

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[59] Kidder, *Military Operations*, 53.

It was not until after the War[60] that Massachusetts again set its sights on Penobscot land. Following the lead of the Provincial Congress, the Massachusetts "Committee on Lands" operated on the assumption that the Penobscots had title to land above the head of the tide on the Penobscot River. On July 7, 1784, for example, the Committee recommended the establishment of three additional townships "between the lands claimed by the Indians & the uppermost of the twelve townships...."[61] To facilitate settlement beyond the three townships, Massachusetts appointed Commissioners to ascertain the limits of the Penobscot territory and investigate the possibility of a cession by the tribe of some of the land which it was found to own.[62]

The Commissioners presented their case to the Penobscots on September 4, 1784. They learned, they said, that the Penob-

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60/ The Penobscots aided the Americans in the Revolution, and were under the care of John Allan, the Superintendent of the federal Eastern Indian Department. *See* Kidder, *Military Operations*, 126.

61/ July 7, 1784, Report of Committee on Lands in the County of Lincoln, Baxter, *Bax. Mss.* XX, 354.

62/ This committee was aware of the twelve-mile corridor in the Watertown Resolve but apparently took the position that the corridor was not intended to limit the Tribe's territory since it recommended appointment of suitable persons to ascertain the boundaries of the lands claimed by the Tribe. June 30, 1784 Report of Committee Appointed by Resolve of Oct. 20, 1783, filed with 1784 Res. C. 57, Mass. Arch.

scots possessed, "more lands than were necessary for their purpose...," and that they had sold "considerable tracts for trifling considerations." The Commissioners noted that these sales were void without approval from the Commonwealth. The Commissioners then stated, however, that if the tribe "...really possessed more Lands than were necessary or were desirous to change their present bounds for others so that all their land should be on one side of the River or on both Sides higher up, a due consideration should be allowed them therefore."[63/]

The Penobscots rejected the suggestion that they wanted to sell or trade any part of their territory. They asserted their right of ownership on the basis of immemorial possession and referring to the Watertown Resolve (without mentioning a twelve-mile corridor), maintained that the General Court had fixed their bounds from the head of the "tides up to the head of the River." They also denied that they had sold any land.[64/] On the other hand, the Tribe welcomed the opportunity to establish a mutually recognized boundary. "All that we desire," they declared, "is that you will fix the bounds, that we may know what we possess."[65/]

63/ Sept. 4, 1784, the Substance of the Commissioners' speech..., in Papers filed with 1796 Jan. Sess. Res. C. 86, Mass. Arch.

64/ *Ibid.*

65/ Sept. 4, 1784, The Answer of the Indian Chiefs to the Commissioners..., *ibid.*

According to the Commissioners, the most that the Tribe would consider was a new boundary four miles above the head of the tide. When the Commissioners suggested instead "that the Indians should occupy the Lands on both sides of the River, half the distance from the Canada lines to the head of the Tide," the Penobscots became insulted and "the Principal of them very abruptly left the Conference."[66/]

In August, 1786, the State sent new commissioners (Benjamin Lincoln, Thomas Rice and Rufus Putnam) "to treat with the Penobscot Tribe of Indians respecting their claims to Lands on Penobscot River...."[67/] The Rev. Daniel Little, an observer at the conference, described the Commissioners' purpose as being "to purchase the Indians' Lands on Penobscot River, or settle more certain & advantageous boundaries...."[68/] During the conference the Penobscots maintained their claims to their lands. The Commissioners acknowledged, according to Rev. Little, that the Watertown Resolve confirmed Penobscot title to six miles on each side of the river from the head of the tide.[69]

66/ Oct. 25, 1784, The Report of the Commissioners appointed to confer with the Indians of the Penobscot Tribe, *ibid.*

67/ A resolve of March 18, 1785, appointed Commissioners "to treat with the Penobscot Tribe of Indians, respecting their claims to lands on Penobscot River...," but a meeting never took place. *See* July 4, 1786 letter, Benjamin Lincoln Papers, Mass. His. Soc., Reel 7, 471-474.

68/ Reverend Daniel Little, Journal, 109, Manuscript Copy, Maine Historical Society, Portland, Maine.

69/ *Ibid.*

This concession, however, was not enough for the Penobscots. The statement about their lands "much hurt and disappointed" them as "...they supposed before they had the whole width of land as far as the waters of this river extended East and West."[70] The Commissioners also added that the Watertown Resolve did not give the Penobscots much advantage, since the Tribe would be prevented from hunting as soon as Massachusetts settled the area beyond the six miles.[71]

The Commissioners offered the Penobscots the following set of terms. The Penobscots would cede

> ... all their claims & Interest to all the lands on the west side of Penobscot river, from the head of the tide up to the River Pisquataquiss being about Forty three miles, And all their claims & Interest on the east side of the river from the head of the tide aforesaid up to the river Mantanomkeektook being about 85 Miles....

The Tribe, for its part, would reserve to itself

> ...the Island on which the Old Town stands, About 10 Miles above the head of the tide, and those Islands on which they now have actual Improvements in the said river, lying from Sunkhaze river, about 3 Miles above the said old town to Passadunkee Island, inclusively, on which Island their new Town so called, now stands, and

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70/ Aug. 30, 1786, Letter of Committee to Governor in re Indians. *Bax. Mss.* XXI, 248.

71/ *Ibid.*

> fee title to two islands in Penobscot Bay, known as Black Island and White Island near Naskeeg point.

Perhaps most significantly of all, the proposed treaty also contained the following pledge:

> And we further agreed that the lands on the west side of the river Penobscot, to the head of all the waters thereof, above the said river, Pisquataquiss & the lands on the east side of the river to the head of all the waters thereof, above the said river Mantanomkeektook, should ly as hunting ground for the Indians and should not be laid out or settled by the state or engrossed by Individuals thereof....[72]

After deliberation, the Penobscots proposed a boundary at Passadumkeag but the Commissioners refused to consider that compromise. The Penobscots responded that the land Massachusetts desired could be theirs but "they expected to be paid for it." A few moments more of negotiations passed and the Commissioners promised "350 Blankets, 200 lbs Powder, & Shot & Flints in proportion, at the time when you sign the papers for the ratification of this agreement."[73]

The verbal agreement between the Penobscots and the Commissioners rested on shaky ground at best. The Commissioners advised the Governor and Council that they "discovered a total aversion in the Indians to surrender all their claims," as Massachusetts wished. "The Indians were so far from doing this,

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[72] *Ibid.* 241. The details of the proposed treaty were set forth in a subsequent draft document. *See* footnote 75, *infra*.

[73] Little, Journal, 110.

that when they were urged to relinquish as far North on the west side of the river as on the east side they absolutely refused on any terms whatsoever, to comply with the proposition."[74/]

Happy with even a partial cession, on October 4, 1786, Governor Hancock recommended that the Commission's promises of goods be granted to the Penobscots in return for "a proper deed of the ceded lands."[75/] Accordingly, the legislature

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74/ August 30, 1786, Report of Committee on Penobscot Indians, Baxter, *Bax. Mss.*, XXI, 241.

75/ October 11, 1786, Act Confirming Treaty with Penobscot Tribe, *ibid.*, VIII, 80-82.

passed an act confirming the Commissioners' verbal agreement with the Penobscots. The act empowered the Governor to appoint a person "to carry into execution the said agreement" by receiving from the Penobscots "a deed of relinquishment in due form." It further provided that "when the said deed of relinquishment shall be executed as aforesaid, this act shall be considered as a compleat and full confirmation of the agreement before recited...."[76] Both the Commissioners and the Legislature understood, then, that the verbal agreement of August, 1786, required the signature of a formal deed and the delivery and acceptance of the goods provided in payment.

Early in November, 1786, Benjamin Lincoln, on behalf of Governor Bowdoin, traveled to the Penobscot to complete the verbal agreement of August. He met Chief Orono who informed him "... the Tribe was in general out on their winters' hunt, & that they would not be collected untill the Spring.". On the chance that the Penobscots might return "sooner than was expected," Lincoln placed the treaty goods and the unsigned deed in the care of John Lee of Majorbagaduce [Castine].[77] Lee also

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[76] Nov. 9, 1786, Benjamin Lincoln to Gov. J. Bowdoin, Benjamin Lincoln Papers, Mass. His. Soc. Reel 7, 547-48. And *see also* Nov. 6, 1786, B. Lincoln to John Lee, and Nov. 10, 1786, B. Lincoln to Gov. Bowdoin, both letters filed with 1796 Jan. Sess., Res. C. 86, in Mass. Arch.

[77] Dec. 5, 1786, John Lee to Benjamin Lincoln, Benjamin Lincoln Papers, Mass. His. Soc., Reel 7, 564.

soon concluded an agreement would not be reached until spring.[78]

A full year passed in futile efforts to induce the Penobscots to accept the goods and to formally cede their lands. John Lee repeatedly conversed with the Penobscot chiefs. He learned "a Majority of the tribe wish to be off from their engagements." He warned the Penobscots that if they refused to ratify the agreement "that the Governor would chastize them severely." Lee added:

> that their refusing to sign the Deed & receive the Blanketts &c would by no means prevent Government from surveying, Disposing of & settling the Lands upon Penobscot River.[79]

Governor Hancock, however, favored continued negotiations:

> for though perhaps a small force may subdue or extirpate the Tribe of Native if they should commence hostilities, yet the effecting it would be more expensive & troublesome than the compleating a Treaty respecting their Lands can be.[80]

On May 29, 1788, Governor Hancock appointed Reverend

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[78] December 28, 1787, John Lee to Gov. Hancock, filed with 1796 Jan. Sess., Res., C. 86 in Mass. Arch.

[79] *Ibid.*

[80] March 17, 1788, Governor Hancock's Message, Baxter, *Bax. Mss.*, XXI, 462-63.

Daniel Little to settle the issue.[81] Little did not intend to negotiate a new treaty with the Penobscots, but simply "to bring forward & complete the Treaty made at Conduskeag by General Lincoln &c, 26 Aug. 1786."[82] Despite Little's reiteration of all the arguments of the past few years, the Penobscots refused to sign any document divesting them of their lands. Orsong Neptune argued the Penobscots'

> right to the soil from the general peace among French Indians, Americans & King George from the gift of God, who put them here to serve him from the promise of Gen^{l} Washington & the Gen^{l} Court from the long possession of five hundred years, from their being of the Religion of the King of France & meaning to remain so.[83]

Daniel Little responded "...You may expect Gov^{t}. will abide by it & expect the same for you."[84]

Despite Little's bluff, Massachusetts continued to recognize Penobscot title. In 1791 Henry Jackson, agent for Henry Knox who was seeking to purchase 2,000,000 acres of Maine land, told his principal that the committee charged with the sale of Maine land "...will not permit us to come within six miles of

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81/ May 29, 1788, Govr's Message respecting a conference with the Penobscot Indians, Baxter, *Bax. Mss.*, XXII, 30-31.

82/ Little, Journal, 126.

83/ June 23, 1788, Witnesses Deposition, filed with 1796 Jan. Sess. Res. C. 86 in Mass. Arch.

84/ Little, Journal, 128. And *see* June 25, 1788, Little to Hancock, filed with 1796 Jan. Sess. Res. C. 86 in Mass. Arch.

Penobscot River." Indeed, the land committee informed Jackson that "the six miles on the east side of Penobscot is the property of the Indians."[85/]

The 1786 treaty was never ratified, and the question of Penobscot lands was not raised again until 1796 when the State again appointed commissioners who this time were successful in obtaining a treaty. The 1796 treaty was similar to the 1786 treaty, except the ceded territory extended only thirty miles up stream from the head of the tide on each side of the river, and the consideration was larger.[86/] The treaty called for the delivery of "...one hundred and forty nine and a half yards of blue cloth for blankets, four hundred pounds of shot, one hundred pounds of Powder, thirty six hats, thirteen bushels of Salt being one large Hogshead, one barrel of New England Rum, and one hundred bushels of Corn...," upon signing the treaty.

The treaty also called for an "annual annuity consisting of three hundred Bushels of good Indian Corn, fifty pounds of powder, two hundred pounds of shot, and seventy five yards of

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85/ June 19, 1791, Henry Jackson to Henry Knox, Knox Papers, Mass. His. Soc.

86/ The deed which encompasses the terms of the treaty was recorded in the Hancock County Registry of Deeds, Ellsworth, Maine on May 3, 1809, at Book 27, Page 6. *See* affidavit of Jacob Kuhn, March 8, 1809, and Order of Council dated March 20, 1809 filed with Papers relating to Massachusetts Resolves of 1796, Jan. Sess., C. 86, Massachusetts Archives, Boston, Mass., for explanation of the late registration.

good blue cloth for Blankets...." In return, the Penobscot Tribe was to cede all its "right, Interest and claim to all the lands on both sides of the River Penobscot, beginning near Colonol Jonathan Eddy's dwelling house, at Nichel's rick, so called, and extending up the said River Thirty miles on a direct line, according to the General Course of said River, on each side thereof...." Excepted from the transaction and reserved to the Tribe were "...all the Island in said River, above old town, including said Old-town Island, within the limits of the said thirty miles." A deed encompassing the terms of the treaty was signed by the Penobscot Nation on August 8, 1796.[87]

Neither the proposed 1786 treaty nor the actual 1796 treaty made mention of a twelve-mile corridor. The proposed 1786 treaty specifically reserved to the Tribe as a hunting ground all of the lands above the ceded area on both side of the Penobscot River "to the head of all the waters" thereof.[88] While the 1796 treaty did not specifically reserve a hunting territory, it did not purport to extinguish title to anything other than the thirty-mile tract. Indeed at the end of negotiations in which they indicated their willingness to enter the treaty, the Penobscots said, "Further-

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[87] *Ibid.*

[88] Little, Journal, 110.

more Brothers - as we have come to a settlement about the Lands, what we now say is exactly Right - Now all the land above thirty miles above Col° Eddys, we do not sell."[89]

In 1818 the Penobscots, who had fallen on hard times, sent word to the State that they wished to sell an additional ten townships.[90] The Commonwealth responded by appointing three commissioners to treat with the Tribe for the release of all its remaining lands.[91] The result was a treaty in which the Tribe relinquished its claim to "all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said commonwealth by their deed of the eighth of August, one thousand seven hundred and ninety six."[92] The Tribe reserved from the said conveyance four townships near the point where the east and west branches of the Penobscot River converge. The Tribe also reserved the islands in the river which had previously been reserved. Massachusetts

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89/ Answer of Indians, August 6, 1796, filed with Massachusetts Resolves of 1796, Jan. Sess. C. 86, Massachusetts Archives, Boston, Mass.

90/ Williamson, *History of the State of Maine*, II, 669.

91/ *Ibid.*

92/ Mary Frances Farnham, ed., *The Farnham Papers: Documentary History of the State of Maine* (Portland: Lefavor - Tower Company: 1902) vol. VIII, 127-132.

promised to purchase two acres of land in the town of Brewer for the use of the Tribe, and to provide them with a man who could instruct them in agriculture. Four hundred dollars and certain specified goods were to be delivered immediately, while other supplies were to be delivered annually thereafter.

The four townships which were reserved by the Penobscot Nation in the 1818 treaty were purchased by the State of Maine in an agreement concluded on June 10, 1833.[93] The Indians were to be paid $50,000, the principal amount of which was to be placed in the state treasury, with the interest paid to them annually if the state thought they needed it. Unappropriated interest was to be added to the principal.

Today the Penobscot Tribe has only the islands in the Penobscot River between Old Town and Mattawamkeag. In fact, the Tribe doesn't even have all of the islands, since the land area of the islands has been reduced by flooding caused by hydro-electric dams.[94]

93/ *Ibid.*, 303.

94/ *See Taylor v. Bangor Hydro-Electric Company*, Civil No. 1970 (D. Me., Filed July 17, 1972).

CONCLUSION

This research has been conducted by experts who are prepared to testify as expert witnesses that the Penobscot Nation constitutes (and has constituted since time immemorial) a tribe of Indians, that the Penobscot Nation used and occupied an aboriginal territory which included the entire Penobscot watershed in the present State of Maine, together with a major portion of the St. John watershed in the present State of Maine, and that the Penobscot Nation ceded the vast bulk of these aboriginal lands in treaties with the Commonwealth of Massachusetts in 1796 and 1818, and in a purchase by the State of Maine in 1833, none of which has ever been approved by the United States.

I INTRODUCTION

The following is a summary of research relative to the Passamaquoddy Tribe.

II TRIBAL EXISTENCE

In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the federal government and the State of Maine stipulated that the Passamaquoddy Indians constitute a tribe of Indians.[1/] There is ample evidence to support that stipulation.

The Passamaquoddy Tribe lives in the east coastal region of the present State of Maine, an area which it has occupied continuously since time immemorial. The first recorded contact with the Tribe was made by Samuel de Champlain in 1604 when he wintered on St. Croix Island.[2/]

1/ *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649, 656 (1975), 528 F.2d 370, 373 (1975).

2/ Samuel de Champlain, *The Works of Samuel de Champlain*, H.P. Biggar, ed. (6 Vols.; Toronto: The Champlain Society, 1922-36), I, 301-411. For later references to the tribal status of the Passamaquoddy, *see* Letter of Father Morain, June 20, 1677, Reuben Gold Thwaites, ed., *The Jesuit Relations and Allied Documents* (173 vols.; New York: Pageant Book Co., 1959), LX 263; and Passamaquoddies to Gov. Philipps, Nov. 23, 1720, *Calendar of State Papers, Colonial Series, 1474-1733* (40 vols.; NCR Microcard Editions, 1965), XXXII, 199.

The Passamaquoddys have long been dealt with as a separate treaty-making entity. On February 23, 1760, Nova Scotia entered into a treaty of peace and friendship with the Passamaquoddy Tribe.[3/] On July 19, 1776, Massachusetts entered into a treaty with the Maliseet and Micmac Tribes which required them (the Maliseets and Micmacs) to attempt to convince the Passamaquoddys to supply men for George Washington's Army.[4/] George Washington wrote to the Passamaquoddys on December 24, 1776, and told them that he was glad to hear that they had accepted a chain of friendship which he sent in February, 1776, and warned the Tribe against turning against the United States.[5/] John Allan, Superintendent of the Federal Government's Eastern Indian Department, had extensive dealings with the Passamaquoddys as a tribe during the

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3/ Treaty of Peace and Friendship with the Delegates of the St. John and Passamaquoddy Tribes of Indians at Halifax, Feb. 23, 1760, Misc. Box 38/8, Maine Historical Society, Archives, Portland, Maine. *See also* Thomas B. Akins, ed., *Selections from the Public Documents of the Province of Nova Scotia*, Halifax, N.S.: (Charles Annand, 1869), facsimile treaty opposite page 573; and Traitte de Paix et d'Amitie avec les Deleges des Nations Sauvages de St. John et Passamaquoddy: a Halifax, febr--, 1760, Mss., Public Archives of Nova Scotia, Halifax, N.S.

4/ Treaty of Alliance and Friendship--entered into, and concluded by and between the Governors of the State of Massachusetts Bay, and the Delegates of the St. John's & Mickmac Tribes of Indians, James Phinney Baxter, ed., *The Baxter Manuscripts: The Documentary History of the State of Maine (Bax. Mss.)* (24 vols.; Portland: Maine Historical Society, 1869-1916), XXIV, 188-93.

5/ Gen. Washington's Letter to the Passamaquoddy Tribe, Dec. 24, 1776, Frederick Kidder, *Military Operations During the Revolution* (Albany: Joel Munsell, 1867), 298-99.

Revolutionary War,[6] and negotiated an unratified treaty in 1777 in which the Passamaquoddys agreed to assist the colonists in the Revolutionary War.[7]

The Commonwealth of Massachusetts and the State of Maine have likewise consistently dealt with the Passamaquoddys as a distinct tribe.[8] In 1794 Massachusetts concluded a treaty with the Tribe in which the Passamaquoddys purported to cede the bulk of their aboriginal territory in the United States.[9] Since its creation in 1820, Maine has enacted some 350 laws which relate specifically to the Passamaquoddy Tribe.[10]

6/ On June 25, 1777, Col. John Allan delivered a copy of an agreement respecting trade and commerce to "Jean Baptis Neptune, Chief of Passamaquoddy," Kidder, *Military Operations*, 106. *See also* Allan's "conference with the Penobscot deputies, together with chiefs of the Merichcitte and Passamaquody tribes," *ibid.*, 126; "General Conference with the Chiefs, Sachems, and Young men of the Merescheet, Passamaquoddy and Penobscot and some of the Mickmac Indians," Jan. 5, 1778, *ibid.*, 162; and Allan's Letter to the Massachusetts Council, Feb. 25, 1777 in which he refers to a prospective conference "with the whole, Mickmacks, St. Johns & Passamaquoddys jointly," *ibid.*, 181.

7/ This agreement was confirmed by the Passamaquoddys on June 23, 1777, Kidder, *ibid.*, p. 106.

8/ *See, e.g.*, Massachusetts Council to the Passamaquody Indians, Sept. 15, 1777, *ibid.*, 232-233.

9/ Treaty with the Passamaquoddy Tribe of Indians, Sept. 29, 1794. Mary Francis Farnham, ed., *The Farnham Papers: Documentary History of the State of Maine* (Portland: Lefavor - Tower Company: 1902) Vol. VIII, p. 98.

10/ *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. at 668.

While the federal government has had comparatively few dealings with the Passamaquoddy Tribe since the Eastern Indian Department was discontinued in 1784, the Tribe was provided benefits between 1824 and 1831 under the first federal act authorizing services for Indians generally, the "Act making provision for the civilization of the Indian Tribes adjoining the frontier settlements."[11/] Since 1965, a variety of agencies, other than the Department of the Interior, have provided funds for the Passamaquoddy Tribe from special Indian allocations and/or funds administered by special Indian desks. These agencies include the Economic Development Administration of the Department of Commerce, the Office of Native American Programs of the Department of Health, Education and Welfare, the Office of Economic Opportunity, and the Law Enforcement Assistance Administration of the Justice Department, each of which has made grants directly to the Indian Township or Pleasant Point Passamaquoddy Tribal Councils or to the Joint Tribal Council, and the Department of Housing and Urban Development which has made grants to the Passamaquoddy Housing Authorities, whose commissioners are appointed by the Tribe.[12/]

In terms of governmental structure, the history of the Passamaquoddys can be divided into three phases. The first

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11/ Act of March 3, 1819, 3 Stat. 516.

12/ *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, *supra*, 388 F.Supp. at 668.

phase began in time immemorial and lasted until the mid-nineteenth century. During this phase the Tribe was governed by sagamores who were selected for life. During the early part of this phase the power of these sagamores was closely limited by kin and community opinion.[13] The fur trade, war and diplomatic contact, however, all served to increase the importance of the sagamores. The fur trade in particular contributed to the rise in importance of the sagamores, for it was the sagamores who were responsible for the allocation of family hunting territories.[14] During and after the American Revolution the sagamores also played a crucial role in intertribal diplomacy as the tribes in Maine and Canada developed alliances to deal with external problems.[15]

13/ This phase can be inferred from the historical studies of the Indians of Maine. For the early status of the sagamores and the complementary role of kin and community opinion *see* Alfred Goldsworthy Baily, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700* (Toronto: University of Toronto Press, 1969), 91-92 and Morrison, *The People of the Dawn*, 38-40.

14/ Snow, *Wabenaki: "Family Hunting Territories,"* American Anthropologist, 1968), 1144.

15/ Frank G. Speck, *The Eastern Algonkian Wabanaki Confederacy*, American Anthropologist, XVII (1915), 492-508, outlined the eighteenth-century alliance system which united the Abenaki peoples. A few short biographies of Penobscot and Maliseet leaders are also suggestive about these developments. *See* Frank T. Siebert, "Wenemouett," in George W. Brown, *et al.*, ed. *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966--), II, 664-66; Kenneth M. Morrison, *"Loron Sauguaaram," ibid.*, III, 584-85 for Penobscot biographies and Richard I. Hunt, "Ambrose St. Auban," and "Pierre Tomah," *ibid.*, IV, for Maliseet leaders.

The coming of the end of the first phase was signaled by a split which developed in the Tribe after the establishment of the school on the Pleasant Point reservation in 1824.[16] One of the factions ultimately established a separate village on the Indian Township reservation,[17] and the resulting strain was resolved by an 1852 "treaty" between the two villages.[18] This treaty marked the beginning of the second phase during which each reservation elected a governor and a lieutenant-governor every four years.[19] During this phase the Tribe also began electing a single tribal representative to the State Legislature. This official was chosen annually by the Tribe as a whole, but was alternately selected from the Pleasant Point and Indian Township reservations.[20] This system was followed until the mid-Twentiety century, the beginning of the third phase, when the term of office for all officers was changed to two years, and six-member tribal councils were established for each reservation.[21] The two councils sit as the Joint Tribal

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16/ Eugene Vetromile, *The Abnakis and their History; or Historical Notices of the Aborigenes of Acadia* New York:(James B. Kirker, 1866), 119.

17/ *Ibid.*

18/ Treaty of Peace made among the Passamaquoddy Indians, Feb. 28, 1852. Vetromile, *The Abnakis and their History*, 119.

19/ *Ibid.*

20/ *Ibid.*

21/ 22 M.R.S.A. § 4831.

Council of the Passamaquoddy Tribe on matters which effect the Tribe as a whole.[22] This third phase represents the current political structure of the Tribe.

III ABORIGINAL TERRITORY

A. *Nature of use.*

The Passamaquoddy Tribe, like the Penobscot Nation, was riverine in terms of land use and ownership. That is, the territory of these Indians was generally defined by the watersheds of the rivers they occupied, and was not bounded by the rivers themselves.[23] The Passamaquoddys spent the winter months hunting and trapping in the interior, and moved to the sea shore to fish and hunt sea mammals in the summer.[24]

The inland territory of the Tribe was divided into family hunting territories. The hunting bands rapidly became trapping bands as the fur trade modified and eventually replaced

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[22] 22 M.R.S.A. § 4831-A.

[23] Dean R. Snow, *Wabenaki "Family Hunting Territories,"* 1143-51.

[24] This seems to be a post-contact phenomenon for the Passamaquoddy. *See* David Sanger's comments "Passamaquoddy Bay Pre-History; A Summary," Maine Archaeological Society, *Bulletin*, XI (Fall, 1971), 17; and also Bruce J. Bourque, "Aboriginal Settlement and Subsistence on the Maine Coast," *Man in the Northeast*, VI (Fall, 1973), 3-20. Morrison, "The people of the Dawn," 25-28 discusses the evidence for the subsistence patterns for various Abenaki groups.

the Passamaquoddys' aboriginal subsistence cycle.[25] As early as 1605, for example, Samuel de Champlain reported the Penobscots promised to "hunt the beaver more than they had ever done, and barter those beaver with us in exchange of things necessary for their usage."[26] The tribes in Maine came to depend on the trade for European commodities and even food during the Seventeenth century. Although their wars with Massachusetts between 1688 and 1727 disrupted this trade,[27] it expanded dramatically after the end of Dummer's War in 1727.[28] Thereafter, the Passamaquoddys brought increasingly remote watersheds into beaver production.

25/ The fur trade reinforced the summer village orientation. *See* Snow, *"Wabenaki 'Family Hunting Territories,'"* 1149.

26/ Biggar, ed., *Champlain's Works*, I, 295-96; III, 361.

27 Bailey, *Conflict of European and Eastern Algonkian Cultures, 26-45 and* passim, *deals with various aspects of the trade.* Morrison, "The People of the Dawn," *passim*, deals with the trade's importance to Abenaki/Massachusetts relations and its role in the English/French conflicts. Calvin Martin, "The European Impact on the Culture of a Northeastern Algonquian Tribe: an Ecological Interpretation," *William and Mary Quarterly*, XXI (Jan., 1974), 3-16 discusses the trade among the Micmac.

28/ Ronald O. MacFarlane, "Indian Relations in New England, 1620-1760: A Study of a Regulated Frontier," (Unpub. Ph.D. Diss.; Cambridge, Mass.: Harvard University, 1933) and his "The Massachusetts Bay Truck House in Diplomacy with the Indians," *New England Quarterly*, XI (March, 1938), 48-65, examine the trade's politics and expansion.

In outline form, the Tribe's land use pattern was as follows:

1. During the Seventeenth century the trapping activity of the Tribe greatly expanded and, as a result, fur resources were depleted. However, Indian population dropped as a result of diseases introduced by the Europeans, which permitted the beaver population gradually to recover.[29/]

2. During the late Seventeenth and for most of the Eighteenth century, the trapping bands expanded in population and more land was exploited. To preserve game, the Passamaquoddys and their neighbors developed conservation methods which maintained a breeding beaver population within each family territory.[30/]

3. During the later part of the Eighteenth century, and especially after the Revolution, the Tribe began to meet

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29/ This paragraph summarizes the material cited in the two previous notes. For other general studies *see:* Harold A. Innes, *The Fur Trade in Canada. An Introduction to Canadian Economic History* (New Haven: Yale University Press, 1930) and William I. Roberts, "The Fur Trade in New England in the Seventeenth Century." (Unpub. Ph.D. Diss.; Philadelphia: University of Pennsylvania, 1958).

30/ The evidence for conservation comes from the Penobscot but applies equally to the Passamaquoddy. *See* Joseph Chadwick, "An Account of a journey from Fort Pownal--now Fort Point--Up the Penobscot River to Quebec, in 1764," *Bangor Historical Magazine,* IV (1889), 143.

direct competition as more and more non-Indians began to hunt and trap inland.[31]

By the American Revolution, then, the Passamaquoddys' use of their aboriginal territory had probably reached its maximum extent. Although Federal Agent John Allan contributed to the support of some Passamaquoddys who were in the United States' service,[32] a number of factors combined to require intensive Passamaquoddy use of their trapping lands. War-time inflation meant that trade goods were over-priced and furs undervalued; the Passamaquoddys had to trap more to purchase less.[33] Although Allan would have preferred to keep the tribe close at hand, a scarcity of both trading goods and food supplies forced Allan to permit the Passamaquoddys to hunt during the winters for their livelihood.[34]

31/ English/Indian hunting conflicts began on the Kennebec in the 1760's, developed on the Penobscot and occurred among the Passamaquoddy during the same decade. Kenneth M. Morrison, "Nodogawerriment," *Dictionary of Canadian Biography*, III, 484-485, discusses the Kennebec case. For the Penobscots *see* His excelly Answer to the 3 Penobscot Indians who appeared Yesterday in the Council chamber, Aug. 23, 1763, Baxter, *Bax. Mss.* XXIV, 120-23. For the Passamaquoddy *see* fn. (47), below.

32/ *See*, for example, references to rations in Kidder, *Military Operations*, 124, 125, 126, 130. But the Passamaquoddy continued to trade, *ibid.*, 133, 142.

33/ On relative values of goods and furs *see* Allan to Massachusetts Council, Feb. 25, 1777, *ibid.*, 182.

34/ *See ibid.*, 145, 147, 193, 235, 237.

B. *Evidence of territorial location and extent.*

The evidence clearly indicates that the Passamaquoddy Tribe's aboriginal territory included--at a minimum the entire St. Croix and Dennys River watersheds, an area encompassing approximately 1,000,000 acres. In the Seventeenth century, for example, Champlain reported that the Passamaquoddys occupied the watersheds at Passamaquoddy Bay.[35/] A 1755 map shows "Passamacadie" territory in the same area.[36/] John Allan, in a 1783 memorandum outlining promises made to the Indians during the Revolutionary War, speaks of them as living on all of the rivers "eastward of Machias, with the lakes that extend from Passamaquoddy River to Penobscot. Including the last."[37/] And in 1797 Passamaquoddy Governor Francis Joseph Neptune gave a sworn deposition in connection with the Canadian - United States boundary dispute in which he said that the "Schoodic River (the present St. Croix) from its mouth to different carrying places into the Machias River, Penobscot River and St. Johns River belongs exclusively to the Passamaquoddy Tribe."[38/]

35/ Biggar, *Champlain's Works*, I, 270-72. *See also* Campeau's remarks, *Monumenta Novae Franciae*, 119.

36/ William F. Ganong, *"A Monograph of the Evolution of the Boundaries of the Province of New Brunswick," Royal Society of Canada, Transactions*, 2nd Ser., VI (1900-01), p. 243.

37/ Memorandum for Indian Eastern Department, May, 1783, PCC roll 163: 149: 567.

38/ Ganong, p. 154.

In addition, there is evidence to indicate that the Passamaquoddys held aboriginal title to an additional one and one-half million acres. The highly respected anthropologist Frank G. Speck states "the Passamaquoddy hunted over and occupied country close to Penobscot Bay on the east, including Mt. Desert Island, which was consequently not in Penobscot territory, the same being true of Union River just east of the Penobscot."[39/]

IV LOSS OF ABORIGINAL TERRITORY

As of the end of the Revolutionary War the Passamaquoddys had not ceded and continued to use and occupy their aboriginal territory, but were becoming increasingly concerned about non-Indian poachers. John Allan commented on this in 1781.[40/] The problem emerged more fully in 1783. In May, Allan reported that non-Indians had "greatly impaired" beaver hunting and he observed that the situation was "still growing worse."[41/] Later in the year he explained to the Governor of Massachusetts, John Hancock, that the Indians were in "great distress" and reported

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39/ Frank G. Speck, *Penobscot Man: The Life History of a Forest Tribe in Maine* (Philadelphia: University of Pennsylvania Press, 1940), p. 9.

40/ March 2, 1782, J. Allan to Samuel Adams, Samuel Adams Papers, New York Public Library, and *see* March 8, 1782, Col. Allan to the Governor, Baxter, ed., *Bax. Mss.*, XIX 437.

41/ May 24, 1783, Memorandum for the Committee appointed by the honorable Congress of the United States respecting the Eastern Indian Department, PCC, roll 163, Vol. 149II, 561-62.

that he had petitioned the United States Congress for the promised confirmation of their ownership of their hunting grounds."[42] In forwarding the petition to Congress, Allan informed its presiding officer, Thomas Mifflin, that "during the whole Warr I haye not seen them under such Anxiety...."[43]

Mifflin did not reply and Allan wrote again on February 9, 1784. This time he was more explicit. The tribes depended, Allan said, "that something may be done to secure for them, their hunting Ground & prevent those Hunters (subjects of the States) from molesting and Destroying the hunting priviledges which has been too much the Case for Some Years past." While requesting instructions on the issue, Allan added that the allies did "not appear Extravagant in their Demands." They were, in fact, willing to compromise. They were willing to relinquish, Allan said, "any Claim to Land," reserving for themselves "only some particular places which their forefathers Occupied many Years ago, with the hunting streams."[44]

Although Allan must have feared the outcome, he assured the Passamaquoddys and the Maliseets that he had forwarded their

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42/ Allan to Governor Hancock, Dec. 15, 1783, Samuel Adams Papers, New York Public Library.

43/ Dec. 25, 1783, Allan to Thomas Mifflin, President of Congress.

44/ Feb. 9, 1784, Allan to Thomas Mifflin, President of Congress, PCC Roll 71:58: 67-68.

petition to Congress. He avowed that both Congress and the State of Massachusetts wished "nothing but your Welfare, that you may enjoy all your rights and Privileges in as full and ample a manner as any of your Brother Citizens of the United States...." Allan also reassured the tribes that both governments "are determined to see Justice done in Your Claims, as far as is consistent with their Power and Authority." The Indian agent counseled patience, asking the tribes to continue to "pursue your Suits on the Several Streems as usual." This conference occurred just before Allan was dismissed from Federal office.[45/]

The federal government neither fulfilled its wartime promises nor accepted the Passamaquoddys' offer to cede a portion of their lands. Indeed no further notice was taken of the Tribe until 1824 when funds were appropriated for their benefit under the Civilization Act of 1819.[46/] As a result of this inattention and the resulting white encroachment on their beaver hunt, the Passamaquoddys suffered extreme hardship during the post-war period.[47/] By 1792 the Tribe was nearly destitute, and

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45/ Feb. 23, 1784, Allan to Maliseet and Passamaquoddys, Kidder, *Military Operations*, 297-98. The Eastern Indian Department was abolished in March, 1784. *Ibid.*, 314.

46/ *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 667.

47/ "Address and supplication of the several Villages of Indians, Situated on the Streams between Penobscot & St. Johns." Nov. 10, 1792; Papers, Massachusetts Acts and Resolves, 1793, Chapter 185, Massachusetts Archives, Boston.

in desperation turned to the Massachusetts General Court for relief.[48] The negotiations with Massachusetts were conducted through John Allan, who, although no longer a federal agent, was still in close touch with the Tribe. In November, 1792, the Passamaquoddys and their Canadian allies met with Allan, and he recorded their complaints and forwarded a transcription of them to Boston. As recorded by Allan, however, the Tribe's view of its situation differed radically from the view which Allan had reported in 1783 and 1784. Most importantly, Allan reports the Tribe as saying in 1792 that they had:

> ...in the time of War, resigned the claim of those lands, which our forefathers so long occupied, only on condition of enjoying our Religion unmolested -- And exclusive rights to the Beaver Hunt -- suitable residence for our Familys, and such other benefits in proportion to which our brethern were entitled to.[49]

In a subsequent report to Massachusetts, Allan himself stated that:

> ...in the course of the war, the Indians of St. Johns & Passamaquoddy, resigned to the United States their particular claim to lands known to be within their haunts, on Condition that the United States would confirm to them the ancient spots of ground, which they have hitherto occupied, & a Suitable tract for the use of all Indians, which might have occasion to resort there.[50]

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[48] *Ibid.*

[49] *Ibid.*

[50] Kidder, *Military Operations*, p. 312.

The claim that the Passamaquoddys had relinquished their claim to land during the Revolution is wholly at odds with the statement made by Allan in 1784 that the Tribe was *willing* to give up its claims to lands, not that it had already done so. Moreover, both of the above statements indicate that any resigning of claim to lands on the part of the Indians was contemplated only in conjunction with specific conditions being met, and it is clear that these conditions were not met. Indeed, it is clear that the Passamaquoddy Tribe had not relinquished its claims to lands to anyone prior to the November, 1792, conference with Allan. One can only speculate as to Allan's reasons for claiming, and reporting the Indians as saying, otherwise. In any event, Massachusetts apparently recognized its opportunity to obtain a clear extinguishment of the Passamaquoddy Tribe's aboriginal title, and responded warmly to the Tribe's petition and appointed Allan and two others to meet with it.[51/]

The result of the negotiations was a treaty concluded on September 29, 1794, in which the Passamaquoddy Tribe, and "others connected with them," relinquished all of their claims to land within Massachusetts, and in return the Commonwealth assigned and set off one hundred acres of islands in the Schoodic River (St. Croix); a 23,000 acre township; Pine-Island (contain-

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51/ Act of March 28, 1793, Massachusetts Acts and Resolves 1792, c. 185; Act of June 26, 1794, Massachusetts Acts and Resolves 1794, c. 92.

ing 150 acres); Lues Island (containing 10 acres); 100 acres at Nemcas Point, adjacent to the Township; the privilege of fishing and passing without molestation over the various carrying places on both branches of the Schoodic River; ten acres at Pleasant Point on Passamaquoddy Bay; and the right of sitting down on fifty acres at the Carrying-Place on West Passamaquoddy on the Bay of Fundy.[52/] No compensation was paid, and no services were provided or promised. The federal government played no part in the transaction.

Massachusetts deeded the Passamaquoddys ninety additional acres at Pleasant Point in 1801,[53/] but the Tribe has lost roughly 8,100 acres of the 23,200 acres reserved in the 1794 treaty in the intervening years.[54/] Of all these transactions, only a 1975 easement to the Eastern Maine Electric Co-op was concluded in accordance with federal law.

52/ Treaty with the Passamaquoddy Tribe of Indians, Sept. 29, 1794, Mary Francis Farnham, ed., *The Farnham Papers: Documentary History of the State of Maine* (Portland: Lefavor - Tower Company: 1902) Vol. VIII, p. 98; Massachusetts Acts and Resolves 1794, 6, 52.

53/ Commonwealth of Massachusetts to Passamaquoddy Tribe of Indians, Feb. 21, 1801; Vol. 58, page 145, Washington County Registry of Deeds, Machias, Maine.

54/ *See generally,* A. Kaliss, "A Report on Passamaquoddy Tribal Lands on Indian Township, Nemcass (Governors) Point and Pine Island," (Unpub. 1969). On December 31, 1975, the largest individual non-Indian land owner of record within Indian Township made a gift of 186 acres of land on Indian Township to the Joint Tribal Council of the Passamaquoddy Tribe.

CONCLUSION

This research has been conducted by experts who are prepared to testify as expert witnesses that the Passamaquoddy Indians constitute (and have constituted since time immemorial) a tribe of Indians, that the Tribe used and occupied an aboriginal territory of upwards of two and one-half million acres in the eastern part of the present state of Maine, and that the Tribe ceded practically all of this territory in a 1794 treaty with the Commonwealth of Massachusetts which was not approved by the United States, and had taken from it an additional 8,100 acres by means of deeds and grants which were not approved by the United States.

NARRAGANSETT TRIBE OF INDIANS

v.

SOUTHERN RHODE ISLAND LAND DEVELOPMENT CORP. et al.

NARRAGANSETT TRIBE OF INDIANS

v.

Dennis J. MURPHY.

Civ. A. Nos. 750006, 750005.

United States District Court,
D. Rhode Island.

Opinion Filed June 23, 1976.

Second Memorandum and Order
July 16, 1976.

Actions were brought by plaintiff Indian tribe against state of Rhode Island and other defendants claiming title to certain lands allegedly held unlawfully in violation of the Indian Nonintercourse Act. The District Court, Pettine, Chief Judge, held that affirmative defenses asserted by defendants including claims of estoppel, laches, statute of limitations and defenses based on alleged insufficiency of allegations of acquisition of title did not present valid defenses to actions and would be stricken, that United States could not be joined as an additional party by it, but Court would not be in violation of equity to allow action to continue without the presence of United States and that action was not subject to dismissal for lack of subject matter jurisdiction on ground that determination of plaintiff's status as a tribe was a nonjusticiable political question.

Motions to strike defenses granted, motion to join United States as a party or to dismiss denied, and motion to dismiss for lack of subject matter jurisdiction denied.

1. Federal Civil Procedure ⇐1104

Court should treat motions to strike with disfavor and be slow to grant them. Fed.Rules Civ.Proc. rule 12(f), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1102, 1104

Traditional disfavor of a motion to strike stems from its potential for abuse as a dilatory tactic, but this drawback must be balanced against motion's intended use as a primary procedure for objecting to an insufficient defense to avoid needless expenditures of time and money in litigating issues which can be foreseen to have no bearing on outcome. Fed.Rules Civ.Proc. rule 12(f), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1147

In passing on motion to strike, court must treat as admitted all material factual allegations underlying challenged defenses and all reasonable inferences which can be drawn. Fed.Rules Civ.Proc. rule 12(f), 28 U.S.C.A.

4. Federal Civil Procedure ⇐1108

Defense will be stricken only if it could not possibly prevent recovery by plaintiff on its claims. Fed.Rules Civ.Proc. rule 12(f), 28 U.S.C.A.

5. Federal Civil Procedure ⇐1147

In ruling on motion to strike defense court need not treat unchallenged allegations of answer as true, and to extent that challenged defenses are not factually in conflict with facts alleged by plaintiff to support its claim for recovery, court must, for purposes of motion to strike, assume that plaintiff will be able to establish them at trial. Fed.Rules Civ.Proc. rule 19(b), 28 U.S.C.A.

6. Indians ⇐10, 15(1)

Indian Nonintercourse Act embodies policy of United States to acknowledge and guarantee the Indian tribes' right of occupancy of tribal lands and to prevent government's Indian wards from improvidently disposing of their lands and becoming homeless public charges. 25 U.S.C.A. § 177.

7. Indians ⇐10

To establish a prima facie case of right to possession of certain land alleged to have been unlawfully held in violation of Indian Nonintercourse Act, plaintiff must show that it is or represents Indian tribe within the meaning of Act, that parcels of land at issue are covered by Act as tribal land, the

United States has never consented to alienation of tribal land, and that trust relationship between United States and tribe which is established by coverage of Act, has never been terminated or abandoned. 25 U.S.C.A. § 177.

8. Indians ⇐10

Indian title is a matter of federal law and can be extinguished only with federal consent; rule is applicable in all states including the original 13. 25 U.S.C.A. § 177.

9. Indians ⇐10

Neither Rhode Island's alleged unilateral attempt to disband the Narragansett Tribe of Indians nor its assumption of almost exclusive responsibility for protection and welfare of the Tribe's members in face of almost complete disregard by federal government could operate to terminate trust relationship between Tribe and federal government which would be established by proof that the Indian Nonintercourse Act applied with respect to land claimed by Tribe to be held by others in violation thereof. 25 U.S.C.A. § 177; U.S.C.A.Const. art. 6, cl. 2.

10. Indians ⇐22, 27(4)

Neither defense of laches nor statute of limitations/adverse possession nor estoppel by sale could overrule operation of federal law if plaintiff tribe established a violation of the Indian Nonintercourse Act. 25 U.S.C.A. § 177; U.S.C.A.Const. art. 6, cl. 2.

11. Indians ⇐27(1)

While action involving Indian land can be maintained by protected Indians or Indian tribes as well as by United States on their behalf, right to assert sovereign interests at issue is equally available to either plaintiff. 25 U.S.C.A. § 177; U.S.C.A. Const. art. 6, cl. 2.

12. Indians ⇐27(6)

Allegation of Indian tribe stating that it is an Indian tribe which has resided within the state since time immemorial and that since time immemorial the plaintiff tribe has exclusively used and occupied claimed land until acts complained of in actions, if established, was sufficient to prove Indian title or right of occupancy.

13. Indians ⇐10

Aboriginal title or Indian right of occupancy is entitled to protection of federal law and good against all but sovereign and can be terminated only by sovereign act. 25 U.S.C.A. § 177.

14. Indians ⇐10

Indian title arises from ancestral dominion of land and need not be solemnized in any treaty, statute, or other formal government action.

15. Indians ⇐10

Where plaintiff asserted that it is the Narragansett Tribe of Indians, not a successor to it, and that it has a tribal right of occupancy to claimed land which has never been legally extinguished, resolution of these claims was strictly a matter of federal law and plaintiff's incorporation under state law would not constitute a bar to recovery under the Indian Nonintercourse Act. 25 U.S.C.A. § 177; Indian Reorganization Act of 1934, § 17, 25 U.S.C.A. § 477.

16. Indians ⇐2

Nothing in Indian Nonintercourse Act suggests that a "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized. 25 U.S.C.A. § 177.

See publication Words and Phrases for other judicial constructions and definitions.

17. Indians ⇐27(1)

Failure of Indian tribe to incorporate under federal statute cannot be a defense to tribe's right to bring action claiming title to land held by others in alleged violation of Indian Nonintercourse Act which is broader than coverage of federal incorporation statute which is limited to members of federally recognized tribes. Indian Reorganization Act of 1934, §§ 17–19, 25 U.S.C.A. §§ 477–479; 25 U.S.C.A. § 177.

18. Indians ⇐10

Exemption in Indian Nonintercourse Act relating to trade or intercourse with Indians living on lands surrounded by settlements of citizens of the United States

applies to transactions by individual Indians living in "white" settlements and is not applicable to land to which a tribal right of occupancy is claimed. 25 U.S.C.A. § 177.

First Memorandum and Order

19. Indians ⇐2

Proof of coverage by the Indian Nonintercourse Act establishes existence of a fiduciary relationship between federal government as guardian and the covered Indian tribe as ward. 25 U.S.C.A. § 177.

20. Indians ⇐27(1, 5)

United States, if it chooses to do so, can bring an action under the Indian Nonintercourse Act as trustee for tribe and joinder of United States as a "necessary" party on joinder of persons would be appropriate if feasible in action brought by Indian tribe for violation of Act. 25 U.S.C.A. § 177; Fed.Rules Civ.Proc. rule 19(a), 28 U.S.C.A.

21. Indians ⇐27(5)

Failure to join United States in Indian tribe's action against state and others with respect to claim to certain lands, alleged to be held unlawfully in violation of Indian Nonintercourse Act, meant that a judgment for defendants would not be binding upon United States while a judgment for plaintiff tribe would accord it full relief despite absence of United States whose joinder as a necessary party under rule would be appropriate if feasible. 25 U.S.C.A. § 177; Fed. Rules Civ.Proc. rule 19(a), 28 U.S.C.A.

22. Indians ⇐27(5)

Where judgment for defendants in actions by Indian tribe complaining of violations of Indian Nonintercourse Act would not in absence of United States as a party be binding on United States although a judgment for plaintiff tribe would accord it full relief, court would proceed to determine whether under rule action might continue in absence of United States over which court had no jurisdiction in view of federal government's sovereign immunity. 25 U.S.C.A. § 177; Fed.Rules Civ.Proc. rule 19(b), 28 U.S.C.A.

23. Federal Civil Procedure ⇐201

In applying rule relating to whether action should continue if a person cannot be joined as a party, court must refrain from taking either too broad or too narrow a view in determining prejudicial effect of a judgment and watchwords of rule are pragmatism and practicality. Fed.Rules Civ. Proc. rule 19(b), 28 U.S.C.A.

24. Indians ⇐27(5)

Although United States could not be compelled to join as a party in action by Indian tribe against state and others claiming title to land alleged to be unlawfully held in violation of Indian Nonintercourse Act, final decree determining title of right to possess as between tribe and defendants would not leave controversy in situation inconsistent with equity and good conscience and court would permit suit to continue over objection that a judgment for defendants would not be binding on United States. 25 U.S.C.A. § 177; Fed.Rules Civ. Proc. rule 19(b), 28 U.S.C.A.

25. Federal Civil Procedure ⇐219

In general, philosophy of joinder rule is to avoid dismissal whenever possible, and when absent person is United States and relief can be granted to party without affecting United States, Government would usually be held not to be an indispensable party to action. Fed.Rules Civ.Proc. rule 19(b), 28 U.S.C.A.

Second Memorandum and Order

26. Constitutional Law ⇐68(1)

Actions by Indian tribe against state and others claiming title to land alleged to be unlawfully held in violation of Indian Nonintercourse Act presented no political question which would be bar to litigation as against claim that court lacked subject matter jurisdiction because the determination of tribal status of plaintiff comprehended a nonjusticiable political question. 25 U.S. C.A. § 177; U.S.C.A.Const. art. 1, § 8.

27. Constitutional Law ⇐68(1)

Judicial construction and implementation of statute passed by Congress cannot constitute interference with powers com-

mitted by Constitution to Congress within the meaning of political question doctrine.

28. **Constitutional Law** ⇐68(1)

There were judicially discoverable and manageable standards for resolving dispute as to whether plaintiff, suing state and other defendants claiming title to land alleged to be held unlawfully in violation of Indian Nonintercourse Act, was a tribe within the meaning of Act for purpose of determining application of political question doctrine. 25 U.S.C.A. § 177.

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Allen P. Rubine, Asst. Atty. Gen., Providence, R. I., for Dennis Murphy.

OPINION

PETTINE, Chief Judge.

Plaintiff in these consolidated actions has filed a motion to strike certain defenses raised by all or some of the defendants as insufficient as a matter of law, pursuant to Rule 12(f), Fed.R.Civ.P. Both the standards for determining this motion and the sufficiency of the challenged defenses are at issue and have been fully briefed.

I

[1] It is not enough merely to echo the oft-repeated statement that courts should treat motions to strike with disfavor and be slow to grant them. *See* 5 Wright & Miller, Federal Practice and Procedure: Civil § 1380 at 783; 2A Moore, Federal Practice paragraph 12.21. We must also examine that concept's underlying rationale. This was carefully explored in *Louisiana Sulphur Carriers, Inc. v. Gulf Resources and Chemical Corp.*, 53 F.R.D. 458, 460 (D.Del.1971):

> "Motions to strike a defense as legally insufficient are not favored and will not ordinarily be granted unless the insufficiency is 'clearly apparent', 1A Barron and Holtzoff, Federal Practice and Procedure, § 368, p. 5016 (1960). Not favored because of their dilatory character and tendency to create piecemeal litigation, motions to strike are often denied even when technically correct and well-founded. Wright and Miller, Federal Practice and Procedure, § 1381 pp. 799–800 (1969); 2A Moore Federal Practice, paragraph 12.21[2]. Thus, absent a showing of prejudice, courts are often reluctant to decide disputed and substantial questions of law. *Id.* However, defenses which would tend to significantly complicate the litigation are particularly vulnerable to a motion to strike. *Id.* The Court is of the opinion that the fourth defense would substantially complicate the discovery proceedings and the issues at trial and that the defense is legally insufficient under any facts alleged herein. It, therefore, grants [plaintiff's] Motion to Strike."

[2] While the traditional "disfavor" of a motion to strike stems from its potential for abuse as a dilatory tactic, this drawback must be balanced against the motion's intended use as "the primary procedure for objecting to an insufficient defense," 5 Wright & Miller, *supra* at 782. Weeding out legally insufficient defenses at an early stage of a complicated law suit may be extremely valuable to all concerned "in order to avoid the needless expenditures of time and money," in litigating issues which can be foreseen to have no bearing on the outcome. *Purex Corp., Ltd. v. General Foods Corp.*, 318 F.Supp. 322, 323 (C.D.Cal. 1970).

Whether it will ultimately be more time-consuming to test their sufficiency at the pre-trial stage or during the course of trial is naturally governed by the particular circumstances of each case. In a complicated

case such as the one at bar, retention of the challenged defenses until trial will inevitably require the parties, who approach 40. in number, to engage in extensive discovery which would in large part be obviated if plaintiff prevails on its motion. In addition, the potential presentation of extraneous issues to a jury at the trial of this case would only result in confusion and unduly lengthened proceedings, since the issues remaining in the case would themselves pose thorny legal and factual questions for judge and jury. Lastly, it can be anticipated that the proof necessary to establish the challenged defenses of estoppel by sale, laches, and statute of limitations/adverse possession will be damaging to the plaintiff by evoking the jury's sympathy for the defendants. If plaintiff is correct that these defenses are legally insufficient to defeat its claim, it would be extremely prejudicial to permit defendants to prove them at trial. The Court therefore concludes that as to these consolidated cases, it is appropriate to seriously consider plaintiff's motion to strike despite the traditional reluctance to do so.

[3–5] In passing upon a motion to strike, a court must treat as admitted all material factual allegations underlying the challenged defenses and all reasonable inferences which can be drawn therefrom. *Kohen v. E. S. Crocker Co.*, 260 F.2d 790, 792 (5th Cir. 1958); *M. L. Lee & Co. v. American Cardboard & Packaging Corp.*, 36 F.R.D. 27, 29 (E.D.Pa.1964). Viewed in this light, a defense will be stricken only if it "could not possibly prevent recovery" by plaintiff on its claim. *United States v. Pennsalt Chemicals Corp.*, 262 F.Supp. 101 (E.D.Pa.1967); *M. L. Lee & Co. v. American Cardboard & P. Corp., supra.* This does not mean, however, that the Court must treat other allegations of the answer, which are not challenged, as true. *Kohen v. E. S. Crocker Co., supra.* Furthermore, unless plaintiff's ability to establish the material allegations underlying its claim is presupposed, we would never be able to reach the issue at hand; our inquiry would continually founder upon plaintiff's failure to establish a prima facie case. Thus, to the extent that the challenged defenses are not factually in conflict with those facts alleged by plaintiff to support its claim for recovery, we must, for purposes of this motion, assume that plaintiff will be able to establish them at trial.

II

These consolidated cases consist of two actions brought by plaintiff Narragansett Tribe of Indians to establish its right to possession of certain parcels of land which it contends are unlawfully held by the State of Rhode Island (C.A. No. 750005) and a number of private individuals and businesses (C.A. No. 750006). Plaintiff asserts only one ground for its claim of superior title: that each of the defendants traces his title back to an unlawful alienation of tribal land in violation of 25 U.S.C. § 177, popularly known as the Indian Nonintercourse Act ("the Act"). Plaintiff concedes that unless it is able to establish that the Act's terms cover the land in question, it has no right to recovery on any other basis. On the other hand, it contends that if it is able to meet is prima facie burden of establishing the Act's coverage, there are no affirmative defenses which can defeat its claim.

Our first task is to determine the proof necessary for plaintiff to establish a prima facie case. This task has been greatly simplified by the First Circuit's analysis of the Act in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), *aff'g*, 388 F.Supp. 649 (D.Me. 1975) (hereinafter *Passamaquoddy*), which was decided after the parties submitted their briefs.

[6, 7] In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (hereinafter *Oneida*), the United States Supreme Court held that the Oneida Indian Nation had stated a federal cause of action cognizable under 28 U.S.C. § 1331 in claiming a right to possession of certain lands which it alleged had been ceded to the State of New York "without the consent of the United States and hence ineffective to terminate the Indians' right to possession under," *inter alia*, the Nonin-

tercourse Act. *Id.* at 664–665, 94 S.Ct. at 776. The Act, 25 U.S.C. § 177, provides as follows:

> "No purchase, grant, lease of other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase or any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

The Act, which has appeared in this form without material change, *see* part III B, *infra,* since its original enactment in 1790, embodies the policy of the United States "to acknowledge and guarantee the Indian tribes' right of occupancy, *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 348, 62 S.Ct. 248, 86 L.Ed. 260 (1941)," *Passamaquoddy, supra,* 528 F.2d at 379, to tribal lands and "to prevent the government's Indian wards from improvidently disposing of their lands and becoming homeless public charges," *United States v. Candelaria,* 271 U.S. 432, 441, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926). *See also Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); *Passamaquoddy, supra,* 528 F.2d at 377; 388 F.Supp. at 656–657 and cases cited therein.

In order to establish a prima facie case, plaintiff must show that:

1) it is or represents an Indian "tribe" within the meaning of the Act;
2) the parcels of land at issue herein are covered by the Act as tribal land;
3) the United States has never consented to the alienation of the tribal land;
4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

See generally Passamaquoddy, supra.

III

The challenged defenses fall into two categories. One group (laches, statute of limitations/adverse possession, estoppel by sale, operation of state law, public policy, hereinafter referred to collectively as "Group One") consists of affirmative defenses in the nature of confession and avoidance. The other challenged defenses ("Group Two") each purport to rebut elements of plaintiff's case in chief.

A

Let us consider the Group One [1] defenses first. Plaintiff's argument as to these defenses is relatively simple. It contends that if it is able to establish the four elements of its case by a preponderance of the evidence, none of these affirmative defenses could prevent recovery. And, conversely, if plaintiff is unable to do so, defendants will prevail for reasons other than proof of the Group Two defenses.

[8] The Court agrees. A legion of prior judicial decisions supports plaintiff's position.

> "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, includ-

1. Group One defenses are compiled by plaintiff in its principal memorandum at 9–11, 17, 33, 35, 38, nn. 4–16, 18, 19, 27, 28, 30. The public policy defense, quoted *id.* at 33 n. 27, has not been pressed by the defendants and, as the ensuing discussion establishes, is completely overshadowed by the contrary federal "public policy" requiring vigorous protection of the rights of Indians. *Cf. Passamaquoddy, supra,* 528 F.2d at 380 n. 11.

ing the original 13." *Oneida, supra,* 414 U.S. at 670 and cases cited at 667–674, 94 S.Ct. at 778.

The broad principle dictated by the Supremacy Clause of the United States Constitution and the sovereign immunity of the United States that state statutes cannot supersede federally created rights[2] has been applied with especial vigor to the question of Indian title as a result of the federal government's "unique obligation toward the Indians," *Morton v. Mancari,* 417 U.S. 535, 555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

[9] Thus, neither the State's alleged unilateral attempt to disband the tribe in 1880, nor its assumption of "almost exclusive responsibility for the protection and welfare of the" tribe's members in the face of almost complete disregard by the federal government, *compare Passamaquoddy, supra,* 388 F.Supp. at 652–653, could operate to terminate the trust relationship between the tribe and the federal government which would be established by proof that the Nonintercourse Act applies herein. *Passamaquoddy, supra,* 528 F.2d at 380, *aff'g,* 388 F.Supp. at 663 n. 15, and cases cited therein.

> "Neither the constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the State the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof." *United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419–420, 18 L.Ed. 182 (1865).

Accord, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173 n. 12, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

[10] Similarly, neither the defense of laches, nor statute of limitations/adverse possession, nor estoppel by sale can overrule the operation of federal law if plaintiff establishes a violation of the Act.

> "No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses. *Utah Power and Light Co. v. United States,* 243 U.S. 389, 408–409, 37 S.Ct. 387, 61 L.Ed. 791; *Cramer v. United States,* 261 U.S. 219, 234, 43 S.Ct. 342, 67 L.Ed. 622; *United States v. Walker River Irr. Dist.,* supra, 104 F.2d [334] at page 339. . . . And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in *United States v. 7,405.3 Acres of Land,* 4 Cir., 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention." *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied,* 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (footnote omitted).

In *Ewert v. Bluejacket,* 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922), the Supreme Court considered restrictions upon aliena-

2. Expressions of this principle abound in decisions of the United States Supreme Court. For example, in *Hughes v. Washington,* 389 U.S. 290, 292–293, 88 S.Ct. 438, 440, 19 L.Ed.2d 530 (1967), the Court stated:

> "[A] dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule."

And in *Board of Commissioners v. United States,* 308 U.S. 343, 350–351, 60 S.Ct. 285, 288, 84 L.Ed. 313 (1939), Justice Frankfurter wrote for the Court:

> "Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated . . . [S]tate notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise [citations omitted]. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments."

tion of land held by individual Indians. Like the Nonintercourse Act, the restriction there at issue was designed to protect the Indian "wards of the nation" from improvident disposition of their lands, and, in addition, to prevent federal officials involved in Indian affairs from abusing their official position. *Id.* at 136, 42 S.Ct. 442. Upon a finding that the land in question had been conveyed in violation of the federal statute, the Court concluded that the transfer was void and that neither the state statute of limitations nor the doctrine of laches constituted a valid defense.

[11] As *Ewert* illustrates, the right to assert the sovereign interests which supersede conflicting principles of state law and equity is not limited to suits brought by the United States as trustee, as defendants contend. Where an action involving Indian land can be maintained by the protected Indians or Indian tribes as well as by the United States on their behalf, it is settled law that the right to assert the sovereign interests at issue here is equally available to either plaintiff.[3] *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968); *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 470–471 (9th Cir. 1975) and cases cited therein. *See also United States v. Schwarz*, 460 F.2d 1365 (7th Cir. 1972); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332; *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Walker River Paiute Tribe v. Southern Pacific Transportation Co.*, Civil No. R–2707 BRT (D.Nev. 5/28/74), *app. pndg. Cf. Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474 n. 13, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

3. This conclusion rests of course on the assumption *arguendo* that plaintiff herein has standing to raise a violation of the Nonintercourse Act on its own. It should be noted that defendants have raised the question of standing in the context of the asserted indispensability of the United States as a separate defense to these actions. Plaintiff concedes that this latter defense is not subject to a motion to strike as insufficient, but correctly contends that the Group One defenses would not affect its right to recovery, whether it prevails on that issue or not.

Thus in reaching the decision herein to grant plaintiff's motion to strike the Group One defenses, the Court has not addressed and does not need to reach the merits of plaintiff's assertion that it has standing to litigate an asserted violation of the Act in the absence of the United States as coplaintiff. It should be noted that these questions are the subject of a separate motion by the defendants to add the United States as a party plaintiff. Beyond this, I would note the language of the First Circuit in *Passamaquoddy, supra*, which suggests that the Supreme Court's decision in *Oneida Indian Nation, supra*, did not implicitly resolve the issue in plaintiff's favor:

> "And without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims." *Passamaquoddy, supra*, 528 F.2d at 376.

However, since the First Circuit rendered its decision in *Passamaquoddy*, the Supreme Court has stated with reference to 28 U.S.C. § 1362:

> "[I]t would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, and treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473, 96 S.Ct. 1634, 1641 (1976).

Although plaintiff herein is admittedly not a "duly recognized" tribe within the meaning of § 1362 and has grounded this action in 28 U.S.C. § 1331 only, it may derive some support for the applicability of the quoted passage to its claim from Judge Friendly's observation in *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 919 n. 4 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974):

> "Apart from the use of the same language as in § 1331, the legislative history makes clear that the sole purpose of § 1362 was to remove any requirement of jurisdictional amount. See 1966 U.S.Code Cong. & Admin. News, pp. 3145–3149. The decision, *Yoder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F.2d 360 (9 Cir. 1964), which the statute aimed to overrule, involved a claim that would have been assertable under § 1331 but for the requirement of jurisdictional amount."

See also Creek Nation v. United States, 318 U.S. 629, 640, 63 S.Ct. 784, 87 L.Ed. 1046 (1943); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332.

Indeed the contrary conclusion would inevitably result in the defeat of many Indian land claims when prosecuted by the individual tribe or Indians which would have been vindicated if brought by the United States on their behalf. The undesirability of this anomalous result is manifest once it is recognized that " 'the interests sought to be protected by Congress are the same, no matter who the plaintiff may be' ", *Capitan Grande Band v. Helix Irr. Dist., supra* at 471, and that adequate fulfillment of its trust obligations imposes an "almost staggering burden" on the United States.[4] *Poafpybitty v. Skelly Oil Co., supra*, 390 U.S. at 374, 88 S.Ct. 982, 19 L.Ed.2d 1238. In addition, such a conclusion would disserve "Congress' unique [fiduciary] obligation toward the Indians," *Morton v. Mancari, supra,* 417 U.S. at 555, 94 S.Ct. at 2485; *see Passamaquoddy, supra,* 388 F.Supp. at 660–663, embodied in an extensive statutory scheme which is to "be construed liberally . . . and never to the Indians' prejudice. *Antoine v. Washington,* 420 U.S. 194, 199–200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930)." *Passamaquoddy, supra,* 528 F.2d at 380.

The cited cases are but a few examples from a long line of decisional law which renders the Group One defenses completely futile: they will not prevent plaintiff from establishing a prima facie case nor in any way defeat its right to recovery if it is able to do so by a preponderance of the evidence. The motion to strike these defenses as insufficient is therefore granted.[5]

B

Since each of the Group Two[6] defenses purports to rebut an element of plaintiff's prima facie case, the legal sufficiency of each must be tested separately.

[12] The defendants variously assert that plaintiff has failed to set forth sufficient allegations of its right to possession or acquisition of title to the claimed land. *See* note 6, *supra* at (1). Plaintiff correctly points out that it has set forth allegations sufficient to establish Indian or aboriginal

4. A less charitable characterization of the federal government's fulfillment of its responsibilities to its Indian wards appears in *United States v. Ahtanum Irrigation District, supra* at 338:

> "The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting 'the generous and protective spirit which the United States properly feels toward its Indian wards', *Oklahoma Tax Comm. v. United States,* 319 U.S. 598, 607, 63 S.Ct. 1284, 1288, 87 L.Ed. 1612, and the ' "high standards for fair dealing" required of the United States in controlling Indian affairs', *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 47, 67 S.Ct. 167, 170, 91 L.Ed. 29, are but demonstrations of a gross national hypocrisy." (Footnote omitted.)

See also Creek Nation v. United States, 318 U.S. 629, 641, 63 S.Ct. 784, 87 L.Ed. 1046 (1943) (Murphy, J., dissenting).

5. Plaintiff correctly notes in its reply memorandum that, although the defense of estoppel as a result of plaintiff's participation in the challenged land sales is no bar to recovery under the Act, *see, e. g., United States v. Ahtanum Irrigation District, supra; cf. Passamaquoddy, supra,* 528 F.2d at 370 n. 11; striking this defense does not prevent defendants from raising some or all of the factual allegations underlying that claim in order to prove that plaintiff abandoned the subject land, as discussed in *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 357–358, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Plaintiff concedes that abandonment, which has been set forth as a separate defense, would bar its claim and has not therefore included it in this motion to strike.

6. The Group Two defenses are compiled in plaintiff's principal memorandum as follows:

(1) plaintiff has set forth insufficient allegations of acquisition of title to the claimed property, at 5 nn. 1–3;

(2) plaintiff's incorporation under state law removes it from the protection of the Nonintercourse Act, at 22–23 nn. 21–22;

(3) in order to assert a claim under the Nonintercourse Act, plaintiff was required, but failed, to incorporate under the Indian Reorganization Act of 1934, 25 U.S.C. § 477, at 23 nn. 23–24;

(4) plaintiff is excluded from the protection of the Nonintercourse Act because it and its constituent members fall within the terms of a proviso to the Act which excluded "Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states", at 28–29 nn. 25–26.

title to the land.[7] In their brief, defendants do not dispute this contention, but instead argue that "aboriginal title alone does not mean a title having the protection of the Non-Intercourse Act."

[13] This argument is without merit. Numerous decisions of the Supreme Court establish that aboriginal title or Indian right of occupancy is "entitled to the protection of federal law," *Oneida, supra* at 669, 94 S.Ct. at 778, and, "good against all but the sovereign, [it can] be terminated only by sovereign act." *Id.* at 667, 94 S.Ct. at 777. This doctrine antedated the Nonintercourse Act and was embodied in it. *Id.* at 667–668; *Passamaquoddy, supra,* 528 F.2d at 376 n. 6. Thus the Act was designed precisely to protect aboriginal title. *Passamaquoddy, supra,* 528 F.2d at 377.

The defendants also assert that plaintiff's incorporation under state law constitutes a bar to recovery under the Act. *See* note 6, *supra* at (2), (3). In their brief, defendants elaborate on the bases for these defenses. They argue first that plaintiff has violated rules of good pleading by failing to show a chain of title, *i. e.,* how the claimed right of possession was transferred to the corporation. Second, defendants contend that only a tribe incorporated pursuant to federal law, 25 U.S.C. § 477, would be able to raise a claimed violation of the Act, whose coverage, it is asserted, extends only to tribes which have been formally and specifically recognized by the federal government.

[14, 15] These defenses are clearly insufficient. By arguing that plaintiff has violated rules of good pleading, defendants attempt to narrow plaintiff's right to recover under the Act to the situation where it can point to an express grant of title once held by the unincorporated tribe, and presumably embodied in writing, which was formally transferred to plaintiff as corporate property upon incorporation. Such formalities are completely at odds with the concepts of Indian title and Indian sovereignty, which the Act was designed to protect. Indian title arises from the ancestral dominion of land and need not be solemnized in any "treaty, statute, or other formal government action." *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260, (1941). That is the case here. Plaintiff asserts that it *is* the Narragansett Tribe of Indians, not a successor to it, and that it has a tribal right of occupancy to the claimed land which has never been legally extinguished. Resolution of these claims is strictly a matter of federal law,[8] *Oneida, supra* at 670–671, and

7. Plaintiff has alleged that it is "an Indian tribe which has resided in the State of Rhode Island since time immemorial," and that "since time immemorial the plaintiff Tribe has exclusively owned, used, and occupied" the claimed land, until the acts complained of in these actions. These allegations, if established at trial, are sufficient to prove Indian title or "right of occupancy."

> "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from land wandered over by many tribes), then the Walapais had 'Indian title'.
>
> * * * * * *
>
> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* [*v. United States,* 261 U.S. 219 [43 S.Ct. 342, 67 L.Ed. 622] (1923)] case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U.S. at page 229, 43 S.Ct. at page 344, 67 L.Ed. 622.
>
> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme." *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 345, 347, 62 S.Ct. 248, 251, 252, 86 L.Ed. 260 (1941).

8. "Indian tribe" as used in the Act was defined in *United States v. Canderlaria, supra* 271 U.S. at 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023, quoting *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901), as:

> "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory."

See Passamaquoddy, supra, 528 F.2d at 377 n.8. In order to satisfy the first element of a prima facie case, *see* part II, *supra,* plaintiff need do no more than establish at trial that it

"the protection [of the Nonintercourse Act] is not affected by reason of the fact that the band has been incorporated under a state charter and attempts to take action thereunder." *United States v. 7,405.3 Acres of Land,* 97 F.2d 417, 422 (4th Cir. 1938).

[16, 17] The defendants' argument that only federally recognized or federally incorporated tribes are protected by the Act must also be rejected as a matter of law under the reasoning of the First Circuit's decision in *Passamaquoddy, supra.* Like plaintiff herein, the Passamaquoddy tribe had never been formally recognized as a tribe by the federal government, although it was "stipulated to be a tribe racially and culturally," *id.,* 528 F.2d at 376–377, by the parties to the lawsuit. Under *Passamaquoddy,* if plaintiff is able to make such a showing here, it, too, would constitute a "tribe" within the meaning of the Nonintercourse Act.

"There is nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized. Nor, as the district court found, is there evidence of congressional intent or legislative history squaring with appellants' interpretation. Rather we find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, . . . and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands . . . . Since Indian lands have, historically, been of great concern to Congress, . . . we have no difficulty in concluding that Congress intended to exercise its power [to legislate as to tribes generally] fully." *Passamaquoddy, supra,* 528 F.2d at 377 (footnote, citations omitted).

Nor can failure to incorporate under 25 U.S.C. § 477 be a defense to plaintiff's right to bring this action in view of the First Circuit's conclusion, quoted above, since, under 25 U.S.C. § 479, incorporation under § 477 is limited to members of federally recognized tribes. As a result, the coverage of § 477 is not coextensive with, and is much narrower than, the coverage of the Nonintercourse Act.[9]

[18] Finally, plaintiff seeks to strike the defenses which claim that plaintiff falls within an exception to coverage of the Nonintercourse Act. This exception appeared as a proviso in early reenactments of the Act between 1793 and 1802 and provided that:

"nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." Act of March 1, 1793, ch. 19, § 13, 1 Stat. 331; Act of May 19, 1796, ch. 30, § 19, 1 Stat. 474; Act of March 30, 1802, ch. 13, § 19, 2 Stat. 145.

At the time that this proviso was a part of the Act, the terms of the Act applied to land of "any Indian" as well as to that of any "nation or tribe of Indians."[10] The

fits this description. As such a tribe, it is wholly within its power to decide what form its government will take. F. Cohen, Federal Indian Law 126 (1940). *See, e. g., McClanahan v. Arizona State Tax Commission, supra,* 411 U.S. at 172–173, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1234–1235 (4th Cir. 1974) and cases cited therein.

9. The basic principle of construction that statutes relating to Indians should never be construed to their prejudice mandates this conclusion. *Cf. Passamaquoddy, supra,* 528 F.2d at 380. Not only is incorporation under § 477 optional, 25 U.S.C. § 478, even as to those Indians to whom it is available, but the statutory scheme of which it is a part was first enacted in 1934, long after the latest reenactment of the Nonintercourse Act took place in 1834. In the absence of a "plain and unambiguous" reduction of the coverage of the earlier Act, *cf. Passamaquoddy, supra,* 528 F.2d at 380 n.12, section 477 cannot be construed to narrow and deny the protective reach of the Nonintercourse Act to the plaintiff.

10. As enacted in 1793, the coverage of the Act was defined as follows:

"[N]o purchase or grant of land, or of any title or claim thereto, from *any Indians* or nation or tribe of Indians, within the bounds

proviso was repealed in 1834, Act of June 30, 1834, ch. 161, § 29, 4 Stat. 734, at the same time that transactions by individual Indians were removed completely from the coverage of the Act. *See* note 10, *supra*. Thus the most logical interpretation of the proviso is the one which is also the most consistent with the rules of construction governing statutes relating to Indians, *see* note 9, *supra* : the proviso was addressed to transactions by individual Indians living in "white" settlements and has no application to land to which a *tribal* right of occupancy is claimed.

It appearing that none of the Group One or Two defenses is sufficient to undermine plaintiff's claim for recovery, the Court hereby grants plaintiff's motion to strike these defenses in full. Plaintiff shall prepare an order accordingly.

MEMORANDUM AND ORDER

Defendants in these consolidated actions have filed a motion to join the United States of America as an additional party plaintiff pursuant to Rule 19(a), Fed.R. Civ.P.[1] Plaintiff objects on the ground that it is not "feasible" to order joinder of the United States by virtue of its sovereign immunity from suit to which it has not consented. At the Court's request, the parties have briefed the question whether the United States is an "indispensable party" within the meaning of Rule 19(b).[2]

The plaintiff's cause of action and supporting legal theory have been discussed at some length in a separate opinion, *ante*, *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, (D.R.I.1976) (hereinafter *Narragansett I*), so that a brief summary will suffice here. Plaintiff has brought these two actions against the State of Rhode Island (C.A. No. 750005) and various individuals and businesses (C.A. No. 750006) to establish its right to possession of certain land which it claims is presently held by the defendants in violation of 25 U.S.C. § 177, the Indian Nonintercourse Act ("the Act"). Subject-matter jurisdiction is asserted under 28 U.S.C. §§ 1331, 1337.

[19] In order "to prevent the government's Indian wards from improvidently

of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330 (emphasis added).
Essentially identical language appeared in the 1796 and 1802 versions of the Act. Act of May 19, 1796, ch. 30, § 12, 1 Stat. 472; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 143. The italicized portion was deleted when the statute was reenacted in 1834, which is the version of the Act in effect today. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730.

1. Fed.R.Civ.P. 19(a) provides:
"*(a) Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

2. Fed.R.Civ.P. 19(b) provides:
"*(b) Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the persons's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

disposing of their lands and becoming homeless public charges," *United States v. Candelaria*, 271 U.S. 432, 441, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), the Act renders invalid any purported alienation of tribal land covered by its terms unless the consent of the United States has been obtained. *Narragansett I*, *ante* at 798. Proof of coverage by the Act also establishes the existence of a fiduciary relationship between the federal government as guardian and the covered Indian tribe as ward. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975), *aff'g*, 388 F.Supp. 649, 663 n.15 (D.Me.1975) (hereinafter *Passamaquoddy*).

[20, 21] It is beyond debate that the United States, if it chose to do so, could bring an action under the Act as trustee for the tribe. *See, e. g., Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (hereinafter *Seitz*). It is similarly not disputed that joinder of the United States as a "necessary" party under R. 19(a) would be appropriate if feasible. *Cf. United States v. Hellard*, 322 U.S. 363, 368, 64 S.Ct. 985, 88 L.Ed. 1326 (1944). As the defendants contend, the consequence of failure to join the United States falls squarely within subdivisions (1) and (2)(ii) of R. 19(a). *See* note 1, *supra*. Unless the United States is a party to these actions, a judgment for the defendants would not be binding upon it. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 371, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968), *quoting Seitz*, *supra*, at 459; *United States v. Candelaria*, *supra*. Thus a judgment for defendants in these actions as presently constituted would not completely remove the cloud cast upon their title to the land in question, nor would it preclude the institution of successive law suits on the tribe's claim, first by the tribe herein and second by the United States as the tribe's guardian. A judgment for plaintiff, of course, would accord it full relief in these actions despite the absence of the United States.

Up to this point, the plaintiff does not dispute the foregoing legal analysis, although it contends that, "[a]s a practical matter, . . . there is no real possibility that the [federal] government would attempt to relitigate these issues" if defendants prevail herein. (Pl. Memo. at 7.)

[22] The parties diverge as to the next step to be taken: defendants argue that the Court should enter an order requiring the joinder of the United States as a party; plaintiff contends that, the Court being without power to compel joinder of the United States, it should not enter an order purporting to do so, but should instead proceed directly to determine whether, under R. 19(b), the action may continue in the absence of the United States. The Court concurs in the latter analysis. *Compare Imperial Appliance Corp. v. Hamilton Manufacturing Co.*, 263 F.Supp. 1015 (E.D.Wis. 1967). *See generally* 7 Wright & Miller, Federal Practice & Procedure: Civil § 1604. Rule 19 traces its source to former equity practice, 7 Wright & Miller, *supra*, § 1601, and "it has been a settled maxim of equity jurisprudence that a court of equity will not issue an unenforceable decree of injunction, mandatory or prohibitory." *Hearne v. Smylie*, 225 F.Supp. 645, 655 (D.Idaho 1964), *rev'd per curiam*, 378 U.S. 563, 84 S.Ct. 1917, 12 L.Ed.2d 1036 (1964). *See* Note, Developments in the Law—Injunctions, 78 Harv.L.Rev. 994, 1012–1013 (1965). *Cf. Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956). Since it does not appear that the United States has expressly or implicitly consented to be sued under the Act, *compare United States v. Hellard*, supra, the federal government's sovereign immunity remains intact and leaves no doubt that the Court is "without jurisdiction to join the United States." *State of California v. Rank*, 293 F.2d 340, 348 (9th Cir. 1961), *aff'd on this ground, rev'd on other grounds sub nom. Dugan v. Rank*, 372 U.S. 609, 617–618, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). It would be a pointless and unseemly gesture for the Court to order joinder of the United States under these circumstances. On the other hand, the Court understands all parties to this litigation to welcome the voluntary inter-

vention of the United States, and it therefore extends a standing invitation to the United States to do so.

We must consequently turn to R. 19(b) "to determine whether in equity and good conscience the action should proceed among the parties before [the Court], or should be dismissed, the [United States] being thus regarded as indispensable." Rule 19(b) enumerates four nonexclusive factors for a court to consider. *See* note 2, *supra*. The first factor concerns the prejudice which nonjoinder will cause the absent person and/or those already parties to suffer.[3] In this case, the absent United States will not be prejudiced by completion of these proceedings on the merits because it will not be bound by any judgment reached herein. *Seitz, supra* at 458. For this reason, as stated above, the defendants fear exposure to multiple litigation in the event they prevail in the instant actions. With reference to the second and third factors listed in R. 19(b), they contend that it is beyond the power of the Court to minimize or avoid the prospect of a second law suit against them by the United States, and that, as a result, a judgment for the defendants which does not bind the United States will not be adequate since it will not dispel the cloud which was cast upon their title to the land by the institution of these proceedings.

[23] In response to the first and second factors, the plaintiff asserts that defendants' exposure to a second law suit, although conceivable in theory, is virtually inconceivable in reality. This is a pertinent contention which has not been challenged.

> "In applying Rule 19 the courts must refrain from taking a view either too broad or too narrow in determining 'prejudicial' effect of a judgment. The watchwords of Rule 19 are 'pragmatism' and 'practicality.'" *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970).

See also Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114–115, 119–120 n.16, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968); *Soar v. National Football League Players' Association*, 65 F.R.D. 531, 538 (D.R.I.1975). As to the third and fourth factors, plaintiff quite logically points out that while dismissal of these suits will do nothing to remove the cloud already cast upon defendants' title, it will effectively prevent plaintiff from ever bringing its case without the voluntary assistance of the United States, which, as correspondence submitted by defendants indicates, is not forthcoming. *See* note 4, *infra*.

[24, 25] Addressing this precise issue in *Seitz, supra* at 460–461, the Tenth Circuit ruled:

> "More than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations, to establish the Nations' title to, and recover for them the possession and use of, the lands involved in this action. When the trial court undertook to compel the United States to be joined as a party, it asserted that it could not be sued without its consent, and it failed to come into the action voluntarily as a party plaintiff. If we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago. On the other hand, if they are permitted to prosecute the suit, in the absence of the United States, a judgment in favor of the defendants will not bind the United States. Defendants assert that that will result in a continuing cloud upon their titles. But, that is their present situation. So long as the United States fails to commence and prosecute to final judgment, an action to establish the title of the Nations to such

3. It may be that a court should accord greater weight to the question of prejudice to the absent person than to those already parties. *See* 7 Wright & Miller, *supra*, § 1604 at 42. Rule 19(a)(2), which sets forth a less stringent test than R. 19(b), *id.* at 41, speaks of a "substantial" risk of prejudice to parties before the court as compared to only the practical possibility of prejudice to absentees.

lands and to recover possession thereof for the Nations, the title of the defendants will continue to be clouded by the possibility of the United States thereafter bringing such an action. So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their long-standing claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.

> We are of the opinion that the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations.
>
> We conclude that a final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience."

I find the Tenth Circuit's analysis in *Seitz, supra*, indistinguishable from the matter at bar.[4] In reviewing a long line of Supreme Court decisions "recognizing the right of restricted Indians, Indian tribes and pueblos to maintain an action with respect to their lands," *id.* at 459–460, the court in *Seitz* concluded that those cases stood for the proposition that protected Indians and Indian tribes not only have the capacity to maintain legal action to vindicate an asserted claim to land, but may do so in the absence of the United States as a party. This interpretation was subsequently expressly adopted by the United States Supreme Court in *Poafpybitty v. Skelly Oil Co., supra*, as to Indian rights under the land allotment system and is implicit in the Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), as to Indian tribal rights under the Nonintercourse Act. *See Narragansett I, ante* at 805 n.3. Since the land allotment system and the Nonintercourse Act both embody and fulfill the same federal obligation to protect Indian land, *compare Poafpybitty, supra*, 390 U.S. at 369, 88 S.Ct. 982, *with Oneida, supra*, 414 U.S. at 667–668, 94 S.Ct. 772, *and Passamaquoddy, supra*, 528 F.2d at 376 n.6; it is most consistent with general rules of construction and the specific rules of construction governing statutes relating to Indians, *see Narragansett I, ante* at 808 and n.9, to apply the *Seitz* analysis herein. *See also Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973). Indeed, given the likely consequence that a finding of indispensa-

4. Defendants' contention that *Seitz, supra, Poafpybitty, supra*, and their predecessors are distinguishable because the protected status of the plaintiff was not at issue therein goes beyond the narrow focus of our present inquiry. For present purposes, we must assume that plaintiff will be able to establish coverage by the Act. The question then is: can plaintiff bring these actions without the presence of the United States? From this perspective, the cited decisions are quite relevant. Of course, our affirmative answer to this question does not in any way foreclose a judgment for the defendants on the merits in the event plaintiff fails to carry its burden to show that it and the land in question are covered by the Act.

The defendants' argument that resolution of the plaintiff's tribal status under the Act necessitates an affirmative decision by Congress or the United States Department of the Interior has been rejected in this Circuit. *Passamaquoddy, supra*, 528 F.2d at 377; *Narragansett I, supra*. Furthermore, defendants' fear that the plaintiff's tribal status will be adjudicated without the benefit of the United States viewpoint is unfounded. The federal government's position vis-à-vis the plaintiff and its claim can be discerned and made a part of these proceedings, to the extent relevant, even though it is not a party.

Lastly, defendants' suggestion that plaintiff follow the example of the Passamaquoddy tribe in litigating its claim, *see Passamaquoddy, supra*, is completely unpersuasive. A finding, after many years of litigation, that the Passamaquoddy tribe is a "tribe" within the meaning of the Act has not affected that tribe's inability to compel the United States to institute proceedings on its behalf, nor has it in any way dissipated or even reduced the size of the cloud hanging over the title to land which it claims under the Act. As specifically noted by the First Circuit in its decision, the Court did not reach the question, "by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions" which underlay the suit. *Passamaquoddy, supra*, 528 F.2d at 376.

bility herein would effectively deny plaintiff any remedy, *see Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 470 (9th Cir. 1975), whether our analysis focuses on the unique protection to be accorded Indian wards, as discussed above, or on the balancing test more generally made under R. 19(b),[5] it compels the conclusion that the United States is not an indispensable party to this action, which the plaintiff may maintain on its own behalf.

The defendants' motion to join the United States as a party under Rule 19(a) or to dismiss the actions under Rule 19(b) for failure to join an indispensable party is denied. The Clerk of Court shall serve a copy of the within memorandum and order upon the United States so that it may be advised of the pendency of these actions and the invitation for it to intervene. *Cf. Imperial Appliance Corp. v. Hamilton Mfg. Co., supra* at 1018–1019.

5. The equitable balance does not shift significantly even if one disregards the special status of Indian wards. In general, "the philosophy of present Rule 19 is to avoid dismissal wherever possible." *Heath v. Aspen Skiing Corp.*, 325 F.Supp. 223, 229 (D.Colo.1971). More specifically, when the absent person is the United States, "when relief can be granted to a party without affecting the United States, the government usually will not be held to be indispensable to the action." 7 Wright & Miller, *supra*, § 1617 at 171 (footnote omitted).

Lastly, the Court notes two decisions, involving neither Indians nor the United States, in which Rule 19(b) considerations similar to those at bar did not result in dismissal. In *Bennie v. Pastor*, 393 F.2d 1 (10th Cir. 1968), the court recognized the potential exposure of the defendant to inconsistent judgments if the absent person was not joined, which, if the suit proceeded, could only be prevented by binding the absentee and denying her a day in court. Dismissal, on the other hand, would bar plaintiff from any remedy because the whereabouts of the absent person were unknown. The court took the position that these R. 19(b) considerations were evenly balanced and looked to state law and other considerations to conclude that the suit should not be dismissed under R. 19(b). In analyzing this decision, Wright & Miller suggest that underlying the court's reference, 393 F.2d at 5, to "pragmatic considerations" was the realization that the likelihood of suit by the defendant against the absentee, the defendant's daughter, was remote, and that both were covered by the same liability insurance policy, *Bennie v. Pastor, supra* at 5 n.12, thus minimizing the potential exposure of the defendant to inconsistent results. 7 Wright & Miller, *supra*, § 1604 at 42.

In *Imperial Appliance Corp. v. Hamilton Mfg. Co., supra*, the court found that the absent persons, as here, would neither be bound nor prejudiced by the action, but that they should be joined under R. 19(a)(2)(ii) in order to prevent defendant's exposure to multiple litigation. Joinder was not feasible however. Since neither plaintiffs nor the absentees would be prejudiced by continuation of the suit without them, and there was no alternative forum in which plaintiffs could maintain the action against all interested parties, the court concluded that the balance tipped toward the plaintiffs and refused to dismiss the action under R. 19(b), stating:

> "Where the determination rested on balancing the loss of plaintiff's right to litigate its claim against a defendant's possible exposure to further suit, the courts have deemed it just and equitable to allow the action to continue in the absence of parties having a material interest therein." *Id.* at 1018 (citations omitted).

See also Soar v. National Football League Players' Association, supra at 538 and nn. 12, 13, and cases cited therein.

MEMORANDUM AND ORDER

Defendants Providence Boys Club, *et al.* have filed their motion to dismiss these consolidated cases for lack of subject-matter jurisdiction on the ground that determination of the tribal status of plaintiff comprehends a nonjusticiable "political question".[1]

In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court undertook its most exhaustive analysis and, perhaps, reconciliation of its previous discussions of the political question doctrine. At the outset the Court noted that such a claim of nonjusticiability does not in itself undermine the court's subject-matter jurisdiction but rather calls for a judgment for defendants on the merits on the ground that plaintiff has failed to state a claim for which relief may be granted. *Id.* at 198–200, 82 S.Ct. 691. *See also Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). As in *Baker v. Carr, supra*, it is clear that

1. For a recent discussion questioning the existence of the "doctrine", *see* Henkin, "Is There a 'Political Question' Doctrine," 85 Yale L.J. 597 (1976).

plaintiff herein has stated a cause of action which "arises under" a federal statute, and, as a result, this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Plaintiff's assertion that the matter in controversy meets the jurisdictional minimum of $10,000. has not been seriously questioned. *See Murray v. Vaughn*, 300 F.Supp. 688 (D.R.I.1969).

In *Baker, supra*, 369 U.S. at 215, 82 S.Ct. 691, the Court, while acknowledging its "deference to the political departments in determining whether Indians are recognized as a tribe", noted that "here too, there is no blanket rule".[2]

> "While 'It is for [Congress] * * *, and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage " * * *, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe * * *.' *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107. Able to discern what is 'distinctly Indian', ibid., the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Id.* at 216, 82 S.Ct. 691, 709–710.

[26] Concluding that "[t]he cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing," *Baker, supra* at 217, 82 S.Ct. at 710, the Court identified the elements which, singly or collectively, describe a nonjusticiable political question:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.*

A brief review of these elements in relation to the instant proceedings reveals that no political question is present to bar this litigation.

[27] 1) *A textually demonstrable constitutional commitment of the issue to a coordinate political department.* Article I, § 8 of the United States Constitution clearly reserves to the sole authority of Congress the power "[t]o regulate commerce . . with the Indian tribes." *See also National Indian Youth Council v. Bruce*, 485 F.2d 97, 99 (10th Cir. 1973), *cert. denied*, 417 U.S. 920, 94 S.Ct. 2628, 41 L.Ed.2d 226, recognizing "the plenary power of Congress to control and manage the affairs of its Indian wards." But even in this area, as recalled in the passage quoted from *Baker v. Carr, supra*, 369 U.S. at 216, 82 S.Ct. 691, there are judicially reviewable limits to Congress' exercise of these powers. More pertinently, as the First Circuit held in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1975) (hereinafter *Passamaquoddy*), Congress has in fact exercised its plenary power in enacting 25 U.S.C. § 177, the Nonintercourse Act, and has done so in a manner which applies to Indian tribes generally. *Id.* at 377. While a hypothetical plaintiff's complaint that it *should have been* included among a group

2. "Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." *Id.* at 210–211, 82 S.Ct. 691, 706.

of tribes specified in some Congressional enactment would likely raise a political question, in seeking judicial inquiry into the wisdom of Congress' decision, *cf. Passamaquoddy, supra* at 377, plaintiff Narragansett Tribe of Indians seeks only to enforce a Congressional enactment. Judicial construction and implementation of a statute passed by Congress surely cannot constitute interference with powers committed by the Constitution to Congress. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[28] 2) *A lack of judicially discoverable and manageable standards for resolving the dispute.* This element is not present. The dispute at issue here is the determination of plaintiff's status as a tribe within the meaning of the Nonintercourse Act. In *Narragansett I, ante* at 807 n.8 this Court noted, as had the First Circuit in *Passamaquoddy, supra* at 377 n.8, that the definition of "Indian tribe" as used in the Nonintercourse Act had been stated by the Supreme Court in 1901 in *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521, to be:

> "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory."

Thus, the standards for resolving the dispute are firmly established.

3) *Other elements.*

The remaining elements identified in *Baker, supra*, 369 U.S. at 217, 82 S.Ct. 691, are simply not implicated herein: the initial policy determination *was* made by Congress in enacting a protective statute that would apply to Indian tribes generally; construction and implementation of its terms by the courts evince no disrespect to Congress.

The defendants make much of the distinction that tribal status, disputed here, was stipulated in *Passamaquoddy*. With all respect, the Court cannot discern a material distinction. Although one of the parties to the stipulation in *Passamaquoddy* was the defendant Secretary of the Department of the Interior, the First Circuit's decision makes clear that the stipulation extended only to the racial and cultural identity of the tribe; despite the stipulation, the Secretary contended the tribe was not covered by the Act. Thus, no affirmative policy decision specifically relating to the Act's application to the Passamaquoddy Tribe has ever been made either by the Secretary or by Congress. Assuming *arguendo* that determination of tribal status under the Act is a nonjusticiable political question, how can a limited concession of tribal status which is obtained from the Secretary only in the course of litigation constitute that type of affirmative policy decision that is necessary to overcome the political question barrier? Certainly a change in the method of proving plaintiff's case, from demonstration by preponderance of the evidence to stipulation, cannot be sufficient to transform a political question into a justiciable issue. Acceptance of such a proposition would place the federal policymaker in the untenable position of disputing what it knows to be susceptible of proof by a preponderance of the evidence simply to prevent its acknowledgment of the truth of those facts from being considered an affirmative decision on its part. *If* there is a policy decision which is to be made solely by that body, the timing of that decision cannot be dictated by the institution of court proceedings without running afoul of any number of the elements of a political question identified in *Baker, supra*, 369 U.S. at 217, 82 S.Ct. 691. Therefore I conclude that the fact that the racial and cultural identity of the plaintiff as a tribe in *Passamaquoddy* was undisputed does not distinguish it from the cases at bar. There, as here, no affirmative decision vis-à-vis the named tribe had ever been made by Congress or the Department of the Interior. The First Circuit concluded that this failure did not prevent the Passamaquoddy Tribe from falling within the terms of the Nonintercourse Act.[3] The same reasoning applies herein.

The motion to dismiss is therefore denied.

3. Although the First Circuit did not address the "political question" argument raised here by name, its rejection of that argument is implicit in its ruling that the protection of the Noninter-

Eugene J. McCARTHY et al.

v.

The Honorable Dolph BRISCOE, Governor, State of Texas, and the Honorable Mark White, Secretary of State of Texas.

Civ. A. No. A-76-CA-158.

United States District Court,
W. D. Texas,
Austin Division.

Judgment Sept. 2, 1976.

Opinion Sept. 3, 1976.

Independent candidate sought access to ballot for office of President. The Three-Judge District Court, Gee, Circuit Judge, held that Texas election procedures are constitutionally invalid for the failure of provisions for obtaining ballot position to afford means of access to ballot for independent candidates for the offices of President, Vice-President or presidential elector; and that balancing of equities and time limitations precluded injunctive interference on behalf of plaintiff who at least had dawdled over his rights and who sought access to ballot as an independent candidate for office of President, where matter had come before court too late for it to fashion meaningful relief without substantially disrupting entire state election scheme.

Order accordingly.

Application denied, 5 Cir., 539 F.2d 1353; — U.S. ——, 97 S.Ct. 9, 50 L.Ed. 2d 47.

Application granted, — U.S. ——, 97 S.Ct. 10, 50 L.Ed.2d 49.

1. Elections ⇐22

State is precluded from forcing an independent candidate to establish a political party to attain ballot position. V.A.T.S. Election Code, art. 13.50, subd. 1.

2. Elections ⇐22

Unreasonably burdensome procedures for independent candidates to obtain ballot position are constitutionally invalid.

3. Elections ⇐22

A remission to a mere write-in campaign is not an acceptable alternative to reasonable procedures for obtaining ballot position by independent candidates. V.A.T.S. Election Code, arts. 6.05, subd. 3, 6.06.

4. Elections ⇐22

Texas election procedures are constitutionally invalid for the failure of provisions for obtaining ballot position to afford means of access to ballot for independent candidates for the offices of President, Vice-President or presidential elector. V.A.T.S. Election Code, art. 13.50, subd. 1.

5. Injunction ⇐112

Balancing of equities and time limitations precluded injunctive interference on behalf of plaintiff who at least had dawdled over his rights and who sought access to ballot as an independent candidate for office of President, where matter had come before court too late for it to fashion meaningful relief without substantially disrupting entire state election scheme.

Don Gladden, Fort Worth, Tex., for plaintiff.

course Act extends to bona fide Indian "tribes" generally, despite a complete absence of federal dealings with the specific tribe at issue. The Court recognized that evidence of past relations between a tribe and the federal government or "judgments of officials in the federal executive branch" as to tribal status might be of great relevance to a judicial determination of the Act's coverage. *Passamaquoddy, supra* at 377. However, neither were present in that case. The Court instead relied upon a stipulation, entered into for purposes of the lawsuit, which established tribal status within the definition of *Montoya v. United States, supra. Id.* at 377 n.8. As defendants themselves asserted at oral argument, that stipulation was not intended to and cannot be considered the equivalent of an official federal judgment that the Passamaquoddy Tribe is and should be covered by the Act. If, as defendants contend, such an official decision is a prerequisite to coverage under the Act, then *Passamaquoddy* was wrongly decided, and the fact of stipulation irrelevant. But this Court is both bound by and in full agreement with the First Circuit's decision in that case.

EXHIBIT B

JOINT TRIBAL COUNCILS
PASSAMAQUODDY INDIAN RESERVATIONS

Indian Township
Princeton, Maine 04668

Pleasant Point
Perry, Maine 04667

Tuesday, February 22, 1972

Louis R. Bruce
Commissioner Bureau of Indian Affairs
Department of the Interior
Washington, D.C. 20242

Dear Commissioner Bruce:

As the only elected representatives of the Passamaquoddy Indians, we are writing as spokesmen for a sovereign people to urge that the United States government act now on its forgotten duties toward our tribe.

The Passamaquoddy people have a long and proud history of service to the American government. In the Revolutionary War our ancestors played a decisive role in securing for the new nation two-thirds of what is now the State of Maine. In our possession is a copy of a letter from General George Washington praising the Passamaquoddy for services to the nation and promising the perpetual protection and support of the federal government.

Yet for 150 years the Passamaquoddy have been largely ignored by the federal government. Were it not for a few isolated exceptions which show that some federal responsibility was acknowledged by Washington, the promises made at the time of the Revolution would be meaningless. We would be prepared to call what has happened a tragic accident of history, an oversight by a great nation of a small band of people, but the obligation remains and the accident has been expensive. As a result of this oversight our people have been exposed to exploitation and theft of our lands, and have been subjected to poverty, disease, and loss of hope.

Despite these adversities, the Passamaquoddy have endured. Of 1600 members of the tribe, 800 still live on the two Passamaquoddy reservations in Maine. These reservations encompass 17,000 acres of land which the tribe has held since time immemorial. That the Passamaquoddys are and always have been an Indian tribe as that term is defined by the federal courts, is beyond question. The language of the tribe is still widely used, and annual tribal census reports attest the lineage of the Passamaquoddy people.

At this point in our history we desire to establish formal ties to the United States government. While we look forward to a new era in which we will benefit not only from federal Indian programs, but also from the full spirit of the nation's new policy toward Indian people as expressed in President Nixon's Message of July 8, 1970, at the moment we are primarily concerned with redressing the wrongs of the past. In particular we seek your support in our efforts to redress the wrongs committed against our people by the States of Massachusetts and Maine during the long period in which we have been left to fend for ourselves in relations with these states.

The wrongs to which we allude are detailed and documented in the enclosed law review article (*State Power and the Passamaquoddy Tribe: 'A Gross National Hypocrisy?*, 23 Maine Law Review 1 (1971)), and in extensive reports in the possession of our attorneys. In summary, our grievances include the following deprivations:

---In 1794 Massachusetts made a treaty with the Passamaquoddy Tribe in violation of the Indian Non-Intercourse Act (Act of July 22, 1790, 1 Stat. 138, as amended by Act of March 1, 1793, 1 Stat. 330; now codified at 25 U.S.C. 177) whereby the tribe ceded almost all of its extensive territory. No compensation was paid for the lands ceded; our tribe was merely permitted to keep 23,000 acres which we already owned.

---Subsequent to 1794, and especially after 1820 when the State of Maine was carved from Massachusetts, approximately 7,000 acres of land reserved in the 1794 treaty have been either flooded, sold, leased for 999 years, or given away by Maine and Massachusetts without our consent. Inadequate compensation was charged for these lands, and proceeds were occasionally deposited in the general funds of the state treasuries.

---As a result of these alienations, the Passamaquoddys have been denied income which these lands would have produced. Taxes collected on these alienated lands have not been paid to the Passamaquoddy tribe.

---The State of Maine has badly mismanaged Passamaquoddy tribal property and a trust fund which it established for the tribe.

---The State of Maine has long denied tribal members the right to freely hunt, fish and trap on tribal lands, and has persistently prosecuted Passamaquoddy tribal members for exercising these rights.

---Until 1967 the State of Maine denied the Passamaquoddy people the right to vote, thus making the Passamaquoddy the last tribe in the United States to become fully enfranchised. At the same time, the State of Maine has consistently denied the sovereign power of the Passamaquoddy people to govern themselves.

This is the outline of our claim, and these are the wrongs which we ask you to help us rectify by immediately recommending that the United States Department of Justice file a law suit on our behalf. We urge that you give this matter your earliest possible attention, because under the terms of 28 U.S.C. 2415 and 2416 the government will be barred from seeking a financial recovery for our tribe unless it files its case prior to July 18, 1972.

Before closing, we want to add that while we believe that our sacrifices and contributions to the new Republic during the Revolutionary War imposed upon the United States government a particularly solemn duty to support and protect the Passamaquoddy tribe during an hour of need, we maintain that the Passamaquoddys would be fully entitled to this relationship if our tribe had never participated in the Revolution. The trust relationship between Indian tribes and the United States is based on the Commerce Clause of the Constitution and the Indian Non-Intercourse Act. While the federal government has from time to time argued that the Non-Intercourse Act does not apply to Indian lands within the thirteen original states, this argument has been consistently rejected by every federal court which has considered it. Most recently, and subsequent to publication of the enclosed law review article, this argument was rejected by the Indian Claims Commission in *Stockbridge Munsee Community* v. *United States*, 25 Ind. Cl. Comm. 281 (1971), and *Oneida Nation of New York, et.al.* v. *United States*, 26 Ind. Cl. Comm. 138 (1971), each decision in turn relying on a long

line of authorities. Thus the United States has the same affirmative duty to protect the tribal property of the Passamaquoddys as it does any other non-terminated tribe in the country.

Because the time for action in this matter is extremely short, we look forward to your early reply. You can depend on our complete cooperation, and the assistance of the three law firms which are representing us in this matter: Pine Tree Legal Assistance, Inc., Calais, Maine; the Native American Rights Fund, Boulder, Colorado; and Hogan & Hartson, Washington, D.C. Communications with our attorneys should be directed to Thomas N. Tureen, Esq., P.O. Box 388, Calais, Maine 04619 (207-454-2113).

Very truly yours,

Eugene Francis
Governor
Pleasant Point Passamaquoddy
Indian Reservation
Perry, Maine 04667

Archie LaCoote
Acting Governor
Indian Township Passamaquoddy
Indian Reservation
Princeton, Maine 04668

cc: Rogers C. Morton
Secretary of the Interior
Washington, D.C.

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pc: Harrison Loesch
William Rogers
William Gershuny

apportion award between life tenants and remaindermen, though commutation had been requested by life tenants and government had deposited award in court and contended that it had no interest in distribution thereof, where there was no dispute of law or fact concerning the respective interests of the condemnees, the only task being computation under standards determined by state law, so that expense was attributable to administrative expedition of apportionment rather than to its judicial determination. U. S. v. 818.76 Acres of Land, More or Less, in Cedar and Dade Counties, State of Mo., D.C.Mo.1970, 315 F.Supp. 758.

21. Review

Sovereign prerogative of United States to not suffer judgment against it for costs or expenses in absence of this section cannot be waived, and bar of judgment for costs presents a jurisdictional question which may be raised for the first time on appeal. Cassata v. Federal Sav. & Loan Ins. Corp., C.A.Ill.1971, 445 F.2d 122.

22. Certificate of probable cause

Where certificate of probable cause was issued in automobile forfeiture case in which claimant prevailed, claimant and the United States would each have to absorb its own costs. U. S. v. One 1969 Two-Door Hardtop, Identification No. RP 23F9G158234, D.C.Ala.1973, 360 F.Supp. 488.

23. Class action

Where the representatives of class, consisting of 138 community health centers, incurred legal expenses in creating for the benefit of all class members a fund, the representatives were entitled to be reimbursed from the fund, consisting of a portion of the money released by the litigation which remained unused, for legal expenses incurred by them as representatives of the class. National Council of Community Mental Health Centers, Inc. v. Weinberger, D.C.D.C.1974, 387 F. Supp. 991.

In class action by petty officers in United States Navy for entitlement to reenlistment bonus, this section did not permit court to enter a judgment for costs against the United States government. Larinoff v. U. S., D.C.D.C.1973, 365 F.Supp. 140.

24. Burden of proof

Although allowance of costs is within discretion of court, burden of establishing that incurrence of any particular expense was reasonably necessary to case should be on party seeking to tax such costs on another party. Harrisburg Coalition Against Ruining the Environment v. Volpe, D.C.Pa.1974, 65 F.R.D. 608.

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions

relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one years after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Added Pub.L. 89–505, § 1, July 18, 1966, 80 Stat. 304, and amended July 18, 1972, Pub.L. 92–353, 86 Stat. 499; Oct. 13, 1972, Pub.L. 92–485, 86 Stat. 803.

Library references: United States ⇐133; C.J.S. United States § 192.

References in Text. The date of enactment of this Act, referred to in subsecs. (a), (b), and (g), means the date of enactment of Pub.L. 89-505, which was approved on July 18, 1966.

1972 Amendments. Subsec. (a). Pub.L. 92–485, § 1(a), added further proviso relating to actions for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub.L. 92-353, § 1(a), added proviso that an action for money damages brought by the United States on behalf of American Indians shall not be barred unless the complaint is filed more than six years ninety days after the right of action accrued.

Subsec. (b). Pub.L. 92–485, § 1(b), added exception relating to actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub.L. 92-353, § 1(b), increased the period of limitation to six years and ninety days for actions brought by the United States under the subsection for or on behalf of American Indians.

Legislative History: For legislative history and purpose of Pub.L. 89-505, see 1966 U.S.Code Cong. and Adm.News, p. 2502. See, also, Pub.L. 92–485, 1972 U.S. Code Cong. and Adm.News, p. 3592.

Index to Notes

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1. Retroactive effect

This section providing that every action for money damages brought by United States and founded on any contract, express or implied in law or fact, shall be barred unless complaint is filed within six years after right of action accrues, had no bearing, where right of action of United States accrued long before passage of this section. U. S. v. Eastern Air Lines, Inc., C.A.N.Y.1966, 366 F.2d 316.

Under this section putting United States on same footing as private litigant when it brings suit in tort or contract but providing that any right of action accruing prior to date of enactment should be deemed to have accrued on date of enactment, suit brought by United States eight months after date of enactment was not time barred, although right of action in tort accrued several years before period. U. S. v. Sabine Towing & Transp. Co., D.C.La.1968, 289 F.Supp 250.

This section imposing on government a six-year statute of limitations with respect to actions for money founded on contract begins to run only from date of enactment, and in the meantime it is still the law that the United States is not bound by statutes of limitation or subject to defenses of laches in enforcing its rights. U. S. v. Vibradamp Corp., D.C.Cal. 1966, 257 F.Supp. 931.

Since this section with respect to government claims relating to actions for money founded upon contract was not applicable to claim of government for repayment upon redetermination proceedings in contract accruing at least seven years prior to institution of government action, government was not barred by any statute of limitations or laches from enforcing claim. Id.

1a. Generally

Under this section providing that every action for money damages brought by United States upon any express or implied contract shall be barred unless commenced six years after accrual of right of action, United States, whose officers overstamped bill of lading to provide that government's shipment would be made under terms of standard form government bill of lading which contained waiver by carrier of all limitation periods, had six years in which to bring suit to recover for damage to goods during shipment. U. S. v. Gulf Puerto Rico Lines, C.A.Puerto Rico 1974, 492 F.2d 1249.

United States must have become entitled to a claim and have acquired a cause of action before it comes under this section pertaining to time for commencing actions brought by United States. U. S. v. Hartford Acc. & Indem. Co., C.A.Cal. 1972, 460 F.2d 17, certiorari denied 93 S.Ct. 308, 409 U.S. 979, 34 L.Ed.2d 243.

Generally, limitations and laches do not apply to United States unless Congress provides otherwise. U. S. v. Pull Corp., D.C.N.Y.1973, 367 F.Supp. 976.

1b. State laws

When United Staten becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to state statute putting a time limit on enforcement. U. S. v. Hartford Acc. & Indem. Co., C.A.Cal.1972, 460 F.2d 17, certiorari denied 93 S.Ct. 308, 409 U.S. 979, 34 L.Ed.2d 243.

California uninsured motorist law requiring suit on uninsured motorist provision in automobile policy to be brought within one year after injury or damage does not create a conventional statute of limitations but creates an absolute prerequisite to accrual of any cause of action under the law; thus, failure of United States, as an insured, to bring suit within one year barred its recovery. Id.

2. Enforcement of rights

Without clear manifestation of congressional intent, the United States is not bound by state statutes of limitations or subject to defeuse of laches in enforcing its rights. Cassidy Commission Co. v. U. S., C.A.Okl.1967, 387 F.2d 875; U. S. v. Gera, C.A.Pa.1969, 409 F.2d 117.

Where United States, as guarantor which paid the outstanding loan balance, acquired claim of holder of note prior to the expiration of the five-year Louisiana statute of limitations, operation of state statute was suspended and could not bar government's subrogation claim against various persons who assumed instrument. U. S. v. Winter, D.C.La.1970, 319 F.Supp. 520.

3. Actions founded upon torts

Notwithstanding fact that Capitan Grande Band of Mission Indians was bringing action on its own behalf for declaratory relief and money damages in trespass for alleged wrongs committed by irrigation district and predecessors with respect to construction and maintenance of waterworks facility on reservation land while held in trust by United States on their own behalf, tribe should benefit from provisions of federal statute of limitations requiring that all actions for damages for trespass on lands which accrued in 1966 be filed within 11 years of that date. Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., C.A.Cal.1975, 514 F.2d 465.

Government's right to reimbursement under Medical Care Recovery Act, section 2651 et seq. of Title 42, is subject only to time limitation established by this section providing that actions for money damages brought by the United States founded upon a tort shall be brought within three years after right of action first accrues. U. S. v. Gera, C.A.Pa.1969, 409 F.2d 117.

Three-year statute of limitations applicable to action founded upon a tort did not apply to government's action to set aside fraudulent conveyance governed by New York law and six-year limitations statute applicable to contract actions applied. U. S. v. Franklin Nat. Bank, D.C. N.Y.1973, 376 F.Supp. 378.

For purpose of motion for summary judgment filed on ground that claim was founded upon a tort and was therefore barred by three-year statute of limitations, court would assume truth of plaintiff's allegations. Id.

Under Federal Tort Claims Act, sections 1346(b) and 2671 et seq. of this title, barring recovery in actions founded on tort unless filed within three years after right of action accrues and providing that any right of action accruing to govern-

ment prior to date of enactment of statute would be deemed to have accrued on date of enactment, government was required to assert its cause of action for medical care rendered prior to date of enactment within three years of that date, and government's motion to intervene filed and served within three-year period was timely. Forrester v. U. S., D.C.Pa.1969, 308 F. Supp. 1157.

Government's attempt to assert by intervention medical care recovery under Medical Care Recovery Act, section 2651 et seq. of Title 42, was subject to provisions of three-year federal statute of limitations for action founded on tort. Id.

4. Defenses

Counterclaim which sought recovery of rent due for period between 1950 and 1956 and which was asserted by United States prior to July 18, 1966 was not subject to bar of limitations or defense of laches. Clifton Products, Inc. v. U. S., 1969, 416 F.2d 1263, 189 Ct.Cl. 118.

4a. Crossclaims

Where crossclaims, which the United States asserted in action against it and codefendants arising from automobile accident involving vehicle of the United States and which were first filed more than three years after date of accident, had no relationship to plaintiff's claim against the United States, crossclaims were barred by statute of limitations. Ash v. U. S., D.C.Neb.1973, 363 F.Supp. 345.

5. Contract actions

Where state statute of limitations had not run on cause of action under note guaranteed by Small Business Administration when comakers defaulted and note was assigned to United States after the SBA paid 50% of balance, state statute ceased to run against Government at time of its acquisition of note, and period of limitation, if any, applicable to suit by Government against comakers of note to collect unpaid balance was six-year statute relating to actions brought by Government for money damages on contract express or implied in law or in fact. U. S. v. Sellers, C.A.Tex.1973, 487 F.2d 1268.

Where one-year limitation in bill of lading was not binding upon Government which was not party thereto, only limitation period on certification-contract suit, i. e., suit for breach of certification that shipping charges did not exceed prevailing rate, was six-year limitation period generally applicable to government suits on contracts. U. S. v. Waterman S. S. Corp., C.A.Ala.1973, 471 F.2d 186.

Where certification contract gave Government cause of action for shipping overcharges independent of causes of action arising under bill of lading, and Government's suit was for breach of certification contract, i. e., certification that charges did not exceed prevailing rate, limitation provision of bill of lading was not applicable to suit. Id.

Suit filed in 1974 by United States against city to recover money advanced pursuant to former section 1671 of the Appendix to Title 50 for plan preparation pertaining to municipal building whose construction was commenced in 1961 was barred by this section. U. S. v. City of Leesville, La., D.C.La.1975, 389 F.Supp. 943.

Federal statute of limitations applied to government's action against pump manufacturer as third-party beneficiary of contract between manufacturer and government contractor. U. S. v. Pall Corp., D.C.N.Y.1973, 367 F.Supp. 976.

United States, which had recorded mortgage on hogs sold by defendants for account of mortgagors, had cause of action for conversion of "property of the United States," and that cause of action was subject to six-year statute of limitations. U. S. v. Southland Provision Co., D.C.Fla.1970, 320 F.Supp. 1069.

Action on debt, brought by United States, was not barred by six-year limitation period on actions for money damages brought by United States or agency thereof founded upon contract, though action was brought almost eight years after debt arose, where debt arose prior to date of enactment of act providing such period of limitation, and where action was brought less than one year after such date. U. S. v. Scheiner, D.C.N.Y.1970, 308 F.Supp. 1315.

5a. Conversion

Where the Farmers Home Administration made operating loans secured by specified property of the borrowers, and where, thereafter, the property covered by the security agreement was allegedly sold and converted by defendant to his own use, the right of action alleged by the United States against defendant was governed by the special six-year limitation period for conversion of property of the United States, not by the limitation period of three years for torts. U. S. v. Squires, D.C.Iowa 1974, 378 F.Supp. 798.

6. Waiver

Where aircraft engine bearings to be furnished to Navy under written contract were not returned by the Government because they were counterfeit, where contractor was informed by letter of alleged breach of warranty within one-year period specified in the contract, and where suit by the Government to recover contract price plus consequential damages for breach of express warranty was brought within six-year limitation period specified for contract actions by the United States, Government did not waive its rights under warranty clause by fact that it failed to return the bearings or by its alleged failure to make demands for breach of warranty. U. S. v. Franklin Steel Products, Inc., C.A.Cal.1973, 482 F.2d 400, certiorari denied 94 S.Ct. 1416, 415 U.S. 918, 39 L.Ed.2d 472.

7. Actions against surety

Even if the United States, suing surety on performance bond issued in favor of lessee of government property, could have brought suit as early as December 31, 1963, to recover rent due for that year, this section enacted July 18, 1966 did not commence to run until date of enactment, and as complaint was filed on April 12, 1972, action was not time-barred. U. S. v. Transamerica Ins. Co., D.C.Va.1973, 357 F.Supp. 743.

8. Date of accrual

For purposes of computing statute of limitations, right of action to recover Federal Works Agency advance, which was made to city pursuant to former section 1671 of the Appendix to Title 50 for plan preparation pertaining to construction of municipal building and which had to be repaid if and when construction of building was undertaken, occurred on day that advance became due and owing, date of commencement of construction, and not on date of determination that either a full or proportionate repayment of advance was due. U. S. v. City of Leesville, La., D.C.La.1975, 389 F.Supp. 943.

Where parties to government contract had submitted their controversy to contracting officers for resolution as required by standard disputes clause of contract, neither the Government nor the contractor could have filed a complaint in federal district court until the administrative procedure had been exhausted. U. S. v. Birmingham Fire Ins. Co. of Pennsylvania, D.C.Pa.1974, 370 F.Supp. 501.

A "right of action" accrues, under provision of this section that an action by United States for money damages based on contract is barred unless complaint is filed within six years after right of action accrues or within one year after a final decision has been rendered in required administrative proceedings, as of the date a final administrative decision has been rendered, i. e., administrative appeals have been exhausted. Id.

Where final decision of contracting officer as regards dispute between the United States and private contractor was rendered on August 5, 1966 but it was not until January 24, 1967 that Board of Contract Appeals dismissed appeal for lack of prosecution, government's action against surety on contractor's performance bond, which action was filed January 18, 1973, had been filed within six years of final administrative decision within meaning of provision of this section requiring that contract actions by United States be filed within six years after right of action accrues; right of action accrued at time of decision of Board of Contract Appeals, notwithstanding that administrative proceedings had been instituted by contractor. Id.

8a. Same transactions or occurrence

For purposes of provision of this section that six-year limitation period for action by Government on a contract shall not prevent assertion of any claim of Government that arises out of transaction or occurrence that is subject matter of opposing party's claim, two claims arise out of the same "transaction or occurrence" if they are logically related. Sea-Land Service, Inc. v. U. S., 1974, 493 F. 2d 1357, 204 Ct.Cl. 57, certiorari denied 95 S.Ct. 69, 419 U.S. 840, 42 L.Ed.2d 67.

Even though shipowner's main claim related to its liability under ship exchange contract whereas Government's counterclaim related to its liability under use agreement, Government's counterclaim arose out of same "transaction or occurrence" that was subject matter of shipowner's main claim, and hence counterclaim was not time barred by this section where the two contracts involved the same ships, were executed on same day, and incorporated each other by reference, and where joint survey of exchange of ships conducted by parties at termination of use period served as basis for shipowner's repair obligations under both contracts. Id.

9. Social Security benefits

Action by Government against social security recipient claiming that benefits received by recipient as representative of her daughter had been misapplied and should be refunded was barred under limitations statute applying to actions to recover for diversion of money paid under grant program, and action was not one to establish title to, or right of possession of, real or personal property, as to which no limitations period would apply. U. S. v. Dimeo, D.C.Ga.1974, 371 F.Supp. 95.

§ 2416. Time for commencing actions brought by the United States—Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

Added Pub.L. 89–505, § 1, July 18, 1966, 80 Stat. 305.

Library references: United States ⇨133; C.J.S. United States § 192.

Legislative History: For legislative history and purpose of Pub.L. 89–505, see 1966 U.S.Code Cong. and Adm.News, p. 2502.

1. Contracts

This section excluding all periods during which facts material to right of action are not known and reasonably could not be known by official by United States for purposes of computing six-year limitation period for bringing action founded upon contract was not applicable in determining whether action against city to recover Federal Works Agency advance was barred, where evidence showed, inter alia, that government's letters to city concerning status of project went unanswered, that regulations provided for a visit to recipient to obtain such information if recipient did not furnish it, and that no government agent visited city. U. S. v. City of Leesville, La., D.C.La.1975, 389 F.Supp. 943.

CHAPTER 163.—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

Supplementary Index to Notes

Criminal fine or forfeiture 7

1. Generally

A "qui tam action" is one brought by an informer under a statute which establishes a penalty or forfeiture for commission or omission of some act, and which additionally provides for recovery of the same in a civil action with part of recovery to go to person bringing the action. Mitchell v. Tenneco Chemicals, Inc., D.C. S.C.1971, 331 F.Supp. 1031.

Other case in similar situation is Demsey & Associates Inc. v. SS Sea Star, 321 F.Supp. 663 (S.D.N.Y.1970), where while each bill of lading was subtitled, "To be used with Charter-Parties" and contained the following additional language with regard to charter parties, " * * * freight at the rate of (~~say~~ ~~per~~) as per Charter-Party, ~~dated~~

"All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated".

The Court held that this does not show what, if any, charter party was intended to be incorporated.

In view of the fact that there is no plain or express incorporation of the charter party in the bill of lading and also based on the decisions of Son Shipping Co. Inc. v. De Fosse & Tanghe, supra; and Demsey and Associates Inc. v. SS Sea Star, supra, defendant's motion to stay proceedings pending arbitration is hereby denied.

It is so ordered.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants,
and
State of Maine, Intervenor.

Civ. No. 1960.

United States District Court, D. Maine, N. D.

Jan. 20, 1975.

As Amended Feb. 11, 1975.

Action was brought by the Joint Tribal Council of the Passamaquoddy Indian Tribe and the Tribe's two governors against federal officials for a declaratory judgment as to the applicability of the Indian Nonintercourse Act to the Tribe. The State of Maine was permitted to intervene as a party defendant. The District Court, Gignoux, J., held that although the Tribe was never "federally recognized" by a treaty between the United States and the Tribe, the Nonintercourse Act was applicable to the Tribe and established a trust relationship between the United States and the Tribe.

Judgment for plaintiffs.

1. Statutes ⇐181(1), 189

In construing statute duty of court is to give effect to intent of Congress, and in so doing the first reference is to the literal meaning of words employed.

2. Statutes ⇐212.6

Unless contrary appears, it is presumed that statutory words were used in their ordinary sense.

3. Statutes ⇐181(1), 184

Primary consideration in construing statute is the mischief to be corrected and the end to be attained by enactment of the legislation; where possible terms of statute should be construed to give effect to congressional intent.

4. Statutes ⇐217.2, 223.1

Extrinsic aids such as legislative history of statute and the accepted interpretation of similar language in related legislation are helpful in interpreting ambiguous statutory language.

5. Statutes ⇐219(1)

Administrative interpretations by agency entrusted with enforcement of statute are persuasive but the power to issue regulations is not the power to change the law and it is for the courts to determine whether or not administrative interpretations are consistent with intent of Congress and words of statute.

6. Indians ⇐6

Indian Nonintercourse Act, whose literal language used in the ordinary sense clearly encompasses all tribes of

Indians, is applicable to the Passamaquoddies, although Federal Government had never entered into a treaty with the Tribe, Congress had never enacted legislation which specifically mentioned the Tribe and the Commonwealth of Massachusetts and the State of Maine had assumed almost exclusive responsibility for protection and welfare of the Passamaquoddies. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

7. Statutes ⇐189

Departure from plain meaning of statutory language is only justified where application of literal language would be at variance with legislative intent as revealed by statute as a whole and its legislative history.

8. Indians ⇐15(2)

Purpose of Indian Nonintercourse Act forbidding conveyance of Indian land without consent of the United States is to protect land of Indian tribes in order to prevent fraud and unfairness. 25 U.S.C.A. § 177.

9. Indians ⇐15(2)

Plain meaning interpretation of phrase "any * * * tribe of Indians" as used in Indian Nonintercourse Act, forbidding conveyance of Indian lands without consent of United States, is the only construction of Act which comports with basic policy of United States as reflected in Act to protect Indian right of occupancy of their aboriginal lands. 25 U.S.C.A. § 177.

10. Indians ⇐6

Language used in statutes conferring benefits or protection on Indians must be construed in a nontechnical sense as the Indians themselves would have understood it, and all ambiguities in such statutes are to be resolved in favor of the Indians.

11. Indians ⇐15(2)

Indian Nonintercourse Act, forbidding conveyance of Indian land without consent of United States, was applicable to the Passamaquoddy Tribe, although never "federally recognized," and imposed a trust or fiduciary obligation on United States to protect land owned by Tribe. 25 U.S.C.A. § 177.

12. Indians ⇐15(1)

By virtue of duty imposed by the Indian Nonintercourse Act, United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though United States did not participate in the unconscionable transaction. 25 U.S.C.A. § 177.

13. Indians ⇐3

Termination of Federal Government's responsibility for Indian tribe requires plain and unambiguous action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe.

14. Indians ⇐3

Where Congress never expressly terminated its relationship with the Passamaquoddy Tribe, failure of Federal Government to object to Maine's undertaking certain obligations for protection of Tribe did not evidence such a clear congressional intent as would support a finding of a termination of Federal Government's obligation toward the Passamaquoddies. 25 U.S.C.A. § 177.

15. Constitutional Law ⇐68(1)

Political question doctrine did not bar court from granting declaratory judgment that the Indian Nonintercourse Act did apply to the Passamaquoddy Tribe since only issue before court was whether Congress once having exercised its power to pass protective legislation on behalf of Indians meant to include Tribe and this presented a question of legislative intent for resolution by court rather than a nonjusticiable political question. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

16. Administrative Law and Procedure ⇐704

Where Attorney General of United States in his refusal to institute suit on behalf of Indian tribe relied exclusively on recommendation of Secretary of the Interior and the actions of the Attorney

General and the Secretary were but two stages of single administrative process, their action was a final agency action reviewable under the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 704; 25 U.S.C.A. § 177; 28 U.S.C.A. §§ 1331, 2201.

17. Declaratory Judgment ⇐304

Secretary of the Interior was proper party to suit by Indian tribe for declaration that the Indian Nonintercourse Act was applicable to it and established a trust relationship between United States and tribe, since the Department of the Interior was a federal agency primarily responsible for protecting Indian land and administering government policy pursuant to statutes. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

18. Declaratory Judgment ⇐203

Doctrine of action committed to agency discretion by law did not preclude Indian tribe from bringing suit for declaratory judgment that the Indian Nonintercourse Act applied to it and established a special trust relationship between tribe and United States after Attorney General declined to bring suit on behalf of tribe, since suit did not seek to require Attorney General to bring suit on tribe's behalf and the doctrine of prosecutorial discretion could not shield legal error resulting from the erroneous legal conclusion of official that the Indian Nonintercourse Act did not apply to tribe. 5 U.S.C.A. § 701(a)(2); 25 U.S.C.A. § 177; 28 U.S.C.A. §§ 516, 519.

19. Declaratory Judgment ⇐91

Indian tribe was not barred from declaratory relief with respect to the applicability of the Indian Nonintercourse Act to it merely because court might not be able to fashion coercive relief to compel Attorney General to bring suit on behalf of tribe. 25 U.S.C.A. § 177.

Thomas N. Tureen, David C. Crosby, Barry A. Margolin, Calais, Me., Robert E. Mittel, Portland, Me., Stuart P. Ross, Washington, D. C., Robert S. Pelcyger, and David H. Getches, Boulder, Colo., for plaintiffs.

Peter Mills, U. S. Atty., Portland, Me., Floyd L. France, Chf. Litigation Section and Anthony S. Borwick, Asst. Atty. Gen., Civil Div., Dept. of Justice, Land & Natural Resources Div., Washington, D. C., for defendants.

OPINION AND ORDER OF THE COURT

GIGNOUX, District Judge.

Plaintiffs in this action are the Joint Tribal Council of the Passamaquoddy Indian Tribe and the Tribe's two governors, who are suing in their individual and official capacities and as representatives of all members of the Tribe. Defendants are the Secretary of the Interior, the Attorney General of the United States, and the United States Attorney for the District of Maine. The State of Maine has been permitted to intervene as a party defendant. Plaintiffs seek a declaratory judgment that the Indian Nonintercourse Act, 1 Stat. 137 (1790), now 25 U.S.C. § 177, forbidding the conveyance of Indian land without the consent of the United States, is applicable to the Passamaquoddy Tribe and establishes a trust relationship between the United States and the Tribe. This Court has jurisdiction under 28 U.S.C. § 1331, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), and declaratory relief is sought pursuant to 28 U.S.C. § 2201. Plaintiffs also invoke applicable provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The case has been submitted upon a stipulated record, briefs and oral argument.

The Historical Background

The Joint Tribal Council of the Passamaquoddy Tribe is the official governing body of the Passamaquoddy Tribe, a tribe of Indians residing on two reservations in the State of Maine. It is stipulated that since at least 1776 the present members of the Tribe and their ances-

tors have constituted and continue to constitute a tribe of Indians in the racial and cultural sense.

Plaintiffs allege that until 1794 the Passamaquoddy Tribe occupied as its aboriginal territory all of what is now Washington County together with other land in the State of Maine. During the Revolutionary War, the Tribe fought with the American colonies against Great Britain. In 1790, in recognition of the primary responsibility of the newly-formed Federal Government to the Indians in the United States, Oneida Indian Nation v. County of Oneida, *supra* at 667, 94 S.Ct. 772; United States v. Sante Fe Pacific R. Co., 314 U.S. 339, 345, 347–348, 62 S.Ct. 248, 86 L.Ed. 260 (1941), the First Congress adopted the Indian Nonintercourse Act, which as presently codified, 25 U.S.C. § 177, provides in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[1]

Plaintiffs allege that in 1794, four years after passage of the 1790 Nonintercourse Act, the Commonwealth of Massachusetts, Maine's predecessor in interest[2], negotiated a treaty with the Passamaquoddies, by which the Tribe ceded to Massachusetts practically all of its aboriginal territory. It is further alleged that out of the 23,000 acres which the 1794 treaty reserved to the Tribe, Maine and Massachusetts have sold, leased for 999 years, given easements on, or permitted flooding of approximately 6,000 acres. The complaint asserts that the United States has not consented to these transactions and therefore that they violated the express terms of the Nonintercourse Act.

Since the United States was organized and the Constitution adopted in 1789, the Federal Government has never entered into a treaty with the Passamaquoddy Tribe, and the Congress has never enacted legislation which specifically mentions the Passamaquoddies. Furthermore, since 1789, the contacts between the Federal Government and the Tribe have been sporadic and infrequent. In contrast, the State of Maine has enacted comprehensive legislation which has had a pervasive effect upon all aspects of Passamaquoddy tribal life. The stipulated record clearly shows that the Commonwealth of Massachusetts and the State of Maine, rather than the Fed-

1. The first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." By the second Nonintercourse Act passed in 1793, this language was amended to read as follows: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 1 Stat. 329, 330. This version was carried forward, without major change, in the 1796 Act, 1 Stat. 469, 472; the 1799 Act, 1 Stat. 743, 746; the 1802 Act, 2 Stat. 139, 143; the 1834 Act, 4 Stat. 729, 730; and in Rev.Stat. § 2116, now 25 U.S.C. § 177.

2. Maine was formerly a District of Massachusetts. In 1819 Massachusetts passed legislation, commonly known as the Articles of Separation, which permitted, subject to the consent of Congress, the separation of the District of Maine from Massachusetts, and the establishment of Maine as an independent state. Act of June 19, 1819, Mass. Laws, ch. 61, p. 248. The Articles of Separation provided that Maine would "assume and perform all the duties and obligations of this Commonwealth towards the Indians within said District of Maine, whether the same arise from treaties or otherwise; . . . ." Shortly thereafter, Congress approved of Maine's admission to the Union. Act of March 3, 1820, ch. 19, 3 Stat. 544. The Articles of Separation were incorporated into the Maine Constitution as Article X, Section 5. Me.Const. art. 10, § 5.

eral Government, have assumed almost exclusive responsibility for the protection and welfare of the Passamaquoddies.[3]

The Present Action

On February 22, 1972 representatives of the Passamaquoddy Tribe wrote to the Commissioner of the Bureau of Indian Affairs, Department of the Interior, and requested that the United States Government, on behalf of the Tribe, institute a suit against the State of Maine, as a means of redressing the wrongs which arose out of the alleged unconscionable land transactions in violation of the Nonintercourse Act. The letter urged that the requested action be filed by July 18, 1972, the date as of which such an action would be barred by 28 U.S.C. § 2415(b), a special statute of limitations for actions seeking damages resulting from trespass upon restricted Indian lands.[4] On March 24, 1972 the Commissioner recommended to the Solicitor of the Department of the Interior that the litigation be instituted and advised the Solicitor that 28 U.S.C. § 2415(b) might bar a suit after July 18, 1972. Defendants, however, despite repeated urgings by representatives of the Tribe, failed to take any action upon their request.

On June 2, 1972 plaintiffs filed the present action seeking a declaratory judgment that the Passamaquoddy Tribe is entitled to the protection of the Nonintercourse Act and requesting a preliminary injunction ordering the defendants to file a protective action on their behalf against the State of Maine before July 18, 1972. Following a hearing on June 16, 1972 the Court ordered defendants to decide by June 22, 1972 whether they would voluntarily file the protective action sought by plaintiffs. In addition, the Court directed defendants, in the event their decision was in the negative, to state their reasons for so deciding and to show cause on June 23, 1972 why they should not be ordered to bring suit. On June 20, 1972 the Acting Solicitor of the Department of the Interior advised the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, by letter, that no request for litigation would be made. The reasons, as stated in the letter, were as follows:

> As you are aware, no treaty exists between the United States and the Tribe and, except for isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Massachusetts and Maine which have acted as trustees for the tribal property for almost 200 years. This relationship between the Tribe and the States has apparently never been questioned by the Tribe until recently.
>
> * * * * * *
>
> In view of the Court's Order of June 16, 1972, requesting it be advised of the Secretary's decision on the Tribe's request by June 22, 1972, this Department has again reviewed its position and has again determined that no request for litigation should be made.
>
> The Department does not reach its decision lightly. On the one hand, we are aware that the tribe may thus be foreclosed from pursuing its claims against the State in the federal courts. However, *as there is no trust relationship between the United States and this tribe,* we are led inescapably to conclude that the Tribe's proper legal remedy should be sought elsewhere. * * * (emphasis supplied).

3. The contacts between the Federal Government and the Passamaquoddies, and between Massachusetts and Maine and the Passamaquoddies, since 1776, as disclosed by the documents stipulated into the record in this case, are set forth in detail in the Appendix to this Opinion.

4. Congress has since extended the time for filing such an action to July 18, 1977. Act of October 13, 1972, P.L. 92-485, 86 Stat. 803.

On June 22, 1972, by means of a written Notice filed with the Court, enclosing a copy of the June 20, 1972 letter from the Department of the Interior to the Department of Justice, defendants notified the Court that they would not voluntarily file the requested action. The Notice stated:

> You are hereby further notified that *consistent with the decision of the Interior Department,* the Assistant Attorney General in charge of the Land and Natural Resources Division, Department of Justice, acting under and by delegation from the Attorney General, has decided not to institute an action against the State of Maine as requested by plaintiffs' counsel. (emphasis supplied).

At the conclusion of the show cause hearing held on June 23, 1972 the Court ordered defendants to file the requested protective action against the State of Maine prior to July 1, 1972.[5] On June 29, 1972 defendants complied with the Court's order by filing an action, United States v. Maine, Civil No. 1966 N.D., in this Court.[6]

On February 1, 1973 plaintiffs filed an amended and supplemental complaint in the present action, abandoning their original request for injunctive relief and seeking only a declaratory judgment that the Passamaquoddies are entitled to the protection of the Nonintercourse Act. On June 17, 1973 the State of Maine was permitted to intervene in the action as a party defendant. On July 15, 1974, following the completion of discovery, plaintiffs filed a second amended and supplemental complaint.

The action is presently before the Court on the basis of plaintiffs' second amended and supplemental complaint, defendants' and intervenor's answers thereto, a stipulated record, briefs and oral argument.

The Issues Presented by the Present Action

In their second amended and supplemental complaint, plaintiffs have dropped their original request for injunctive relief and seek only a declaratory judgment. Their basic position is that the Nonintercourse Act applies to all Indian tribes in the United States, including the Passamaquoddies, and that the Act establishes a trust relationship between the United States and the Indian tribes to which it applies, including the Passamaquoddies. Therefore, they say, defendants may not deny plaintiffs' request for litigation on the sole ground that there is no trust relationship between the United States and the Tribe.[7] In opposition, defendants and intervenor contend that only those Indian tribes which have been "recognized" by the Federal Government by treaty, statute or a consistent course of conduct are entitled to the protection of the Nonintercourse Act and, since the Passamaquoddies have not been "federally recog-

5. Defendants' appeal from the June 23, 1972 order was dismissed by the United States Court of Appeals for the First Circuit on motions filed by plaintiffs and defendants, after the Solicitor General had refused defendants permission to proceed.

6. On July 26, 1972, pursuant to stipulation, the Court ordered that the protective action filed against the State of Maine by the United States on behalf of the Passamaquoddies and a similar action filed by the United States on behalf of the Penobscot Indian Nation, United States v. Maine, Civil No. 1969 N.D., be held in abeyance on the Court's docket and that no action need be taken by the parties in either suit pending the outcome of the present action.

7. In their second amended and supplemental complaint, plaintiffs also seek a declaratory judgment that the Tribe is entitled to the protection of U. S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o regulate Commerce . . . with the Indian Tribes"), art. I § 10 ("[n]o State shall enter into any Treaty . . ."") and art. II, § 2 ("[t]he President . . . shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . ."). Plaintiffs have not pressed their initial request for this relief, and the applicability to the Passamaquoddies of these Constitutional provisions is not presently in issue.

nized," the Act is not applicable to them. Defendants and intervenor also deny that the Nonintercourse Act creates any trust relationship between the United States and the Indian tribes to which it applies.

In addition to denying that the Passamaquoddies are protected by the Nonintercourse Act, defendants and intervenor raise several affirmative defenses. First, they say that defendants' refusal to institute suit on behalf of the Passamaquoddies is not subject to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq., both because it is not "final agency action," 5 U.S.C. § 704, and because it constitutes "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Next, intervenor asserts that the Court lacks jurisdiction of the action because it presents a nonjusticiable "political question." Finally, intervenor contends that the case is not one in which declaratory relief is proper. Plaintiffs respond that these affirmative defenses are without merit.

The Court will deal separately with each of the issues thus presented.

The Applicability of the Nonintercourse Act to the Passamaquoddies

[1–6] The rules of statutory interpretation by which this Court must be guided in determining the applicability of the Nonintercourse Act to the Passamaquoddies are summarized in United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963), as follows:

> "In matters of statutory construction the duty of this court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." Unless the contrary appears, it is presumed that statutory words were used in their ordinary sense. A primary consideration is "the mischief to be corrected and the end to be attained" by the enactment of the legislation; and, where possible, its terms should be construed to give effect to the Congressional intent. Extrinsic aids such as the legislative history of the Act, and the accepted interpretation of similar language in related legislation, are helpful in interpreting ambiguous statutory language. Finally, administrative interpretations by the agency entrusted with the enforcement of the statute are persuasive. However, the power to issue regulations is not the power to change the law, and it is for the courts, to which the task of statutory construction is ultimately entrusted, to determine whether or not administrative interpretations are consistent with the intent of Congress and the words of the Act. 318 F.2d at 142–143. (citations omitted).

Applying these rules of construction, the conclusion is inescapable that, as a matter of simple statutory interpretation, the Nonintercourse Act applies to the Passamaquoddies. The literal meaning of the words employed in the statute, used in their ordinary sense, clearly and unambiguously encompasses all tribes of Indians, including the Passamaquoddies; the plain language of the statute is consistent with the Congressional intent; and there is no legislative history or administrative interpretation which conflicts with the words of the Act.

[7] The provisions of the Nonintercourse Act prohibiting dealings in Indian land without the consent of the United States have remained essentially unchanged since passage of the first Act in 1790.[8] The statute in effect in 1794, when Massachusetts negotiated its treaty with the Passamaquoddies, applied to land transactions with "any Indians or nation or tribe of Indians," within the United States. Act of March 1, 1793, 1 Stat. 329, 330. Subsequent versions of the statute, including the present codification, have applied to land transactions with "any Indian nation or

8. *See* n. 1, *supra*.

tribe of Indians." The words employed in the statute are clear and unambiguous; the prohibition against dealings in Indian land without the consent of the United States is applicable to "any . . . tribe of Indians." In the present case, it is stipulated that the Passamaquoddies are a "tribe of Indians." It may be conceded that the Tribe has not been "federally recognized," but there is no suggestion in the statute that, as defendants and intervenor contend, the Act is not applicable to a particular Indian tribe unless that tribe has been recognized by the Federal Government by a formal treaty, mention of the tribe in a statute, or a consistent course of administrative conduct. A departure from the plain meaning of statutory language is only justified where the application of literal languge would be at variance with legislative intent as revealed by the statute as a whole and its legislative history. Marks v. United States, 161 U.S. 297, 301, 16 S.Ct. 476, 40 L.Ed. 706 (1896); Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 276, 131 Ct.Cl. 593, cert. denied, 350 U.S. 848, 76 S.Ct. 82, 100 L. Ed. 755 (1955).

[8] Neither defendants nor intervenor have suggested any reason why giving the term "any . . . tribe of Indians" its literal meaning, thereby encompassing the Passamaquoddies, would lead to a result at variance with the statutory objectives of the Nonintercourse Act. To the contrary, it is eminently clear that the literal interpretation of the statute is required to give effect to the Congressional intent. The Court is aware of no legislative history of the Nonintercourse Act, which might reveal whether the First Congress had in mind the Passamaquoddies when it enacted the 1790 Act. Nor have defendants been able to call to the Court's attention any administrative interpretation prior to the filing of the instant litigation as to the applicability of the Act to the Passamaquoddies or any similarly situated Indian tribe.[9] Every court, however, which has considered the purposes of the Act has agreed that the intent of Congress was to protect the lands of the Indian tribes in order to prevent fraud and unfairness. As the Supreme Court noted in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119, 80 S.Ct. 543, 555, 4 L.Ed.2d 584 (1960):

> The obvious purpose of that [the Nonintercourse] statute is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.

The decided cases are replete with similar statements of the Act's purpose. *E. g.*, United States v. Candelaria, 271 U.S. 432, 441–442, 46 S.Ct. 561, 562, 70 L.Ed. 1023 (1926) (the intent of Congress was "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges," and thereby to protect "a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races"); Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 888 (2d Cir. 1958), vacated as moot sub nom. McMorran v. Tuscarora Nation of Indians, 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009 (1960) (the statute was enacted "to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain"); Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957), cert. denied, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958) (the purpose of such legislation is to protect the Indians "against the loss of their lands by improvident disposition or

9. Clearly, the administrative determination made in response to this Court's order of June 16, 1972, cannot so qualify. An administrative ruling which is no sooner made than challenged is not authoritative. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156, 64 S.Ct. 474, 88 L.Ed. 635 (1944).

through overreaching by members of other races"); Seneca Nation of Indians v. United States, 173 Ct.Cl. 917, 923 (1965) ("From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness.").

[9] A plain meaning interpretation of the phrase "any . . . . tribe of Indians" is also the only construction of the Nonintercourse Act which comports with the basic policy of the United States, as reflected in the Act, to protect the Indian right of occupancy of their aboriginal lands. Thus, in United States v. Santa Fe Pacific R. Co., *supra*, 314 U.S. at 348, 62 S.Ct. at 252, the Supreme Court cited the Act as embodying

> . . . the unquestioned general policy of the Federal Government to recognize such right of occupancy. As stated by Chief Justice Marshall in Worcester v. Georgia, *supra*, 6 Pet. [515,] at page 557, 8 L.Ed. 483, the Indian trade and intercourse acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

Santa Fe also established that "recognition" is not a prerequisite to Nonintercourse Act protection:

> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case [Cramer v. United States, 261 U.S. 219, 229, 43 S.Ct. 342, 67 L.Ed. 622 (1923)], "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 314 U.S. at 347, 62 S.Ct. at 252.

In Oneida Indian Nation v. County of Oneida, *supra*, 414 U.S. at 667–668, 94 S.Ct. 772, decided last Term, the Supreme Court reaffirmed these fundamental propositions stated in *Santa Fe*. In *Oneida*, the Supreme Court also again summarized the policy of the United States to protect the rights of Indian tribes to their aboriginal lands:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. See 25 U.S.C. § 177. 414 U.S. at 667–668, 94 S.Ct. at 777. (footnote omitted).

It is thus clear that the policy embodied in the Nonintercourse Act is to protect Indian tribes against loss of their

aboriginal lands by improvident disposition to members of other races. The Passamaquoddies, an Indian tribe, fall within the plain meaning of the statutory language, and there is no reason why they should be excluded from the protection which the Act affords.

Defendants and intervenor rely on a trilogy of Supreme Court cases, all involving the Pueblo Indians in New Mexico, for the contention that, despite the all-inclusive language of the Nonintercourse Act, the Act applies only to Indian tribes which have been "federally recognized" by treaty, statute or a consistent course of conduct: United States v. Joseph, 94 U.S. 614, 24 L.Ed. 295 (1876); United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); United States v. Candelaria, *supra*. Close analysis of these decisions, however, leaves little doubt that the Act means what it says and that the protection of the Act is not limited to "recognized" tribes.

Congress had extended the 1834 Nonintercourse Act to the New Mexico and Utah territories in 1851. Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 587. The applicability of the Act to the Indians of the Pueblo of Taos in New Mexico was at issue in the *Joseph* case. The Court there held that the Act applied only to "uncivilized" Indians, and therefore did not protect Indians such as the Pueblos and the Senecas or Oneidas of New York, who, unlike the "nomadic" Apaches, Comanches and Navajoes, had attained a high degree of civilization:

> The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals. 94 U.S. at 617.

It is unclear whether the Court held that the Pueblos were a tribe outside the scope of the Act, or simply not a tribe. In either event, it is clear that, by the standards applied in *Joseph*, even if the case is still good law,[10] the Passamaquoddies in 1794 were "uncivilized" Indians to whom the Act would apply. More importantly, the Court's opinion plainly does not contain any suggestion that "federal recognition" is a precondition to the Act's applicability.

Defendants' reliance on the *Sandoval* case is equally misplaced. That case involved not the Nonintercourse Act, but the Act of January 30, 1897, ch. 109, 29 Stat. 506, a criminal statute prohibiting the introduction of intoxicating liquor into "Indian country." Congress had expressly made this statute applicable to lands owned by the Pueblo Indians as a condition to the admission of New Mexico to statehood. Act of June 20, 1910,

10. As plaintiffs point out, the Court's statement in *Joseph* that the Pueblos, the Senecas and the Oneidas would be outside the scope of the Act because of their high degree of civilization has been rejected with respect to all three tribes. United States v. Candelaria, *supra;* Oneida Indian Nation v. County of Oneida, *supra;* Seneca Nation of Indians v. United States, *supra*.

ch. 310, § 2, 36 Stat. 557. A criminal prosecution brought pursuant to the 1897 statute was dismissed by the District Court on the ground that Congress lacked authority to regulate the sale of liquor in the State of New Mexico. The issue presented to the Supreme Court was not one of statutory construction, as Congress had made it clear in the 1910 Act that the 1897 statute applied to the Pueblo Indians. The only issue before the Court was whether "the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico into statehood," 231 U.S. at 38, 34 S.Ct. at 3, or whether the Pueblos instead were "beyond the range of Congressional power under the Constitution." *Id.* at 49, 34 S. Ct. at 7. On this question, the Court concluded that since the Constitution expressly authorized Congress to regulate commerce with the Indian tribes and prior judicial decisions had affirmed the power and duty of Congress to enact protective legislation on behalf of dependent Indian communities, United States v. Kagama, 118 U.S. 375, 384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); Tiger v. Western Investment Co., 221 U.S. 286, 315, 31 S. Ct. 578, 55 L.Ed. 738 (1911), the law banning the sale of liquor in Indian country was a legitimate exercise of congress' power. United States v. Sandoval, *supra*, 231 U.S. at 45–46, 34 S.Ct. 1. The Court held that the determination by Congress that the Pueblos were a dependent Indian community entitled to the benefits of protective legislation presented a "political question," upon which the Court was bound to uphold the judgment of Congress unless the classification was so arbitrary as to constitute a usurpation of power. *Id.* at 47, 34 S.Ct. 1. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865).

In the *Candelaria* case, in 1926, the Supreme Court reexamined for the first time since *Joseph* the applicability to the Pueblo Indians of the 1834 Nonintercourse Act, as extended to the New Mexico territory in 1851. *Candelaria* was an action brought by the United States to quiet title to land of the Pueblo of Laguna occupied by José Candelaria, a non-Indian. The suit was brought on the theory that the Pueblos were wards of the United States, which therefore had the authority and was under a duty to protect them in the ownership of their lands. 271 U.S. at 437, 46 S.Ct. 561. The issue presented to the Supreme Court was whether the guardian-ward relationship between the United States and the Pueblos was such that the United States, as guardian of the Pueblos, was barred from bringing suit by a judgment involving title to the same land entered in a prior lawsuit in which the United States had not been joined as a party. *Id.* at 438, 46 S.Ct. 561. In reaching the conclusion that the Pueblos were wards of the United States whose lands could not be alienated without its consent, the Court had occasion to construe the language "any tribe of Indians" in the Nonintercourse Act:

> While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious, and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United

States, 180 U.S. 261, 266, 21 S.Ct. 358, 359 (45 L.Ed. 521). In that sense the term easily includes Pueblo Indians. *Id.* at 441–442, 46 S.Ct. at 563.

There is nothing in this language which would indicate that the Nonintercourse Act applies only to "federally recognized" Indians. Rather, *Candelaria* appears to erase any doubt *Joseph* may have created as to whether the all-inclusive language in the statute should be construed as its plain meaning dictates.[12]

[10] Finally, even if a latent ambiguity might be found in the statutory language, two cardinal principles of statutory construction buttress plaintiffs' position that the Nonintercourse Act applies to all Indian tribes in the United States, including the Passamaquoddies. The Supreme Court has consistently held that language used in statutes conferring benefits or protection on Indians must be construed in a nontechnical sense, as the Indians themselves would have understood it, and that all ambiguities in such statutes are to be resolved in favor of the Indians. *See, e. g.*, Squire v. Capoeman, 351 U.S. 1, 6–8, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918); Winters v. United States, 207 U.S. 564, 576, 28 S.Ct. 207, 53 L.Ed. 340 (1908); United States v. Payne, 264 U. S. 446, 448–449, 44 S.Ct. 352, 68 L.Ed. 782 (1924); United States v. Celestine, 215 U.S. 278, 290, 30 S.Ct. 93, 54 L.Ed. 195 (1904).

The Court holds that the Nonintercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquoddy Indian Tribe.

The Trust Relationship between the United States and the Passamaquoddies under the Nonintercourse Act

[11] Defendants have rejected plaintiffs' request for assistance on the ground that no trust relationship exists between the United States and the Passamaquoddies. The Court disagrees. In the only decided cases to treat this issue, the Court of Claims has, in a series of decisions during the last ten years, definitively held that the Nonintercourse Act imposes a trust or fiduciary[13] obligation on the United States to protect land owned by all Indian tribes covered by the statute: Seneca Nation of Indians v. United States, *supra*; United States v. Oneida Nation of New York, 477 F.2d 939, 201 Ct.Cl. 546 (1973); Ft. Sill Apache Tribe v. United States, 477 F.2d 1360, 1366, 201 Ct.Cl. 630 (1973).

12. Defendants also refer to the recent case of Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), and to an unreported opinion letter of the District Court in Avalos v. Morton, Civil No. 9920 (D.N.M., September 10, 1974), as supporting their contention that general Indian statutes only apply to "federally recognized" tribes. *Mancari* involved no issue of statutory construction. Instead, it involved a Fifth Amendment Due Process challenge to the Indian Preference in Employment Act, 25 U.S.C. § 472. The Supreme Court did no more than approve the constitutional validity of the Indian preference as rationally related "to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555, 94 S.Ct. at 2485. The *Avalos* letter resulted from the failure of counsel for the Indian plaintiffs to offer any brief or other argument on the issues in that case. Plaintiffs were suing for benefits afforded members of Indian tribes under the Snyder Act, 25 U.S.C. § 13. The District Court, relying primarily on *Sandoval*, ruled that since it did not have authority to recognize the plaintiffs as a tribe, the action should be dismissed. It is unclear from the letter whether the dismissal was based upon a fundamental misreading of *Sandoval* or upon the failure of the plaintiffs to establish that they were "in fact an American Indian Tribe." (Letter of court page 3). In the present case, it is stipulated that the Passamaquoddies are in fact an Indian tribe.

13. The courts have used interchangeably the terms "trust," "fiduciary," and "guardian-ward" to describe the relationship between the Federal Government and the Indian tribes. *E. g.* Seminole Nation v. United States, 316 U.S. 286, 296–297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); Cherokee Nation v. Georgia, 5 Pet. (30 U.S.) 1, 17, 8 L.Ed. 25 (1831); United States v. Seminole Nation, 173 F.Supp. 784, 790–791, 146 Ct.Cl. 171 (1959); Gila River Pima-Maricopa Indian Community v. United States, 140 F.Supp. 776, 780–781, 135 Ct.Cl. 180 (1956).

These decisions are supported by a century of federal Indian case law which has recognized the existence of a fiduciary relationship between the Federal Government and the Indian tribes.

The courts were first squarely presented with the question of the nature of the obligation, if any, imposed by the Nonintercourse Act in Seneca Nation of Indians v. United States, *supra*. In that case, the Senecas sued the United States under the Indian Claims Commission Act, 25 U.S.C. § 70a, claiming damages arising out of four sales of their New York lands at allegedly inadequate prices, to private parties. They alleged that a representative of the United States was present at each of the sales and that the United States breached a fiduciary duty owed the tribe by permitting the unconscionable transactions. The Indian Claims Commission dismissed the claims on the ground that the Federal Government was not responsible for the transactions. The Court of Claims agreed as to the first sale, which took place in 1788 prior to the passage of the Nonintercourse Act, but reversed as to the three later sales, which occurred subsequent to the adoption of the Act in 1790. With respect to the Act, the court began by noting that:

> [T]he requirement has always been for federal consent and participation in any disposition of Indian real property. From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness. *Id.* at 923.

The court then quoted at length from President Washington's speech to the Senecas in December 1790, shortly after the passage of the Act:

> Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. *The General Government will never consent to your being defrauded, but it will protect you in all your just rights.* * * * But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, *and will be your security that you shall not be defrauded in the bargain you may make.* * * * That, besides the before mentioned security for your land, you will perceive, *by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.* . . . American State Papers (Indian Affairs, Vol. I, 1832), p. 142. *Id.* at 923–24 (emphasis in original).

This contemporary executive pronouncement, the court observed "plainly show[s] the Federal Government as thenceforth the guardian and preserver of fairness to the Indians in their land dispositions." *Id.* at 924. After reviewing prior judicial construction of the Act, the court concluded:

> In the light of its language, contemporaneous construction, and history, we hold that the Trade and Intercourse Act created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions. *Cf.* The Oneida Tribe of Indians v. United States, 165 Ct.Cl. 487 (1964), cert. denied, 379 U.S. 946. [85 S.Ct. 441, 13 L.Ed.2d 544] This responsibility was not merely to be present at the negotiations or to prevent actual fraud, deception, or duress alone; improvid-

> ence, unfairness, the receipt of an unconscionable consideration would likewise be of federal concern. . . . The concept is obviously one of full fiduciary responsibility, not solely of traditional market-place morals. When the Federal Government undertakes an "obligation of trust" toward an Indian tribe or group, as it has in the Intercourse Act, the obligation is "of the highest responsibility and trust," not that of "a mere contracting party" or better business bureau. *Cf.* Seminole Nation v. United States, 316 U.S. 286, 296–97 [62 S.Ct. 1049, 86 L.Ed. 1480] (1942). *Id.* at 925.

[12] In *Oneida Nation* and *Ft. Sill Apache Tribe,* the Court of Claims, in unequivocal language, reaffirmed the holding of *Seneca Nation* "that the Trade and Intercourse Act establishes a fiduciary relationship between the Indians and the United States Government." United States v. Oneida Nation of New York, *supra,* 477 F.2d at 942–943; Ft. Sill Apache Tribe v. United States, *supra,* 477 F.2d at 1366. Moreover, in *Oneida Nation,* the court made clear that by virtue of the fiduciary duty imposed by the Nonintercourse Act, the United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though the United States did not participate in the unconscionable transaction:

> The Government would argue that the absence of participation in the remaining twenty-three (23) treaties releases it from any fiduciary duty that might have existed. Although the Government did not actually participate in the remaining treaties, we hold the fiduciary relationship would continue to exist if the Government had either actual or constructive knowledge of the treaties. With such knowledge, if the Government subsequently failed to protect the rights of the Indians, then there would be a breach of the fiduciary relationship. This court does not see any distinction between *participation* and failure to exercise a duty, and *knowledge* and the failure to exercise the same duty. *Id.* 477 F.2d at 944 (emphasis in original; footnotes omitted).

These Court of Claims decisions are consistent with an unbroken line of Supreme Court decisions which, from the beginning, have defined the fiduciary relationship between the Federal Government and the Indian tribes as imposing a distinctive obligation of trust upon the Government in its dealings with the Indians. In the early case of Cherokee Nation v. Georgia, *supra,* 5 Pet. (30 U.S.) at 17, 8 L.Ed. 25, Chief Justice Marshall described the condition of the Indians as "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." The following year, in Worcester v. Georgia, 6 Pet. (31 U.S.) 515, 556, 8 L.Ed. 483 (1832), the same Chief Justice observed that the laws enacted by Congress for the protection of the Indians, and especially the Nonintercourse Act, "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." Fifty years later, in United States v. Kagama, *supra,* 118 U.S. at 383–384, 6 S.Ct. at 1114, the Court reaffirmed that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." (emphasis in original). Again, in Tiger v. Western Investment Co., *supra,* 221 U.S. at 310, 31 S.Ct. at 584, the Court stated, ". . . the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to

their protection as such." More recently, in Seminole Nation v. United States, n.13 *supra*, 316 U.S. at 297, 62 S.Ct. at 1055, the Court recognized that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged with the most exacting fiduciary standards." Finally, in Federal Power Commission v. Tuscarora Indian Nation, *supra*, 362 U.S. at 119, 80 S.Ct. at 555, the Supreme Court said with specific reference to the Nonintercourse Act:

> The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.

The Court of Claims decisions are also supported by numerous Supreme Court cases which have held that the power of Congress to restrict the alienation of Indian land is justified only by the existence of the guardian-ward relationship between the Federal Government and the Indian tribes. *E. g.*, Sunderland v. United States, 266 U.S. 226, 233–234, 45 S.Ct. 64, 69 L.Ed. 259 (1924); Brader v. James, 246 U.S. 88, 98, 38 S.Ct. 285, 62 L.Ed. 591 (1918); Tiger v. Western Investment Co., *supra*, 221 U.S. at 316, 31 S.Ct. 578; Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306–308, 23 S.Ct. 115, 47 L.Ed. 183 (1902); United States v. Kagama, *supra*, 118 U.S. at 384,[14] 6 S.Ct. 1109.

[13, 14] In view of the foregoing, the conclusion must be that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddies,[15] to which it applies. The Court holds that defendants erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Indian Tribe.[16]

14. The imposition of a legal incapacity combined with an undertaking to ensure fairness in transactions involving the incapacitated party's property constitutes the most literal kind of guardianship.

> A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. Like a trustee a guardian is a fiduciary. He is not, however, a trustee in the strict sense. He is entrusted with the possession and management of his ward's property but he does not take title to it. Scott, Law of Trusts (3rd Ed. 1967) § 7 at 71.

15. While apparently not denying that the Nonintercourse Act may have at one time protected the Passamaquoddies, intervenor argues that the Federal Government has since terminated its obligations toward the Passamaquoddies by acquiescing in Maine's assumption of responsibility for the Tribe. It is clear, however, that termination of the Federal Government's responsibility for an Indian tribe requires "plain and unambiguous" action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe. United States v. Santa Fe Pacific R. Co., *supra*, 314 U.S. at 346, 62 S.Ct. 248; United States v. Nice, 241 U.S. 591, 599, 36 S.Ct. 696, 60 L.Ed. 1192 (1916). *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Congress has never expressly terminated its relationship with the Passamaquoddy Tribe, and the mere fact that the Federal Government has not objected to Maine's undertaking certain obligations for the protection of the Passamaquoddies does not evidence such a clear and unequivocal Congressional intent as will support a finding of termination.

16. Whether the United States breached its fiduciary duty to plaintiffs by refusing to bring suit against the State of Maine for the redress of alleged violations of the Nonintercourse Act is a question not presently before the Court. In the present action plaintiffs seek no more than a declaratory judgment that defendants erred in denying their request solely on the erroneous legal ground that no trust relationship exists between the United States and the Passamaquoddies. However, to the effect that the Govern-

The Affirmative Defenses

Defendants and intervenor have raised a number of affirmative defenses, which they assert preclude the Court from ruling upon the substantive issues presented by the action. The Court finds these to be without merit.

[15] *The Political Question Doctrine.* Intervenor contends that the Court lacks jurisdiction of the action because it presents a nonjusticiable "political question." Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961). The position is that "the scope and nature of federal responsibility over Indian tribes is not a matter for the courts to determine." The decisions cited as authority for this proposition, however, deal solely with the *power* of Congress to legislate with respect to Indians. They fall into two categories: (1) cases in which the constitutional power of Congress to enact legislation respecting a particular group of Indians is challenged on the ground that the group is not an "Indian tribe" within the meaning of the Commerce Clause: Board of Commissioners v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943); United States v. McGowan, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); United States v. Ramsey, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926); United States v. Nice, n.15 *supra*; Peprin v. United States, 232 U.S. 478, 34 S. Ct. 387, 58 L.Ed. 691 (1914); United States v. Sandoval, *supra*; Tiger v. Western Investment Co., *supra*; United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); United States v. Holliday, *supra; see also* Baker v. Carr, *supra,* 369 U.S. at 282, 82 S.Ct. 691 (Frankfurter, J., dissenting); and (2) cases which hold that Congressional action involving the administration of Indian affairs is not subject to judicial challenge on the ground that it violates previous treaty commitments. Federal Power Commission v. Tuscarora Indian Nation, *supra*; Sioux Indians v. United States, 277 U.S. 424, 48 S.Ct. 536, 72 L. Ed. 939 (1928); Lone Wolf v. Hitchcock, *supra.* There is no dispute in this case that Congress has the power under the Commerce Clause to pass protective legislation on behalf of the Passamaquoddy Tribe; nor is there any claim that application of the Nonintercourse Act to the Passamaquoddies would violate any prior treaty commitment. The only issue before this Court is whether Congress, once having exercised its power to pass protective legislation on behalf of the Indians, meant to include the Passamaquoddies. This presents a question of legislative intent, which has always been for resolution by the courts. *See, e. g.,* Morton v. Ruiz, 415 U.S. 199, 212–229, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). It is clear that this case presents no nonjusticiable political question.

[16, 17] *The Availability of Review under the Administrative Procedure Act.* The defendants and intervenor assert that defendants' refusal to institute suit on behalf of the Passamaquoddies against the State of Maine is not subject to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Their argument is twofold. First, they contend that defendants' action is not "final agency action" reviewable under 5 U.S.C. § 704. While they concede that the decision of the Attorney General was final action, they argue that the decision of the Secretary of the Interior not to recommend litigation must be "treated separately" and that, so regarded, the Secretary's determination is not judicially-reviewable final action. The record before the Court clearly establishes, however, that the Attorney General relied exclusively on the recommendation of the Secretary in making his decision [17] and that the

ment's obligation may include the duty to litigate, see Mason v. United States, 461 F.2d 1364, 1372–1373, 198 Ct.Cl. 599 (1972), rev'd on other grounds, 412 U.S. 391, 93 S. Ct. 2202, 37 L.Ed.2d 22 (1973).

17. The Court rejects as specious defendants' argument that, because the Notice filed by the defendants with this Court on June 22, 1972 (p. 6 *supra)* stated that the Attorney General's decision not to bring suit was

actions of the Attorney General and the Secretary were but two stages of a single administrative process. In the instant action, plaintiffs seek review of the result of this combined administrative determination. Furthermore, there is concededly a final order before the Court, and the Administrative Procedure Act, 5 U.S.C. § 704, expressly provides that an "intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." The cases cited by defendants, Chicago and Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 112–113, 68 S.Ct. 431, 92 L.Ed. 568 (1948), and Federal Power Commission v. Hope Gas Co., 320 U.S. 591, 619, 64 S.Ct. 281, 88 L.Ed. 333 (1944), involved attempts to review an intermediate stage of administrative action without reviewing the ultimate stage; they are inapposite where the ultimate action is itself being reviewed.[18]

[18] The second argument presented by defendants and intervenor as preventing judicial review under the Administrative Procedure Act is that defendants' action constitutes "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2). The thrust of the argument is that the Attorney General has absolute discretion to institute litigation, 28 U.S.C. §§ 516, 519, and that judicial review of his exercise of that discretion is barred by the doctrine of prosecutorial discretion. United States v. Nixon, 417 U.S. 418, 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Newman v. United States, 127 U.S.App.D.C. 263, 382 F.2d 479, 480–481 (1967); Smith v. United States, 375 F. 2d 243, 246–247 (5th Cir. 1967); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379–382 (2d Cir. 1973); Weiss v. Morgenthau, 233 F.Supp. 307, 308 (S.D.N.Y.1964), aff'd per curiam, 344 F.2d 428 (2d Cir. 1965); Application of James, 241 F. Supp. 858, 860 (S.D.N.Y.1965); Boyd v. United States, 345 F.Supp. 790, 794 (E. D.N.Y.1972).[19] This contention is based on two fundamental misconceptions. In the first place, plaintiffs do not ask this Court to order the Attorney General to bring suit on their behalf; in the present action, plaintiffs seek only a declaratory judgment that the Nonintercourse Act establishes a trust relationship between the United States and the Passamaquoddies. In the second place, the doctrine of prosecutorial discretion cannot shield legal error. As the court stated in Nader v. Saxbe, 497 F.2d 676, 679–680 n. 19 (D.C.Cir.1974),

> It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion

made "consistent with" the Secretary's determination that no trust relationship exists, that was not the sole basis for the Attorney General's decision. The Notice incorporated the determination of the Interior Department and stated that, consistent with that decision, the Justice Department was declining to institute the action requested by plaintiffs. The Notice was filed in response to the Court's order of June 16, 1972 directing defendants, in the event their decision was to deny plaintiffs' request, to state their reasons for so deciding. The only reason stated in the Notice is the Secretary's determination that no trust relationship exists. It is clear that the Attorney General adopted the Secretary's determination as his only reason for declining to bring suit.

18. The defendant Secretary is a proper party because the Department of the Interior is the federal agency primarily responsible for protecting Indian land and administering government policy pursuant to statutes such as the Nonintercourse Act. *See, e. g.*, Hynes v. Grimes Packing Co., 337 U.S. 86, 96–97, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); Boles v. Greenville Housing Authority, 468 F.2d 476, 479 (6th Cir. 1972).

19. Similarly, intervenor cites several cases which stand merely for the proposition that 25 U.S.C. § 175 (requiring that the United States Attorney "shall" represent all Indians in all suits at law and equity) does not impose a mandatory duty. Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082, 1084–1085 (9th Cir. 1972); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53, 56 (9th Cir. 1968); Siniscal v. United States, 208 F.2d 406, 410 (9th Cir. 1953), cert. denied, 348 U.S. 818, 75 S.Ct. 29, 99 L.Ed. 645 (1954).

> generally, is subject to statutory and constitutional limits enforceable through judicial review. The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority. Judicial review of the latter sort is normally available unless Congress has expressly withdrawn it. (citations omitted).

See also Boyd v. United States, *supra*, 345 F.Supp. at 792–793. Where, as in the present case, the decision of an administrative official is based upon an erroneous legal conclusion, the courts have an obligation to correct the error so that he may exercise his discretion based upon a correct understanding of the law. Perkins v. Elg, 307 U.S. 325, 349–350, 59 S.Ct. 884, 83 L.Ed. 1320 (1939); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943); McGrath v. Kristensen, 340 U.S. 162, 168–171, 71 S. Ct. 224, 95 L.Ed. 173 (1950). *See* 5 U. S.C. § 706. *Cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 140–141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

The Administrative Procedure Act does not bar judicial review of defendants' action.

[19] *The Propriety of Declaratory Relief.* Intervenor contends that since the Court is without authority to compel the Attorney General to file suit on behalf of plaintiffs, the prayer for declaratory relief is merely an effort to obtain an advisory opinion, which the Court should decline to render. *See* Sierra Club v. Morton, 405 U.S. 727, 732 n. 3, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Public Service Commission v. Wycoff Co., 344 U.S. 237, 241, 73 S.Ct. 236, 97 L.Ed. 291 (1952). Intervenor's argument is identical to that rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). In that case, Adam Clayton Powell sought both a declaratory judgment that the House of Representatives could not constitutionally prevent him from taking his seat because of prior misconduct, and a writ of mandamus or an injunction to compel officers and employees of the House to seat him. The District Court dismissed the complaint, and the Court of Appeals affirmed on the grounds that the case was not justiciable because the requested coercive relief would bring the judiciary into open conflict with a coordinate branch and a declaratory judgment would "not finally terminate, the controversy." Powell v. McCormack, 129 U.S.App.D.C. 354, 395 F.2d 577, 597 (1968). The Supreme Court reversed and remanded the case to the District Court with instructions to enter a declaratory judgment for Powell and to consider other appropriate remedies. With respect to the defendants' claim of nonjusticiability because the Court lacked power to grant coercive relief, the Court said:

> We need express no opinion about the appropriateness of coercive relief in this case, for the petitioners sought declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, 28 U. S.C. § 2201, provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." The availability of declaratory relief depends on whether there is a live dispute between the parties, and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. We thus conclude that in terms of the general criteria of justiciability, this case is justiciable. 395 U.S. at 517–518, 89 S.Ct. at 1962 (citations omitted).

It is thus clear that plaintiffs are not barred from declaratory relief merely because this Court may not be able to fashion coercive relief. *See also* Perkins v. Elg, *supra*, 307 U.S. at 349–350, 59 S. Ct. 884; McGrath v. Kristensen, *supra*, 340 U.S. at 168–171, 71 S.Ct. 224.

* * * * * *

Judgment will be entered for the plaintiffs declaring that the Indian Nonintercourse Act, 25 U.S.C. § 177, is applicable to the Passamaquoddy Indian Tribe; that the Act establishes a trust relationship between the United States and the Tribe; and that defendants may not deny plaintiffs' request for litigation in their behalf on the sole ground that there is no trust relationship between the United States and the Tribe. Plaintiffs may submit a proposed form of decree, with notice to defendants, within ten days. Defendants may present their comments thereon within five days thereafter.

It is so ordered.

APPENDIX

I

Contacts between the Federal Government and the Passamaquoddy Tribe since 1776

1. On December 24, 1776, George Washington wrote to the Passamaquoddy Tribe and told them that he was glad to hear that the Tribe had accepted the chain of friendship which he sent in February 1776, and warned the Tribe against turning against the United States.

2. John Allan served as the Continental Congress' agent to the Indians of the Northeast during the American Revolutionary War. Appointed in 1777, he was instructed to enlist the support of the Indian tribes for the American colonies. In May 1777 Allan met with the Passamaquoddy and St. John's Tribes. In recognition of Allan's promises that the Tribe would be given ammunition for hunting, protection of their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, a clergyman, and the appointment of an agent for their protection and support in time of need, the Passamaquoddy Tribe pledged their support to the colonies.

In 1783 and 1784 Allan wrote several letters to the Federal Government in which he indicated that the Passamaquoddy Indians had greatly assisted the American cause and urged Congress to fulfill the promises he had made on behalf of the Government, especially with respect to protecting Passamaquoddy hunting grounds. Congress failed to act on Allan's recommendations, and on March 5, 1784, Allan's appointment was revoked pursuant to a resolution of the Continental Congress revoking the appointments of all Indian Superintendents.

3. In 1793 the same John Allan appeared before the Massachusetts General Court. He reported that during the Revolutionary War the Passamaquoddy Tribe had relinquished their claims to land in Massachusetts on the condition that the United States would confirm the Tribe's right to inhabit, unmolested, certain parcels of their aboriginal territory.

4. In 1819 Congress passed legislation entitled, "An Act making provision for the civilization of the Indian tribes adjoining the frontier settlements." Act of March 3, 1819, 3 Stat. 516. In 1824, using funds appropriated pursuant to this Act, the Federal Government contributed $233.00 to the Tribe, an amount which covered one-third of the cost of the construction of a school. From 1824 to 1828 the Federal Government used funds appropriated pursuant to the 1819 Act to contribute $250.00 a year to Elijah Kellogg, a missionary to the Indians, who sought to establish and maintain a school for the Passamaquoddies. In 1829 the Government withheld funds for the school because of intra-tribal disputes concerning the religion of the Superintendent. In December 1829 two leaders of the Passamaquoddy Tribe, Deacon Sockbason and Sabattis Neptune, met in Washington with Thomas L. McKenny, Director of the Office of Indian Affairs, and John H. Eaton, Secretary of War, seeking a reinstatement of the funds for the school, money to hire a priest, and a parcel of land. Although

the funds for the school were temporarily reinstated and money for a priest was provided, all funds were permanently terminated in 1831 because of the continuation of sectarian strife.

5. In December 1829 President Jackson requested funds from Congress to purchase additional land for the Passamaquoddy Tribe. Congress failed to act on the President's request.

6. In July 1832 the Commissioner of Indian Affairs, Elbert Herring, denied Kellogg's request for funds for the improvement of Passamaquoddy agriculture.

7. During the period 1899 to 1912, five members of the Passamaquoddy Tribe attended the Carlisle Indian School at Carlisle, Pennsylvania. In 1970 a member of the Passamaquoddy Tribe graduated from Haskel Indian College at Lawrence, Kansas.

8. Since 1965 the Tribe has received funds from the Department of Housing and Urban Development, the Office of Economic Opportunity and Federal agencies other than the Department of the Interior. Although eligibility for such assistance has been determined by criteria applicable to all citizens, in many instances the funds were taken from special Indian allocations or were administered by special Indian desks within the various agencies.

II

Contacts between the States of Massachusetts and Maine and the Passamaquoddy Tribe since 1776 Massachusetts Contacts

1. On July 19, 1776, the Governor of Massachusetts on behalf of Massachusetts and the other states entered into a treaty of alliance and friendship with delegates from the St. John's and Micmac Tribes in which the Indian delegates agreed to use their influence to convince the Passamaquoddy and other tribes to supply men for George Washington's army.

2. In 1792 leaders of the Passamaquoddy Tribe petitioned Massachusetts for land where they could "assemble unmolested." In response to the petition, the Massachusetts Legislature appointed a committee to assign land to the Passamaquoddy Indians. Treaty negotiations began in 1793, and on September 24, 1794 Massachusetts and the Passamaquoddy Tribe entered into a treaty. John Allan, the former Federal Indian agent, was one of the members of the committee appointed by the Massachusetts Legislature, and his name appears as one of the signers of the treaty for Massachusetts. By the terms of the treaty, the Passamaquoddy Tribe surrendered all claims to land in the territory of Massachusetts in exchange for a conveyance of 23,000 acres of land at Indian Township, ten acres of land at Pleasant Point, and the exclusive right to fish and hunt the Schoodic River, all in the District of Maine. Seven years later, in 1801, Massachusetts assigned an additional 90 acres of land at Pleasant Point to the Tribe.

3. In 1819 Massachusetts passed legislation commonly known as the Articles of Separation, which provided for the establishment of Maine as a separate State. Under the Articles of Separation Maine agreed to "assume and perform all duties and obligations of the Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties or otherwise, . . ." *See* n. 2, *supra*.

Maine Contacts

4. Since its admission as a State in 1820, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. This legislation includes 72 laws providing appropriations for or regulating Passamaquoddy agriculture; 33 laws making provision for the appropriation of necessities, such as blankets, food, fuel, and wood, for the Tribe; 85 laws relating to educational services and facilities for the Tribe; 13 laws making provision for the delivery of health care services and facilities to the Tribe; 22 laws making allowance for Passamaquoddy housing

(Me.Const. art. 9, § 14–D, authorizes the Legislature to make available a fund not to exceed $1,000,000.00 for the purpose of insuring mortgages on homes owned, "by members of the 2 tribes on several Indian reservations"); 54 laws making special provision for Indian indigent relief; 54 laws relating to the improvement and protection of roads and water on the Passamaquoddy reservation; and 15 laws providing for the legal representation of the Tribe and its members.

5. The following is a representative sample of Maine statutes currently in effect providing for the welfare and protection of the Passamaquoddy Tribe.

a. Beginning in 1823 Maine has administered trust funds on behalf of the Passamaquoddy Tribe. 22 M.R.S.A. § 4834, as amended, P.L.1973, ch. 141, creates a trust fund out of the annual net proceeds from the sale of timber and grass taken from Indian Township. This statute permits the tribal council to determine the manner in which a certain percentage of the funds shall be expended.

b. 22 M.R.S.A. § 4707 renders void any contract made by an Indian for the sale or disposal of trees, timber, or grass on Indian lands.

c. 22 M.R.S.A. § 4709 authorizes the Attorney General, on his own initiative or at the request of a Tribe, to sue in the name of the Tribe in actions for money owed the Tribe for injuries done to tribal land. The damages recovered by such a suit are to be distributed by the Commissioner of Indian Affairs, or invested in useful articles.

d. In 1954 an amendment to the Maine Constitution, Me.Const. art. 2, § 1, extended the franchise to Indians. 22 M.R.S.A. § 4831, as amended, P.L.1973, ch. 104, authorizes an official tribal government. This statute provides that each Passamaquoddy reservation shall have a governor, lieutenant governor, and six-man tribal council. It further provides that each reservation shall elect, on an alternate basis, a representative to the State Legislature to serve as the Passamaquoddy representative.

e. 22 M.R.S.A. § 4702, as amended P.L.1971, ch. 544, establishes a Department of Indian Affairs, which is under the control and supervision of the Commissioner of Indian Affairs. 22 M.R.S.A. § 4733, as adopted, P.L.1967, ch. 252, eff. May 8, 1967, provides for the creation of an Indian Housing Authority.

f. Maine has always retained a variety of miscellaneous laws which affect various aspects of Passamaquoddy tribal life. For instance, current Maine statutes permit members of the Tribe to obtain free hunting and fishing licenses, 12 M.R.S.A. § 2401–B(7), as amended, P.L.1973, ch. 92; forbid any person from keeping Indian skeletons or bones for more than a year without returning them to the Tribe for burial, 22 M.R.S.A. § 4720, as adopted, P.L.1973, ch. 788, §§ 95, 96, eff. April 1, 1974; and impose a $250.00 fine upon any person who poses as an Indian for the purpose of vending goods or wares, 22 M.R.S.A. § 4715.

These were a medical certificate stating that petitioner was suffering from tuberculosis, a service memo, and a call-in letter addressed to him in Mexico. He contends that it was error to admit them because they lacked probative value and their authors were not present at the hearing.

Since the documents tended to corroborate a key portion of the statement in Form 1–213, petitioner's return to Mexico in 1961 for health reasons, their relevance is undeniable. Nor does the lack of foundation testimony by live witnesses in a deportation hearing necessitate reversal. *Hernandez v. INS*, 498 F.2d 919, 921 (9th Cir. 1974); *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972). Without evidence to indicate the need to have these witnesses present, we cannot say that their absence was so fundamentally unfair so as to violate due process.

Our standard on review of a deportation order, fixed by 8 U.S.C. § 1105a(a)(4), is limited to determining that the agency's order is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Lavoie*, 418 F.2d at 735. From the Form 1–213 and the corroborative documents it was found that petitioner left the United States in 1961 and re-entered in 1972 without inspection or proper documentation. This finding is supported by substantial, probative evidence and will not be overturned by this court.

[7] Under 8 U.S.C. § 1361, petitioner bore the burden of proof on the issue of legal entry. Since he offered no evidence to rebut the evidence of illegal entry in 1972, the order of deportability must be affirmed.

[8, 9] Petitioner also appeals the denial of the privilege of voluntary departure. 8 U.S.C. § 1254(c). He presented no evidence in support of his eligibility, contending that there existed sufficient information in his administrative file to support the application. The petitioner bears the burden of proof to establish eligibility for voluntary departure. *Khalaf v. INS*, 361 F.2d 208 (7th Cir. 1966). Good moral character of the alien is a prerequisite. Since no evidence of that was presented, it was not an abuse of discretion to deny him the status of voluntary departure.

The petition for review of the Service's order of deportation is denied and the order is affirmed.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants-Appellees,

State of Maine, Intervenor-Appellant.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants-Appellants.

Nos. 75–1171, 75–1172.

United States Court of Appeals, First Circuit.

Argued Sept. 11, 1975.

Decided Dec. 23, 1975.

Action was brought by the joint tribal council of the Passamaquoddy Indian Tribe and the tribe's two governors against federal officials for a declaratory judgment as to the applicability of the Indian Nonintercourse Act to the tribe. The state of Maine intervened as a party defendant. Judgment was given for the Indians in the United States District Court for the District of Maine, Edward Thaxter Gignoux, J., 388 F.Supp. 649, and the state of Maine and federal offi-

cials appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that the Nonintercourse Act applies to the Passamaquoddy Tribe and established a trust relationship between the United States and the tribe. No congressional termination of the guardianship role was shown, and neither the tribe nor the state of Maine would have the right to terminate the federal government's responsibility.

Judgment affirmed.

1. Indians ⇐10

Right to extinguish Indian title is attribute of sovereignty which no state, but only United States, can exercise, and Nonintercourse Act gives statutory recognition to that fact. 25 U.S.C.A. § 177; Act July 22, 1790, 1 Stat. 137; Act Mar. 1, 1793, 1 Stat. 329; Act Mar. 3, 1819, 3 Stat. 516; Act Mar. 3, 1820, 3 Stat. 544.

2. Indians ⇐2

Passamaquoddy Tribe of Indians, though not otherwise federally recognized, is "tribe" within Nonintercourse Act. 25 U.S.C.A. § 177.

See publication Words and Phrases for other judicial constructions and definitions.

3. Indians ⇐6

Congress' power to regulate commerce includes authority to decide when and to what extent it shall recognize particular Indian community as dependent tribe under its guardianship, and Congress has right to determine for itself when guardianship maintained over Indian shall cease, but Congress' power is limited in sense that it may not bring community or body of people within range of its power by arbitrarily calling them an Indian tribe, and may exercise its guardianship and protection only in respect of distinctly Indian communities. 25 U.S.C.A. § 177; U.S.C.A.Const. art. 1, § 8.

4. Indians ⇐7

Voluntary assistance rendered by state to Indian tribe is not necessarily inconsistent with federal protection, and Maine's assumption of duties to Passamaquoddy Tribe did not cut off whatever federal duties existed. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

5. Indians ⇐7

Unwillingness of Congress to furnish aid when requested by Passamaquoddy Indian Tribe did not alone show congressional intention that Nonintercourse Act should not apply. 25 U.S.C.A. § 177.

6. Indians ⇐10

Under Nonintercourse Act, federal government bears trust relationship to Passamaquoddy Indian Tribe; such relationship under the Act pertains to land transactions which are or may be covered by the Act and is rooted in rights and duties encompassed or created by the Act. 25 U.S.C.A. § 177.

7. Indians ⇐6

Once Congress has established trust relationship with an Indian tribe, Congress alone has right to determine when its guardianship shall cease; neither the tribe nor state of Maine, separately or together, has right to make that decision and so to terminate the federal government's responsibilities. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

8. Indians ⇐6

Any withdrawal of trust obligations toward Indian tribe by Congress would have to be plain and unambiguous to be effective. 25 U.S.C.A. § 177.

9. Indians ⇐6

Record in Indian tribe's action against Secretary of the Department of the Interior and other defendants failed to establish that Congress had at any time terminated or withdrawn its protection which had been extended under the Nonintercourse Act. 25 U.S.C.A. § 177.

10. Courts ⇐365(1)

Federal government had no obligation to respond to decision by the Supreme Judicial Court of Maine, which could not affect federal authority with respect to Indian tribe, and federal government's alleged failure to react to such decision was not to be taken by a federal district court as an acknowledg-

ment of such state court ruling. 25 U.S. C.A. § 177.

Martin L. Wilk, Deputy Atty. Gen., with whom Joseph E. Brennan, Atty. Gen., was on brief, for State of Maine, Augusta, Me., appellant.

Edmund B. Clark, Atty., Dept. of Justice, with whom Wallace H. Johnson, Asst. Atty. Gen., Walter Kiechel, Deputy Asst. Atty. Gen., and Edward J. Shawaker, Atty., Dept. of Justice, Washington, D. C., for Rogers C. B. Morton, appellants.

Thomas N. Tureen, Calais, Me., with whom David C. Crosby, Barry A. Margolin, Calais, Me., Stuart P. Ross, Hogan & Hartson, Washington, D. C., Robert S. Pelcyger, Boulder, Colo., and Robert E. Mittel, Portland, Me., were on brief for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

This is an appeal from a declaratory judgment entered in the District Court for the District of Maine. 388 F.Supp. 649, 667 (D.Me.1975).

Plaintiffs are, under Maine law, the political representatives of the Passamaquoddy Indian Tribe ("the Tribe"). 22 M.R.S.A. § 4831 (Supp.1975). They brought this action against the Secretary of the Interior and the Attorney General of the United States after the Secretary refused to initiate a lawsuit against the State of Maine on behalf of the Tribe. Earlier, in a letter to the Commissioner of the Bureau of Indian Affairs, the Tribe had stated the following grievances against Maine and its predecessor, Massachusetts (hereinafter collectively "Maine"): that Maine had divested the Tribe of most of its aboriginal territory in a treaty negotiated in 1794; that Maine had wrongfully diverted 6,000 of the 23,000 acres reserved to the Tribe in that treaty; and that Maine had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and taken away the right of members to vote, from 1924 to 1967. The Tribe had requested the Secretary to sue Maine on its behalf to redress these asserted wrongs before July 18, 1972, the date an action would allegedly be barred.[1] Although the Commissioner of the Bureau of Indian Affairs favored compliance with plaintiffs' request, defendants did not act.

On June 2, 1972, plaintiffs filed this action, seeking a declaratory judgment that the Tribe is entitled to federal protection under the Indian Nonintercourse Act, 25 U.S.C. § 177,[2] and a preliminary injunction ordering defendants to file a protective action on the Tribe's behalf against the State of Maine by July 18, 1972. Defendants persisted in their refusal to sue for the Tribe, relying upon the advice of the Acting Solicitor for the Department of the Interior, who stated,

> "[N]o treaty exists between the United States and the Tribe and, except for

1. 28 U.S.C. § 2415(b) sets forth a special statute of limitations for actions seeking damages resulting from trespass on Indian lands. The time for filing such an action was originally July 18, 1972, but has since been extended by Congress to July 18, 1977. Act of October 13, 1972, P.L. 92–485, 86 Stat. 803.

2. Title 25 U.S.C. § 177 provides as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Maine and Massachusetts which have acted as trustees for the tribal property for almost 200 years.

. . .

. . . . . .

. . . [W]e are aware that the Tribe may thus be foreclosed from pursuing its claims against the State in the federal courts. However, as there is no trust relationship between the United States and this Tribe, . . . the Tribe's proper legal remedy should be sought elsewhere."

After a hearing, the district court ordered defendants to file suit by July 1, 1972, and to include all matters of which the Tribe had complained. In compliance, they instituted *United States v. Maine,* Civil No. 1966 N.D. An appeal from that order was dismissed on motions of both plaintiffs and defendants. Civil No. 1966 N.D. has meanwhile been stayed pending final determination of the present action.

Plaintiffs then filed two amended and supplemental complaints herein, abandoning their request for an injunction and seeking only a declaratory judgment. The State of Maine was allowed to intervene. As finally framed and argued in the district court, the issues were,[3] (1) whether the Nonintercourse Act applies to the Passamaquoddy Tribe; (2) whether the Act establishes a trust relationship between the United States and the Tribe; and (3) whether the United States may deny plaintiffs' request for litigation on the sole ground that there is no trust relationship. The district court ruled in plaintiffs' favor on all points. Both the federal defendants and the State of Maine appeal. We affirm, subject to the qualifications hereinafter stated.

I

The issues in this proceeding can best be understood in light of facts about the Tribe appearing in the parties' stipulation and exhibits and in the district court's comprehensive and scholarly opinion.[4]

The Tribe now resides on two reservations in Washington County in Maine. Its members and their ancestors, as was agreed below, have constituted an Indian tribe in both the racial and cultural sense since at least 1776. Plaintiffs allege that until 1794 the Tribe occupied as its aboriginal territory all of what is now Washington County and certain other land in Maine. In 1777, the Tribe pledged its support to the American Colonies during the Revolutionary War in exchange for promises by John Allan, Indian agent of the Continental Congress, that the Tribe would be given ammunition for hunting, protection for their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, and a clergyman. In addition, an agent would be appointed for their protection and support in time of need. Allan, as Superintendent of the Eastern Indian Agency, reported to the federal government on several occasions in 1783 and 1784 that the Passamaquoddy Tribe had greatly assisted the revolutionary cause and urged Congress to fulfill these promises made on the Government's behalf. Allan also transmitted the views of the Tribe in this regard. However, the Continental Congress failed to act on Allan's recommendations. His appointment was revoked in March 1784, under a resolution revoking the appointments of all Indian Superintend-

3. Plaintiffs also requested in their second amended and supplemental complaint a declaratory judgment that the U.S.Const. art. I, §§ 8 and 10, and art. II, § 2, are applicable to the Tribe. Relief along these lines was not pursued below and is not now an issue.

4. Plaintiffs' contentions that the Department of the Interior has wrongfully turned its back on the Tribe, and that federal guardianship must replace that of the State, are elaborated in detail in O'Toole & Tureen, *State Power and the Passamaquoddy Tribe; "A Gross National Hypocrisy?",* 23 Me.L.Rev. 1 (1971).

ents. In 1790, the First Congress adopted the Indian Nonintercourse Act.[5]

In 1792, the Passamaquoddy Tribe petitioned Massachusetts for land upon which to settle, and Massachusetts appointed a committee to investigate, one member of which was the same John Allan. Allan reported that during the Revolutionary War the Passamaquoddy Tribe had given up its claims to lands known to be its haunts on the condition that the United States would confirm its "ancient spots of ground" and a suitable tract for the use of both the Tribe and all other Indians who might resort there. Soon after, in 1794, Massachusetts entered into an agreement, also referred to as a treaty, with the Passamaquoddy Tribe by which the Tribe relinquished all its rights, title, interest, claims or demands of any lands within Massachusetts in exchange for a 23,000 acre tract comprising Township No. 2 in the first range, other smaller tracts, including ten acres at Pleasant-point, and the privilege of fishing on both branches of the Schoodic River. All pine trees fit for masts were reserved to the state government for a reasonable compensation. An additional ninety acres at Pleasant-point were later appropriated to the use of the Tribe by Massachusetts in 1801.

Since 1789, Massachusetts and later Maine have assumed considerable responsibility for the Tribe's protection and welfare. Maine was a District of Massachusetts until 1819, when it separated from Massachusetts under the Articles of Separation, Act of June 19, 1819, Mass. Laws, ch. 61, p. 248, which were incorporated into the Maine Constitution as Article X, Section 5. The Articles provided that Maine "shall . . . assume and perform all the duties and obligations of this Commonwealth [Massachusetts], towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise . . . ." Maine was thereafter recognized by Congress and admitted to the Union. Act of March 3, 1820, ch. 19, 3 Stat. 544. The Maine Constitution, with the above quoted provision relating to the Indians, was read in the Senate, referred to committee, and finally declared by Congress to be established in the course of the admission proceedings.

Since its admission as a state, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. This legislation includes 72 laws providing appropriations for or regulating Passamaquoddy agriculture; 33 laws making provision for the appropriation of necessities, such as blankets, food, fuel, and wood, for the Tribe; 85 laws relating to educational services and facilities for the Tribe; 13 laws making provision for the delivery of health care services and facilities to the Tribe; 22 laws making allowance for Passamaquoddy housing; 54 laws making special provision for Indian indigent relief; 54 laws relating to the improvement and protection of roads and water on the Passamaquoddy reservation; and 15 laws providing for the legal representation of the Tribe and its members.

In contrast, the federal government's dealings with the Tribe have been few. It has never, since 1789, entered into a treaty with the Tribe, nor has Congress ever enacted any legislation mentioning the Tribe. In 1824, the Department of War contributed funds to the Tribe, one-third toward the construction of a school, pursuant to an act for the civilization of Indian tribes. Act of March 3, 1819, 3 Stat. 516. It also gave money annually

5. The first Nonintercourse Act, 1 Stat. 137, 138, provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This was amended in 1793, 1 Stat. 329, 330: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution." Subsequent amendments have made no major changes and the present version was enacted in 1834. (*See* note 2 *supra*.)

from 1824 to 1828 under the same act to Elijah Kellogg of the Society for the Propagation of the Gospel Among the Indians, to support a school for the Tribe. The funds were granted at the request of the State of Maine, were channeled through the State, and were subject to State controls. Kellogg, according to one nineteenth century source, was himself sent to the Tribe as a schoolmaster by the State of Maine, and as a missionary by the Missionary Society of Massachusetts. These funds were withheld during 1829 because of intra-tribal differences concerning the religion of the Superintendent of the school and, as a result, two principal men of the Tribe, Deacon Sockbason and Sabattis Neptune, went to Washington to meet with Thomas L. McKenney, Director of the Office of Indian Affairs, and John H. Eaton, Secretary of War, to seek reinstatement of the school funds and additional money to hire a priest and to purchase a parcel of land. Money was again appropriated for the school and the priest in 1830, although discontinued after 1831 on account of the same intra-tribal differences. However, despite a request from President Jackson, Congress failed to appropriate any money to purchase land for the Tribe. After the school funds were again suspended during 1831 because of the same sectarian strife, the Tribe requested that the funding be reinstated and used for the improvement of the Tribe's agriculture; this request was also denied and the funding was never resumed. During the period from 1899 to 1912, five members of the Tribe attended the Carlisle Indian School for short periods of time. A member of the Tribe also graduated from Haskel Indian College in 1970. Since 1965, various federal agencies other than the Department of the Interior have provided funds to the Tribe under federal assistance programs available to all citizens meeting the requirements of the program. Some of these funds were taken from special Indian allocations or were administered by special Indian desks within the various agencies. In 1966, the General Counsel to the Department of Housing and Urban Development, writing to the Commissioner of the Maine Department of Indian Affairs in regard to the establishment of public housing authorities by the governing councils of the Passamaquoddy and Penobscot Tribes, stated in part that "[i]t is our understanding that these tribes do not have any governmental powers in their own right or by virtue of any federal law. . . . "

In 1968, the Tribe brought suit against the Commonwealth of Massachusetts in the Massachusetts state courts alleging that the Commonwealth, with the consent of the federal government, assumed jurisdiction over and responsibility for the Tribe and that by the act admitting Maine into the Union, Congress confirmed and ratified that relationship.

II

The central issue in this action is whether the Secretary of the Interior was correct in finding that the United States has no "trust relationship" with the Tribe and, therefore, should play no role in the Tribe's dispute with Maine. Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address. The district court held only that defendants "erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Tribe." It was left to the Secretary to translate the finding of a "trust relationship" into concrete duties.

Over the years, the federal government has recognized many Indian tribes, specifically naming them in treaties, agreements, or statutes. The general notion of a "trust relationship," often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes, *see Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Cherokee Nation v. Georgia,* 30

U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831); and the cases cited in the district court's opinion, 388 F.Supp. at 662–63. It is the defendants' and the intervenor's contention here that such a relationship may only be claimed by those specifically recognized tribes.

The Tribe, however, contends otherwise. It rests its claim of a trust relationship on the Nonintercourse Act, enacted in its original form by the First Congress in 1790 to protect the lands of "any . . . tribe of Indians." Plaintiffs argue, and the district court found, that the unlimited reference to "any . . . tribe" must be read to include the Passamaquoddy Tribe as well as tribes specially recognized under separate federal treaties, agreements or statutes. As the Act applies to them, plaintiffs urge that it is sufficient to evidence congressional acknowledgement of a trust relationship in their case at least as respects the Tribe's land claims.

Before turning to the district court's rulings, we must acknowledge a certain awkwardness in deciding whether the Act encompasses the Tribe without considering at the same time whether the Act encompasses the controverted land transactions with Maine. Whether the Tribe is a tribe within the Act would best be decided, under ordinary circumstances, along with the Tribe's specific land claims, for the Act only speaks of tribes in the context of their land dealings. If that approach were adopted here, however, the Tribe would be deprived of a decision in time to do any good on those matters cited by the Department of the Interior as reasons for withholding assistance in litigation against Maine. And without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims. Given, in addition, the federal government's protective role under the Nonintercourse Act, see below, it is appropriate that plaintiffs and the federal government learn how they stand on these core matters before adjudication of the Tribe's dispute with Maine.

Yet the resulting bifurcation of decision necessarily restricts the reach of the present rulings. In reviewing the district court's decision that the Tribe is a tribe within the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions with Maine. When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.

Now, however, for purposes of the issues currently existing between themselves and the federal government, plaintiffs are entitled to declaratory rulings on the basis of which courses can be charted and actions planned and taken.

A. *Is the Passamaquoddy Tribe a "tribe" within the Nonintercourse Act?*

[1] The district court found the Passamaquoddy Tribe to be within the language of the Nonintercourse Act, "any . . . tribe of Indians." It read the quoted language as encompassing all tribes of Indians. The court reasoned that the Act should be given its plain meaning, there being no evidence of any contrary congressional intent, legislative history, or administrative interpretation; that the policy of the United States is to protect Indian title;[6] that there is no reason why the Passamaquoddy Tribe should be excluded since it is stipulated

6. Indian title, also called "right of occupancy," refers to the Indian tribes' aboriginal title to land which predates the establishment of the United States. *See, e. g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). The right to extinguish Indian title is an attribute of sovereignty which no state, but only the United States, can exercise, the Nonintercourse Act giving statutory recognition to that fact. *Id.* at 667, 670, 94 S.Ct. 772; *O'Toole & Tureen, supra* note 4, at 25–26.

to be a tribe racially and culturally; that there is no requirement that a tribe must be otherwise recognized by the federal government to come within the Nonintercourse Act; and that even if "tribe" is thought to be ambiguous, it should be construed non-technically and to the advantage of Indians so as to include the Passamaquoddy Tribe.

[2, 3] Intervenor and defendants contend that "any . . . tribe of Indians" is ambiguous; that its proper meaning is a community of Indians which the federal government has at some time specifically recognized; and that the Passamaquoddy Tribe is, in that sense, not a tribe. "No court", says intervenor, "has ever held a statute regulating trade and intercourse with Indians to apply to a tribe which the Federal Government disavows any relationship with. . . ."

But while Congress' power to regulate commerce with the Indian tribes, U.S. Const. art. I, § 8, includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship,[7] *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913), Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized.[8] Nor, as the district court found, is there evidence of congressional intent or legislative history squaring with appellants' interpretation. Rather we find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941), *rehearing denied*, 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1942), and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584, *rehearing denied*, 362 U.S. 956, 80 S.Ct. 858, 4 L.Ed.2d 873 (1960); *United States v. Candelaria*, 271 U.S. 432, 441, 46 S.Ct. 561, 70 L.Ed. 1023 (1926). Since Indian lands have, historically, been of great concern to Congress, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully.

This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs." *United States v. Sandoval*, 231 U.S. at 47, 34 S.Ct. at 6, *quoting United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865). But the Passamaquoddies were a

7. Congress also has "a right to determine for itself when the guardianship which has been maintained over the Indian shall cease." *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913). On the other hand, Congress' power is limited in the sense that it may not bring "a community or body of people within the range of [its] . . . power by arbitrarily calling them an Indian tribe," and may exercise its guardianship and protection only "in respect of distinctly Indian communities." *Id.* It having been stipulated, however, that the Passamaquoddy Tribe is a tribe in both the racial and cultural sense, there is no question that the Tribe is a "distinctly Indian" community.

8. In *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), the Supreme Court, *quoting Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901), read "Indian tribe," as used in the Nonintercourse Act of 1834, 25 U.S.C. § 177, to mean "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." The Tribe plainly fits that definition.

tribe before the nation's founding and have to this day been dealt with as a tribal unit by the State.[9] *See* 22 M.R.S.A. ch. 1355. No one in this proceeding has challenged the Tribe's identity as a tribe in the ordinary sense. Moreover, there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddies' tribal status, apart, that is, from the simple lack of recognition. Under such circumstances, the absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a "tribe" within the Act.

Intervenor cites two cases dealing with the Pueblo Indians of New Mexico for its contention that "tribe" refers only to tribes that have been federally recognized. *United States v. Candelaria, supra*; *United States v. Joseph*, 94 U.S. 614, 24 L.Ed. 295 (1876). In *Joseph*, the Supreme Court found that the Pueblo Indians were not a tribe within the Nonintercourse Act, apparently because of their high degree of civilization and the nature of their earlier relations with the Government of Mexico when they had been under its control.[10] In *Candelaria*, the Court held that the Pueblos did come within the Act, though it did not expressly overrule the *Joseph* view that some tribes, because highly civilized or otherwise, might conceivably be exempt. The Court found that the Pueblos were a simple, uninformed people such as the Act was intended to protect and pointed to federal recognition in the past as evidencing Congress' intention to protect the Pueblos. 271 U.S. at 440–42, 46 S.Ct. 561. These cases lend little aid to intervenor and defendants. The cases do, it is true, suggest that the Act's coverage is limited to tribes consisting of "simple, uninformed people," an interpretation understandable in light of the Act's protective purpose. But it is not claimed that the Tribe and its members are so sophisticated or assimilated as to be other than those entitled to protection. *Cf. Joseph, supra. Candelaria* is cited mainly in support of intervenor's argument that the Act requires federal recognition, but it does not elevate recognition to a *sine qua non*; it merely indicates that if there is a question of inclusion, federal recognition of dependent, tribal status may be helpful evidence of Congress' intent.

[4, 5] Appellants also assert that there is significance to Congress' approval of the Articles of Separation between Maine and Massachusetts, providing that Maine would assume the duties and obligations which Massachusetts owed to the Indians. But, as the district court recognized, Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed. Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection. *See State v. Dibble*, 62 U.S. (21 How.) 366, 16 L.Ed. 149 (1858). Similarly, Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Nonintercourse Act should not apply. (*See* Part II, C *infra*.) The reasons behind Congress' inaction are too problematic for the matter to have meaning for purposes of statutory construction. *Cf. Order of Railway Conductors v. Swan*, 329 U.S. 520, 529, 67 S.Ct. 405, 91 L.Ed. 471 (1947).

9. In *State v. Newell*, 84 Me. 465, 24 A. 943 (1892), it is true, the Maine court disputed the continued viability of the Tribe, apparently on the grounds that its sovereignty, such as the power to make war or peace, and the like, had vanished, and the political and civil rights of its members were enforced only in the courts of the State. Nonetheless that court did acknowledge the Passamaquoddies' tribal organization for certain purposes, *id.* at 468, 24 A. 943, and no federal cases hold that the test of tribal existence for purposes of the Act turns on whether a given tribe has retained sovereignty in this absolute sense.

10. The Pueblos had submitted to all laws of the Mexican Government, their civil rights had been fully recognized, and they had been absorbed into the "general mass of the population." *United States v. Joseph*, 94 U.S. 614, 617, 24 L.Ed. 295 (1876).

We have considered appellants' remaining arguments carefully and find them unpersuasive. We agree with the district court that the words "any . . . tribe of Indians" appearing in the Act include the Passamaquoddy Tribe.

B. *Is there a trust relationship between the Passamaquoddy Tribe and the federal government?*

[6] The district court found that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddy Tribe. It relied on a series of decisions by the Court of Claims, *Fort Sill Apache Tribe v. United States*, 201 Ct.Cl. 630, 477 F.2d 1360 (1973); *United States v. Oneida Nation of New York*, 201 Ct.Cl. 546, 477 F.2d 939 (1973); *Seneca Nation v. United States*, 173 Ct.Cl. 917 (1965), while also finding support in an extensive body of cases holding that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe. *See, e. g., Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Worcester v. Georgia, supra.*

We agree with the district court's conclusions and in large part with its reasoning and analysis of legal authority. That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion. The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 348, 62 S.Ct. 248, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.

We emphasize what is obvious, that the "trust relationship" we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities; and we of course do not rule out the possibility that there are statutes or legal theories not now before us which might create duties and rights of unforeseen, broader dimension. But on the present record, only the Nonintercourse Act is the source of the finding of a "trust relationship," and neither the decision below nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe.

Once this is said, there is little else left, since it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship. This dispute arises merely from the defendants' flat denial of any trust relationship; no question of spelling out specific duties is presented. It is now appropriate that the departments of the federal government charged with responsibility in these matters should be allowed initially at least to give specific content to the declared fiduciary role.

Thus we are not moved by intervenor's criticism of the lower court's interpretation of cited Court of Claims cases, for those arguments go more to the scope of the federal government's duties under particular circumstances than to the existence of a trust relationship. Nor are we moved by intervenor's other complaint that the judgment below implies some sort of overly "general" fiduciary relationship, unlimited and undefined. A fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties; but, as we have held, the Nonintercourse Act is such a statute.

We affirm, on the basis set forth herein, the finding of a trust relationship and the finding that the federal government may not decline to litigate on the sole ground that there is no trust relationship.

C. *Are plaintiffs precluded by acquiescence or by congressional termination of its guardianship role from now asserting a trust relationship with the federal government?*

[7] Intervenor also contends that, under general equitable principles, the Tribe should be precluded from now invoking a trust relationship with the federal government because of its long-standing relationship with the State of Maine. However, once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *United States v. Nice*, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S.Ct. 578, 55 L.Ed. 738 (1911). Neither the Passamaquoddy Tribe nor the State of Maine, separately or together, would have the right to make that decision and so terminate the federal government's responsibilities.[11]

[8, 9] We turn, then, to whether Congress itself has manifested at any time a determination that its responsibilities under the Nonintercourse Act should cease with respect to the Tribe. The district court cited a rule of construction that statutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians would naturally understand them, and never to the Indians' prejudice. *Antoine v. Washington*, 420 U.S. 194, 199–200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930). We agree with the district court that any withdrawal of trust obligations by Congress would have to have been "plain and unambiguous" to be effective.[12] We also agree that there is no affirmative evidence that Congress at any time terminated or withdrew its protection under the Nonintercourse Act. The federal government has been largely inactive in relation to the Tribe and has, on occasion, refused requests by the Tribe for assistance. Intervenor argues that this course of dealings is sufficient in and of itself to show a withdrawal of protection. However, refusing specific requests is quite different from broadly refusing ever to deal with the Tribe, and, as stated above, there is no evidence of the latter.

[10] Intervenor also points to a decision by the Supreme Judicial Court of Maine, *State v. Newell,* 84 Me. 465, 24 A. 943 (1892), which found that the Passamaquoddy Tribe has never been recognized by the fedeal government, and argues that the federal government's failure to react to that decision by recognizing the Tribe in some way amounts to an acknowledgement of that ruling. However, the federal government had no obligation to respond to the state court's decision, which could not affect federal authority with respect to the Tribe. *See Oneida Indian Nation v. County of Oneida, supra.*

We accordingly affirm the district court's ruling that the United States never sufficiently manifested withdrawal of its protection so as to sever any trust relationship. In so ruling, we do not foreclose later consideration of whether Congress or the Tribe should be deemed

11. One might argue that, although Congress has not terminated this relationship, the Tribe's own course of dealings with the State of Maine still prevent it from asking Congress for assistance. However, the Indians' presumed helplessness is at the heart of the guardian-ward analogy; to deny the ward a right to call upon the guardian for protection would be to deny that he was incapable of looking out for himself.

12. The Supreme Court has said with respect to the termination of Indian reservations that it will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court,* 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions with Maine.

Judgment affirmed.

UNITED STATES of America, Plaintiff-Appellee,

v.

Alvin WILLIS, Jr., Defendant-Appellant.

No. 75-3009.

United States Court of Appeals, Ninth Circuit.

Jan. 12, 1976.

The United States District Court for the Eastern District of California, Thomas J. MacBride, Chief Judge, found defendant guilty of interstate transportation of a forged security, and he appealed. The Court of Appeals held that where defendant knowingly and fraudulently deposited a forged check drawn on a Texas bank in his California bank account knowing that the signature of the drawer was forged, and where he drew the money after the forged check cleared the Texas bank, he was properly found guilty of interstate transportation of a forged security, even though the fruition of the alleged scheme occurred after the mails were utilized.

Affirmed.

1. Receiving Stolen Goods ⇐1

Where defendant knowingly and fraudulently deposited a forged check drawn on a Texas bank in his California bank account knowing that the signature of the drawer was forged, and where he drew the money after the forged check cleared the Texas bank, he was properly found guilty of interstate transportation of a forged security, even though the fruition of the alleged scheme occurred after the mails were utilized. 18 U.S. C.A. § 2314.

2. Receiving Stolen Goods ⇐1

Mail fraud statute's peculiar language, i. e., that use of the mails be for the purpose of executing a fraudulent scheme, is not an element of the crime of interstate transportation of a forged security; all that the interstate transportation statute requires is that defendant either transport or cause to be transported in interstate commerce the forged security knowing it was forged. 18 U.S. C.A. § 2314.

Jerome S. Stanley, Sacramento, Cal., for defendant-appellant.

Bruce Babcock, Jr., Asst. U. S. Atty., Sacramento, Cal., for plaintiff-appellee.

OPINION

Before CHOY and KENNEDY, Circuit Judges, and WONG,* District Judge.

PER CURIAM:

On stipulated facts, Defendant was found guilty of interstate transportation of a forged security. We affirm.

He contends here that *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974) bars his conviction because the fruition of the alleged scheme occurred after the mails were utilized. (In *Maze*, a case under the mail fraud statute, 18 U.S.C. § 1341, the mailing occurred after the fraud was consummated so the Court held that the use of the mails had not been "for the purpose of executing such [fraudulent] scheme or artifice" as the statute required.)

[1] Here the essential stipulated facts were that Willis knowingly and fraudu-

* The Honorable Dick Yin Wong, United States District Judge, District of Hawaii, sitting by designation.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

FINAL DRAFT
(PASSAMAQUODDY) 1/10/77

Honorable Peter R. Taft
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Attention: Mr. Myles E. Flint
Acting Chief,
Indian Resources Division

Dear Mr. Taft:

This is the litigation report in the case of United States v. Maine, Civil No. 1966 N.D., U.S.D.C., D. Maine, the Indian Nonintercourse Act claim of the Passamaquoddy Tribe. Our report on the similar claim of the Penobscot Nation will soon follow.

In our letter of June 28, 1976 to you in this matter, we indicated that it is now our view that it is settled that the Indian Nonintercourse Act (25 U.S.C. § 177) established a trust relationship between the federal government and the Passamaquoddy Tribe with regard to tribal lands under the coverage of the Act. This position was of course compelled by the decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st. Cir. 1975). We also offered the view that the Tribe can present substantial evidence that a large part of its aboriginal territory was taken in violation of the Nonintercourse Act. Much of that evidence is contained in the enclosed report [Appendix A] prepared by a team of experts who are available to testify in support of the opinions and conclusions stated therein. (Photocopies of the source materials for the report are enclosed as Appendix B.) Other experts in the field have also been retained, and they are conducting further research in preparation for a possible trial in this case.

During the preparation of this litigation report the Attorney General of the State of Maine asked for the opportunity to submit a memorandum offering his view that the claims of both the Passamaquoddy Tribe and the Penobscot Nation are without merit. He also requested from us any materials we might have in support of the Tribe's claims. In November after consulting with you and members of your staff, we agreed to offer the Maine Attorney General summaries of the historical evidence supporting the claims. We have since been provided with memoranda presenting the State's position, and they are enclosed here as Appendix C. It is our view that the State's arguments do not provide us with any basis to regard the Tribes' claims as without merit. Enclosed is a memorandum from the Acting Associate Solicitor for Indian Affairs [Appendix D] reviewing the materials provided by the State.

As you know, copies of this report and the Penobscot report are being made available to the State in the interest of a better understanding of the position of the United States in this controversy. The Maine Attorney General has asked for the opportunity to comment on our reports, and because of the serious consequences to Maine which may result from pursuit of this litigation, we recommend that you provide such an opportunity within the limitations of the court-ordered and statutory deadlines which you face.

ANALYSIS

A. Elements of a Cause of Action for Recovery of Indian Land.

A prima facie case for recovery of Indian land taken in violation of the Nonintercourse Act is established by a showing that:

(1) the claimant is a "tribe of Indians" within the meaning of the Act;

(2) the land claimed is covered by the Act as tribal land;

(3) the United States has never consented to its alienation; and

(4) the trust relationship between the United States and the tribe, which was established by the coverage of the Act, has never been terminated.

Narragansett Tribe of Indians v. Murphy, C.A. No. 750005, U.S.D.C., D.R.I., opinion entered June 23, 1976, at p. 9 (enclosed as Appendix E).

Two of the elements of such a cause of action require little discussion. The fourth listed element presents a settled matter of law with regard to the Passamaquoddy Tribe. The First Circuit Court of Appeals has already determined that Congress has never withdrawn Nonintercourse Act protection. 528 F.2d at 380. And the first element is a simple matter of proof. As mentioned in our June 28 letter, no persuasive evidence can be offered to dispute the fact that the Passamaquoddies constitute an Indian tribe in the racial and cultural sense, and that they are therefore a "tribe" within the meaning of the Act. This issue receives comprehensive treatment in Section II of Appendix A. Thus, our principal inquiries are whether the land claim area is covered by the Act and whether the United States consented to any alienation of those lands. The Court of Appeals specifically declined to rule on these issues. Id. at 376, 380.

B. Passamaquoddy Lands Covered by the Nonintercourse Act

The policy behind the Nonintercourse Act applies to Indian lands whether or not the Indian title thereto is based upon treaty, statute, or other formal government action. United States as Guardian of the Walapai Tribe v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941), rehearing denied 314 U.S. 716 (1942); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d at 377. The Passamaquoddy claim is one based on aboriginal title unrecognized by any formal

action. The legal nature of such title is the subject of numerous Supreme Court opinions, and it is treated in the enclosed memorandum of Tim Vollmann of this office. [Appendix F] It should be noted that the concept of aboriginal title and the principle of its inalienability predate the 1790 enactment of the Nonintercourse Act. Indeed, the Supreme Court decisions of the early nineteenth century rarely cite the Act, but instead recognize aboriginal title as a principle of international law dating back to the European "discovery" of the American continents. For further background we suggest reference to the Vollmann memorandum.

Proof of aboriginal title is established by a showing of actual, exclusive, and continuous use and occupancy of lands for a long period of time. Sac and Fox Tribe v. United States, 315 F.2d 896, 903 (Ct. Cl. 1963), cert. denied 375 U.S. 921 (1963). Use and occupancy is determined by reference to the way of life, habits, customs, and usages of the Indians. Sac and Fox Tribe v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967). And it has been held that "the 'use and occupancy' essential to the recognition of Indian title does not demand actual possession of the land, but may derive through intermittent contacts [citation] which define some general boundaries of the occupied land . . . ." United States v. Seminole Indians, 180 Ct. Cl. 375, 385 (1967) [emphasis in original]. Section III A of Appendix A presents detailed documentary evidence in support of an aboriginal Passamaquoddy claim to five watersheds in eastern Maine, an area of over two million acres. Such historical evidence, including expert testimony, is regularly relied upon in Indian claims cases to establish aboriginal title. See e.g., Snake or Piute Indians v. United States, 112 F. Supp. 543, 552 (Ct. Cl. 1953); Confederated Tribes of the Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 201-02 (1967).

We have experts prepared to testify that the area covered by the St. Croix, Dennys, Machias, Narraguagus, and Union watersheds, and the adjacent coastline and islands, were all part of the exclusive aboriginal territory of the

Passamaquoddy Tribe. However, it has been suggested that Passamaquoddy aboriginal use of the western watersheds was not exclusive, and that the Tribe's aboriginal title therefore cannot be established. This suggestion arises principally from references in the journals of Col. John Allan during the Revolutionary War. Allan refers to the presence of Penobscots and other Indians in this area alongside the Passamaquoddies in their campaign against the British. F. Kidder, Military Operations in Eastern Maine and Nova Scotia during the Revolution (1867) at pp. 305-313. Our experts are of the view that the presence of these other Indians in Passamaquoddy territory is primarily attributable to Allan's efforts to recruit them for the defense of eastern Maine, and that they returned to their own territories after the war. There may also have been some intermarriage between the tribes during the period of the alliance. That would account for some Indians remaining behind and becoming members of the Passamaquoddy Tribe by virtue of marriage or other kinship ties. But this would not defeat the exclusive occupancy of the Tribe. 1/

C. Consent of the United States

The Nonintercourse Act provides that once the tribe "make[s] out a presumption of [Indian] title . . . from the fact

1/ It should be noted that even if it were found that certain portions of this territory were used and occupied jointly by the Passamaquoddies and other Indians, this would not necessarily defeat aboriginal title. The Court of Claims has held on several occasions that two or more closely related Indian groups might inhabit a region in joint and amicable possession and retain joint aboriginal title thereto. See e.g., United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394-96 (1975).

of previous possession," the burden is on the non-Indian defendants to show that aboriginal title was extinguished. 25 U.S.C. § 194. And, of course, under the Act the consent of the United States is required to perfect such extinguishment. Section III B of Appendix A documents the history of the Passamaquoddy Tribe's ouster from possession of their aboriginal lands. In short, most of that territory was lost as a result of a 1794 treaty with the Commonwealth of Massachusetts. That treaty did set aside roughly 23,000 acres in parcels as reservations within the Tribe's territory. But 8,100 acres of this land was later conveyed away as well. It appears evident that Congress never consented to the alienation of any Passamaquoddy territory in accordance with the Nonintercourse Act, either by ratifying the 1794 treaty or otherwise.

We are in the process of compiling a file of copies of those deeds, grants, and other conveyance instruments (including the 1794 treaty) which purported to transfer Passamaquoddy territory out of tribal hands, and will forward this file to you when it has been completed. We have already reviewed these documents, and it suffices to say that there is no indication on their face that the federal government participated in any of those transactions.

Nonetheless, the State of Maine will undoubtedly claim that Congressional approval of the 1819 Articles of Separation establishing Maine as a state separate from Massachusetts amounted to federal ratification of all earlier conveyances. 3 Stat. 544 (1820). (See pp. 21-37 of the memorandum to Maine Governor Longley in Appendix C.) A similar contention was made by the State as intervenor during the Tribe's suit against the Department. Reliance was placed on the following provision in the Articles:

> "[Maine] shall . . . assume and perform all the duties and obligations of [Massachusetts] towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise . . . ."

Maine Const., Art. X, sec. 5. Thus, it was argued that Congressional endorsement of the Articles amounted to a termination of all federal responsibilities to the Passamaquoddies. However, the First Circuit rejected this argument, holding Congress' action was no more than approval of Maine's voluntary assumption of certain responsibilities to the Indians. 528 F.2d at 378. An argument that Congress' ratification of the Articles effectively extinguished the Tribe's aboriginal claims is, if anything, substantially weaker than the proposition already put forward. Indian lands are not even mentioned in the Articles. Moreover, the courts have often held that Congressional extinguishment of Indian title "cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." Walapai Tribe, supra, 314 U.S. at 354. 2/ For further discussion of this and related arguments made by the State, please refer to Appendix D.

D. Defenses

Due to the antiquity of the Tribe's claims, we may anticipate that the defendants will attempt to raise state law defenses such as limitations, laches, and estoppel. The United States is of course immune from such defenses, whether it is suing on behalf of its Indian wards or on its own behalf. United States Immigration and Naturalization Service v. Hibi, 414

2/ Attorneys for the State of Maine have cited Seneca Nation v. United States, 173 Ct. Cl. 912 (1965), as authority for the proposition that Congress can impliedly ratify a conveyance of Indian lands. However, that case involved an act of Congress which specifically referred to the transaction which was claimed to have violated the Nonintercourse Act. Id. at 915. We are aware of no Congressional act which even mentions the Passamaquoddy Tribe by name, much less refers to the conveyance of any Passamaquoddy lands.

U.S. 5, 8 (1973); United States v. Minnesota, 270 U.S. 181, 196 (1926). And a federal district court recently granted a tribe's motion to strike such defenses to its aboriginal land claim even though the United States was not a party to the suit. Narragansett Tribe of Indians v. Murphy, supra. However, a federal statute of limitation with regard to actions to recover damages for trespass on behalf of an Indian tribe is due to run on July 18, 1977. 28 U.S.C. § 2415(b). Thus, it behooves the United States to file any such claims on behalf of the Passamaquoddies before that date. Our recommendation on the relief to be sought in this case is discussed below.

It may also be expected that Maine will contend that Passamaquoddy title was extinguished prior to enactment of the Nonintercourse Act. In support of that contention reliance would be placed on statements made by John Allan in 1792 that the Tribe had given up its land during the War of Revolution. However, as the discussion in Appendix A indicates, those statements are inconsistent with contemporary documentation, including the earlier statements of Allan himself. In addition, the context of these statements was a proposed treaty between the Tribe and the Continental Congress, and there is no evidence that the Congress ever took any action on the proposal.

Because there was some non-Indian settlement in Passamaquoddy territory prior to 1790, it may be argued that the Tribe voluntarily abandoned certain portions of the region and thus relinquished its claims to those portions. This argument might be advanced together with the theory, discussed in the preceding paragraph, that the Tribe gave up all its territory during the War of Revolution. As a factual matter, the areas from which the Passamaquoddies may have departed prior to 1790 are relatively small. Settlement appears to have been limited mainly to coastal outposts. (See Heads of Families-Maine, U.S. Census (1790) at p. 9. The townships with recorded populations may be plotted on a map in J. Sullivan, History of the District of Maine (1795).) Even so, it has been held that white encroachment, by itself, does not effect

an abandonment of Indian title. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 947 (Ct. Cl. 1974). The Indians must have demonstrated a "plain intent" or a "clear intention" to unreservedly give up their lands. Walapai Tribe, supra, 314 U.S. at 354; Healing v. Jones, 210 F. Supp. 125, 134 (D. Ariz. 1962). Neither non-use alone, nor the lapse of time, can extinguish an aboriginal claim. Fort Berthold Indians v. United States, 71 Ct. Cl. 308, 334 (1930); see also Strong v. United States, 518 F. 2d 556, 565 (Ct. Cl. 1975), Healing v. Jones, supra.

In an October 7, 1976 letter to your office Maine Deputy Attorney General John Paterson argued along this same line that the decision in Williams v. City of Chicago, 242 U.S. 434 (1917), is authority for the proposition that the Passamaquoddy Tribe has since abandoned its land claims. That case involved a treaty cession to the United States. The lands ceded were described in the treaty as being bounded by the shores of Lake Michigan. Many years later some of the lakebed was reclaimed and annexed as part of downtown Chicago. This suit was an enterprising attempt by eight Pottawatomie Indians, who then lived in the State of Michigan, to quiet title to the reclaimed area. However, the Supreme Court held that the Pottawatomies had long before voluntarily abandoned their claim to the lakebed. The Passamaquoddy claim differs from Williams in at least one substantial respect: the Passamaquoddies gave up possession of their lands by means of conveyances in violation of the Nonintercourse Act. To hold that such action amounted to an effective abandonment of their lands would render the Act a nullity. Such logic would validate any tribal conveyance made without federal consent.

In defense against the Passamaquoddy claim it may also be expected that certain land grants made prior to enactment of the Nonintercourse Act will be offered as proof of the extinguishment of Passamaquoddy title. Between 1762 and 1776 a number of townships along the southeastern Maine coast were included in grants made by the Massachusetts Bay Colony. However, those grants recited that they would "be void and of none effect, unless the Grantees do obtain

his Majesty's Confirmation of the same in eighteen months from this Time," and they were never perfected by royal confirmation. Indeed, it has been suggested that the inhabitants of the unsanctioned settlements in Passamaquoddy territory joined the patriots' cause during the war for the very reason that royal confirmation had never been forthcoming. Note further that, like the Nonintercourse Act, British colonial law provided that Indian title could not be extinguished without the consent of the sovereign. Mitchel v. United States, 34 U.S. 711 (1835).

After independence, beginning in 1784, the Commonwealth of Massachusetts purported to confirm a few of the unratified grants made during the colonial period, principally in or adjacent to the Union and Narraguagus watersheds. The Commonwealth also granted a dozen more townships along the Atlantic Coast and adjacent to Passamaquoddy Bay. In addition, pursuant to a 1786 Resolve, Massachusetts offered 50 inland townships in Passamaquoddy territory for sale by lottery, an area of approximately 1.1 million acres. However, only a fraction of this area was disposed of prior to 1790. The bulk of the lottery offering was deeded to one William Bingham in 1793. We are in the process of compiling a comprehensive file on these early transactions, and will provide it when it is complete.

It is not completely clear what the intended effect of the 1784-1790 conveyances was. None of the instruments of conveyance mention Indian title or recite, in so many words, that a fee simple absolute title is being conveyed. Indeed, a number of the grants were subject to conditions subsequent regarding diligent settlement. The Passamaquoddy Tribe--or any other Indian or Indian tribe, for that matter--was not a party to any of these conveyances. Thus, they may have been mere conveyances of Massachusetts' preemptive fee title, subject still to the Indians' right of use and occupancy. Or Massachusetts may have intended to extinguish Indian title.

If the latter view is determined to be correct, we are of the opinion that Massachusetts nevertheless had no authority to make grants of Indian lands before 1790 without the

consent of the United States. Persuasive arguments can be made for the proposition that the law regarding extinguishment of aboriginal title was little or no different during the period of the Confederation than it was after the enactment of the Nonintercourse Act. As mentioned supra at page 4, early precedent relies not on the Act but on universally understood principles of aboriginal title. Statutory law during that period was also very similar to the Nonintercourse Act. For further discussion of this subject, please refer to Appendix D. In any event, it should be pointed out that the validity of pre-1790 conveyances is important at this time only for purposes of determining the scope of the Passamaquoddy claim. It is clear that hundreds of thousands of acres remained in Passamaquoddy hands as of the date of enactment of the Nonintercourse Act.

RECOMMENDATION

Enclosed is a proposed amended complaint for discussion purposes. [Appendix G] It is intended to be illustrative only. As we indicated in our June 28 letter, the four-page protective complaint filed over four years ago is obviously insufficient. It does little more than recite the Nonintercourse Act, allege the invalidity of the cession of tribal lands made in the 1794 treaty, and pray for damages of $150 million from the State of Maine. 3/ In addition, it contains superfluous references to voting rights and other matters unrelated to the Passamaquoddy aboriginal claim.

The proposed complaint seeks ejectment of all persons in possession of the Tribe's aboriginal lands as defined by the boundaries of five watersheds in eastern Maine (map

3/ Paragraph 7 of the protective complaint describes the Tribe's aboriginal territory as including all of Washington County and parts of Hancock and Waldo Counties. However, our research reveals no evidence that the Passamaquoddies hold Indian title to any portion of Waldo County.

enclosed as Appendix H). It also prays for mesne profits for the period of the Tribe's dispossession. This relief is framed after that sought by the United States in the Walapai Tribe claim, cited supra. See also United States v. Boylan, 265 F. 165 (2d Cir. 1920).

We are not unmindful of the breadth or the potential impact of this claim on the population of eastern Maine. Several important considerations have led us to seek such comprehensive relief. First, and most importantly, we have been ordered to acknowledge the existence of a trust relationship between the United States and the Passamaquoddy Tribe. And having done so, we are in no position to view our responsibilities thereunder in a niggardly fashion. Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973). Indeed, for the government to file suit for less than what the Tribe can demonstrate is a legitimate claim could be seen as having the practical effect of extinguishing Indian title. See Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919). Only Congress has such power. Turtle Mountain Band v. United States, supra, 490 F.2d at 945; United States v. Portneuf-Marsh Valley Irr. Co., 213 F. 601, 605 (9th Cir. 1914). 4/

In addition, filing suit for the maximum tribal claim has the merit of settling the matter once and for all. If we

4/ In the recent decision in United States v. Southern Pacific Transportation Co., 9th Cir., Nos. 74-3333, 75-1080 (Sept. 10, 1976), the U.S. Court of Appeals noted that the United States had amended its complaint on behalf of the Walker River Paiute Tribe to omit its prayer for ejectment of the railroad from the right-of-way across Indian lands: "This change of position concerns us. We cannot be oblivious to the fact that this railroad services a United States Navy munitions depot. Whether the Justice Department can represent the claims of the Tribe and allottees without a conflict of interest should be examined by the district court on remand." Slip opinion, footnote 3.

were to sue for less, there would be no jurisdictional bar to an ejectment action on the part of the Tribe for the remainder of the claim--perhaps years later. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Recent publicity has already thrown all local titles in doubt. Thus, a complaint which omitted a portion of the claim area would leave that portion in a legal limbo long after resolution of the suit.

Another reason for asserting an all-inclusive claim is found in your letter of June 21, 1976 to this office regarding the Nonintercourse Act claim of the St. Regis Mohawks of upstate New York. There you offered the view that where a land claim is alleged, all record titleholders within the claim area should be joined as indispensable parties pursuant to Rule 19, F.R. Civ. P. While we are not necessarily in agreement on this point, your position certainly dictates the filing of a comprehensive claim, apart from the other considerations discussed above.

Of course, assertion of a claim of this size creates a number of logistical problems. We are still in the process of defining the precise geographical boundaries of the Passamaquoddy aboriginal area. And we must identify each record titleholder or non-Indian claimant within the claim area and the real property in the possession of each such individual. This is undoubtedly a task of great proportion, and we assume that it must be completed and every defendant joined by July 18, 1976. Otherwise the Tribe's monetary claims might be barred by the federal statute of limitations. 28 U.S.C. § 2415(b). We have already discussed the defendant class action concept, and understand that you do not believe that it is an appropriate procedure for this case. However, we wish to note the possibly persuasive argument that the filing of a class action tolls the running of the limitation period for each member of the putative class. See American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974). Thus, if it appears fairly certain that some potential parties may not be identifed and joined by July 18, we suggest use of the class action device to buy additional time for joinder.

It should be apparent that further research needs to be done before the Tribe's claim will be ready for trial. Indeed, identification of defendants must be accomplished prior to the filing of a final amended complaint. However, we think there is presently a sufficient basis for determining that the Passamaquoddy Tribe has a substantial claim to hundreds of thousands of acres of land in eastern Maine. Therefore, we recommend that you inform the U.S. District Court on January 15, 1977 that the United States intends to prosecute United States v. Maine, (Civil No. 1966).

For further information or for assistance in the prosecution of this claim, we suggest you contact Lawrence A. Aschenbrenner, Assistant Solicitor for Indian Affairs.

Sincerely yours,

Enclosures

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

FINAL DRAFT
(PENOBSCOT) 1/10/77

Honorable Peter R. Taft
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Attention: Mr. Myles E. Flint
Acting Chief,
Indian Resources Division

Dear Mr. Taft:

This is our litigation report on the Penobscot Indian Nation land claim, United States v. Maine, Civil No. 1969 N.D., U.S.D.C., D. Maine. We have also sent you our separate report on the very similar claim of the Passamaquoddy Tribe. The legal principles underlying both cases are virtually identical. Therefore, to the extent that this report's discussion of such principles is incomplete, please refer to the Passamaquoddy report.

Unlike the Passamaquoddy situation, the question of the existence of a trust relationship betwen the United States and the Penobscot Indian Nation has not been adjudicated. Nonetheless, a protective complaint in the instant suit was filed in July, 1972 pursuant to a stipulation entered into between representatives of your Department and the Nation. This was done in apparent acknowledgment of the similarity of the Penobscot claim to that of the Passamaquoddies. By letter of July 6, 1972 this office had indicated that it would have no objection to the filing of such a protective complaint.

We must now determine to what extent the decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), requires the United States

to assist the Penobscots in the pursuit of their claims under the Indian Nonintercourse Act (25 U.S.C. § 177). The Court of Appeals held that the Act should be read to include within its coverage Indian tribes other than those which have been specifically recognized by the federal government. In other words, the Act's restriction against the alienation of tribal lands is applicable to Indian tribes identifiable as such by reference to racial and cultural factors rather than to affirmative governmental action. Id. at 377. Accordingly, as an initial matter we must ascertain whether the Penobscot Indian Nation is an Indian tribe in the racial and cultural sense, and thus entitled to the protection of the Nonintercourse Act.

The Court also ruled that the Act establishes a trust relationship between the United States and the tribes protected by its provisions with respect to tribal lands subject thereto. Thus, unless such a trust relationship has ever been terminated, the Tribe's land claims must be examined to determine whether there has been compliance with the Act, and the United States must then take appropriate action in light of its statutory trust responsibilities. In summary, our inquiry preliminary to the making of a recommendation is:

1) whether the Penobscot Indian Nation is an Indian tribe in the racial and cultural sense;

2) whether any trust relationship arising from the Nonintercourse Act has ever been terminated;

3) what Penobscot tribal lands are covered by the Act; and

4) whether the United States has, as required by the Act, ever consented to the alienation of any such lands.

See Narranganset Tribe of Indians v. Murphy, C.A. No. 750005, U.S.D.C., D.R.I., opinion entered June 23, 1976, at p. 9.

ANALYSIS

A. Tribal Existence.

Enclosed you will find a report on the history of the Penobscot Nation as it relates to their land claim. [Appendix AA] This report was prepared by experts available to testify in support of the conclusions stated therein. Also enclosed are copies of the source materials cited in the report. [Appendix BB] Part I of the report provides detailed evidence of continuous Penobscot tribal existence since the seventeenth century. Note that, like the Passamaquoddies, the Penobscots are today recognized as an Indian tribe by the State of Maine. Also enclosed is a copy of an August 6, 1976 memorandum from the Acting Deputy Commissioner of Indian Affairs which offers the Bureau of Indian Affairs' considered opinion that the Penobscot Nation is an Indian tribe in the racial and cultural sense. [Appendix CC]

B. Trust Relationship.

Having found that the Penobscot Nation is an Indian tribe within the meaning of the Nonintercourse Act, we must determine whether the trust relationship created by that Act has ever been terminated. We can find no basis for concluding that such a termination has ever occurred. No federal legislation appears even to mention the Penobscots by name, much less suggest a termination of any trust responsibilities flowing from the Nonintercourse Act. Of course, it was a similar lack of "recognition" which led the Government to deny the existence of any trust relationship with the Passamaquoddy Tribe during the pendency of Passamaquoddy Tribe v. Morton. However, the courts have held that the Nonintercourse Act is a sufficient source of such a relationship. And we can find no affirmative evidence that this has ever been legislatively undone.

The State of Maine may nonetheless contend, as it did before the U.S. Court of Appeals, that the absence of any active relationship between the United States and the Penobscot Nation for over 180 years has served to terminate the Government's trust obligations. But in specific answer to that contention the court held: "[O]nce Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease." 528 F.2d at 380.

C. Penobscot Lands Covered by the Nonintercourse Act.

The Penobscot claim is one based on both aboriginal title and title secured by a number of eighteenth century treaties. Section II of the enclosed report indicates that the Penobscots occupied as their aboriginal territory all of the Penobscot River watershed and also a large portion of the St. John River watershed in northern Maine. Since that report was prepared, additional research has been conducted for purposes of determining what portion of the latter watershed was used and occupied by the Penobscot Nation. We will provide the detailed results of that research as soon as it is available. At present, it appears that there is evidence that the Penobscots possessed what is now the northwestern corner of Maine in aboriginal times, but that the Malicetes used and occupied the northeastern corner. Additional research will enable us to draw an accurate boundary between the two aboriginal territories.

Section II of Appendix AA relates a series of complicated and confusing transactions between the Penobscot Nation and British colonial authorities prior to 1775. While those transactions provided recognition for the sovereignty of the Tribe and its aboriginal claims, they also resulted in the cession of some Penobscot territory. The precise extent of those cessions is far from clear, and this is a subject of our continuing research.

Nevertheless, as the report shows, our experts are prepared to testify that at the time of the American Revolution, and until 1796, the Penobscots continued to hold dominion over all of that portion of their aboriginal territory which lay above the head of the tide on the Penobscot River. 1/ This is estimated to be 6 to 8 million acres of land.

D. Consent of the United States.

The Penobscots' loss of the remainder of their territory is also described in detail in Appendix AA. The first major transaction was in 1796 when the Tribe deeded to the Commonwealth of Massachusetts all its "right, Interest, and claim to all the lands on both sides of the River Penobscot, beginning near Col. Jonathan Eddy's dwelling house, at Nickels's rock, so called, and extending up the said River thirty miles on a direct line," excepting Oldtown island and all the islands above it. The dwelling house referred to appears to have been situated near the head of the tide. There is no evidence that the United States was a party to the transaction or that the Congress approved it in accordance with the Nonintercourse Act.

Other lands in the Penobscot watershed were granted to individuals after 1790 without the consent of either the United States or the Penobscot Nation. We are developing a file of the conveyance instruments used in these transactions as evidence of violation of the Nonintercourse

1/ We understand that the head of the tide lay between Oldtown and what is now Bangor during the eighteenth century. However, a modern dam has prevented the tide from reaching beyond Bangor in recent times.

Act. It is interesting to note that, unlike the Passamaquoddy situation, very little non-Indian settlement had taken place in Penobscot territory at the time of the enactment of the Nonintercourse Act. Indeed, the 1790 U.S. Census provides no population figures north of the Eddy township which was apparently near the head of the tide. Heads of Families-Maine, U.S. Census (1790) at p. 9.

Most of the rest of Penobscot territory was lost as a result of the treaty of June 29, 1818 between the Penobscot Nation and Massachusetts. Reserved from an otherwise complete cession of all their lands above the thirty-mile tract lost in the 1796 transaction were four townships now identified as Mattamwamkeag, Woodville, Indian Purchase, and Millinocket. Those townships were purchased by the State of Maine in 1833. None of these transactions appear to have been executed in accordance with the Nonintercourse Act. As a result, the Penobscot Nation today holds only the islands in the Penobscot River between Oldtown and Mattawamkeag.

RECOMMENDATION

We propose that the complaint in the Penobscot Nation claim against the State of Maine be amended to seek ejectment of all persons in possession of Penobscot aboriginal lands north of the head of the tide of the Penobscot River, and also mesne profits for the period of the Nation's dispossession. At the same time we wish to reserve judgment on the Penobscot claim to any lands below the head of the tide until further research has been performed.

Our recommendation, of course, involves a huge claim which may have dire consequences for the residents of northern Maine. However, as we have discussed in detail in our Passamaquoddy litigation report, the federal trust responsibility to Indian tribes compels us to recommend the prosecution of claims of this nature. The recent decision of the U.S. Court of Appeals for the Ninth Circuit in United States v. Southern Pacific Transportation Co., No. 74-3333 (Sept. 10, 1976), confirms the correctness of that view. There the United States sued for trespass on behalf of the Walker River Paiute Tribe of Nevada on the ground that the operation of a railroad across Indian lands since 1882 violated the Indian Nonintercourse Act. The appellate court agreed, adding:

> "Although it may appear harsh to condemn an apparent good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result." Slip opinion at page 37.

Accordingly, we also recommend that you inform the court by January 15, 1977 that the United States intends to pursue the Penobscot land claims.

For further information or for assistance in the prosecution of this claim, we suggest you contact Lawrence A. Aschenbrenner, Assistant Solicitor for Indian Affairs.

Sincerely yours,

the Department of Justice are designated as "Final Draft Report." As indicated by cover letter from the current Solicitor of the Department of the Interior, it was his best judgment that the new Administration at the Department of the Interior taking office on January 20, 1977, should have an opportunity for a final review before its recommendations are made final since the new Administration will have to oversee both the policy and content of continuing activities in these cases.

However, equally important is the need for concurrent Congressional activity dealing with the merits of the claims presented in these cases. Resolution of the claims by Congress should not await the conduct of litigation in these cases.

The reasons are that litigation cannot lead to an equitable resolution of the claims involved with respect to all potential parties in these actions and further, even if conducted to its conclusion, succesful litigation would still require Congressional resolution of the results obtained.

As is clear from the Court of Appeals' opinion in *Passamaquoddy v. Morton, supra,* the parties to this action proceeded in good faith for 176 years based on a misinterpretation of the status of Eastern Indian tribes and the applicability of the Nonintercourse Act of 1790. During that period, people of the State of Maine have acted largely in good faith in handling real estate transactions, investing their funds, and improving their property with the reasonable expectation that their titles were as secure as in any other state of the Union. Because of the unusual context and historical circumstances of this case, if the United States were successful in asserting claims on behalf of the tribes to possession of large tracts of property in the State of Maine, as well as trespass damages up to the time of recovery of possession, we would be in a unique situation. In solving an injustice imposed upon the Indian tribes in the State of Maine, we would be placing substantial hardship on innocent parties, including in part the State of Maine itself which was not even in existence during the period that many transactions were made in violation of the Nonintercourse Act. Only a Congressional resolution of the Indian tribe claims can correct the injustice to the tribes in question without committing new hardships on other citizens of the State of Maine.

However, an even more compelling reason for the need for Congressional involvement is that litigation cannot ultimately resolve the claims in question. As the Court of Appeals stated in *Passamaquoddy v. Morton, supra,* the purpose and intent of the Nonintercourse Act of 1790 as amended was to "acknowledge and guarantee the Indian tribes' right of occupancy" to their lands. However, a second purpose of the Nonintercourse Act is to preserve for Congressional action the resolution of Indian rights which have never before been made subject to settlement. Assuming the United States were successful in regaining possession on behalf of the Maine tribes to those lands over which the tribes exercised a right of use and occupancy in 1790, further Congressional action would still be necessary. A substantial portion of the claims involve only the right of use and occupancy, or aboriginal title. Such title is a unique interest in land. The peculiar nature of this title is defined by the Supreme Court in *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339 (1941); see also *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1954). It is a right the sovereign protects against third parties, a policy reflected in the Nonintercourse Act, but as between itself and the tribe, the sovereign can treat such title as it sees fit. Thus, upon recovery of possession in the instant litigation, Congress would still have the power to settle the possessory interest. This is not to indicate that Congress would act arbitrarily. Nonetheless, this doctrine makes clear that litigation cannot solve finally all aspects of the dispute presented. As the Supreme Court stated in *United States v. Santa Fe Pacific R. Co.,* 314 U.S. at 347, the ultimate resolution of aboriginal title as between Indian tribes and the United States raises "political, not justiciable, issues."

Since Congress must eventually become involved in settlement of the ultimate issues, it would be in the interest of justice that it become involved immediately. A Congressional solution should be reached before the litigative process now underway has reached its ultimate conclusion, especially in light of the fact that this is potentially the most complex litigation ever brought in the federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties. In the past, Congress has successfully proposed and arrived at solutions to Indian claims equitable to all involved. The Indian Claims Act of 1946, the Alaska Native Claims Settlement Act of 1971, the Pueblo Lands Board Act of 1924, each indicates the ability of Congress to fashion solutions meeting the unique factors involved in each set of meritorious claims. The Carter Administration in transition has communicated with the Department of Justice and stated that it wishes to review these issues to determine if it believes it appropriate to assist Congress in any way with its task. An extension to March 1, 1977, will permit time for Congress and the new Administration to determine if they wish to seek a Congressional solution which would proceed concurrently with the litigative process with the objective of ultimately mooting these cases. Such delay, however, will in no way slow down the Department of Justice review and decision on litigation.

For the foregoing reasons, plaintiff respectfully requests this Court for an extension of time to March 1, 1977, to report specific proposals for the future progress of the above-captioned cases.

Respectfully submitted,

PETER R. TAFT,
Assistant Attorney General.
PETER MILLS,
United States Attorney.

[District of Maine Northern Division]

(United States of America, Plaintiff v. The State of Maine, Defendant, Civil No. 1966–ND; United States of America, Plaintiff v. The State of Maine, Defendant, Civil No. 1969–ND)

PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME

The plaintiff moves for an enlargement of time until June 1, 1977, within which to report to the Court on the status of its preparations with respect to the pending actions filed in this Court by the United States on behalf of the Passamaquoddy Tribe and Penobscot Nation against the State of Maine. The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

PETER R. TAFT,
Assistant Attorney General.
PETER MILLS,
United States Attorney.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR FURTHER EXTENSION OF TIME TO REPORT TO THE COURT

I. *Introduction*

Pursuant to the court's order of January 17, 1977, plaintiff seeks a further extension of time until June 1, 1977, within which to report to the court regarding particular steps to be taken in the further prosecution of the above-entitled actions. There are two basic reasons for the extension. First, an extension is necessary to enable plaintiff to adequately prepare proposed claims discussed herein and to coordinate them with other claims against major landholders in the affected areas. While substantial work has been completed, additional work is required.

Second, the President has announced that in response to the request of the Maine Congressional delegation he is appointing a special representative to help the parties reach an amicable settlement for submission to Congress. The extension of time is necessary to allow all parties to engage in meaningful settlement talks and to permit Congress sufficient time to adopt any agreement reached. As stated in our memorandum of January 14, 1977, only Congress can correct past injustice to the tribes without causing new hardship to other citizens of Maine. We therefore fully support and endorse the settlement process. On the other hand, if it proves unsuccessful, we have no choice but to proceed with the litigative course outlined herein.

II. *Summary of new status*

In final draft litigation reports forwarded to the Department of Justice on January 11, 1977, the Department of the Interior requested the initiation of litigation on behalf of the Penobscot and Passamaquoddy Tribes for possession and trespass damages for lands in certain defined watersheds in Maine. These lands included areas used and occupied by the tribes as of 1790; they also included other areas mostly along the coast where lands were settled by, or land granted to, non-Indians as of 1790. These coastal areas remain the most heavily populated at the current time.

In the interim since January 11, 1977, certain agreements have been arrived at with the Penobscot and Passamaquoddy Tribes. In accord with these agreements, the Department of the Interior has modified its request to the Department of Justice for the initiation of litigation in its final litigation reports. Subject to conditions hereinafter set forth, the Interior Department limits its request for litigation to a possession and trespass damage claim for those lands actually used and occupied by the Penobscot and Passamaquoddy Tribes as of 1790. This omits the coastal areas settled and land granted as of 1790.

In the interim since January 11, 1977, the Department of Justice has conducted an independent review of the laws and facts submitted and made an independent judgment as to the scope and content of any causes of action. We have reviewed all materials previously submitted and have conducted independent research of documentary evidence in the Archives of the United States and elsewhere. Additionally, we met with anthropologists and ethnohistorians knowledgeable with the tribes and their traditional use and occupancy of land in the latter half of the Eighteenth Century.

Based on this review and the modified litigation request from the Department of the Interior, the Department of Justice has concluded that a valid cause of action exists for possession and trespass damages for those lands actually used and occupied by the Penobscot and Passamaquoddy Tribes as of 1790, and thereafter taken from them in violation of the Trade and Intercourse Act of 1790, as amended.

The modified request from Interior and the cause of action Justice has agreed to pursue modifies the claim areas. As to certain portions of that area, we have fully satisfied ourselves as to actual use and occupancy by the tribes in question as of 1790. As to other portions, we have concluded that additional evidence is necessary to assure ourselves of the tribes' claim and the necessary studies are commencing forthwith. The modified claim area is as follows.

Modified Claim Area

We have concluded that a valid cause of action on behalf of the Penobscot Tribe encompasses all those lands lying in the Penobscot River watershed above the ancient head of the tide, a point north of

Eddington, Maine, to the head of the river. Based on the outcome of further study this cause of action may also include those portions, if any, of the eastern shore of Moosehead Lake and the St. John River watershed west of Houlton, Presque Isle and Caribou which the tribe actually used and occupied in 1790, excluding, however, those lands in the St. John River watershed under treaty deeds confirmed pursuant to Article 4 of the Webster-Ashburton Act of 1842.

We have concluded that a valid cause of action on behalf of the Passamaquoddy Tribe encompasses all those lands lying within the upper St. Croix River watershed beginning north of Baring Plantation. Based on the outcome of further study this cause of action may also include those portions, if any, of the upper watersheds of the Machias and Dennys Rivers which the tribe actually used and occupied as of 1790.

Tribes Offer to Exclude Homeowners and Small Property Owners Within the Modified Claim Area

The Penobscot and Passamaquoddy Tribes had indicated their intention not to pursue, and to request Justice not to pursue, any remedy for land or damages against any homeowner or other small property owner in the modified claim area if they can substitute a satisfactory monetary claim against an appropriate sovereign body for the full value of such claims. The Department of the Interior intends to assist them in developing a legislative package substituting such a monetary claim and to support them in obtaining passage of appropriate legislation. We will honor that offer.

Coastal Areas Excluded

The Department of the Interior, in its litigation report, has specifically requested that the Department of Justice omit all claims for possession of land or damages for the coastal areas which had been substantially settled by non-Indians and land which had been granted prior to 1790, the date of passage of the first Trade and Intercourse Act. As a result, coastal areas which are presently the most densely populated portions of the original claim area will not be involved in any litigation to be initiated by the United States. In lieu thereof, the tribes and the Department of the Interior have agreed to seek an alternative legislative solution with respect to these coastal areas.

Appointment of a Special Representative of the President

The White House has announced that the President will shortly name a special representative to assist the parties in reaching a settlement to these claims. When that person is designated, it is contemplated that efforts will be underway immediately to open discussions which hopefully will lead to an out-of-court solution. The Department of Justice fully supports these efforts. As a consequence, and if approved by the courts, we propose to take no further steps in this or related litigation before June 1, 1977, so as not to interfere with the settlement process. We suggest to the court that it would be appropriate to continue the stay against further activities in the above-captioned actions through June 1, 1977, for this same purpose.

Basis of Claim

The claim on behalf of the Penobscot and Passamaquoddy Tribes discussed in the previous section is predicated on the tribes' aboriginal use and occupancy of the lands in the claim area as of 1790.

Aboriginal title, the basis of the claims proposed by Interior, is a factual matter to be proved at trial. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). Proof of aboriginal title is established by a showing of actual, exclusive, and continuous use and occupancy of lands for a long period of time. *Sac and Fox Tribe* v. *United States*, 315 F.2d 896, 903 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 921 (1963). Use and occupancy is determined by reference to the way of life, habits, customs, and usages of the Indians. *Sac and Fox Tribe* v. *United States*, 383 F.2d 992, (Ct. Cl. 1967). And it has been held that "the 'use and occupancy' essential to the recognition of Indian title does not demand *actual* possession of the land, but may derive through intermitten contacts [citations] which define some general boundaries of the occupied land . . ." *United States* v. *Seminole Indians*, 180 Ct. Cl. 375, 385 (1967) [emphasis in original].

The Nature of Tribal Usage of Claimed Area

Penobscot Indians were riverine oriented so that the territorial boundaries used and occupied by them were generally defined by the watersheds (or parts thereof) of the rivers so used. This, also, dictated how they would live, hunt, fish, and gather berries for subsistence.

Briefly, their traditional mode of land use was that they had a series of core villages near and above the head of the tide. From these core villages they would conduct their hunting, fishing, trapping and berry picking expeditions. Dividing their time somewhat regularly, they spent the summer months in the lower coast or salt-water region, then ascended the river to hunting territories for the fall hunting and finally returned to their core villages for the dead of winter. The early spring months were spent drifting down toward the ocean and hunting and fishing through the Penobscot River and neighboring streams. As non-Indians settled in the coastal regions, Indian reliance on the coast for subsistence was diminished. On the other hand, their use of the upper watershed intensified both for subsistence and development of the fur trade with non-Indians.

The Passamaquoddy Tribe's use and occupancy of land was essentially the same as the Penobscot's. They were also riverine oriented, and they used and occupied lands in the St. Croix, Dennys and Machias watersheds. The Passamaquoddies had their core villages along the coast. Their use pattern was to spend the spring and summer along the coast herrying and fishing. In the fall and winter they went inland to hunt and trap, returning to their core villages in the spring. Settlement by non-Indians tended to interfere more with their core villages than with the Penobscots, but their use of the upper watersheds was the same.

This was essentially the state of affairs as of 1790, with Indian use and occupancy extant in the modified claim area. In 1790, the first Non-Intercourse Act was passed with respect to Indian land which provided in relevant part:

"No purchase, grant, lease or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The First Circuit Court of Appeals held in *Joint Tribal Council* of the *Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (C.A. 1, 1975) that this statute created a trust responsibility on the part of the United States to protect Indian rights under this statute and specifically described the duty as follows:

"The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy . . . and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted by the circumstances." 528 F.2d at 379.

The Department of Interior has interpreted this responsibility to require a suit for possession and trespass damages and we agree.

It has been asserted that the Trade and Intercourse Acts did not apply to land transactions entered in between tribes and states if those actions occurred east of a line defining the boundaries of Indian country or if the state involved was one of the original colonies. Such contentions are inconsistent with the plain language of the Non-Intercourse Acts and contrary to well-settled law.

Dealings in tribal lands must be placed in a constitutional context. As pointed out *infra*, the right to extinguish Indian occupancy rights resides only with the sovereign. The traditional mode for such transactions at that time was by treaty, recognizing the limited sovereign rights of the tribes. In accord therewith, the Commerce Clause of the Constitution relegated the right to deal with Indian tribes to the United States, and Article I, § 10 abolished the right of States to enter into treaties. In this context, the statutory provisions dealing with land transactions must necessarily be viewed in a geographically unlimited context which the actual language of the relevant statutes and judicial opinions indeed reflect.

The provisions of the Trade and Intercourse Acts dealing with the transfer of Indian land have changed little since 1790.[1] The words contained in each act with respect to land transfers were unambiguous. The provisions in each section prohibited *all* purchases or grants of land from Indian tribes without federal approval. Each act specifically set forth the geographical area in which the land transfer section was to be applied. In 1790 that area was defined as "in the United States." In the 1793, 1796, 1799 and 1802 acts that area was defined as "within the bounds of the United States." The constitutional demand for unlimited geographical applicability of these sections is reflected in the statutory requirement that valid transactions had to be entered into "by treaty or convention entered into pursuant to the Constitution" or under direct federal auspices. To this day, the provision remains unlimited. See 25 U.S.C. 177.

The fact that the land transfer provisions were intended to have broad and unlimited application is supported by reference to other sections of the statutes. For example, in contrast to the unlimited language of the land transfer provision of the 1802 act is the section of the act which relates to trading. The later section explicitly provided that it was to have application in "Indian country" only. That limitation, and similar limitations with respect to trading in the later acts, was never appended to the provisions in those acts prohibiting land transfers.

In the landmark case of *Worcester* v. *Georgia*, 6 Pet. 515 (1832), Justice Marshall was confronted with the question of whether the State of Georgia had complete governmental jurisdiction over the portion of the Cherokee Reservation within that state. Justice Marshall rejected the State's assertion of jurisdiction, finding it inconsistent with the constitution, treaties and laws of the United States. One basis for his conclusion was that the Trade and Intercourse Act of 1802 which contained language identical to that found in the 1790 Act granted exclusive jurisdiction to the federal government and prohibited state jurisdiction. This case is direct authority for the proposition that the Trade and Intercourse Act did apply to the original thirteen colonies and thus would apply to Massachusetts.

Later rulings have held that the land transfer provisions of those acts did apply in the eastern United States in the original thirteen colonies. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council* of the *Passamaquoddy Tribes*

[1] See Act of July 22, 1790, 1 Stat. 137, 138; Act of March 1, 1793, 1 Stat. 329, 330; Act of May 19, 1796, 1 Stat. 469, 472; Act of March 3, 1799, 1 Stat. 743, 746; Act of March 30, 1802, 2 Stat. 139, 143; Act of June 30, 1834, 4 Stat. 729, now 25 U.S.C. 177.

v. *Morton*, 528 F.2d at 380 (1st Cir. 1975); *Narragansett Tribe of Indians* v. *Murphy*, C.A. No. 750005, U.S.D.C. Rhode Island (unpublished opinion of June 23, 1976). See also, *United States* v. *Boylan*, 265 F.2d 165 (C.A. 2, 1920).

It has been asserted that the tribes' rights to the use and occupancy of the lands in the modified claim area have been extinguished by various transactions which occurred either before or after the passage of the Trade and Intercourse Act in 1790. There is no question that the sovereign may extinguish aboriginal title. *Johnson* v. *McIntosh*, 21 U.S. 543 (1823). The sovereign may extinguish title by purchase, conquest followed by dispossession, or by the exercise of complete dominion over the property adverse to the continued use or occupancy of the tribe. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), *rehearing denied*, 314 U.S. 716 (1942). When the transactions discussed hereinafter are viewed in the light of this law, it is clear that the tribes' title was not extinguished.

It is asserted, first, that the tribes' title was extinguished by Pownall, the Royal Governor of Massachusetts, in 1759. At the outset of the French and Indian War in 1754 and 1755, Pownall declared war on all the tribes in eastern Maine, including the Penobscots. Pownall never engaged the Indians in battle or invaded and occupied the areas encompassed within the modified claim area. In 1759 Pownall issued a Proclamation which provided:

"May 23, 1759, Province of Massachusetts Bay—Penobscot Dominions of Great Britain. Possession Confirm'd by Thos. Pownall, Govr."

Immediately after issuing the proclamation, Pownall buried a leaden plate at the head of the tide on the Penobscot River on which the Proclamation was inscribed. That was the limit of settlement in 1759 and still was in 1790. It also is the southern limit to the modified claim on behalf of the Penobscots. It is argued that by these actions Pownall extinguished the tribes' claims. We disagree.

It is a well-settled principle of law that more is required to extinguish aboriginal title than a mere declaration of dominion over a tribe. *Johnson* v. *McIntosh*, 21 U.S. 514 (1823). Circumstances surrounding the issuance of the Proclamation show that the purpose of proclaiming dominion over the Penobscots' lands was an attempt to establish English jurisdiction over them and thereby discourage allegiance with the French. Pownall made no attempt to remove them from their lands. Thus all Pownall did was to establish the relationship necessary for the sovereign to treat the tribal occupancy rights. The action did not impair in fact the tribes' use and occupancy of the land. *Johnson* v. *McIntosh*, 21 U.S. at 572.

Pownall's actions followed the well-settled principle of adjusting rights in the New World among competing European sovereigns rather than rights of actual occupancy. Local occupancy rights would only be affected if the conquest were established by actual expulsion of the natives. As the Supreme Court stated in *Worcester* v. *Georgia*, 6 Pet. 515, 543 (1832):

"This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.'"

This dominion set up the right to deal with the occupants for actual possession:

"It regulated the right given by discovery among European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right of purchase, but did not found that right on a denial of the right of the possessor to sell."

Except for the fact that the French and the English were at war over their rights to Maine, the situation is no different than the original discovery of the New World, or the Louisiana Purchase or the Purchase of Alaska. In each case, the sovereign dominion obtained merely set the stage for dealing with the actual occupancy of the natives.

Here the tribes actively continued to use and occupy the lands contained in the modified claim area without interruption after the issuance of the Proclamation. That use and occupancy was only ended after the tribes had entered into treaties with the State of Massachusetts after 1790 which were invalid under the terms of the Trade and Intercourse Acts. The fact that the State of Massachusetts dealt with the tribes, is itself proof that the State considered these groups as tribes and recognized the extent of their land use rights. All these factors lead to the conclusion the tribes' use and occupancy had not been extinguished by conquest.

Finally, it has been asserted that the approval by Congress of the 1819 Articles of Separation of Maine from Massachusetts ratified the land transactions with the tribes. Nothing in the Articles of Separation mention Indian lands or the previous land transactions of Massachusetts with the tribes. The case law is specific that where Indian property rights are involved and congressional acts are passed affecting them, all such rights not expressly dealt with survive. *Menominee* v. *United States*, 391 U.S. 404 (1968).

Proposed Form of Action

As can be seen from the foregoing, the areas subject to the Department of the Interior recommendation, though reduced in size from the original litigation report, are substantial and will include numerous parties. A suit naming every potential party would be incredibly cumbersome, if not impossible to manage. Because of its size, the procedural aspects of the litigation could take over a year to resolve.

If litigation is found to be the only method for resolving these claims, it will be necessary to devise a lawsuit which can be effectively managed so that a final decision on all major issues can be obtained as rapidly as possible. In order to reach that objective, the United States at this time contemplates a lawsuit against a limited number of major landowners holding lands in the Penobscot and and St. Croix watersheds and in those portions of the St. John, Dennys and Machias watersheds which are found to be included in the claim area. As proposed, the litigation would permit the adjudication of all the major issues, factual and legal, with only a few parties with the resources to properly defend the case. The limited number of defendants would enable the case to proceed expeditiously. If the court denied a claim to a particular watershed, there might be no need to proceed against any other landholders in the same watershed.

Such a litigation program will require an extension of the current statute of limitations which expires on July 18, 1977. See 28 U.S.C. 2415. For if a claim against major landowners in a given watershed is upheld, we would thereafter proceed against the remaining landholders within the claim area in that watershed. Moreover, even if we wished to move against all landholders in the original suit, it would be virtually impossible to determine the names of all potential defendants and initiate an action prior to July 18, 1977. Therefore, the United States proposes to seek legislation to extend the statute with respect to the claims on behalf of the Passamaquoddy and Penobscot Tribes.

Conclusion

Plaintiff submits that the foregoing description of the status of the cases makes it readily apparent that an extension of time until June 1, 1977, is necessary.

Since the last report to the court, there has been a complete review of the legal basis for this litigation. Although the validity of causes of action on behalf of the Penobscot and Passamaquoddy Tribes as to some areas is certain, additional research is yet necessary to establish the outer perimeters of the claims area. In addition, there is substantial work to be undertaken to identify possible defendants in the claim area. An extension of time until June 1, 1977, is necessary to permit this work.

It is impossible to overemphasize, however, the fact that litigation is not the best method to resolve the issues presented in these claims. Litigation, while resolving past injustices imposed on the tribes, would place substantial hardships on innocent parties, who acted largely in good faith in purchasing real estate, investing their funds and improving their property. Only a congressional resolution of the Indian claims can correct the past injustices to the tribes without creating new hardships for others.

As stated previously, steps are now being taken to provide a method for getting a legislative solution underway. A presidential representative is to be appointed. The extension requested is equally necessary to permit this representative the time necessary to work with the parties to effect a settlement and to permit Congress to adopt a just and equitable legislative solution to the claims of the Passamaquoddy and Penobscot Tribes.

Respectfully submitted,

PETER R. TAFT,
Assistant Attorney General.
PETER MILLS
United States Attorney.

Mr. MUSKIE. Mr. President, I join with Senator HATHAWAY in introducing the State of Maine Aboriginal Claims Act of 1977. Our legislation, introduced at the request of the Governor and attorney general of Maine, is designed to alleviate the potentially disastrous social and economic impact of claims made by the Passamaquoddy and Penobscot Indian Tribes for return of aboriginal lands in northern Maine. While the land claim has yet to be filed, the mere pendency has raised substantial questions which threaten the economic stability of the State.

The bill we introduce today is a vehicle for review of the case by the Senate and for congressional action to settle the claims put forth by the Indians. I believe it is an appropriate response to a complex legal, social and economic problem.

The legislation is designed to protect the property and livelihood of hundreds of thousands of innocent citizens of Maine who now hold title to land in the disputed area, or whose jobs depend on the resources and factories on the land. Since there is simply no equitable way to disown these people, the claims of the Indians must not be allowed to include the return of land.

It is designed further, however, to preserve the rights of the Tribes to have the factual and legal questions of their claim resolved, and recognizes that if the claims are resolved in favor of the Indians, that some damages must be paid.

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 8, 1976

Honorable Gregory Austin, Solicitor
Department of Interior
Washington, D.C.

Re: United States v. Maine - Indian Cases.

Dear Mr. Austin:

On November 15, 1976, we received from you some summary historical material prepared by the Department of Interior relating to the subject lawsuit. At the time that you forwarded that information you invited our comments and indicated that Interior would evaluate our response in preparing its litigation report to the Department of Justice. You invited our response by November 30, 1976. Shortly thereafter John Paterson discussed this matter with Tim Vollmann of your staff and they agreed that our response by the first part of this week would be sufficiently timely for Interior.

Pursuant to that invitation, I enclose herewith a memorandum dealing with the subject case.

The memorandum was prepared to advise Governor James B. Longley on the status of the case and our assessment of it. We believe its contents are in a form suitable to be shared with your Department. I trust that you will forward this to the Justice Department along with your litigation report. I understand that you will provide us with a copy of your litigation report and that you will recommend to Justice that it provide us with an opportunity to comment on the report prior to their final decision with respect to it.

As you can see from the memorandum, we firmly believe that the Indian land claims in Maine are without merit and that pursuit of the claims through litigation will be unsuccessful. We do not believe that there is any serious possibility that any responsible court will divest 350,000 Maine citizens of the land and homes and order that 60% of the State be turned over to Indian tribes on the basis of claims that are 200 years old. We trust that after you have had an opportunity to review our analysis you will inevitably come to the same conclusion.

As Governor Longley and I have frequently stated, we support the Tribes' right to try their claim in court. While we believe that we will be ultimately successful, we think they have a right to assert their claim in an appropriate forum. However, our continuing concern is and has been that the mere assertion of such claims will have serious adverse consequences in Maine, including the impeding of municipal and State bonding and real estate transactions. This is a very serious matter since it affects the welfare and well-being of all citizens of our State. We cannot support any suit which merely by its pendency might have the effect of disrupting the entire Maine economy.

We suggest, therefore, that some way be found to permit the Tribes to pursue their claims without creating the consequences which we all fear. I think from my discussions with the Tribal attorneys that they share this common desire. I cannot imagine that the Tribes would desire to see the State and its citizens made financially insolvent by a mere pending claim. One possible way to accommodate these interests is embodied in a draft legislative act which I enclose for your consideration. It is one of several possible approaches to the problem that might achieve the same end. I would assume that Interior or Justice might have some other useful ideas that reflect their experience and expertise in solving other Indian land claims in the United States.

The approach the enclosed legislation suggests is, we believe, a just and fair one. It permits the litigation of the claims for full damages and guarantees that any damages thus awarded will be paid by a party with adequate resources (i.e., the United States Government); it avoids the possible economic disruption that will result in Maine if the United States or the Tribes press forward with a suit against landowners for possession of land; it recognizes that Indian claims in Maine are part of a national problem for which the United States Government and all its citizens are responsible and commits the national government to assume this responsility; it is based on the recognition that the United States Government, as the trustee for the Maine Tribes, is ultimately the party responsible for the welfare of the Tribes and that, even assuming violations of the Non-Intercourse Act by Massachusetts or Maine, it places the ultimate responsibility on the United States for failing to adequately protect the Tribal rights for nearly 200 years. This approach also lends itself to application in other states with similar claims pending. I understand those include Massachusetts, Rhode Island, Connecticut and New York. I have also recently been advised by the Attorney General of the State of South Carolina that the Native American Rights Fund has informed them that it is preparing to file suit under the Non-Intercourse Act for a claim involving better than 100,000 acres of land in that State.

In addition to the foregoing materials, I have also enclosed a memorandum briefly responding to the historical summaries that you forwarded to us. Inasmuch as we only received those summaries on November 15, 1976, despite having requested them nearly six months ago, our critique is a brief one. We think it adequately illustrates, however, that the underlying factual basis for a Tribal land claim which is premised on Indian occupancy in 1790 is and has been grossly inflated. I think it goes without saying that the federal government could hardly commence a suit against the State or its citizens on the basis of such a one-sided historical analysis.

We could not believe more strongly that the Maine tribes simply do not have a case under the Non-Intercourse Act. We think that any reasonable man must share this view. Accordingly, we believe the United States is under no obligation to bring suit on their behalf. I realize the United States has an obligation to protect the interests of the Tribes and that the government has been compelled to tread carefully in its dealings with the State in order not to breach that obligation. However, as I previously indicated to you, it is our firm belief that in fullfilling its fiduciary obligation the United States government ought not to assert a claim for which there is no legal basis. We do not believe that a fiduciary obligation obliges the Department, or any trustee, to assert a claim for a beneficiary which as a matter of law does not have a substantial likelihood of success. While a trustee is required to be prudent, he is not compelled to be overreaching. The general rule is that a trustee is required to exercise such care and skill as a man of ordinary prudence would use in managing his own property. Scott, The Law of Trusts, § 174 (1967). He is under a duty to the beneficiary to take reasonable steps to protect the trust property and realize on claims for the benefit of the beneficiary. Scott, §§ 176 and 177. However, it is black letter law that a trustee is not obliged to bring an action on a debt or otherwise litigate claims that might inure to the benefit of the trust if, among other things, he does not believe that the suit will be successful. Hendrick v. Cleghorn, 93 N.E.2d 256 (Mass., 1950) and Scott, § 177. In matters relating to litigation and appeals in litigation, the trustee has wide discretion and is liable only for abuse of discretion. Scott, §§ 177, 187 and 192.

In the unlikely event that the Interior Department recommends that Justice prosecute these claims, and if Justice should act on that recommendation, we know that such decision will result in serious economic consequences in Maine. I am sure the events of the last few months have made the various possibilities and ramifications of that decision clear t all parties. Therefore, we strongly urge that any such recommendation by Interior be accompanied by an equally strong recommendation to Congress for immediate enactment of appropriate remedial legislation along the general lines of that embodied in the enclosure. If the federal governme

believes that it needs additional time beyond January 15, 1977, to frame such legislation, we would be agreeable to permitting the government an extension of time from the current court order. We would also be available to meet with you again at your earliest opportunity to discuss the case.

I have taken the liberty of forwarding copies of these materials to Peter Taft at the Department of Justice and Tim Vollmann of your Department.

Sincerely,

Joseph E. Brennan
JOSEPH E. BRENNAN
Attorney General

JEB:jg
Enclosures

cc: Honorable Peter Taft
Honorable Tim Vollmann

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
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DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 7, 1976

To: Honorable James B. Longley

From: Joseph E. Brennan, Attorney General

Re: Indian Claim Litigation

I. INTRODUCTION

This memorandum has been prepared for the purpose of advising you on the status of the pending Penobscot and Passamaquoddy Tribal land claims in the State of Maine. This memo does not purport to contain a complete summary of all relevant historical facts. That research is in progress and will require examination of numerous original and secondary source materials. Insofar as facts are included in this memo, they are cited because they bear upon the legal analysis undertaken herein and are believed to be beyond dispute.

This memorandum does not purport to treat all possible legal issues that might be raised in actual litigation. In addition to the principal legal issues analyzed herein, there are numerous other defenses to the claims as well as possible counter-claims against the Tribes and the United States government and third party claims against the State of Massachusetts. Any or all of these claims or defenses have substantial merit and will be pursued by us should the matter proceed to litigation. We do not discuss those claims

and defenses here because of the limits of time and space, but more importantly because of our strong opinion, as expressed in the conclusion, that the defenses analyzed herein will be wholly dispositive of the case.

II. STATUS OF THE CASE

On February 22, 1972, the Joint Tribal Council of the Passamaquoddy Tribe requested that the Departments of Interior and Justice bring suit against the State of Maine on behalf of the Tribe to redress numerous wrongs the Tribe alleged to have been perpetrated by the State. Among other things, the Tribe alleged that the State had taken or caused or permitted to be taken lands of the Tribe in violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177 (the "Nonintercourse Act"). The timing of the request was prompted by the enactment of a federal statute of limitations on such claims, which statute was due to expire in July, 1972. 28 U.S.C. § 2415(b) since amended by P.L. 92-485, 86 Stat. 803. The Tribe requested that such suit be brought by the United States in its capacity as a trustee for the Tribe.

On March 24, 1972, the Departments of Interior and Justice advised the Tribe that they did not intend to sue the State since they asserted that they had no trust relationship with and owed no fiduciary obligation to the Tribe. On June 2, 1972, the Tribe brought suit against the Departments seeking a judicial declaration of the existence of a trustee relationship. (Joint Tribal Council of the Passamaquoddy Tribe, et al. v. Rogers C. B. Morton, et al.)

After filing of the suit the Tribe obtained an order of court compelling the United States to file a protective suit against the State before July 1, 1972, to toll the statute of limitations. The government then voluntarily filed a second protective complaint against the State in July, 1972, on behalf of the Penobscot Tribe, again to toll the applicable statute of limitations. The Court immediately thereafter ordered both suits held in abeyance until resolution of the Tribal suit and further order of court.

The Passamaquoddy suit proceeded to trial, with State of Maine as an Intervenor-Defendant. In January, 1975, the District Court rendered a judgment in favor of the Tribe. Passamaquoddy v. Morton, 388 F. Supp. 649 (D.C., Me., 1975). That decision was appealed by the State and the United States subsequently joined in the appeal. In December, 1975, the Court of Appeals for the First Circuit affirmed the District Court opinion, but added important qualifying language. Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir., 1975). Among other things that Court specifically said:

> "Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue not raised or decided below and which we consequently do not decide."
>
> x x x
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> "In reviewing the district court's decision that the Tribe is a tribe within the meaning of the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions in Maine. When and if specific transactions are litigated, new facts and legal and equitable

> considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here."
>
> x x x
>
> "In so ruling [on the existence of a trust relationship], we do not foreclose later consideration of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions in Maine."

Since the decision of the Court of Appeals, the United States has made no decision on whether to prosecute these claims, and is, as of this date, unable to state when, if ever, it will have made that decision. (See Plaintiff's Motion for Extension of Time and Supporting Memorandum, United States v. Maine, Civil Docket No. 1966-ND and 1969-ND, October, 1976). As of this date, however, the United States is subject to an order of the court requiring the government to decide by January 15, 1977, whether it will proceed forward with these cases.

III. THE NATURE AND SCOPE OF THE CLAIMS

The lawsuits pending before the District Court name the State of Maine as defendant. The principal allegation, and one with which we will deal in this memorandum, is that the State of Maine acquired, or caused or permitted to be acquired, land from the Passamaquoddy and Penobscots without the approval of the United States as required by 25 U.S.C. § 177. The suits each seek $150 million in damages and "such other relief as the Court deems proper and just." No action

for return of land has yet been commenced. However, the Tribal attorneys have orally stated in court that it is their intention to sue for recovery of lands in the event that the United States fails to do so on their behalf. As of this date the territory claimed by the Tribes has not been delineated other than in very general terms.

The territory named in the suits as being territory alleged wrongfully taken from the Tribes includes:

Passamaquoddy Tribe - All of Washington and "parts of" Waldo and Hancock Counties

Penobscot Tribe - "All of the land along both sides of the Penobscot River including but not limited to most of what is now Penobscot County."

The Tribes have orally stated to the Court and the Attorney General and have been reported in the press as claiming approximately 60% of the State, to wit: The Penobscot River Watershed and all lands to the east and north of the Watershed. Therefore, analysis in this memorandum will extend to not only the territory actually named in the complaints but all lands claimed by either Tribe. It must be emphasized, however, that at this point neither the Tribes nor United States Government have defined with precision the scope or boundaries of the claimed area. The following analysis is therefore undertaken without the benefit of any explicit definition of the scope of the claim and without the benefit of the federal government's legal analysis of the basis of the claim.

IV. FACTS

As stated in the introduction to this memorandum, a complete enthno-history of the Maine tribes and a recitation of their relationship to the various governmental bodies that have exercised jurisdiction over them, including Maine and Massachusetts, is neither possible nor necessary for this analysis.

For purposes of this memorandum only, and because our intention herein is to focus on what we believe to be clearly dispositive legal issues, we assume that as of 1790, the effective date of the Non-Intercourse Act, both Maine tribes held by aboriginal possession some lands in the then District of Maine. It should be clearly understood that this assumption is made solely to facilitate the preparation of this memorandum and that based on preliminary historical research, we believe that the Penobscot holdings were very limited and the Passamaquoddy holdings non-existent.1/

1/ See for example the letter of the Passamaquoddy and Micmac Tribal Chiefs to the Great Council of Massachusetts (the Legislature) in 1791 in which the Chiefs indicate that they had lost their traditional tribal lands either by abandonment or as a result of intrusion by non-Indians. See Attachment A to memorandum of Michael Smith, Bureau of Indian Affairs, May, 1973.

See also John Allen's report in 1793 in which he states that by the end of the Revolution,

> "the Indians of St. John and Passamaquoddy resigned to the United States their particular claims to land known to be within their bounds on condition that the United States would confirm to them the ancient spots of ground which they have hitherto occupied and a suitable trace for the use of all Indians which might have occasion to resort thereto." F. Kidder, Military Operations in Eastern Maine and Nova Scotia During the Revolution, p. 312 (1867).

The following facts are a brief summary of facts relevant to our legal opinion.

A. THE PUBLIC LANDS IN MAINE

Various source materials are available that summarize the land policy of the State of Massachusetts in the period both before and after 1790. Useful summaries can be found in Frederick Allis, Jr. "The Maine Frontier" in Banks ed., History of Maine, pages 131-135 (Dubuque, Iowa; Kendall/Hunt Pub. Co. 1969); David C. Smith, "Maine and Its Public Domain - Land Disposal on the Northeastern Frontier" in Banks ed. History of Maine, pages 191-192; Frederick Allis, Jr. ed. "William Bingham's Maine Lands" in Publications of the Colonial Society of Massachusetts, Vol. 36 and 37 (Boston, 1954), and Moses Greenleaf, A Survey of the State of Maine, (1829) pages 400-430. A brief summary of that land policy and relevant transactions is set forth below.

In 1783 the Massachusetts Legislature created the Committee for the Sale of Eastern Lands. The principal purpose of the Committee was to sell public lands in Maine as a source of income for the State. At the time it was estimated that the State owned for sale some 17 million acres on the assumption that they were not Indian lands. In 1784 the Committee reported to the Massachusetts Legislature a scheme to dispose of these lands. It recommended that townships be lotted out, each six miles square, between the Penobscot and St. Croix

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1/ cont.
numerous towns being settled or incorporated prior to the enactment of the Non-Intercourse Act. See, e.g., Stanley Bearce Atwood, The Length and Breadth of Maine, pp. 21 and 22 (1946) and Moses Greenleaf, A Survey of the State of Maine, pages 139-150 (1829) (republished by Maine State Museum, 1970).

Rivers, such lots to be sold at set prices. By 1786, sales having been slow, the Committee created a land lottery for 50 townships between the Penobscot and St. Croix, the so-called "Lottery Lands." These Lottery Lands were depicted on a map by Osgood Carlton prepared in 1795 and published in James Sullivan, History of the District of Maine (1975) and in various maps by Moses Greenleaf.

As of 1790 the Committee had managed to sell or lottery away approximately 375,000 acres. Greenleaf at page 428. Precise location of the tracts thus sold have not been yet determined, but the bulk of nearly all this land was in the current claim area. Greenleaf's Survey of Maine at pp. 400-430 sets forth in more detail the names of recipients and the location of lottery prize lands.

After 1790 sales became more brisk. Between 1790 and 1820 more than 5,000,000 acres of land were sold, again principally in the claim area. In addition, other lands were given away to charitable or educational institutions. Thus, between 1783 and 1820, 6,070,638 acres of public lands in the eastern part of the District of Maine had been sold or granted by Massachusetts. Again, precise location of each tract requires further research, but it can be fairly said that most of these sales were in areas now claimed by the Tribes. For our purposes, it is enough to establish that the sales constituted a patchwork pattern throughout the eastern half of what was then District of Maine and in what is now the Indian claim area.

Of special interest for our purposes is the fact that 2 million acres east of the Penobscot were purchased by Henry Knox and William Duer from Maine in 1791. The Knox-Duer purchase is treated at length

in Allis, William Bingham's Maine Lands at page 35. This contract was made between Knox and Duer and the Committee for the Sale of Eastern Lands. The contract was later amended that same year so that one million acres of land were to be located at the headwaters of the Kennebec and the other million between the Penobscot and St. Croix. In 1792 Knox purchased a third one million acre parcel, the so-called "back tract," running from the eastern tract due north to the St. John River. This back tract is depicted in Carlton's map referred to supra. These transactions were carried on for Knox through agents acting on his behalf. Thus by 1792 Knox and Duer had acquired 3 million acres in what is now territory claimed by both Tribes. The lands thus purchased by Knox were later sold by him to William Bingham in 1793.

Of particular note is the fact that Henry Knox, Secretary of War, along with President George Washington, were instrumental in convincing Congress to adopt the Non-Intercourse Act in 1790. Francis P. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834, page 45 (Lincoln, Neb., University of Nebraska Press; 1962). At the time of his purchase of these tracts Knox was Secretary of War and had authority for the supervision of Indian affairs. It seems fair to assume that Knox was conscious of the Non-Intercourse Act and its requirements relating to purchase of Indian lands. Nevertheless Knox purchased substantial tracts in areas the Indians now claim. Apparently Knox and Duer negotiated to buy other lands along the Penobscot but the committee refused to sell them on the grounds that they belonged to the Tribe.

to contradict that the

This would suggest, among other things, that (1) the highest levels of the federal government in 1791 and 1792 did not consider these lands as belonging to the Maine Tribes, and (2) that in subsequently admitting Maine to the Union the government did so with full knowledge of the way in which Massachusetts had been dealing with lands in eastern Maine and with an awareness by the Executive branch of the federal government of both the existence of the tribes and the scope of their land claims.

A graphic depiction of some of the above described land transactions between 1783 and 1820 can be found in various maps by Moses Greenleaf.[1/] Among other things, the maps include the following:

1. The map at pages 7-8 of the folio shows the status of land sales of 1829, and shows nearly all of present day Hancock and Washington Counties as sold or lotteried. The map also depicts royal patents and colonial grants. It also shows the division of lands between Maine and Massachusetts under Section I, Article 1 of the Act of Separation (see infra).

2. That map at pages 11-12 of the folio shows the course of settlement from 1790-1820 and depicts areas of the State with permanent non-Indian inhabitants in that period.

1/ One set of the original prints are available in the Maine State Library and are stored under security. Because of their size they are not readily susceptible to reproduction.

3. The map at pages 15-16 of the folio shows the status of land sales, grants and lotteries as of 1815. This map is inscribed "Entered according to an Act of Congress of October 30, 1812" indicat that the map was filed with the Clerk of the District Court on that d and thereby obtained for the cartographer certain copyright privilege This map again depicts a substantial portion of the current claim are as having been sold or granted by Massachusetts by 1815.

By 1820, the records of the Committee indicate that more than 6 million acres of Maine lands were conveyed by Massachusetts. See Smith at page 192 and Allis at pages 33-34. All that remained unsold was Aroostook County and the northern most portions of present day Penobscot, Piscataquis and Somerset Counties. This left a balance estimated at between 11 and 9 million acres which Maine and Massachusetts assumed were public domain at that date. As will be discussed in this memo infra the remaining public domain was divided equally between Maine and Massachusetts. As of 1820 only part of such lands were surveyed. See Greenleaf's maps at pages 7-8. These lands continued to be divided as surveys were made as provided in the Act of Separation until Maine purchased them from Massachusetts in 1853. Smith at page 192.

B. INDIAN TREATIES FROM 1790-1820

We set forth below, seriation, the treaties between Massachusetts and the two tribes in the above period. We do not discuss herein the circumstances surrounding their execution or their legal significance at the time of execution. The recitation of the treaties should not be assumed to constitute an agreement by us that they are of any legal

significance, i.e. in referring to the "treaties" we should not deemed as conceding that the provisions thereof in fact deprived Tribes of any lands. We refer to them and paraphrase relevant p so that this opinion will be placed in proper context.

1. In 1794 Massachusetts made an agreement with the Passama in which, among other things, the Tribe relinquished all claims t lands and accepted a total of 23,000 acres in eastern Washington as tribal lands. The State also agreed to provide annually to th Tribe certain specified goods and produce.

2. In 1796 Massachusetts made an agreement with the Penobscot which provided that the Tribe relinquished all its land claims 6 m in width on either side of the Penobscot from the head of tide (ap imately Bangor) up stream 30 miles. (Approximately 9 townships or about 200,000 acres). In return the State paid the Indians some ca and promised to deliver certain goods and produce annually.

3. In 1818 the State of Massachusetts made another agreement wi the Penobscots in which the Tribe sold all their remaining lands to State and were reserved 4 townships that appear to include present day Millinocket, Mattawamkeag, Woodville and Indian Purchase (curren unorganized territory) and all the islands in the Penobscot from Indian Island north. The State also promised as further consideratic certain goods and produce annually and two acres in Brewer for a gard for the Tribe.

C. ADMISSION OF MAINE TO THE UNION IN 1820

In June 1819 Massachusetts enacted "An Act Relating to the Separation of the District of Maine from Massachusetts Proper Forming the Same Into a Sta

things, the Act had several provisions relevant to this case. Those provisions provided that:

Section 1, Art. 1 - All public lands in Maine were to be divided between Massachusetts and Maine, one-half to each state.

Section 1, Art. 5 - Maine was to assume and perform all obligations of Massachusetts running to the Indians whether arising from treaty or otherwise, in return for which Massachusetts was to pay Maine $30,000.

Section 1, Art. 7 - All grants of land and all contracts for land made by Massachusetts within the District of Maine shall continue in full force.

In the fall of 1819 the Constitutional Convention met in Portland, Maine, at which time a constitution was adopted. The constitution included in Art. 10, Sec. 5 all of the above provisions in the Act of Separation. In addition to the foregoing reference to Indians in the Act of Separation, the constitution referred to Indians in Art. IV, Part 2, Sec. 1 and Art. IX, Sec. 14. Of particular note is the latter provision which provided that the state debt limitation did not apply "to any funds which the State shall hold in trust for any Indian tribe."

In the Spring of 1820 An Act to Admit Maine to the Union was submitted to Congress. During the debate in the Senate the constitution was read in the Senate and referred to Committee. In March 1820, Congress, after reciting that the Act of Separation had been passed and that the Maine Constitution had been established, admitted Maine to the Union on an equal footing with the original States

The admission of Maine was not a perfunctory legislative act since the admission was delayed by the debate over the admission of Missouri. An account of the events surrounding enactment of Maine's admission may be found in Ronald Banks, "The Missouri Compromise: 'The Mother Has Twins'" in Banks, ed., History of Maine, pages 177-185.

D. DEALINGS BETWEEN MAINE AND TRIBES AFTER 1820

Since 1820 there have been other land transactions between Maine and the tribes. The single most significant land transaction was the purchase by the State in 1833 of the four townships granted to the Penobscots in 1818. The current Penobscot tribal holdings include all the islands in the Penobscot from Indian Island north totalling about 4,500 acres. Other transactions from 1820 to the present have resulted in a reduction of the Passamaquoddy holdings from 23,000 acres, as reserved in 1794, to the current holdings of about 15,000-16,000 acres.

Non-property transactions have been much more numerous. In the past 156 years Maine has enacted about 360 separate pieces of legislation affecting the tribes. The substance of these laws are summarized in the Court of Appeals opinion in Passamaquoddy v. Morton. This legislation covers Tribal Government, appropriations of necessities for living needs, education, housing, indigent relief, roads, water supplies, use and disposition of tribal lands and representation for the Tribe in the Maine Legislature. Many appropriations were made to the Tribes from the State General Fund (i.e. the general treasury of the State). By 1973 it is estimated that the state had spent about $7,553,000 for the general benefit

What is the citizenship of this?

of the tribes, not including bond issues for water and sewage facilities and schools on the reservations. More detail about expenditures for the Tribes is set forth in the Proctor Report at pages 6-7, 46-58 and 64 and in "Maine Indians; a Brief Summary" (Maine Department of Indian Affairs, 1971) at pages 20-21. While no precise figures are available on the total financial assistance provided to the Maine Tribes by the State, it is fair to say that it is substantial. In addition to being eligible for the full panoply of benefits available to all citizens and communities, the State maintains separate Tribal housing authorities, schools and vast array of social/welfare benefits over and above that provided to non-Indian citizens.

Administration of Indian Affairs in Maine was handled by ad hoc legislative committees until 1830. In 1830 the Executive Council on Indian Affairs was appointed. A joint standing committee on Indian Affairs was created by the Legislature in 1839 consisting of 3 members of the Senate and seven from the House. Until 1929 the Governor and Council managed daily administration of tribal affairs when it was transferred to the Forestry Department. In 1932 it was transferred to the Department of Health and Welfare where it remained until 1965 when a separate Department of Indian Affairs was created, the first such state agency in the nation. Sales of grass and timber on and leases of Indian lands were managed by the State Land Agent until 1932 when these were also transferred to Health and Welfare. Proctor Report, pages 2-3.

E. TRANSACTIONS AMONG THE FEDERAL GOVERNMENT, MAINE AND THE TRIBES SINCE 1820.

Most of the following facts are taken from the Stipulated Facts in Passamaquoddy v. Morton. Reference to many of these facts may be found in the Court of Appeals' decision.

During the years 1824-1828, the Federal Government contributed $250 per year to Elijah Kellogg of the Society for the Propagation of the Gospel Among the Indians, a charitable institution, pursuant to the Act of March 3, 1819, 3 Stat. 516, which provided funds for civilizing Indians adjoining the frontier. The funds were used to support a school for the Passamaquoddies. According to Eugene Vetromile in his book entitled The Abnakis: And Their History, (New York, 1855) at page 120, Kellogg had been sent to the Passamaquoddies as a schoolmaster by the Government of Maine and as a missionary, by the Missionary Society in Massachusetts.

In 1824, the Department of War contributed $233.33, constituting 1/3 of the cost of construction of a school for the Passamaquoddy Indians pursuant to the Act of March 3, 1819, 3 Stat. 516.

By letter dated August 12, 1828, Thomas L. McKenney, Director of the Office of Indian Affairs, advised certain members of the Passamaquoddy Tribe that the Federal funds for the school would be discontinued if intra-tribal differences concerning the religion of the Superintendent of the school were not resolved. The aforementioned dispute was not resolved, and Federal funds for the school were withheld during the year 1829.

In 1824 John C. Calhoun, Secretary of War, corresponded to U. S. Senator John Holmes of Maine with respect to Federal financial assistance to the Passamaquoddy tribe for educational purposes.

In December of 1829, Deacon Sockbason and Sabattis Neptune, two principal men of the Passamaquoddy Tribe, met in Washington with Thomas L. McKenney and Secretary of War John H. Eaton to request reinstatement of funds for the Passamaquoddy School, money with which to hire a priest and to purchase a parcel of land. Their appearance in Washington was noted by President Andrew Jackson who in turn notified the Speaker of the U. S. House of Represenatives by letter. Sockbason's and Neptune's request for reinstatement of the school and for money to hire a priest were granted, with funds appropriated under 3 Stat. 516, and $300 was contributed for these joint purposes in 1830.

On December 10, 1829, McKenney informed Sockbason and Neptune by letter that the "Great Father" would seek funds from Congress so that he might grant their request for additional lands. On or about December 14, 1829, President Andrew Jackson requested funds from Congress to purchase additional land for the Passamaquoddy Tribe. On December 10, 1829, McKenney provided information concerning the Passamaquoddy Tribe's request for land to Congressman Bell, Chairman of the Committee of Indian Affairs, and recommended that Congress appropriate funds for the President to purchase land for that tribe. Congress never appropriated funds for the purchase of land for the Passamaquoddy Tribe.

Due to the above mentioned sectarian strife, Secretary of War Samuel Hamilton informed Kellogg on May 27, 1831 that funds for the school would be suspended during 1831 and discontinued altogether

unless a plan could be devised to end the sectarian strife. Funds for the school were discontinued after 1831. In a letter dated July 2, 1832, Commissioner of Indian Affairs Elbert Herring denied Kellogg's request that the school funds be reinstated and used for the improvement of Passamaquoddy agriculture.

During the period 1899 to 1912, five members of the Passamaquoddy Tribe attended the Carlisle Indian School at Carlisle, Pennsylvania, for short periods of time.

In this century there have been other contacts between the Tribes and the United States Government. The following are a few examples of such contacts.

In the 1930's and 1940's extensive W.P.A. projects were funded on the reservations for roads, water mains, cemeteries and to repair flood damage. Proctor Report, pages 59-63.

In 1935 the United States Commissioner of Indian Affairs corresponde with U.S. Representative Ralph Brewster of Maine regarding the status of the Maine tribes. The Commissioner's letter acknowledged the fact that Maine had long exercised exclusive jurisdiction over the Tribes within its borders and that the United States had never disputed that exercise of jurisdiction. In 1942 the Commissioner corresponded with Ralph Proctor on this same issue and referring to his predecessor's communication to Brewster.

In 1961 the Maine Attorney General responded to then Senator Sam Ervin of the Senate Judiciary Committee regarding Ervin's inquiry about the extent to which Indian constitutional rights were protected by the State of Maine. Then Deputy Attorney General George West noted to Ervin that:

> "The State of Maine has assumed law and order jurisdiction over the Indian reservations by virtue of a treaty between the Indians and the Commonwealth of Massachusetts originally made in 1794 and ratified by the State of Maine."

The United States Departments of Agriculture and Housing and Urban Development have both corresponded with Maine officials about Maine tribes and discussed their status in 1967 and 1968.

Since 1966 the United States Government has provided extensive aid to the tribes for housing and water and sewage systems. "Maine Indians: A Brief Summary," p. 21. Maine Department of Indian Affairs, (1971).

In addition to these direct federal contacts with the tribes themselves, the federal government has engaged in a number of other transactions in the so-called "Indian claim area." A brief list of these transactions and programs includes: acquisition of Park Lands (e.g. Moosehorn National Wildlife Refuge, Acadia National Park, Allagash Wilderness Waterway, all of which were acquired with funds from or are managed by bureaus within the Department of Interior), acquisition of military bases (e.g. Dow Air Force Base in Bangor, Presque Isle Air Force Base, Loring Air Force Base in Limestone, Cutler Naval Facility, Searsport P.O.L. Facility) acquisition and construction of post offices, courthouses, armories and other federal facilities and leasing of land and structures for federal use, financial assistance for highway construction and maintenance (e.g. I-95, U.S. Rte. 1), financial assistance for urban renewal, model cities, sewage and water systems and sewage treatment plants, FHA, HUD

and Small Business Administration, loans or grants. All of those programs involve either the acquisition by the United States of a possessory interest in land or the extension of credit or grant-in-aid for a project involving or requiring the acquisition of a possessory interest in land by the recipient of such federal financial assistance. Dollar amounts are not available at this point, but inasmuch as federal agencies are involved that data could be gathered as easily by the United States Government as by the State of Maine.

Within the City of Millinocket, the area of which was arguably acquired from the Penobscot Tribe by the treaty of 1833-1834, numerous federal projects have been undertaken involving federal acquisition of land or federal grant-in-aid or other financial assistance for municipal projects involving the use or acquisition of real property by the city. These include W.P.A. projects, assistance for airport construction, schools, sidewalks and roads, sewage treatment facilities water treatment facilities as far back as the 1930's. The United States through various agencies has acquired land in Millinocket from non-Indians for a United States Post Office, an armory and has leased land for FAA facilities at the airport.

We know of no instance in which the government itself has ever compensated a tribe or tribal member for land so acquired or used nor obtained a release for such acquisition or use from the Tribe or tribal member, regardless of whether the use or acquisition was by the United States or other person or entity. In all instances the United States Government in acquiring land has never suggested that any Indian tribe had any claim to any land so affected.

F. ACQUIESCENCE BY THE TRIBES TO MAINE'S DEALINGS WITH THEM.

No evidence has been found thus far to suggest that at any time prior to the 1971 the Tribes ever viewed the land transactions between themselves, Massachusetts and Maine as either subject to or illegal under the N.I.A.

To the contrary, the Tribes and their attorneys had previously taken the position that the treaties are valid and enforceable document and that the State legitimately exercises jurisdiction over the tribes. In 1968 the Passamaquoddy Tribe filed suit in Massachusetts Superior Court for Suffolk County against the Commonwealth of Massachusetts alleging inter alia that (1) Massachusetts with the consent of the United States, had assumed jurisdiction over and responsibility for the Passamaquoddies, and (2) the Act of March 1820 admitting Maine to the Union ratified and affirmed that relationship.

V. LEGAL ANALYSIS

A. VALIDITY OF THE PRE-1820 TREATIES

As the preceding factual summary sets forth more fully, prior to year 1820, the Commonwealth of Massachusetts had entered into several treaties with the Penobscot and Passamaquoddy Indians. There is significant case law which is determinative of the validity of these aforesaid treaties.

In June, 1819, Massachusetts enacted "An Act relating to the Separation of the District of Maine from Massachusetts Proper, and forming the same into a separate and independent State." Said Act stated specifically, among other things, that:

> "The new State [Maine] shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties or otherwise; . . . ." (emphasis added) Sec. 1. Fifth.

At the Sixteenth Congress, 1st Session, the United States Congress devoted what can be termed considerable attention to the admission of Maine into the Union. (See Exhibit A, attached hereto) 1/

On March 3, 1820, Congress passed "An Act for the Admission of the State of Maine into the Union," as follows:

> "Whereas, by an act of the state of Massachusetts, passed on the nineteenth day of June, in the year one thousand eight hundred and nineteen, entitled 'An Act relating to the separation of the district of Maine from Massachusetts proper, and forming the same into a separate and independent state,' the people of that part of Massachusetts heretofore known as the district of Maine, did, with the consent of the legislature of said state of Massachusetts, form themselves into an independent state, and did establish a constitution for the government of the same, agreeably to the provisions of said act - Therefore,
>
> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the fifteenth day of March, in the year one thousand eight hundred and twenty, the state of Maine is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."

1/ For example, the entire Maine Constitution was read in the United States Senate. The above mentioned provision (clearly stating that Maine assumed the duties and obligations to the Indians arisi from the Massachusetts treaties previously entered into with the Indians) was incorporated into the Maine Constitution; accordingly, the above mentioned provision was read in full before the Senate of the United States.

Exhibit A does not contain an exhaustive list of references. There was additionally, for example, extensive debate regarding Maine's admission into the Union and the admission of Missouri (the Missouri Compromise, so-called).

In 1821, the Supreme Court of the United States handed down its first decision in the leading case of Green v. Biddle, 21 U.S. (8 Wheaton) 1 (1823). Kentucky had been a part (a District) of the Commonwealth of Virginia. In 1789, the legislature of the Commonwealth of Virginia passed "An Act Concerning the Erection of the District of Kentucky into an Independent State." (copy attached hereto as Exhibit B.) This act or compact was ratified by the Kentucky convention, which convention drafted the Kentucky constitution. The act was furthermore incorporated into that Kentucky constitution (see Green v. Biddle at 3, 4) The compact or act stated in part that all private rights and interests of lands within the district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State of Kentucky, and shall be determined by the laws then existing in Virginia.

In 1791, Congress passed an Act admitting Kentucky into the Union, as follows:

> "Whereas the legislature of the commonwealth of Virginia, by an act entitled 'An act concerning the erection of the district of Kentucky into an independent state,' passed the eighteenth day of December, one thousand seven hundred and eighty-nine have consented, that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state: And whereas a convention of delegates, chosen by the people of the said district of Kentucky, have petitioned Congress to consent, that, on the first day of June, one thousand seven hundred and ninety-two, the said district should be formed into a new state, and received into the Union, by the name of 'The State of Kentucky:'

> "Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, and it is hereby enacted and declared, That the Congress doth consent, that the said district of Kentucky, within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries, on the eighteenth day of December, one thousand seven hundred and eighty-nine, shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new State, separate from and independent of, the said commonwealth of Virginia.
>
> "Sec. 2. And be it further enacted and declared, That upon the aforesaid first day of June, one thousand seven hundred and ninety-two, the said new State, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America."

Subsequently, after obtaining statehood, the State of Kentucky adopted legislation adversely affecting land titles. At issue in Green v. Biddle was whether the statute passed by the Kentucky legislature was an unconstitutional impairment of the obligation of a contract. The Supreme Court twice held that it was. The first decision was rendered by the Court in 1821 in an opinion by Justice Story.

Shortly thereafter, Mr. Clay (as amicus curiae) moved for a rehearing, which was granted. Clay specifically argued, among other things, that assent of Congress to compacts or agreements between States (see Article 1 Section 10 of the Constitution of the United States) must be an express consent, and that this consent was not given by Congress. (See Green v. Biddle at 39 - 42) The argument was emphatically rejected by the Supreme Court in its second decision in Green v. Biddle, handed down in 1823. Said the Court in applicable part:

"It was contended by the counsel for the tenant, that the compact was invalid in toto, because it was not made in conformity with the provisions of the constitution of the United States; . . .

"The first objection is founded upon the allegation, that the compact was made without the consent of Congress, contrary to the tenth section of the first article, ... Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition, that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that District assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said District should become a separate State on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a State, upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February, 1791, Congress passed an act, which, after referring to the compact, and the acceptance of it by Kentucky, declares the consent of that body to the

> erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union.
>
> "Now, it is perfectly clear, that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent State; and then it would follow, that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument, would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true." (emphasis in original) (Green v. Biddle at 85-87)

While the ultimate issue before the Court in Green v. Biddle was different, of course, than that in the litigation at hand,[1/] that case clearly stands for the proposition that when Congress admits a new state into the Union, said new state having formerly been a part of another state prior to the admission, the consent of Congress to that admission is a consent to the terms of the statute (or compact) between the two states which provided for their separation. The Act relating to the Separation of the District of Maine from Massachusetts, as noted earlier, expressly refers to the treaties which had been

1/ There is however, it should be carefully noted, a close factual similarity between the manner of separation of Kentucky from Virginia and the admission of Kentucky into the Union on one hand and the manner of separation of Maine from Massachusetts and Maine's admission into the Union on the other.

made between the Commonwealth of Massachusetts and the Indians, involving land in the District of Maine. Under the principle set forth in Green v. Biddle, the admission of Maine into the Union was necessarily a consent (". . . not by a mere tacit acquiescence, but by an express declaration of the legislative mind. . ." 21 U.S. 8 Wheaton at 87) by the Congress to the terms of said Act and was accordingly a consent to the treaties themselves.

The foregoing conclusion is supported by the reasons of Mr. Justice Story (who, as noted supra, was on the United States Supreme Court when Green v. Biddle was decided) in his highly-regarded Commentaries on the Constitution of the United States. Story analyzed that clause in Article I Section 10 of the United States Constitution which states in relevant part that "No State shall, without the Consent of Congress, . . . enter into any agreement or compact with another State . . . ." Said Story

> "In what manner the consent of Congress is to be given to such acts of the States is not positively provided for. Where an express consent is given, no possible doubt can arise. But the consent of Congress may also be implied; and, indeed, is always to be implied, when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them. Thus, where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part; there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. This was true as to the compact between Virginia and Kentucky, upon the admission of the latter into the Union . . . [citation by Story to Green v. Biddle, 8 Wheat. R. 1, 85, 86, 87]; and the like rule will apply to other States, such as Maine, more recently admitted into the Union." (emphasis added) Volume II, Section 1405.

In Virginia v. West Virginia, 78 U.S. (11 Wall) 39 (1870) the effect of the admission by Congress of a state into the Union was again before the United States Supreme Court. West Virginia had been a part of the State of Virginia. In 1861 an organic convention of the State of Virginia reorganized the State. The convention passed an ordinance calling for a convention of delegates from certain counties of the State of Virginia to form a constitution for a new State. This convention (provided for by the aforementioned ordinance) met in 1861 and adopted a constitution for West Virginia. Said constitution provided that forty-four counties (not including the counties of Berkeley or Jefferson) were named as those which would form the new State. In addition, the constitution provided in a separate section in applicable part that should a majority of the voters of the district composed of the counties of Berkeley, Jefferson and Frederick be in favor of the adoption of the constitution, then those counties would form a part of the State of West Virginia. On May 13, 1862, the legislature of the State of Virginia passed an act consenting to the formation of the State of West Virginia, to be composed of forty-eight named counties (but not including Berkeley, Jefferson or Frederick). The act provided, however, in a separate section that the consent of the legislature of Virginia is given that the counties of Berkeley, Jefferson and Frederick shall form a part of the State of West Virginia whenever the voters of those counties ratify and assent to the constitution of West Virginia. On December 31, 1862, the Congress of the United States passed "An

Act for the admission of the State of 'West Virginia' into the Union and for other purposes." The Congressional act referred to the aforementioned convention of West Virginia and the May 13, 1862 act passed by the legislature of Virginia, listed the forty-eight counties by name which were set forth in the May 13, 1862 Virginia statute, and stated that ". . . Congress doth hereby consent that the said forty-eight counties may be formed into a separate and independent State . . . ." (the counties of Berkeley and Jefferson were not, of course, included in the list).

Subsequently, elections were held in the counties of Berkeley and Jefferson and the State of West Virginia thereupon extended her jurisdiction over those two counties.[1/] The Commonwealth of Virginia filed a bill in equity against the State of West Virginia regarding their boundary and especially concerning whether the counties of Berkeley and Jefferson had become a part of West Virginia. West Virginia filed a demurrer; the Court sustained the demurrer and dismissed the bill.

Said the Court,

> "In the further consideration of the question raised by the demurrer we shall proceed upon the ground, which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question, can only be maintained by a valid agreement between the two States on that subject, and that to the validity of such an agreement, the consent of Congress is essential. . . ." 78 U.S. at 55.

1/ It should be noted that some of the acts related to the formation of West Virginia as a separate state have no material bearing on the present legal issue, and, accordingly, will not be treated herein.

The Court found that there was an agreement between Virginia and West Virginia that the counties of Berkeley and Jefferson should become a part of West Virginia upon the condition set forth supra.

The Court continued,

> "But did Congress consent to this agreement? Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between States without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement.
>
> "The attention of Congress was called to the subject by the very short statute of the State of Virginia requesting the admission of the new State into the Union, consisting of but three sections, one of which was entirely devoted to giving consent that these two counties and the county of Frederick might accompany the others, if they desired to do so. The constitution of the new State was literally cumbered with the various provisions for receiving these counties if they chose to come, and in two or three forms express consent is there given to this addition to the State. The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the constitution framed by that convention, and in the act of the Virginia legislature, must have received the attentive consideration of Congress. To hold otherwise is to suppose that the act for the admission of the new State passed without any due or serious consideration. But the substance of this act clearly repels any such inference; for it is seen that the constitution of the new State was, in one particular at least, unacceptable to Congress, and the act only admits the State into the Union when that feature shall be changed by the popular vote. If any other part of the constitution had failed to meet the approbation of Congress, especially so important a part as the proposition for a future change of boundary between the new and the old State,

> it is reasonable to suppose that its dissent would have been expressed in some shape, especially as the refusal to permit those counties to attach themselves to the new State would not have endangered its formation and admission without them.
>
> "It is, therefore, an inference clear and satisfactory that Congress by that statute, intended to consent to the admission of the State with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing it necessarily consented to the agreement of those States on that subject.
>
> "There was then a valid agreement between the two States consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition." 78 U.S. at 59 - 61.

Thus, in Virginia v. West Virginia, supra, the United States Supreme Court without hesitation followed the legal principle it had set forth earlier in Green v. Biddle. The Court stated again that when Congress admitted a new State into the Union, said new State having been a part of another state prior to the admission, the Congress "necessarily" consented to the terms of the separation agreement between the new State and the State of which it had formerly been a part.

The foregoing cases have been quoted at length due to their highly important bearing on the issue at hand. Our research, thus far, indicates no case law overturning or eroding the firm legal principles first set down by the United States Supreme Court over 150 years ago in Green v. Biddle, and later reaffirmed by that court in Virginia v. West Virginia. In light of the decisions of the courts imposing a high fiduciary responsibility upon the federal government towards the Indians, and in light of the decision in Green v. Biddle and in

Virginia v. West Virginia, we believe it would be specious to argue that either Congress had no knowledge of the treaties between Massachusetts and the Indians, or that Congress would have approved of the admission of Maine into the Union had it (Congress) not approved of the treaties between Massachusetts and the Indians.

The case of Virginia v. Tennessee, 148 U.S. 503 (1893) is also of worthy note. Involved in that case was a boundary dispute between the States of Tennessee and Virginia. The States of Tennessee and Virginia appointed Commissioners from each state in an attempt to settle a long standing boundary dispute. In 1803, legislation was passed in both States accepting the boundary as proposed by the commissioners. Almost ninety years later, the State of Virginia filed suit claiming that no Congressional approval had been obtained to the boundary "agreement," as required by Article 1 Section 10 of the United States Constitution. Although no express consent of Congress had ever been obtained, the Supreme Court rejected Virginia's argument.

In reaching its decision, the Court noted with approval the statement in Story, Commentaries on the Constitution of the United States (which statement was quoted earlier herein at page 27) that,

> ". . . where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact." 148 U.S. at 521.

In addition, the Court spoke at some length about the recognized inviolability of long standing boundaries between States or Provinces or Nations or individuals. The Court noted several compelling reasons, some of which had previously been set forth by other recognized

authorities and by earlier Court decisions, for the extreme reluctance to disturb long recognized boundaries. Significantly, the Supreme Court specifically included "moral considerations." 148 U.S. at 524.

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary." 148 U.S. at 523, quoting from Rhode Island v. Massachusetts, 4 How. 591, 639.

This sound and beneficial principle applies equally to the situation at hand.

A significant decision specifically regarding Indian matters was handed down by the court in The Seneca Nation of Indians v. The United States, 173 Ct. Cl. 912 (1965). The Seneca Nation in that case sued the United States for indemnification for a tract of land taken by New York State by eminent domain. Between 1858 and 1872, the State of New York took by eminent domain approximately 51 acres from the Seneca's Oil Spring Reservation. There was no contemporaneous consent by Congress for these takings.

In suing the federal government, the Seneca Nation specifically claimed that New York State's taking by eminent domain without federal consent was violative of the Trade and Intercourse Act, 25 USC § 177. The Court said in response, in salient portion,

> ". . . that, if federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant [The Seneca Nation of Indians] would have no complaint if assent had been given at the time of the appropriations. [footnote omitted] But approval can also come afterwards, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except 'that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings.' Act of January 5, 1927, ch. 22, 44 Stat. 932, 933. This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation, as well as of the state's continued claim of right. [footnote omitted] Cf. United States v. National Gypsum Company, 141 F.2d 859, 863 (C.A. 2, 1944)." 173 Ct. Cl. at 915.

Seneca Nation of Indians v. United States remains good law today. It firmly supports the legal principle that under the Trade and Intercourse Act, 25 USC § 177, subsequent approval of treaties, as well as contemporaneous approval, can validly be given by the Congress; and that by the admission of Maine in 1820 into the Union by Congress, upon the terms set forth in the Act of Separation of the District of Maine from Massachusetts (which terms explicitly imposed upon the State of Maine the obligations towards the Indians that arose from the treaties between Massachusetts and the Indians), there was an "implicit ratification" of the pre-1820 Indian treaties by Congress.

The United States Supreme Court has, while saying that a termination of Indian title to land is not to be lightly implied, has never stated that a termination could not be implied. See e.g., DeCoteau v. District County Court, 420 U.S. 425 (1975); United States v. Santa Fe Pacific

R. Co., 314 U.S. 339 (1941). To the contrary, the Supreme Court, in looking at the "public records" (314 U.S. at 353) facts, surrounding circumstances, historical data, and other relevant indicia and evidence has where warranted found the necessary action for such termination. See e.g., DeCoteau v. District County Court, supra; United States v. Santa Fe Pacific R. Co., supra. Thus, as the Supreme Court noted recently in DeCoteau, supra, "[s]ome might wish they [Congress and the Indian tribe] had spoken differently, but we [the Supreme Court] cannot remake history."[1/]

In addition to the reference to Indian treaties in the Act of Separation, two other provisions are to be found therein which support our conclusion. Section 1, Art. 1 and Section 1, Art. 7 of the act make provision for disposition of public lands in Maine. Without completely reciting the facts set forth in part IV of this memorandum, briefly stated by 1820 Massachusetts had granted or sold and otherwise treated as publicly owned domain all of the now claimed territory. With respect to lands specifically reserved to Indians by a State treaty, Massachusetts had acted on the assumption that Indian possession

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1/ Counsel for the Passamaquoddy and Penobscot Indians have verbally indicated that they are relying, in part, upon United States v. Boylan, 265 F. 165 (2nd Cir. 1970) in support of their legal position. It should be noted that the United States Supreme Court dismissed an appeal from Boylan for want of jurisdiction, due to failure to apply for writ of error within the statutory period. 257 U.S. 614. Consequently, any dicta or holding in Boylan has not been before the Supreme Court for review. The case, furthermore, appears to be inconsistent with the decisions of the United States Supreme Court. See, e.g., DeCoteau v. District County Court, supra; United States v. Santa Fe Pacific R. Co., supra.

could be terminated at the sole discretion of the State. The effect of the above provisions of the Act of Separation was to ratify that course of conduct, to reaffirm land grants by Massachusetts and to permit Maine and Massachusetts to divide up 10-11 million acres of remaining public domain.

Even if one were to ignore the reference to treaties in the Act of Sepration, one would still be compelled by the foregoing case law to conclude that in admitting Maine to the Union, Congress ratified previous sales or grants of land by Massachusetts in Maine whether within or without lands claimed by Indians by virtue of Section 1, Art. 7 of the Act. Additionally, in order to give vitality and meaning to Section 1, Art. 1 of the Act, and in light of the knowledge of the domain then considered by Maine and Massachusetts as publicly owned, to wit: everything except that reserved to the Tribes by the treaties of 1818 and 1794, one must conclude that Congress agreed that Maine and Massachusetts owned such lands. Any other reading of those articles of the Act would render them meaningless. That is, if we were to conclude that the lands now claimed by the Tribes were rightfully theirs, we would have to conclude that Article 7 does not say what it says, and that Congress did not approve of it despite the rationale of Green v. Biddle and that sales and grants of land by Massachusetts throughout the state were not reaffirmed by the Act of Separation. Similarly, we would have to conclude that Massachusetts and Maine had no right to survey, divide up other lands in the fashion provided by Article 1 and that Congress did not approve that article, again in spite of Biddle.

Interestingly enough Section 1 Article 7 of the Maine Act of Separation is nearly identical in effect to Section 7 of the Kentucky Act of Separation. See Exhibit B. It was that provision which was at stake in Biddle. That suggest, therefore, that Biddle applies with particular force in this case.

In order to conclude that Congress has not ratified the pre-1820 treaties by admitting Maine to the Union, one must discount not only the reference to treaties in Section 1, Art. 5 but must read out the language in Articles 1 and 7 and ignore the factual circumstances and background to those provisions. We believe that to do so ignores sound case law and defies logic. We, therefore, conclude that in so admitting Maine, Congress fully ratified the pre-1820 treaties in the manner required by the various Non-Intercourse Acts.

B. RATIFICATION OF AND ACQUIESCENCE IN LAND ACQUISITIONS SINCE 1820.

Since 1820 the State has acquired or authorized the acquisition of Indian lands. The most significant of those acquisitions was made pursuant to the treaty or agreement of 1833, by which the State purchased four township reserved to the Penobscots by the Treaty of 1818. The assent of the federal government to that and other purchases, and the concomitant extinguishment of Indian title required by the Non-intercourse Act, 25 U.S.C.A. § 177, is found in the long and continued acquiescence of the federal government in the exercise by the State of Maine of the power to deal with matters of Indian title, which acquiescence is indicative of (1) ratification of the post-1820 purchases made by the State of Maine and others, and (2) the delegation to the State of Maine of plenary power to handle Indian affairs.

As a preliminary matter, it should be emphasized that the Non-intercourse Act requires neither contemporaneous nor prior federal approval of an alienation of Indian lands. Seneca Nation of Indians v. United States, supra. On the contrary, that decision firmly establishes the principle that where federal consent is required under the Non-intercourse Act, the requisite approval ". . . can also come afterwards" and that such subsequent confirmation or ratification is fully effective. (Id. at 915)

More importantly, however, the Seneca decision also recognized that ratification under the Non-intercourse Act may be implicit as well as explicit. While there does not appear to be any specific Congressional enactment analogous to that found to be dispositive in the Seneca case, which makes explicit mention of the purchase in question, other factors exist in this case which appear to be equally dispositive of the issue of implied federal approval.

First, of course, are the unavoidable facts that the transaction in controversy occurred nearly one hundred and fifty years ago, that it took place in an open and somewhat ceremonious fashion,[1/] and that it created a long-standing status and source of land titles which have remained, until only recently, unchallenged. Secondly, correspondence between officials of the State of Maine and various federal authorities, including the Commissioner of Indian Affairs, the Department of Agriculture, the Department of Housing and Urban Development and the Senate Judiciary Committee, reflects a mutual understanding and recognition by the federal government and the State of Maine that the State of Maine has properly exercised, since its inception, comprehensive regulatory authority over Indian affairs within its territorial jurisdiction. Finally, it is certain that the federal government has engaged, both directly and indirectly, in a substantial number of land transactions in the four townships in

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1/ The purchase was accomplished by means of a treaty with the Penobscots the basic contents of which were published shortly thereafter in Laws of Maine (1843), pp. 261-263.

question, including, inter alia, acquisition of land for federal facilities such as post offices and courthouses; financial assistance for highway construction and maintenance; funding for urban renewal projects; model cities programs, sewage and water systems; sewage treatment plants; HUD and FHA housing programs; and, secured financing by the Farmers Home and Small Business Administrations. It would seem likely, moreover, that a substantial portion of these dealings has involved either the acquisition by the United States of a possessory or security interest in real estate now claimed by the Penobscots, or the extension of credit or grants of money for projects requiring the acquisition of an interest in that land. There is no evidence to suggest that the federal government has ever manifested any recognition of Penobscot title to these lands by negotiating with them, in any manner, for a release of their purported title or compensating them for the land so acquired. On the contrary, the federal government has uniformly dealt with the record owner of the real estate as the recognized holder of title and consistently recognized the existing status of titles in the area.

Similar factors were held to be indicative of federal approval or implied ratification of leases of Indian reservation lands in United States v. National Gypsum Company, 141 F.2d 859 (2nd Cir., 1944). In that case, a tribe had entered into a treaty with the federal government in 1857 which authorized it to later purchase

land for a reservation in the State of New York. The treaty further provided that title to the land so purchased would be held in trust for the tribe by the Secretary of the Interior until the New York Legislature appointed an appropriate public official to take title upon a similar trust. It appears, however, that there was nothing in the treaty which delineated the powers of the trustee. Soon thereafte the title to the land devolved to the Comptroller of the State of New York, in trust, pursuant to the treaty. In 1873 the state legislature authorized the tribe to sell gypsum on reservation lands. Accordingly, under this authorization, certain leases were concluded with the National Gypsum Company. In a subsequent action by the United States, on behalf of the tribe, to have the leases declared void under the Non-intercourse Act, the court considered the question of whether the federal government had authorized the State to so control the disposition of reservation lands. In finding the requisite federal approval, the court relied almost entirely upon factors similar to those appearing in this case, to wit, various correspondence and memoranda between federal and state authorities which reflected a mutual understanding and federal recognition of rather extensive state regulatory authority over the reservation, including regulation of leasing therein. Within this context, the following portions of the opinion are particularly significant:

"While there can be no question but that the United State could have controlled the Tonawandas if it had thought best, we are inclined to think that it deliberately left a large measure of control in respect to the reservation to the State of New York. There can be no other explanation of the arrangement for transferring the Tonawanda Reservation from the Secretary of the Interior to the Comptroller of the State of New York, or of the continued recognition by the Federal authorities of the exercise of State supervision over that reservation. Ever since 1862 there have been statutory enactments by the State regarding the administration of the Reservation of the Indians and for some seventy years there have been provisions relating to sales of gypsum from that Reservation." Id. at 862 (emphasis added)

* * * * *

"For many years it has been the understanding of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under the State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that the Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. Sec. 177, R.S. Sec. 2116. United States v. Midwest Oil Company, 236 U.S. 459, 481, 35 S.Ct. 309, 59 L. Ed. 673." Id. at 863 (emphasis added)

The same rationale would appear to be applicable to this case. The conclusion seems inescapable that the federal government deliberately left a large measure of control over the Indians to the State of Maine, or, at least, acquiesced in the State's continued

exercise of that control. Since 1820, the State of Maine has enacted 360 separate pieces of legislation covering, inter alia, tribal government, agriculture, education, housing, roads, water supplies, representation in the legislature and, most importantly, laws regulating the use and disposition of tribal lands. Nevertheless federal authorities have never questioned the propriety of the State's assertion or exercise of such regulatory authority. Instead, they have continually recognized it. More importantly, however, by its own transactions and dealings in the affected area, it is evident that the United States has acknowledged and confirmed the existing status of land titles therein. As in the National Gypsum case, there is no logical reason why a status so long maintained with the consent of the United States should be disregarded and set aside under the Non-intercourse Act.

Worthy of note here is Virginia v. Tennessee, supra, which involved, among other thins, a search for the consent of Congress to a compact between the States of Virginia and Tennessee regarding a boundary line. The court found that consent was necessarily implied from subsequent Congressional legislation and proceedings, including the apportioning of districts for judicial, revenue, electoral, and federal appointment purposes.

> "Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line;

> but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other side, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings (at p. 522).

It is significant that the only precedent relied upon by the court in National Gypsum was United States v. Midwest Oil Company, 236 U.S. 459. This indicates that the opinion in National Gypsum was predicated upon the principle, enunciated in Midwest Oil, that long-continued acquiescence, manifested by a course of governmental action and/or inaction, as tantamount to implied approval or confirmation. Therefore, although it did not involve the validity of a tribal conveyance, the Midwest Oil decision is particularly germane to the present litigation.

There, the issue for decision was the validity of a 1909 Executive withdrawal, from public entry, of lands which the Congress, by general legislation, had previously made available for public acquisition. In considering the question, the court observed that the President had made, during the past eighty years, similar withdrawals for various purposes without any express statutory authority but solely under a claim of power to do so. The court also attached particular significance to the fact that Congress had repudiated neither the power claimed nor any of the more than 250 orders made thereunder but had continually, although tacitly, acquiesced in the practice. In concluding that this tacit acquiescence constituted implied Congressional consent of the practice the court states:

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. The presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, --- even when the validity of the practice is the subject of the investigation." (236 U.S. at 472-3)

* * * *

> "Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any case, be construed as a denial of the right of the Executive to make temporary withdrawals of public lands in the public interest. Considering the size of the tracts affected and the length of time they remained in force, without objection, these orders . . . furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw." (Id. at 479-80)

Similarly, there are other noteworthy decisions which, in the context of appropriations of Indian lands by the federal government, have held implied ratification or confirmation of initially tortious appropriations, either through acquiescence or through a course of Congressional and executive conduct, to be sufficient to extinguish tribal title.

In Confederated Salish and Kootenai Tribes v. United States, 401 F.2d 785 (Ct. Cl. 1968), a proceeding was brought by those tribes to determine the value of reservation lands which had been

appropriated by the United States. Apparently, the plaintiff tribes' reservation had been erroneously surveyed by federal officials, in 1887 and again in 1893, which resultedin the subsequent treatment of a considerable portion of the reservation as part of the federal public domain. As a further consequence of the erroneous surveys, certain portions of the lands thereby excluded from the reservation were later made part of National Forest lands by virtue of two separate Presidential Proclamations, in 1897 and 1906, respectively.

Against this background, therefore, the tribes instituted their claim for compensation more than 60 years after the surveys had been conducted. During the proceedings, however, a dispute arose as to whether the portion of the former reservation lands since placed in national forests were included in the tribes' claim. Evidently, reasoning that they would gain more from an accounting for profits together with the incidents of present ownership, the tribes now asserted that the President had been without authority to place these lands within national forests and, as an unauthorized tort was insufficient to divest them of title, that the land, therefore, still belonged to the tribe.

In resolving the dispute, the court emphasized that if the placement of the disputed tracts in national forests had been authorized or ratified by Congress, the taking would constitute a legitimate exercise of eminent domain thereby fully divesting

the tribes of any interest in the property. In holding that the requisite confirmation had occurred, albeit implicitly, the court observed:

> "Here the formal actions of Presidents Cleveland and Theodore Roosevelt have stood for many years; the areas have been administered as, and have become part of, the national forests; they have been uniformly so treated by Congress and by the executive branch. If there was any want of authority, in 1897 and 1906, to designate this land as an integral sector of the forest reserve, that lack has since been cured by the consistent legislative and executive treatment in the intervening years. There has, in other words, been legislative and executive confirmation and ratification, as there was held to be in Creek Nation. Such implicit ratification is fully effective." Id. at 788 (Citations omitted)

Accordingly, the court rejected the tribes' claim that they had never been divested of title.

As indicated in the above-quoted portion, a similar decision was rendered in United States v. Creek Nation, 295 U.S. 103, 55 S. Ct. 681, 79 L.Ed. 1331 (1935). Briefly stated, that case involved a suit by the Creek Indians to recover compensation for tribal lands which, as a result of erroneous surveys, had been mistakenly disposed of by allotments to other tribes and sales to settlers by federal officials. During the course of the litigation, a question arose as to whether there had, in fact, been an appropriation or taking of lands by the federal government. In concluding that a taking had occurred, by virtue of subsequent ratification, the court reasoned, in pertinent part:

> ". . . Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand --- not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way, the United States in effect confirmed the disposals, and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them." 295 U.S. at 110.

Consequently, in view of the implied ratification described above, the court held that there had been, as claimed, an appropriation of Indian lands thereby entitling the tribe to compensation.

Another decision involving implied confirmation of an extinguishment of tribal title is Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244 (1937). In this suit by the Shoshones to recover damages for breach of treaty obligations wher by the tribe had been divested of possession of a portion of reservation lands, the primary issue was the time at which the value of the land was to be fixed, i.e., the time at which the taking occurred. By Treaty of July 3, 19868, the tribe had been granted a reservation which was to be set apart for their exclusive use and occupation., In 1878, however, the federal government began bringing bands of another tribe, the Arapahoes, into the area for settlement on the reservation. Despite continued and unheeded protests by the Shoshones, moreover, nearly the entire Arapahoe tribe had settled in the area by April of 1878. Although years passed and the

protests continued, no action was taken to ameliorate the situation. Instead, schools and other projects were constructed for the benefit of the Arapahoes. In 1897 and 1907, moreover, Congress ratified two agreements providing for the cession of certain reservation lands to the government. Under each agreement, both the Shoshones and the Arapahoes were to share equally in the agreed consideration for the cessions, i.e., allotments and cash. In view of the foregoing history, the court concluded that the appropriation occurred at the time of the initial intrusion by the Arapahoes by virtue of an implied ratification of the Arapahoe occupancy. The court reasoned, in pertinent part, as follows:

> ". . . Looking at events in retrospect through the long vista of the years, we can see that from the outset the occupancy of the reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the government of the United States, through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong adopting the de facto appropriation by relation as of the date of its beginning. . . . There are the reports at the beginning as to the purpose of the settlement; the words and silence of administrative officers when entreated to banish the intruders; the creation of schools. . . and, most important of all, the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." 299 U.S. at 495.

The acquiescence of the federal government in the exercise by the State of Maine of the power to deal with matters of Indian

title is also consonant with the delegation of the power to the State of Maine. It is not open to question that Congress may delegate its powers and this authority to delegate extends even to those powers conferred upon it by the United States Constitution. /Simms v. Simms, 175 U.S. 162 (delegation of powers conferred by Property Clause); District of Columbia v. Thompson Co., 346 U.S. 100 (delegation of legislative power to the District)/

In this regard, constitutional grants of power to Congress have been held not to vest Congress with exclusive control over the subject matter. In Texas Oil and Gas Corporation v. Phillips Petroleum Co., 277 F. Supp. 366, aff'd. 406 F.2d 1303, cert. denied 395 U.S. 829, a challenge was made to Oklahoma forced pooling statutes which purported to cover oil and gas mining operations being carried out on federal land under leases granted by the federal government pursuant to the Federal Mineral Leasing Act of 1920, as amended. The court found that neither the Act nor the property clause of the United States Constitution rendered invalid the Oklahoma statutes:

> "This clause (of the Constitution) does not place the exclusive control of the federal public domain in the United States Government. It only confers this power on Congress and leaves to Congress the determination of when and where and to what extent this power will be exercised." (p. 368)

While it may appear that cases arising under the Property Clause are inapposite to the present controversy over Indian lands, it is clear that the Property Clause is one of sources of the federal

government's control over Indian tribes, Indian reservations and Indian lands. (United States v. State of Minnesota, 95 F.2d 468, 469, aff'd. 305 U.S. 382).

It is submitted that federal power over Indian affairs is no less and no more extensive than its power over the public domain, and no more and no less exclusive. It follows, therefore, that Congress may choose the manner, the what, where and when, it will exercise its power over Indian affairs just as it can choose how it exercises its power over the public domain. Indeed, it has been said that the United States has taken upon itself the guardianship of the Indians "and has reserved to itself the right to determine the manner in which the guardianship has been and shall be carried out." (United States v. State of Minnesota, supra, p. 470; United States v. McGowan, 302 U.S. 535; United States v. Sandoval, 231 U.S. 28).

The manner in which this guardianship has been carried out in Maine - with regard to the Passamaquoddy and Penobscot Indians - has been the delegation to Maine of plenary power to handle Indian affairs. The delegation is implied from low level of involvement of Congress and the Department of Interior with Indian affairs in Maine and the absence of an objection by these federal entities to the numerous transactions between Maine and the Indian tribes heretofore mentioned. That such acquiescence can amount to a delegation of authority to act finds support in United States v. Midwest Oil, supra, at p. 481:

> "Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until revoked by some subsequent action by Congress." (Emphasis added)

It will no doubt be asserted that the Non-intercourse Act reflects the intent of Congress to retain exclusive jurisdiction over Indian affairs and thus precludes any suggestion of a delegation of authority. cf. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974). This case involved a claim by three Chippewa tribes for compensation for lands in North Dakota acquired by the McCumber Agreement of 1892 and approved, as amended, by Congress in 1904 and the Indians in 1905. In the course of a long opinion the court of claims reviewed the history of the exclusive and plenary power of Congress in dealing with Indian affairs, and noted, significantly, that "Congress may of course delegate this power. . . " (at p. 945) However, it found no such delegation in the instance of the Chippewa lands, relying on the Non-intercourse Act and the Act Creating the Territory of Dakota (Act of March 2, 1861, 12 Stat. 239), which expressly preserved the power of Congress to handle Indian affairs.

It is not contended here that Congress has ever enacted legislation delegating to the State of Maine the power to handle Indian affairs. Nevertheless, support for the delegation of the power is to be found in the absence of any reservation in Congress of power to handle Maine Indian affairs in the 1820 Act admitting Maine into the Union. (3 Stat. 544) This is in sharp contrast to

the Act creating the Territory of Dakota and to the Act admitting Oklahoma into the Union, 34 Stat. 267, June 16, 1906:

> "Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

At this late date in the history of the relationship of the Indians, the State of Maine, and the United States Government, it is reasonable to conclude that, even if Congress has not surrendered its interest in the matter, the federal government, by its conduct, should be precluded from asserting its rights or the rights of the Indians. (cf. United States v. California, 332 U.S. 19, 36). The mere existence of federal legislation germane to the issue of title t Indian lands is not dispositive and does not exclude from considerati under appropriate circumstances, a further delegation of authority ev when the exercise of the delegated authority amounts to a disposal of property thought to be prohibited under legislation or the United States Constitution.

In Butte City Water Co. v. Baker, 196 U.S. 119, an ejectment action was brought against defendant on the grounds that he had failed to comply with certain Montana statutes governing the locations of mines. These statutes contained regulations governing locations in addition to those found in Congressional legislation

The defendant asserted the Montana statutes undertook to dispose of public lands, a power reserved to Congress, and one not to be delegated to the state. The court found that there had been no specific delegation of Congressional power, but, nothing that the Montana legislation had been extant for 30 years, said:

> "Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the Far West. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast - " (at p. 127).

As the Supreme Court has said:

> ". . . No human transactions are unaffected by time. Its influence is seen on all things subject to change. . . . The tranquility of the people of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion wars. . ." (Virginia v. Tennessee, supra, p. 523)

This quotation expresses the equities that should govern disposition of the present controversy. The federal assent required to validate the purchase of Indian lands by the State of Maine subsequent to 1820 is found in the long acquiescence of the federal government in the exercise by the State of Maine of the power to deal with matters of Indian title.

The only conclusion to be drawn from the facts in this case is that the federal government has not only delegated to the State of Maine the plenary power to handle Indian affairs, but has also ratified the transactions entered into by the State with the Indian tribes. The long-standing and heretofore unchallenged

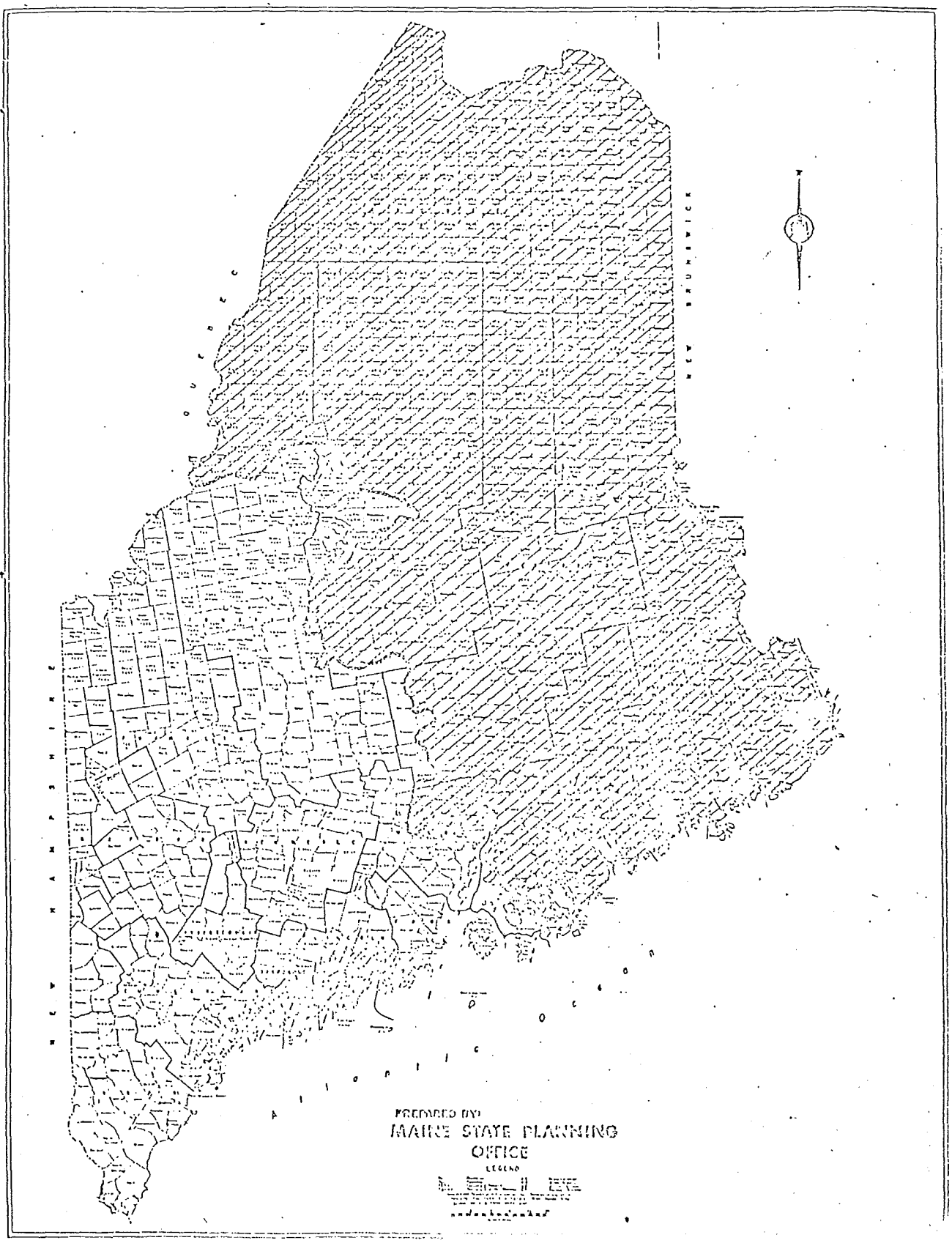
status of land titles in the disputed area, the continued recognition by the federal government of that status by its own dealings in the area, and its acknowledgment of comprehensive state regulatory authority over the Maine Indian tribes clearly manifest the early recognition by the federal government of Maine's authority to handle Indian affairs and its consent to the exercise of that authority from 1820 to the present day.

IV. CONCLUSION

Based on the foregoing analysis and the cases cited herein, this office is of the firm opinion that the claims now asserted by the Penobscot and Passamaquoddy Tribes under the Non-intercourse Act are without merit and that such claims if pursued through litigation will be unsuccessful. In light of all the facts and the cited law, we believe that the likelihood of any court finding in favor of the Tribes is so remote as to be inconceivable.

Joseph E Brennan

JOSEPH E. BRENNAN
Attorney General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MAINE STATE PLANNING
OFFICE

EXHIBIT A

Annals of the Congress of the United States
Sixteenth Congress
1st Session
The Debates and Proceedings of the Congress of the United States

December 6, 1819 to May 15, 1820

Senate, Dec. 8 P. 20 Mr. Mellon, presented the memorial of the Convention of the District of Maine, praying to be admitted into the Union, as a separate and independent State, on the footing of an original State, together with the constitution formed in convention for the State of Maine; which were severally read, and respectively referred to committee.

Senate, Dec. 22 P. 35 Williams, to whom the subject was referred, reported a bill declaring the consent of Congress to the admission of Maine into Union; the bill was read and passed to the second reading.

Senate, Dec. 23 P. 36 The Bill declaring the consent of Congress to the admission of Maine into Union was read the second time, and considered as in Committee of the Whole; and the bill having been amended, further consideration postponed.

Senate, Jan. 4 P. 55 The bill from the House of Representatives entitled 'An act for the admission of the State of Maine into the Union,' was read twice by unanimous consent, and referred to the Committee on the Judiciary.

Senate, Jan. 13 P. 84 The Senate, having taken up bill from House of Representatives for the admission of Maine into Union, together with the amendment reported thereto, by the Judiciary Committee, which amendment embraces provisions for authorizing the people of the Territory of Missouri to form a convention preparatory to their admission into the Union.

Roberts of Pennsylvania proposed that the bill to admit Maine be recommitted to the Judiciary Committee with instructions to modify its provisions, divested of the amendment embracing Missouri. Roberts said the question involved in the amendment would probably "excite much feeling." Roberts felt that they were two separate questions. "Maine, he said, was a part of the old territory of the U.S.; her constitution was already formed, with the consent of the State from whom she was to be separated; there was no dispute about her limits, which were defined,. . . There were many doubts about Missouri, with respect to her extent, boundaries, and population, without regard to other questions which might arise respecting her constitution, & c."

Senate Feb. 18 P. 429 The bill entitled "An act for the admission of the State of Maine into the Union" was read a third time as amended . . . and the bill passed with amendments. Title amended to "An act for the Admission of the State of Maine into the Union, and to enable the people of the Missouri territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States; and to prohibit slavery in certain territories."

House of Representatives Dec. 8, 1819 P. 704 Holmes presented petition of convention lately assembled within and for district of Maine, praying that assent of Congress be given to admission of Maine into Union as a State. Referred to a select committee.

House of Representatives Dec. 31, 1819 P. 846 House then proceeded to the order of the day, and resolved itself into a Committee on the whole on the bill providing for admission of Maine into Union as a State. The Committee rose and reported the bill and amendments to the House.

House of Representatives Jan. 3, 1820 P. 849 An engrossed bill entitled "An act for the admission of the State of Maine into the Union, and to extend the laws of the United States to said State" was read the third time, and passed.

EXHIB. B

COMPACT WITH VIRGINIA.

COMMONWEALTH OF VIRGINIA.

AN ACT CONCERNING THE ERECTION OF THE DISTRICT OF KENTUCKY INTO AN INDEPENDENT STATE. APPROVED DECEMBER 18, 1789.

WHEREAS, It is represented to this present General Assembly, that t act of last session, entitled "An act concerning the erection of the Distr of Kentucky into an Independent State," which contains terms materia different from those of the act of October session, one thousand sev hundred and eighty-five, are found incompatible with the real views this Commonwealth, as well as injurious to the good people of the s district:

§ 1. Be it enacted by the General Assembly, That in the month May next, on the respective court days of the counties within the s district, and at the respective places of holding courts therein, represen tives to continue in appointment for one year, and to compose a c vention, with the powers, and for the purposes hereinafter mentior shall be elected by the free male inhabitants of each county above age of twenty-one years, in like manner as delegates to the Gen Assembly have been elected within said district, in the proporti following: In the county of Jefferson shall be elected five represen tives; in the county of Nelson five representatives; in the county Mercer five representatives; in the county of Lincoln five representati in the county of Madison five representatives; in the county of Fay five representatives; in the county of Woodford five representatives the county of Bourbon five representatives; and in the county of Ma five representatives: Provided, That no free male inhabitant above age of twenty-one years, shall vote in any other county except tha which he resides, and that no person shall be capable of being elec unless he has been a resident within the said district at least one yea

§ 2. That full opportunity may be given to the good people exercising their right of suffrage on an occasion so interesting to th each of the officers holding such elections, shall continue the same f day to day, passing over Sunday, for five days, including the first and shall cause this act to be read on each day immediately prece the opening of the election, at the door of the court-house or o convenient place; each of the said officers shall deliver to each pe duly elected a representative, a certificate of his election, and shall tr mit a general return to the clerk of the Supreme Court, to be by him before the convention.

§ 3. For every neglect of any of the duties hereby enjoined on officer, he shall forfeit one hundred pounds, to be recovered by actio debt by any person suing for the same.

§ 4. The said convention shall be held at Danville on the twenty-s day of July next, and shall and may proceed, after choosing a presi and other proper officers, and settling the proper rules of proceedin consider and determine whether it be expedient for, and the will o

good people of the said district, that the same be erected into an independent State, on the terms and conditions following:

§ 5. First, that the boundary between the proposed State and Virginia, shall remain the same as at present separates the district from the residue of this Commonwealth.

§ 6. Second, that the proposed State shall take upon itself a just proportion of the debt of the United States, and the payment of all the certificates granted on account of the several expeditions carried on from the Kentucky district against the Indians, since the first day of January, one thousand seven hundred and eighty-five.

§ 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.

§ 8. Fourth, that the lands within the proposed State of non-resident proprietors, shall not in any case be taxed higher than the lands of residents, at any time prior to the admission of the proposed State to a vote by its delegates in Congress, where such non-residents reside out of the United States, nor at any time, either before or after such admission, when such non-residents reside within this Commonwealth, within which this stipulation shall be reciprocal; or where such non-residents reside within any other of the United States, which shall declare the same to be reciprocal within its limits; nor shall a neglect of cultivation or improvement of any land within either the proposed State or this Commonwealth, belonging to non-residents, citizens of the other, subject such non-residents to forfeiture or other penalty, within the term of six years, after the admission of the said State into the Federal Union.

§ 9. Fifth, that no grant of land or land warrant to be issued by the proposed State, shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, one thousand seven hundred and ninety-one.

§ 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals, or description of individuals, by the laws of this Commonwealth, for military or other services, shall be exempted from the disposition of the proposed State, and shall remain subject to be disposed of by the Commonwealth of Virginia, according to such appropriation, until the first day of May, one thousand seven hundred and ninety-two, and no longer; thereafter the residue of all lands remaining within the limits of the said district, shall be subject to the disposition of the proposed State.

§ 11. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth, and of the proposed State, on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river.

§ 12. Eighth, that in case any complaint or dispute shall at any time arise between the Commonwealth of Virginia and the said district, after it shall be an independent State, concerning the meaning or execution of the foregoing articles, the same shall be determined by six commissioners, of whom two shall be chosen by each of the parties, and the remainder by the commissioners so first appointed.

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 7, 1976

COMMENTS ON DEPARTMENT OF INTERIOR HISTORICAL SUMMARY RELATING TO PASSAMAQUODDY AND PENOBSCOT TRIBAL LAND CLAIMS

To: Gregory Austin, Solicitor
United States Department of Interior

From: Joseph E. Brennan, Attorney General
of the State of Maine

On November 15, 1976, the Department of Interior forwarded to us a summary of the history of the Passamaquoddy and Penobscot Indian Tribes as they relate to alleged claims by those Tribes under the so-called Non-Intercourse Act. The summaries presumably represent substantial historical research by the Tribes and their representatives. Comments were solicited from us by November 30, 1976. That comment period was subsequently extended to December 10. Because of the limitations of time, therefore, the following comments are preliminary only. Our failure to comment on a statement of fact or expression of opinion in the Department's summary should not be construed as agreement by us with the fact statement or opinion.

I. General Comments

The documents do not reflect the qualifications of the exper whose work they purport to reflect. Moreover, regardless of the

authors' qualifications, we understand from conversations with the Solicitor's Office that the summary history was compiled by persons retained by the Tribes and not the Department of Interior. This understanding is confirmed by a brief review of the Department's summary. The summary is not a balanced historical analysis, but is decidedly weighted in favor of the tribes and cites only historical documents that support the Tribes' claims. Since that summary was prepared for the purpose of facilitating a decision by the federal government on whether there was a legitimate claim by the Maine Tribes against the State, we assume that it would have discussed all relevant facts and opinions. Instead, however, much significant data appears to have been omitted. We think that it is clear beyond doubt that the government's litigation position and fiduciary obligation must be made after it has examined all facts and not merely a selectively compiled and edited series of documents favoring only one point of view. A fiduciary is obliged and must evaluate a claim on behalf of his beneficiary in the same way he would in evaluating a claim affecting his own affairs. Scott, Law of Trusts, §§ 174-177 (1967). Under that standard, we submit that it would be just as much a breach of a trust obligation to bring a groundless suit as it would be to fail to file a meritorious one on behalf of a beneficiary. We suggest that the Department's summary does not represent a fair and balanced historical analysis required of a reasonably prudent trustee.

Our view that the historical summary is incomplete is supported by simply reviewing the factual statement in the memorandum from the Maine Attorney General to the Governor of Maine. None of the facts cited therein are referred to in the Department's summary. Additional facts relating to non-Indian settlements, incorporated townships and census data, all of which is readily available to even the unskilled researcher, was not cited in the report. The report reflects no information of land sales in eastern Maine pre-1790, cites none of the Royal patents or colonial grants and their legal significance, an fails to discuss the increasing lumbering and other economic activiti by whites in the interior of eastern Maine. The report fails to disc the declining Indian population prior to 1790, the causes for that decline and to relate that to the scope of the territory held by the tribes as of 1790.

II. Passamaquoddy Tribal History

The summary fails to cite any data on the number of members of the Tribe in 1790. Various figures are available in F. Kidder, Military Operations in Eastern Maine and Nova Scotia During the Revolution (1867) pages 303-318, 384-385; Ralph W. Proctor, Report Maine Indians, Maine Legislative Research Committee (1945) page 64; and W. H. Kilby, Eastport and Passamaquoddy (1888), pages 483-484. John Allen states in Kidder that by 1790 there were only 30 Passam families in eastern Maine. All the sources agree that by 1790 the Tribe's population had declined substantially even from the Revolu period.

The report places substantial reliance on Frank Speck in support of the proposition that Passamaquoddies hunted over and occupied the coast eastward as far as the Union River and Mt. Desert. The report fails to note that Speck's opinion is unspecific and merely refers to tribal territory in the 18th century, without specifying when in that century Speck means. Speck, Penobscot Man; The Life History of a Forest Tribe in Maine, page 9. Moreover, Speck's thesis is unsupported by U.S. Census data of 1790 showing coastal Maine populated by whites, and other records of incorporated townships and settlement by 1790. See Moses Greenleaf's Maps; Stanley Bearce Atwood, The Length and Breadth of Maine (1946) and Moses Greenleaf, A Survey of the State of Maine (1829). The writer of the Department's summary apparently chose to assume that Speck's statements referred to all of the 18th centu without having any basis for such assumption. Furthermore, the report fails to note that Speck does not offer any historical source for his conclusions, apparently preferring to rely on Speck's reputation in the absence of citations by Speck to support his opinion. Based upon discussions with experts retained by the State, we believe that the historical theories of Speck are precisely that--theories-- and are subject to serious doubt. A more balanced treatment of thehistory of the Tribe would reveal that fact.

The opinion that the lands in eastern Maine, now claimed by the Passamaquoddy, was occupied by them since time immemorial fails is also based on selective data. In order to establish aboriginal possession the Tribes will have to show exclusive occupation not or as to non-Indians, but also as to other Tribes. The Department's report fails to cite reports in Kidder at pages 284-285 and 305 which

indicates that Tribes other than the Passamaquoddy used the Schoodic Lake area. That information indicates that the Micmac, St. John and Penobscot Indians regularly used the territory jointly with the Passamaquoddy. Moreover, the "riverine" nature of all eastern Indians would strongly support a thesis that lands between the Penobscot and St. Croix were not exclusive but were used by all tribes, including perhaps tribes from west of the Penobscot. See Andrea Bear "Concept of Unity Among Indian Tribes of Maine, New Hampshire and New Brunswick: An Ethnohistory," pages 62-63 (Colby College Library, Special Collections Section; Unpublished Thesis, 1966), which work was cited in "Federal and State Services and the Maine Indian" (Report of the Maine Advisory Committee to the United States Commission on Civil Rights, 1974). Bear also disputes the theory that the Passamaquoddy were a separate tribe, and refers to them as a subgroup of the Malisee Bear at page 38.

The Passamaquoddy historical summary fails to even mention the letter from the Passamaquoddy and Micmac Tribes to the Massachusetts General Court in 1791, despite the fact that its existence is well known to the Department, it having been cited in its entirety in an earlier report by the Bureau of Indian Affairs to the Department of Justice. See Memorandum of Michael Smith, May 1973, Bureau of Indian Affairs as transmitted to Assistant Attorney General Anthony S. Borwi May 1973, by Assistant Solicitor Duard Barnes and materials attached hereto. In that letter the tribe stated:

> "Since peace we have been wandering from place to place those spots of grounds, which were want to be our abode, are taken up on the American, as on the British side, and when our Familys attempt to encamp thereon are threatened with every insult, so that our women and children are in continual fear - it is to you therefore, we look as our Chiefs. Through many of us hunt on the English ground, where we formely resided, and in some cases obliged still to encamp, yet a place is wanting, where we can assemble unmolested at stated times, according to ancient custom; and for the benefits of such who inclines to sow and plan - it is in this country we wish to make our home - we ask from you to fulfill those promieses made in war, particular that we may have secured, for the use of several Tribes a tract of land on Shuduch [i.e. the St. Croix] River, and a place of residence on the Sea Shore. We have given no trouble, nor any expense arose on our parts since peace. We expect you will answer this, with friendship and agreeable to our request."

The letter would seem to corroborate John Allen's reports in 1792. In any event, the failure to even cite the letter indicates to us that there is decided lack of objectivity in the Department's historica summary.

With respect to the same point, the Department's summary fails to cite Eugene Vetromile, The Abnakis and Their History, (New York: J.B. Kirkes, 1866) for his discussion of the Tribe's lands in and about 179(Vetromile, at page 55, supports the thesis that in 1790 the Passamaquo Tribe had no lands and that the Treaty of 1794 was a grant of land to the destitute and landless Tribe. The failure to cite Vetromile is all the more unusual since it is cited in part in the Department's summary at page 6, notes 16-20. In all likelihood, further researc will continue to reveal the highly selective nature of the historical summary.

III. Penobscot Tribal History

In addition to the foregoing general remarks all of which are applicable to the Penobscot historical summary, there are numerous readily identifiable omissions in the report that relate specifically to the Penobscot summary.

As is the case with the Passamaquoddy report, the summary fails to mention data on incorporated towns, settlements and white population figures cited supra and in the accompanying memorandum of law. See Williamson, History of the State of Maine, Vol. II, p. 582 (1823) in which he places the number of Penobscots in Maine at 350; James Sullivan History of the District of Maine, p. 96 (1795) that estimates the number at less than 300; and a report of the United States Indian Commissioner in 1822 that estimates the number of Penobscots at that time at 277 cited in Ralph W. Proctor, "Report on Maine Indians" (Maine Legislative Research Committee, 1942) at page 65. The Department has not even consulted reports of the first United States census taken in 1790.

The report has also failed to inquire into the extent of lumbering and other white commercial ventures in eastern Maine in that period to determine the extent to which whites regularly moved over or used the tribes "aboriginal lands." For example, Williamson notes in his history at page 550 that:

> "Since the war that lumber business and the fur trade greatly increased. Hunters multiplied and many spent the whole year in the northern woods of Maine; seldom returning so much as to visit their home."

Williamson reports that hunting pressure had become so great that in 1790 Massachusetts enacted a hunting season limit

The reliance placed on Speck is subject to the same criticism as above. Since Speck seems to be the most important source for the Penobscot tribal claim, the above comments are all the more important. Apparently Speck is the only source to place the Penobscots in the St. John River area in northern Maine in 1790. It should be noted that Speck's work was undertaken in the 20th century for the purpose o documenting the Tribe's life style. From all that appears in Penobscc Man, Speck's historical statements are conjectures.

The transactions between Massachusetts and the Penobscots, recounted at pages 18-28, fail to mention the various reports filed by the Commissioners appointed by the Massachusetts Legislature and whic are referred to in various Massachusetts Legislative enactments c ed in the summary. Those reports were prepared for the purpose of determining the extent of the boundaries of the land claimed by the Penobscots at various periods. A complete and objective report woul include examination of those reports.

Despite the fact that the report itself fails to mention pre-17 white settlements and incorporated townships in the Penobscot claim area and in the face of a citation to documents indicating that at most the Penobscots only had a claim to a strip 6 miles in width on either side of the Penobscot River upstream from the head of tide i 1790, the summary nevertheless concludes that it is "clear" that tribe had an aboriginal claim to the "entire Penobscot Watershed a a major portion of th . . John Watershed." This conclusion pe to be a vast overstatement of even the most favorable interpretati of all such facts.

IV. Conclusion

On the basis of the brief foregoing critique, we believe that the evidence to substantiate a claim based on Indian occupancy of lands in Maine in 1790 is and has been grossly overinflated. The Department's historical analyses does not contain sufficient documentation on which a reasoned judgment can be made on whether indeed the Maine Tribes can substantiate such a claim. Absent further objective research by the United States government, we submit that it would be irresponsible of the United States to initiate a suit on the Tribes' behalf.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General
State of Maine

JEB:jg

1977 SETTLEMENT OF NATIVE AMERICAN CLAIMS ACT

Section 1. Congressional Findings. Congress finds and declares:

(a) that all aboriginal titles and all claims of aboriginal title, including, without limitation, claims based on use and occupancy, including submerged land underneath all water areas, both inland and offshore and including any aboriginal hunting or fishing rights, if any, have, prior to the date of this Act, been extinguished or abandoned;

(b) that continuing claims based on aboriginal title, including the possibility of as yet unasserted aboriginal land claims, constitute an interference with the orderly administration of justice and a cloud on otherwise valid land titles and hinder careful land use planning and the operation of numerous federal and state programs;

(c) that certain states made treaties, agreements, grants or reservations with or for the benefit of Native Americans, which have resulted in or may result in land claims by Native Americans;

(d) that there is an immediate need for a fair and just settlement of all Native American claims based on aboriginal title or based upon title to land as a result of any state treaty, agreeme grant or reservation;

(e) that a settlement should be accomplished rapidly, with certainty and in fairness to all concerned, without creating any additional reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutio enjoying special tax privileges;

(f) that no provision of this chapter shall constitute a precedent or authority for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native Americans;

(g) that no provision of this chapter shall relieve, replace or diminish any obligation of the United States to otherwise protect and promote the rights or welfare of Native Americans as citizens of the United States.

Section 2. Aboriginal Title Extinguishment through Prior Transactions.

(a) All prior conveyances of land and water areas or any interest therein, to the extent the same has not been judicially determined prior to the date of this Act, whether said conveyances were ratified by Federal action or not, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

Section 3. Title Claims.

(a) All claims that are based on claims of aboriginal right, title, use or occupancy of land or water areas in any state or territory may be brought only against the United States and shall be brought pursuant to the Indian Claims Commission Act, as amended, on or before June 1, 1980, or be forever barred.

(b) All claims arising out of or based upon the title to or interference with lands or hunting or fishing rights granted to or reserved for Native Americans by any state or territory pursuant to a treaty, agreement, grant or reservation by said state or territory whether or not such treaty, agreement, grant or reservation was ratified by Congress, may be brought only against the United States and shall be brought pursuant to the Indian Claims Commission Act,

as amended, on or before June 1, 1980, or be forever barred.

(c) Any relief granted as a result of an action brought pursuant to subparagraphs (a) and (b) hereof shall be limited to money damages.

(d) All claims or actions which could have otherwise been brought pursuant to subparagraphs (a) and (b) hereof but which actions are, as of this date, pending in any state or federal court shall be immediately transferred to the Indian Claims Commission, where th same may be heard de novo and there determined pursuant to the provisions of the Indian Claims Commission Act as if the same had originally been therein brought.

Section 4. Indian Claims Commission.

(a) Title 25 U.S.C. §70a as amended October 27, 1974, is hereby further amended by deleting the first paragraph thereof and substituting the following:

> "§70a. Jurisdiction; claims considered; offsets and counterclaims.
>
> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based

upon fair and honorable dealings that are not recognized by any existing rule of law or equity. (New) (6) claims pursuant to the 1977 Settlement of Native American Claims Act. No claim in respect of numbers 1-5 hereof, accruing after August 13, 1946, shall be considered by the Commission."

(b) Title 25 U.S.C. §70v, as amended April 10, 1967, is further amended by deleting the first sentence thereof and substituting the following:

"§70v. Dissolution of Commission and disposition of pending claims.

The existence of the Commission shall terminate at the end of ten years from and after January 1, 1976, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. The records and files in all other pending cases, if any, including those on appeal shall be transferred to the United States Court of Claims, and jurisdiction is hereby conferred upon the United States Court of Claims to adjudicate all such cases under the provisions of section 70a of this title: Provided, that section 70a of this title shall not apply to any case filed originally in the Court of Claims under section 1505 of Title 28."

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APPENDIX D

Q

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 2 6 1976

MEMORANDUM

To: Solicitor

From: Acting Associate Solicitor for Indian Affairs

Subject: Review of materials provided us by the Maine Attorney General re United States v. Maine.

On December 9, 1976 at a meeting in the Secretary's Office, Maine Attorney General Joseph E. Brennan and his deputy, John M. R. Paterson, gave you a package consisting of the following materials:

(1) a December 8, 1976 cover letter;
(2) a legislative proposal for resolution of the Maine Indian claims;
(3) a December 7, 1976 memorandum addressed to you from Mr. Brennan; and
(4) a December 7, 1976 memorandum to Maine Governor James E. Longley from Mr. Brennan.

Messrs. Brennan and Paterson have indicated that this submission to us is made in the hope that we will ultimately decide that the land claims of the two Maine Indian Tribes are without merit. We have reviewed the State's materials and find that no arguments have been advanced of which we had not already been aware. Indeed, contrary to the Attorney General's suggestion, we are familiar with almost all of the sources he relies on in support of his view that the Indian claims are "grossly over-inflated." Accordingly, we remain of the opinion that the Tribes' claims are meritorious.

Following are our specific comments on the State's submission. We decline to comment on the legislative proposal, however, since we think it inappropriate for the Department to act on any such proposal at this time. We propose that this memorandum be appended to our litigation report in United States v. Maine along with the

State's materials to provide the Justice Department with opposing viewpoints from which it can render independent judgment.

The December 7, 1976 Memorandum to the Solicitor

This 9-page document is offered as a preliminary rebuttal to the evidence contained in the historical summaries submitted to the State with your letter of November 11, 1976. The Maine reply states that the summaries were "prepared for the purpose of facilitating a decision by the federal government on whether there was a legitimate claim by the Maine Tribes against the State . . .." (at page 2). This is incorrect. The summaries are edited versions of the Morrison papers being submitted to the Justice Department. Tim Vollmann of our staff participated in the editing process with two tribal attorneys and one other researcher (not Dr. Morrison). The object was to delete from the papers any reference to any transaction or other event which could be turned to the Tribes' disadvantage at trial. This was a condition of the tribal attorneys' consent to the release of the summaries. Such disadvantageous evidence would not be discoverable. And the edited summaries adequately served the purpose of giving the State the opportunity to rebut the Tribe's affirmative cases. We thought that purpose was made clear in the November 11 letter, but apparently it was not. The Attorney General appears to have regarded our submission to him as an offering of our complete justification for pursuit of the Indian claims. This was never our purpose; nor should it have been.

The State's substantive objections to the evidence found in the summaries are based primarily on one premise with which we disagree: that the Indian land claims can be no more extensive than the territory the Tribes actually possessed on the date of the enactment of the Nonintercourse Act in 1790, and are thus subject to all non-Indian settlement prior to that date, whether or not such settlement was predicated on the lawful extinguishment of

Indian title. This premise suggests that aboriginal Indian title was not entitled to any legal recognition prior to enactment of the Nonintercourse Act. This is contrary to the opinion of Chief Justice Marshall in Worcester v. Georgia, 31 U.S. 515 (1831), which expressly treats Indian title as a matter of international and common law predating the Constitution. Indeed, questions involving the legality of colonial-era takings of Indian land were the subject of litigation well into the nineteenth century. E.g., Mitchel v. United States, 34 U.S. 711 (1835).

At any rate, working from that basic premise, the State points to three factors which it contends rebut much of the evidence supporting extensive tribal claims. Those factors are (1) the relatively small populations of the Tribes, (2) pre-1790 non-Indian settlement in aboriginal territory, and (3) pre-1790 conveyances by the Commonwealth of Massachusetts and Massachusetts Bay Colony.

(1) The argument regarding population thinness is raised on pages 3 and 7 of the memorandum. Col. John Allan's A report of "only" 30 Passamaquoddy families in 1790 is cited, as well as early nineteenth century estimates of the Penobscot population ranging from 277 to 350. It is argued that such numbers could not occupy the millions of acres claimed. First, it should be pointed out that the State's figures are selective. Col. Allan also reported 50 to 60 Penobscot families residing from Penobscot Bay north to the border with Canada. And his war memoirs refer to a contingent of 500 Indians in 128 canoes traveling down the Machias River to defend Maine against the British. Later population figures may well have been attributable to disease and starvation caused by incursion of the white man into Indian territory. Secondly, proof of aboriginal title does not demand actual possession of land, but may derive from intermittent contacts which establish a tribe's dominion over it. Spokane Tribe of Indians v. United States, 163 Ct. Cl. 58, 66 (1963). The Passamaquoddy and Penobscot Tribes were not agriculturally oriented, but relied on hunting, fishing, and gathering to sustain

themselves. The rivers of Maine were their highways, and they would take their canoes many miles in search of the beaver and other game. In this respect their occupancy patterns were very similar to those of the Seminole Indians whose aboriginal title to all of the Florida peninsula was upheld despite the fact that all of their settlements were in the north. United States v. Seminole Indians, 180 Ct. Cl. 375, 383-86 (1967). In that case the Government argued that a population of only 2,500 Indians could not establish occupancy of such a large land mass. The area of the Florida peninsula is perhaps three times the size of the Passamaquoddy and Penobscot claims areas combined.

Furthermore, the cited reference to "only" 30 families should be taken in proper context. The extended family was a Wabenaki hunting unit and a single family often occupied an entire subwatershed. Anthropologist Frank Speck spent over 30 years at the beginning of this century tracing the territories of only 20 Penobscot aboriginal families, whose land stretched from Penobscot Bay to the headwaters of the St. John's River near the northern tip of Maine. Penobscot Man at page 8. And contrary to the suggestion of the State that Speck's information is unreliable, his research is no doubt relied upon more than that of any other early anthropologist in the field. See e.g., Snow, Wabenaki "Family Hunting Territories," 70 American Anthropologist 1143-51 (1968).

(2) The State's reliance on pre-1790 non-Indian settlement as defining the scope of Indian territory shows a basic misunderstanding of aboriginal title. On page 4 of the memorandum it is said that a tribe must "show exclusive occupation . . . as to non-Indians . . . ." However, white encroachment by itself cannot effect an abandonment of Indian title. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 947 (Ct. Cl. 1974). Eighteenth century records indicate that colonial and state authorities often insisted upon formal extinguishment of aboriginal title as a prerequisite to settlement. In times of good faith provincial leadership

unauthorized settlement was regarded as but trespass. An 1821 opinion of the U.S. Attorney General illustrates that view. It ruled that aboriginal possession is a sufficient proprietary interest to prevent the presence of mere surveyors in Indian territory. 1 Op. A.G. 465. This was the prevailing legalistic view of the era, and should be distinguished from the dominant extralegal attitude of manifest destiny. Quite simply, legal rights could not be established in non-Indians by merely disregarding Indian occupancy. The affirmative act of the Tribe (abandonment) or of the primary sovereign (extinguishment) was needed to establish non-Indian rights of occupancy.

(3) The third argument of the State is the most problematic. It refers unspecifically to pre-1790 conveyances and grants. Our research into those transactions is clearly much farther advanced than the State's, but the issue remains and must be confronted. No doubt some pre-1790 transactons cannot be assailed. For example, some of the early eighteenth century treaties between colonial authorities and the Penobscots involved Indian cessions of land in the St. George's River watershed west of Penobscot Bay. See pp. 11-13 of Morrison Penobscot Paper. We are researching those conveyances to determine whether any aboriginal title was lawfully extinguished. But it is already clear that numerous colonial transactions were of dubious legality. Many deeds and grants (including all colonial conveyances in Passamaquoddy aboriginal territory) required royal approval on the face of the conveyance instrument, but never received such approval. This is particularly evident in the grants made subsequent to a 1763 royal proclamation which required crown approval before Indian lands could be conveyed.

With regard to conveyances made between 1776 and 1790 the question becomes: who had the authority to extinguish Indian title, the State or the federal government? We think very persuasive arguments can be made that only the federal government, the supreme authority in Indian affairs during the period of the Confederation, had such

authority. Article IX of the Articles of Confederation (1777) provided:

> "The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated . . .." 1 Stat. 4, 7.

That provision was quoted in full in the Proclamation of September 22, 1783 of the Continental Congress, which then provided:

> ". . . Therefore the United States in Congress assembled have thought proper to issue their proclamation, and they do thereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians without the limits or jurisdiction of any particular state, and from purchasing or receiving any gift or cession of such lands or claims, without the express authority and directions of the United States in Congress assembled.
>
> "And it is moreover declared, that every such purchase or settlement, gift, or cession, not having the authority aforesaid, is null and void and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement." Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), Appendix at 15-16.

This proclamation appears to be nearly identical in its intended effect to the Indian Nonintercourse Act of 1790, except for the references to "Indians, not members of any of the States" and Indian lands "without the limits or jurisdiction of any . . . State." In Docket 301 before the Indian Claims Commission, Oneida Nation of New York, et al. v. United States, the government took the position that these phrases, as used in Article IX, were intended to limit the application of that article to Indians and Indian lands outside the borders of the thirteen original States. However, the Commission disagreed. After a lengthy discussion of the historical background of the Articles of Confederation and their application, it concluded (1) that "Indians, not members of any of the States" referred to those Indians who continued to maintain their tribal organization and assert their independence; and (2) that "the legislative right of any State, within its own limits" referred to a State's preemptive fee title to Indian lands, i.e., its exclusive right to purchase such lands. 37 Ind. Cl. Comm. 522, 536-546 (1976). Similarly, the phrase "without the limits or jurisdiction or any particular state" in the proclamation no doubt pertained to unceded Indian territory within the boundaries of a State since the Continental Congress had reserved to itself the exclusive authority for managing all Indian affairs. In support of this proposition note the discussion by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. 515, 557-560 (1832). There he offers his view in conscious dicta that upon the declaration of its independence, the national government immediately presumed to take over the exclusive sovereign role of dealing with the Indian tribes. Thus, after the 1783 proclamation, if not before, any grants or cessions of Indian country were subject to the approval of the United States.

A few specific issues raised by the State in this memorandum also deserve some comment. On pages 5-6 reliance is placed on some contemporary correspondence for the proposition that the Passamaquoddy Tribe possessed no land at the time of the enactment of the 1790 Nonintercourse Act. Contrary to the statement of the Attorney

General, one such letter from the Tribe to the Massachusetts General Court was cited in the summary we provided that State. That letter and similar correspondence have been a subject of our investigation.

A reading of this material fails to demonstrate to us that the Passamaquoddies abandoned their aboriginal territory at this time. Indeed, no lands had been set aside for them; nor were they the recipient of white rations or of any other standard consideration of the treaty era. They had no choice but to hunt and fish in their territory to survive. The evidence suggests that white settlement and hunting during the 1780's had seriously depleted the game, and that as a result the Indians were destitute, but were still living in their traditional manner as best they could under the circumstances. John Allan reported that after the War of Revolution the Passamaquoddies wandered from place to place trying to eke out a living. As a result of this unfortunate state of affairs, the Tribe petitioned Massachusetts for confirmation of some tracts of land which would be free from non-Indian trespass. The very fact that the Commonwealth entered into a treaty of cession with the Tribe in 1794 indicates an acknowledgment that the Passamaquoddies still retained possessory rights to their territory. Historian Kenneth Morrison has adopted the same kind of analysis of the events of this period. It is also important to note that non-Indian settlement alone cannot defeat Indian title.

On page 8 of the memorandum there is reference to a "citation to documents [in the Penobscot summary] indicating that at most the Penobscots only had a claim to a strip 6 miles in width on either side of the Penobscot River . . . ." An examination of that discussion in Morrison's Penobscot paper (at pp. 22-36) should demonstrate that the 12-mile corridor had little or nothing to do with the Penobscots' teritorial claim. It originated in the terms of a 1775 Resolution of the Provincial Congress, and that enactment on its face treats only the problem of non-Indian trespass. Furthermore, the unexecuted treaty of 1786 reserves to the Tribe over three million acres of hunting grounds in the headwaters of the Penobscot River.

Thus, the State has misrepresented the evidence of the significance of the 12-mile corridor.

Finally, on page 5 of the memorandum the Attorney General cites an unpublished thesis for the proposition that the Passamaquoddy Tribe did not constitute an identifiable tribal group. Experts recognize that the Passamaquoddies were linguistically related to the Malicetes to the north and east, but they are virtually unanimous in their recognition of the Tribe as a distinct tribal entity. Indeed, Massachusetts so recognized them when the 1794 treaty was negotiated. And the State of Maine has acknowledged their separateness during its entire history.

The December 7, 1976 Memorandum to Governor Longley.

The first 20 pages of this memorandum are devoted to background for the Governor's information. The rest of this document briefs two familiar, and closely-related, legal arguments against the Indian claims:

> (1) The 1819 Articles of Separation, as approved by the U.S. Congress, ratified all prior transactions with the Tribes.
>
> (2) The U.S. Government, over the past 180 years, has acquiesced in the transactions which purported to extinguish Passamaquoddy and Penobscot title.

(1) Our answer to the first argument remains that the terms of the Articles of Separation, whether or not they are regarded as an affirmative act of the U.S. Congress (see the State's citation to Green v. Biddle at pp. 23-27), do not purport to ratify any conveyance of Indian land, either explicitly or implicitly. The Articles state that:

> "[Maine] shall . . . assume and perform all the duties and obligations of this Commonwealth [Massachusetts], towards the Indians within said District of Maine, whether the same arise from treaties or otherwise . . .."

Exclusive reliance is placed on the reference to "treaties," but there is no hint of any intended reference to any land transactions. Indeed, much of the Indian land was conveyed by means of instruments other than treaties. The 1796 Penobscot "treaty" was actually a deed. And unilateral grants of Indian lands by the Commonwealth to third parties between 1790 and 1819 were of course not accomplished by treaty. Moreover, the 1794 Passamaquoddy treaty did not give rise to any continuing "duties or obligations" to the Tribe. Under the terms of the treaty the Passamaquoddy Indians relinquished all their lands in Massachusetts, and as sole "consideration" therefor, the Commonwealth set aside several tracts of land from within their aboriginal territory. Thus, arguably the cited provision of the Articles of Separation did not even refer to the Passamaquoddy treaty. We think it almost inconceivable that a court would hold that Congress' approval of the Articles ratified any conveyances of land--particularly in view of the fact that the First Circuit has already rejected the State's much stronger argument that the "duties and obligations" clause did not terminate federal responsibilities under the Nonintercourse Act. 528 F.2d at 378.

Similarly, we find unpersuasive the State's discussion of the case law cited for the proposition that Congress ratified the conveyances. The text at pages 23 through 32 stands only for the proposition that Articles of Separation become the law of the land when Congress admits the separating state into the Union. From this there is a remarkable nonsequitur (at pp. 31-32):

> "In light of the . . . fiduciary responsibility [of] the federal government towards the Indians, and in light of [the separation decisions], we believe it would be specious to argue that either Congress had no knowledge of the treaties between Massachusetts and the Indians, or that Congress would have approved of the admission of Maine into the Union had it (Congress) not approved of the treaties between Massachusetts and the Indians."

In other words, because of the federal trust responsibility, Congress was aware that it was ratifying the conveyance of Indian lands. This is the rule of statutory construction favoring Indians turned inside out: even though Congress did not say or even suggest that it was ratifying any conveyances, it must have done so because of its concern for the Indians.

At pages 33 through 35 the Maine Attorney General relies on several Indian cases for the proposition that while extinguishment of Indian title may not be lightly implied, it may nonetheless be implied. Whatever the merit of that argument as an abstract proposition, there is virtually no similarity between the cited decisions and the Maine Indian claims. Those cases involved interpretations of acts of Congress which dealt specifically with Indian land transactions. 1/ Because of latent ambiguities in the statutes, the presumption against the extinguishment of Indian title was invoked. In only one cited decision (Seneca Nation; see page 7 of our draft litigation report) did a court find sufficient evidence of Congressional intent to overcome that presumption.

The State relies to a lesser degree on two other provisions in the Articles of Separation which do not mention Indians. The first divided public lands in Maine between the new State of Maine and the Commonwealth of Massachusetts, one-half to each. The other provided:

> "All grants of land, franchises, immunities , corporate or other rights, and all contracts for, or grants of

1/ DeCoteau v. District Court, 420 U.S. 425 (1975), cited by the State, did not even involve extinguishment of Indian title. Rather it was concerned with a jurisdictional issue: when reservation lands were opened to non-Indian settlement by Congress, did state jurisdiction displace federal and tribal authority?

> land not yet located, which have been or may be made by [Massachusetts], before the separation of [Maine] shall take place, and having or to have effect within [Maine], shall continue in full force, after [Maine] shall become a separate state . . . ."
> Sec. 1, Art. 7 [emphasis added].

The Maine Attorney General reads these provisions as quieting Massachusetts' title to all its present and former public lands. That was clearly not the purpose of this exercise. Rather those provisions were intended only to define and clarify proprietary rights as between Maine and Massachusetts. Article 7 prevents Maine from challenging or enacting legislation which would impair titles to land which had been conveyed by Massachusetts. It did not extinguish any latent third-party claims or choses in action--either Indian or non-Indian--which had existed or were pending against Massachusetts. Indeed, the constitutionality of any such provision would have been seriously suspect.

One should also note that Article 7 provides only that Massachusetts-based titles should "continue" in force. No new imprimatur of validity is conveyed by Congressional approval of the Articles. The decision cited by the State, Green v. Biddle, is consistent with this interpretation. The Supreme Court's opinion stated the issue before it in these terms:

> "Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that State, as valid and secure under the above acts [of the Kentucky legislature] as they were under the laws of Virginia on [the date of separation]?" 21 U.S. 1, 69 (1823).

(2) The State also argues that federal acquiescence in the conveyances of Indian lands served to extinguish the Indian title thereto. Reference is made to the passage of time and twentieth century federal activities in Maine as indicative of that acquiescence. However, no authority is cited for the proposition that federal acquiescence by itself is sufficient to extinguish Indian title in accordance with the Nonintercourse Act. All the Indian decisions cited involved interpretations of Congressional action, what the State characterizes as "implied ratification." (At p. 40.) Thus, those cases really are being relied upon to support the State's first argument with respect to the Articles of Separation.

The State's contentions, to the extent they rely on the passage of time and federal activities in Maine, are more properly characterized as the affirmative defenses of laches and estoppel. However, contrary to the suggestion on page 53 of the memorandum, these defenses cannot be asserted against the United States; nor can they bar an Indian land claim. 2/

The precedent is clear that federal acquiescence alone cannot destroy Indian title. Only Congress has that power, though it may delegate it to the Executive. United States as Guardian of the Walapai Tribe v. Santa Fe Pacific R. Co., 314 U.S. 339, 350 (1941); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 945 (Ct. Cl. 1974). It follows that if unauthorized federal executive action cannot extinguish Indian title, than federal inaction certainly cannot do so.

2/ The "cf" citation on page 53 to United States v. California, 332 U.S. 19, 36 (1947), is inaccurate. The page cite refers to California's estoppel argument. On page 40 the Supreme Court opinion rejects that argument and holds to the contrary.

Among the cases relied upon by the State are United States v. Creek Nation, 295 U.S. 103 (1935), and Confederated Salish and Kootenai Tribes v. United States, 401 F.2d 785 (Ct. Cl. 1968), cert. denied 393 U.S. 1055 (1969), which we must consider. Both involved federal executive action conveying Indian lands as a result of inaccurate surveys, and both decisions held that there was a taking of property giving rise to damages in later Indian claims litigation. From this the State contends that extinguishment of Indian title can be accomplished by means of unauthorized action which is acquiesced in for many years:

> "The mere existence of federal legislation germane to the issue of title to Indian lands is not dispositive and does not exclude from consideration under appropriate circumstances, a further delegation of authority even when the exercise of the delegated authority amounts to a disposal of property thought to be prohibited under legislation or the United States Constitution." (At p. 53.)

However, the U.S. Attorney General had occasion in 1972 to consider the effect of the two cited decisions. 42 Op. A.G. No. 42 (January 18, 1972). In his analysis he offered his view that the Creek Nation decision is "unclear" (at p. 11), and he specifically refused "to read the Confederated Salish decision as resting alone upon a concept of Executive ratification of an unauthorized Executive act." (At p. 12.) Instead, he concluded that the Creek Nation decision is best understood by realizing that the conveyances were within the general authority of a relevant statute, even though they were erroneous, and that therefore they were not unauthorized acts obtaining their authority from the mere passage of time and the acquiescence of federal authorities.

Not only were the Maine transactions unauthorized and unratified by any federal legislation; they were not even a consequence of the unauthorized act of a federal official. Thus, they are two steps removed from the situations posed in the two above-cited decisions. A finding of some Congressional authority for those transactions involves a true leap of faith--a leap the U.S. Court of Appeals would not take in its Passamaquoddy opinion. There it was contended similarly, though more persuasively, that the federal and state governments had jointly acquiesced in the understanding that the latter was responsible for the welfare of the Indians within its borders. However, after dismissing the argument regarding the Articles of Separation, the court held:

> "Similarly, Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Nonintercourse Act should not apply . . .. The reasons behind Congress' inaction are too problematic for the matter to have meaning for purposes of statutory construction." 528 F.2d at 378.

Therefore, we think it highly unlikely that the courts will adopt the view of the Maine Attorney General on these issues, however equitable they may appear.

Lawrence A. Aschenbrenner

Implicit in this memorandum is the fact that the Federal Government itself should recognize its responsibility to the citizens of Maine who now find the title to their land, and title to the land of the companies where they work, thrown in question by the Federal Government's alleged failure to assume its responsibilities to the Indian tribes nearly 180 years ago.

The legislation which Senator MUSKIE and I are proposing, and which will be introduced on the House side today as well, can initiate the congressional review recommended by the Justice Department. It is not intended to be the only approach, but the effect of limiting the available remedy to monetary damages would remove the possibility of any cloud on title to land which might arise during the course of any litigation regarding aboriginal title rights. In light of the historical context of this case, this would make available an adequate and fair remedy.

In recent developments, the Justice Department has filed a second memorandum with the district court which indicates a reduction in the scope of the claims for the return of land from approximately 60 percent of the State to up to 40 percent. In addition, Justice indicated the return of land of individual homeowners and in heavily populated coastal areas would not be sought if a satisfactory monetary remedy were devised. Finally, a special representative is to be appointed to assist in initiating a legislative solution.

I welcome this narrowing of the claims, and am pleased by the administration's recognition of the need for a speedy resolution of this case. Congressional action is still needed, however, and this legislation can be a vehicle for full congressional study and consideration of the issues involved in this case. It is not intended to be a judgment on the legal merits one way or the other; it is, however, a recognition that there are other considerations which demand to be taken into account. The most significant of these is the potential economic disruption and confusion in the State of Maine which might result from the mere pendency of the litigation, regardless of the merits of the claim. These potential collateral consequences justify congressional action on this matter and I recommend that this issue quickly receive the attention of my colleagues.

At this time, I ask unanimous consent that the bill be printed in the RECORD as well as several documents which I feel will more fully explain the nature and status of this issue.

There being no objection, the bill and material were ordered to be printed in the RECORD, as follows:

S. 842

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "State of Maine Aboriginal Claims Act of 1977".

DECLARATION OF FINDINGS

SEC. 2. Congress finds and declares that—

(1) there are currently pending aboriginal land claims by the Passamaquoddy and Penobscot Indian Tribes of the State of Maine which may involve over 40 percent of the land area of the State of Maine and which may result in a cloud on the title of the potentially affected land areas;

(2) these aboriginal land claims were presumed extinguished by conquest, abandonment or by treaties entered into in the late eighteenth and early nineteenth centuries;

(3) the mere pendency of these claims for the return of aboriginal lands may result in irreparable damage and substantial adverse consequences for the State of Maine and its citizens which consequences are disproportionate to the ultimate resolution of the litigation;

(4) while the legal basis for the claims rests in large part on the alleged failure of the Federal Government to carry out its trust responsibility to the Passamaquoddy and Penobscot Indian Tribes, the burden of the claims falls upon the State of Maine and present day good-faith titleholders in the State of Maine;

(5) a monetary remedy, if any, shall be the exclusive remedy available for any claims arising out of or based upon any claims of violation of aboriginal title rights which may be brought by the Passamaquoddy or Penobscot Indian Tribes; and

(6) no provision of this Act shall be construed as replacing or diminishing any right, privilege, or obligation of members of the Passamaquoddy or Penobscot Indian Tribes as citizens of the United States or of the State of Maine, or relieving, replacing, or diminishing any obligation of the United States or of the State of Maine to protect and promote the rights or welfare of the members of these Tribes as citizens of the United States or of the State of Maine.

DECLARATION OF TITLE EXTINGUISHMENT

SEC. 3. (a) To the extent, if any, that the Passamaquoddy or Penobscot Indian Tribes held aboriginal title to or interests in lands or waters, or both, in the area now comprising the State of Maine, the Congress hereby recognizes all prior conveyances of such title and interests from such Indian Tribes to the State of Maine and its predecessor in interest, the Commonwealth of Massachusetts, and deems all such title and interests to have been extinguished as of the date of such conveyances.

(b) Any relief which may hereafter be granted as a result of any claims arising out of or based upon the alleged wrongful loss of aboriginal title rights in the State of Maine by the Passamaquoddy and Penobscot Indian Tribes shall be limited to monetary damages which shall be the exclusive remedy available for any such claim.

SEC. 4. Notwithstanding any other provision of law, any action brought in any district court other than the United States District Court for the District of Maine shall be transferred to that Court immediately upon a determination that the action involved the construction, application or constitutionality of this Act. The United States District Court for the District of Maine shall have the duty to expedite to the greatest extent possible the disposition of the issue of such construction, application, or constitutionality and a decision of the District Court of that issue shall be deemed to be a final order for purposes of review.

SEC. 5. If any section of this Act, or any portion thereof or any particular application thereof is held invalid, the remainder of the Act, and any application of this Act not held invalid, shall not be affected thereby.

STATE OF MAINE,
DEPARTMENT OF THE ATTORNEY GENERAL,
Augusta, Maine, February 18, 1977.

To the Members of the Maine Legislature:

The purpose of this letter is to advise you and the people of the State on the status of the land claims being asserted by the Penobscot and Passamaquoddy Tribes. In order to keep you abreast of developments in the case, this letter will also set forth briefly our analysis of the claims and the reasons for our continuing assertion that the State and its citizens will prevail in any lawsuit.

I. THE BACKGROUND OF THE CASE

The claims arise under the so-called Indian Non-Intercourse Act. That Act, originally passed by Congress in 1790, provides that no one may obtain title to Indian land without the approval of Congress. In 1972, the Passamaquoddy Tribe asked the United States Department of Interior to bring suit against the State of Maine under the Non-Intercourse Act. The Department of Interior refused on the grounds that it owed no trust obligation to the Tribe, and the Tribe sued the Federal Government challenging that refusal. Shortly after suing the United States Government the Tribe obtained a court order requiring the United States to sue Maine, so that the statute of limitations might not run out on the Tribes' claims. These suits, one on behalf of the Passamaquoddies and one on behalf of the Penobscots, seek only monetary damages in the total amount of $300 million. They do not seek return of land.

In 1974 the United States District Court issued a decision in the Tribe's suit against the United States holding that the Non-Intercourse Act created a trust responsibility upon the United States to protect the Tribe's interest.

In late 1975 the Court of Appeals affirmed the decision of the District Court but specifically qualified its opinion to make clear that,

(1) It was not ruling on the applicability of the Act to the Indian transactions in Maine, and

(2) It was leaving open the question of whether, even if the Act did apply, Congress or the Tribes might be deemed to have acted in a fashion to make the land transactions legal.

The Court noted: "Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue not raised or decided below and which we consequently do not decide."

"In reviewing the district court's decision that the Tribe is a tribe within the meaning of the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the act affords relief from, or even extends to, the Tribe's land transactions in Maine. When and if specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here."

In so ruling [on the existence of a trust relationship], we do not foreclose later consideration of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions in Maine."

For the last year the United States Government has been evaluating the history of the land transactions in Maine in order to determine whether it should bring suit on behalf of the Tribe. The Department of Interior, under the former Administration, has recently made a tentative recommendation to the Department of Justice that suit be brought on behalf of both the Passamaquoddy and Penobscot Tribes. The Interior Department's recommendation included the suggestion that the suit include a claim which if maintained could cause 350,000 residents in the claim area to be ejected from their homes and properties. The Justice Department is considering this tentative request. The Justice Department is now subject to a court order that requires it to advise the Court and the State by March 1 whether it will proceed with the suit and if

so, against whom and for what. There is now a possibility that this deadline may be extended to June 1.

II. THE NATURE OF THE CLAIM

The two Tribes claim that Maine, and its predecessor state, Massachusetts, acquired about 12,500,000 acres from the Tribes after 1790 without Congressional approval. The principal transactions on which the Tribes base their claim are agreements with the Passamaquoddies in 1794, treaties with the Penobscots in 1796 and 1818, a purchase of Penobscot land in 1833 and other numerous small purchases, easements, road constructions and the like in and through tribal land. The Tribes claim the Non-Intercourse Act entitles them to return of all the land and to $25 billion in money damages for trespass for the intervening years.

The boundaries of the claim area are still imprecise. Neither the Tribe nor the Federal Government has ever clearly delineated its outline. It may even be that the claim, if ever made, will be for much less than 12 million acres. Nevertheless, the magnitude of the potential claim is enormous. As we presently understand it, it ecompasses roughly all land in and to the east of the Penobscot River watershed. The northerly boundary is very vague but may run roughly as far as an east-west line midway through Aroostook County. Until the Tribes define the claim area more precisely, these dimensions are mere approximation.

III. OUR EVALUATION OF THE CASE

We firmly believe that the Indians will not be successful in their claim. We assert that view after careful historical and legal analysis, and without equivocation. There are several reasons for our opinion.

A. History

An examination of the historical record clearly indicates that in 1790, the operative date of the Non-Intercourse Act, neither the Penobscots nor Passamaquoddy had any legal claim to land in Maine.

In 1755 the French-Indian Wars were underway. The Province of Massachusetts declared war on the Penobscot and Passamaquoddy Tribes that year. By 1759 the war in Maine had come to an end. That year Governor Thomas Pownal travelled up the Penobscot and issued a proclamation declaring that the land of the Penobscot and their allies the Passamaquoddy, had been lost through conquest by Massachusetts. This act of Conquest was subsequently acknowledged by both tribes in various documents in 1760 and later. Although the Tribes continued to occupy some lands in Maine, then eastern Massachusetts, they did so at the sufferance of Massachusetts, the Tribes having lost any right of aboriginal possession.

In 1775 as a result of the so-called Watertown Agreement, Massachusetts agreed to set aside some land for hunting and fishing for the Penobscots in return for their help in the Revolutionary War. The land set aside for the Tribe consisted of a strip 6 miles wide and 6 miles long in the area either side of the Penobscot River at the head of tide (roughly Bangor). These hunting and fishing rights were given to the Tribes probably in return for the Tribe's assistance in the Revolution. Massachusetts continued to take the position that the Tribe had no legal right to occupy lands, having lost the same through conquest by Pownal in 1759.

The position of the State of Massachusetts found support from the early federal government. In 1783 John Jay, John Adams and Benjamin Franklin relied on Pownal's declaration of conquest in negotiating the terms of the treaty to end the Revolutionary war with Britain. While discussing the terms of the treaty with Great Britain in Paris, a dispute arose as to the easterly boundary of the United States and Canada. The British argued for the Penobscot River as the boundary; the Americans for the St. Croix River. Adams produced Pownal's 1759 document as evidence of Massachusetts' victory in the French-Indian War, thereby establishing Massachusetts' possession of all the lands in Maine. The American view of the boundary prevailed. The United States negotiators thus relied on the truth of Pownal's declaration of conquest in important international dealings.

In the early 1780's the Penobscots asserted to Massachusetts a claim to their former lands. In 1784 the Massachusetts Legislature appointed commissioners to investigate the Penobscots claim. The commissioners, including General Henry Knox, reported that the Tribe had lost their lands in 1759 and that the Watertown Agreement at best gave to the Penobscots the right to hunt and fish on some lands but did not give to the Tribes any title to land. However, Massachusetts decided as a matter of equity to set aside some lands for the exclusive use of the Penobscots. Acting on this recommendation negotiations were begun in 1786 and an agreement in principle was made permanently granting to the Indians essentially the lands covered by the Watertown Agreement.

After agreeing in principle to this resolution of their claim, the Penobscots refused to sign it for 10 years despite repeated statements by representatives of Massachusetts that unless the Tribe agreed to the proposal, they would have no lands at all. In 1796 the agreement of 1786 was finally signed by both the State of Masachusetts and the Penobscots. Although the 1796 agreement contained language in which the Tribe appeared to relinquish their lands to Massachusetts, in reality the 1796 agreement constituted a landgrant by Massachusetts to the Penobscots. The language in the agreement relinquishing their claims was included to make it clear that the agreement was designed to finally resolve a long standing dispute between Massachusetts and the Penobscots.

The relationship between Massachusetts and the Passmaquoddy was similar. Like the Penobscots, the Pasamaquoddy had no lands in 1790 because of the outcome of the French-Indian War. They acknowledged their landless status in the 1760's and as late as 1792 when they wrote to the Massachusetts Legislature asking for a land preserve. Acting at the request of the Passamaquoddy and presumably out of a sense of debt to that Tribe for their aid in the Revolution, Massachusetts in 1794 made a grant to the Tribe in the form of a treaty setting aside 23,000 acres for the Pasamaquoddy and other Tribes. Like the agreement with the Penobscots, the agreement with the Passamaquoddy was a land grant by the State and not a vehicle to obtain lands from the Tribe.

Of course, the details of these transactions and the events leading up to them are considerably more complex than this summary. In brief, however, the historical facts clearly indicate that the transactions after 1790 were grants of lands to the Tribes, not acquisitions from them. While the lands granted in 1794 and 1796 were subsequently sold or otherwise transferred by the Trihe to others, the nature of the title acquired by the Tribe from Massachusetts was not covered by the Non-Intercourse Act.

B. Applicability of the Non-Intercourse Act

As we noted above, the opinion of the Court of Appeals makes it clear that the question of the application of the Act to Maine is unresolved. Research done as of this date by our historians, indicates quite clearly that Congress never intended the Act to apply to New England. We believe our interpretation is supported by, among other things, the following facts.

The Non-Intercourse Act and its predecessor, the Indian Ordinance of 1786, were largely the product of the efforts of Henry Knox of Massachusetts. Knox was Secretary of War from 1784 through 1794 with primary federal responsibility for Indian Affairs. Knox's various communications about the Acts indicate that he never intended the act to apply to Indians within any of the States. Moreover, the administrative framework under both acts indicates that Congress never intended to apply the Act to the States. Under both Acts, Congress established administrative structures to supervise Indian Affairs but never created a division within the government to supervise Eastern Indians. Indeed, the last federal Eastern Indian agency was closed in 1783 at the request of Massachusetts.

Interestingly enough Henry Knox himself purchased 3,000,000 acres of land from Massachusetts in 1791 and 1793 in the area now claimed by both Tribes. Unless one is to assert that Knox was acting illegally, an assertion wholly unsupported by Knox's distinguished record of public service, one can only conclude that Knox correctly believed that the land he purchased did not belong to any Tribe and that the Non-Intercourse Act did not apply in any event.

Reports of the War Department in the early 1800's demonstrate that the Department knew of the New England Indians, including the Passamaquoddy and Penobscot, knew of their relationship to the States, so advised Congress. Debates in Congress in the early 1830's over Indian legislation again confirms that Congress knew that the Act was never applied to New England. When a modified version of the Act was considered in 1834, the Congressional Committee Report states that its intent was "to continue" the policy of the earlier Acts to apply the Act to Indians "not within any state." Reports to the Congress of various Secretaries of War and President Andrew Jackson also make it clear that the Executive branch never interpreted the Act as applying to New England. We have found no evidence that Congress ever expressed any disapproval of such interpretation.

These facts and other items of legislative history have led us to the conclusion that the Non-Intercourse Act was never intended to apply to tribes within the original 13 colonies. We think it clear that the interpretation, when brought to the attention of the Court, will prevail.

C. The Admission of Maine to the Union

In 1820 Maine separated from Massachusetts and was admitted to the Union as a separate State. Both the Maine Act of Separation and the Maine Constitution refer to Indians and require Maine to assume all obligations of Massachusetts to the Indians from the earlier treaties. In considering the admission of Maine, the Acts of Separation enacted by Massachusetts and the proposed Maine Constitution were read in the United States Senate. The preamble of the Act admitting Maine to the Union specifically refers to the Act of Separation and the Maine Constitution. Clearly Congress was on notice that (1) there were Indians in Maine and (2) Massachusetts had treaties with these Indians.

We have examined United States Supreme Court decisions dealing with the legal significance of the admission of a State to the Union, including, for example, the admission of West Virginia and Kentucky. In those cases, the Supreme Court made it clear that in admitting a new state to the Union, Congress was deemed to consent to the terms of the compacts between the new State and the old State. We think the principle of those cases is equally true here. Even if we go so far as to assume that the Indians in Maine lost their land in Maine after 1790 without immediate federal approval and even if we assume that the Non-Intercourse Act applied to New England Indians, it seems clear that in admitting Maine to the Union

in 1820 Congress approved all the treaties up to then.

The suggestion that Congress might have overlooked the Indian issue in admitting Maine is a specious one. In 1819 Congress, when debating the admission of Alabama discussed at great length the jurisdiction of Alabama over Indians. Ultimately Congress admitted Alabama but with special conditions regarding Indians. In considering Maine's admission a year later, and despite being on notice regarding the Indians in Massachusetts and Maine, there was not even any debate on the subject of Indians.

D. Implied Federal approval by the executive branch of the United States Government

In addition to all the above, there is case law to support the proposition that the actions of Congress and the Executive branch can constitute ratification of all the transactions between the Tribes, the State, and private citizens. A brief recitation of the types of federal transactions in Maine involving land in the claim area include federal acquisition of park lands, military bases, harbor facilities, post offices and federal loans and grants for highways, urban renewal, Farmers Home Administration loans, Small Business Administration loans, pollution control facilities and the like. In all those instances land was involved. In none of those instances has the federal government ever paid any money to a Tribe in acquiring land for federal use nor has it required the recipient of a federal loan, grant or mortgage guarantee to obtain a release from the Tribe. In short, for 157 years the United States has acted consistently as if the Non-Indian occupants of the land had good and valid title and possession. We believe that as a matter of law this indicates federal agreement with our entire posture in this case.

E. Other legal issues

In addition to all the foregoing there are of course many other defenses too numerous and detailed to set forth here. Not only are there other defenses but there are what we believe to be valid claims that we can, and of course will, assert against the Tribe, the United States and Massachusetts. Indeed Massachusetts' financial stake in this claim is as big as the State of Maine's, since if there was any illegal act it related back to Massachusett prior to 1820.

Of course, the summary set forth above is only a summary of our continuing legal and historical research. The research and facts cannot be set forth in full, herein, because it would be far too lengthy. The above explanation should, however, adequately explain our assessment of the case.

IV. NEGOTIATION OR LEGISLATION

In spite of the fact that the outcome of the case seems abundantly clear, the mere pendency of a threatened claim of this size has had 'enormous impact' on Maine. No municipal bonds have been sold in the claim area since early 1976. Whether or not forthcoming State and local bonds will be sold will soon be tested. Residential real estate transactions have continued but some large developments have been delayed principally because title insurance is not available.

Because of the economic problems created by the pending claims, some people have suggested that we should negotiate with the Tribes. Some people have suggested that since the United States owes the American Indian a moral debt Maine ought to negotiate this claim. Finally, other people who have been concerned about the strength of our legal case have suggested negotiations. I understand these views but respectfully disagree.

The only purpose that I can see in negotiations would be to discuss the possible payment of State lands or monies to the Tribe. I believe it would be wrong to compromise this claim in that way. I believe it would be wrong to settle a case about which we feel so strongly simply because the Tribes, backed by the resources of the Federal Government are in a position to bring great financial pressure to bear on the State.

Although I am not willing to negotiate away State land or money, I am willing to discuss with the Tribes or any other person any proposal that might permit the Tribes to pursue their claim in Court without causing the State financial distress. Governor Longley and I have for several months urged enactment of federal legislation to that end. The legislation we have proposed and which has now been endorsed by our Congressional delegation, would validate current titles and permit the Tribes to sue the Federal Government for money damages. Thus far the Tribes have rejected this proposal, but have offered no alternative.

I think it is important to recognize that the claim being asserted by the Tribes involves two significantly different issues. On the one hand, there is a legal claim being asserted by the Tribes against the State and its residents. On the other hand, there is the question of whether or not this nation owes a moral debt to its Native Americans regardless of any legal claim that they might have. The two questions ought not to become confused. I believe that it would be perfectly proper for the United States Congress and the nation as a whole to resolve once and for all the question of whether or not there is some longstanding unpaid national debt to the Native Americans, including the Tribes of Maine. That question, however, is a distinctly different one than the question posed by this lawsuit. While I think it would be perfectly proper for Congress to address the moral question, I do not believe that moral problem can be resolved in the context of this lawsuit.

The record of this country in its dealing with Indians is not a proud one. But I would suggest that, while not perfect, the State of Maine has made great strides in the last 10 years in trying to correct economic disparities and social injustices that may have existed in the State of Maine with respect to native Americans. Over the years, the State of Maine has given millions of dollars in benefits to the Maine Tribes. The State currently provides the Maine Indians social welfare benefits that are more than $2,000 per family of four in excess of similar benefits given to non-Indian poor. The State makes educational expenditures for Indian children that are twice the expenditures made for the average non-Indian child. The State of Maine was the first state in the country to create a Department of Indian Affairs. Tribal housing authorities are funded by and the bonds underwritten by the full faith and credit of the State of Maine. So far as we know, Maine is one of the few states in the country to provide benefits to Indians of this size and diversity. Furthermore, the State has in the last 10 years repeatedly joined with the Maine Tribes in seeking federal recognition and federal benefits for the tribes. Despite the mammoth problems created by the pending claims, I have heard no state official suggest that these programs be discontinued or that there be any form of retaliation against the tribes. All of those considerations must be weighed in any determination of whether indeed there is any unpaid moral debt to the tribes.

In any event, as I stated above, the moral question is a wholly separate one from the legal issues posed by the pending litigation. I firmly believe that it would be wrong for the State of Maine to give in to the pressures of the litigation and to give state lands or monies to the Tribes to settle these suits. I believe the legal issues should be settled in a court of law.

Sincerely,

JOSEPH E. BRENNAN,
Attorney General.

[District of Maine, Northern Division]

(United States of America, Plaintiff, v. The State of Maine, Defendant, Civil No. 1966–ND; United States of America, Plaintaiff, v. The State of Maine, Defendant, Civil No. 1969–ND)

PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME

The plaintaiff movcs for an enlargement of time until March 1, 1977, within which to report to the Court whether it intends to continue prosecution of the pending protective actions filed in this Court by the United States on behalf of the Passamaquoddy Tribe and the Penobscot Nation against the State of Maine. The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

PETER R. TAFT,
Assistant Attorney General.
PETER MILLS,
United States Attorney.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR FURTHER EXTENSION OF TIME TO REPORT TO THE COURT

Pursuant to the Order Amending Report of Combined Conference of Council and Order dated October 27, 1976, plaintiff provides the following report and seeks a further extension of time until March 1, 1977, within which to provide more specific information to the Court on plaintiff's proposed course of action in the above-captioned actions.

On January 11, 1977, the Department of Justice received from the Department of the Interior final draft litigation reports and recommendations concerning claims to be asserted on behalf of the Passamaquoddy and Penobscot Tribes in the State of Maine. The litigation reports are supplemented by very substantial historical and documentary materials and summaries of expert opinions. Portions of the research necessary to particularize claims are still being conducted by the Department of the Interior and will be forwarded to the Department of Justice when complete in the near future.

The Department of Justice is obligated in its capacity as counsel for the United States to conduct an independent review of the law and facts submitted and to make an independent judgment as to the scope and content of any causes of action asserted in the above-captioned cases. In view of the very short time Justice has had to review the litigation reports and supportive materials, it is not now in a position to make a final determination on the form, scope or content of causes of action to be asserted. However, the Department does assure the Court that the judgment will be made in accord with the intent and directives of the opinion of the First Circuit Court of Appeals in *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 522 F.2d 370 (1st Cir. 1975).

The Department of Justice is proceeding at utmost speed to complete its review. At the same time both the Department of Justice and the Department of the Interior are proceeding without delay to establish the mechanics required to effectuate the filing of any such potential actions against relevant defendants by July 18, 1977, the date on which the statute of limitations expires for seeking damage claims pursuant to 28 U.S.C. 2415.

The purpose in seeking an extension to March 1, 1977, to make a more particularized report to the Court is twofold: First, the foregoing is an accurate summary of the current status of the activities of the Department of Justice and Department of the Interior in arriving at their ultimate litigation decisions.

Second, this issue has come to fruition at the time of a change in Administration which has several impacts on the decision-making process. The litigation reports delivered to

JAMES B. LONGLEY
GOVERNOR

STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA, MAINE
04333

January 12, 1977

Thomas Tureen, Esq.
Legal Counsel and
Tribal Governors of Maine

Gentlemen:

As Governor of Maine and in behalf of all people of Maine, including the Indian Community, I ask for your help. Please cooperate with me as Governor and with the people of Maine who own homes and whose jobs depend on a fair resolution of the pending land claim case. I am communicating with you independent of our Attorney General because I am satisfied he is doing everything possible to be as fair to the Indian Community as he is to the rest of the people of Maine. I plead with you to do likewise. Please either by amendment or stipulation or by agreement with me as Governor, indicate to Justice and to the Citizens of Maine that you as Legal Counsel and the Tribal Governors, representing the Indian Community, will agree to accept money damages rather than continue to insist that two-thirds of the land of this state belongs to the Indian Community.

As Governor, I have tried my level best to protect the rights of the Indian Community, including their right to fairly and properly bring legal action and I am now pleading with you to be equally fair and considerate of the remaining million of the people of Maine in order that we might move forward together for what is best for the present and future of all people of Maine.

Very truly yours,

Jim Longley

James B. Longley

JBL:bh

Tuesday, January 18, 1977

Honorable James B. Longley
Governor, State of Maine
State House
Augusta, Maine 04330

Dear Governor Longley:

Thank you for your letter of January 12, 1977 concerning our tribal land claims. As you know from our many previous conversations, we share your concern for the people of the State of Maine. When we heard that you were writing to us, therefore, we had hoped that we would find in your letter some new suggestion that would help to move us beyond our previous impasse. Unfortunately, as we read your letter, it contains no new suggestions, only a repetition of your prior request that we solve the state's problems by abandoning our claim for return of land.

As we told you last fall, we must seek recovery of land both as a matter of principle and as a matter of law. Land is sacred to Indians, and we are determined to recover a significant land base. Only through the recovery of such a land base can we regain the position of independence and importance which the Nonintercourse Act was designed to guarantee us, and which we would possess today if that law had not been violated. Moreover, there is strong legal precedent for the proposition that we cannot recover any monetary damages unless we first establish our right to possession of land. Thus, even if our principles would permit us to consider such an alternative, the law would not.

We assume that your motivation for asking us to drop our land claim is your desire to avoid the economic side effects of our litigation, *i.e.*, mortgaging and bonding difficulties. The experience of the towns of Mashpee and Gay Head in Massachusetts, however, prove that this goal cannot be accomplished by our limiting our claims. When the Mashpee tribe filed its Nonintercourse Act claim it stated in its complaint that it was not seeking possession of anyone's principal place of residence. The Gay Head tribe sued only for 240 of the 3400 acres to which it had a claim. Despite these facts, local attorneys have refused to certify title and banks have refused to grant mortgages on all of the land which is subject to claim. We should also point out that our monetary damage claims are so large that they alone would seriously effect bonding and mortgaging since the property of the defendants would be subject to attachment before and execution after judgment to secure payment of the damages award.

You must understand that having come this far, we cannot and will not turn back. If we must litigate the remainder of our claims, we cannot and will not unilaterally give up anything in advance. Our obligation to our past generations, who have suffered such needless poverty and obscurity, and to our future generations, whose prospects are so bright, leaves us no alternative.

This is not to say, however, that we are not willing to compromise. As you know, we have always been willing to discuss a negotiated settlement, and we remain ready to do so today. In the past we have said that we would not seek possession of anyone's home in a negotiated settlement, and that remains our position. We also believe that a fair and honorable settlement can be negotiated which will not burden any individual. In this connection we are particularly encouraged by the Justice Department's recent suggestion that Congress assist in implementing an out-of-court solution. By pointing to the Alaskan Native Claims Settlement Act of 1971, the Justice Department has suggested a framework within which reasonable people should be able to reach an agreement. In Alaska the alternative of long and costly litigation was avoided through a settlement funded primarily by the federal government. Certainly there is every reason for Congress to be similarly involved in this case.

In the past you have refused to consider any negotiated settlement because you had been advised that our claims were without merit. Hopefully, the recently released final draft litigation reports from the Department of the Interior, which hold that our claims have merit, will persuade you to reconsider your position on this most important matter.

Before closing, we want to address a dangerous alternative which we understand Attorney General Brennan is considering. Our information is that while you are calling on us to voluntarily relinquish our land claims, Mr. Brennan is supporting a legislative proposal which would have Congress unilaterally extinguish our property rights, deny us access to the federal courts, and provide the Indian Claims Commission as our only avenue for redress. It is important for you to understand that this cannot be done. Our trespass damage claims are protected by the Fifth Amendment of the Constitution, and cannot be taken from us without full compensation. The Indian claims Commission (which was established in 1946 to provide token monetary compensation to tribes who did not have legally supportable claims) is not a court, and is without power to award anything remotely approaching the measure of damages that we are entitled to. Congress cannot constitutionally deny us our day in the federal district court for Maine, and we will vigorously oppose any attempt to do so.

Hard cases, such as these, put our legal system to the test as nothing else can. Long after our claims are resolved and forgotten, that legal system will remain. Fundamental to any system of justice is the proposition that everyone, rich and poor, powerful and weak, must live by the law whatever its consequences. If all citizens are to be expected to conform to the law, they must have faith in the inviolability of the law. We have patiently litigated our claims in the courts, winning every round during the past five years. If the State's response to our successes is to seek to change the rules to prevent further victories on our part, the State will only drive us further apart, prolong the uncertainty created by our claims, and permanently tarnish our legal system. Only through a negotiated settlement can the rights of our tribes and the desire of the State for a speedy and non-disruptive resolution of this problem be accomplished in a manner which preserves the integrity of the legal system. We are ready to explore such a solution, and truly hope that you are as well.

Sincerely,

Francis Nicholas

Francis Nicholas, Governor
Pleasant Point Passamaquoddy
Reservation

Nicholas Sapiel

Nicholas Sapiel, Governor
Penobscot Nation

John Stevens

John Stevens, Governor
Indian Township Passamaquoddy
Reservation

Thomas N. Tureen
Counsel for the Passamaquoddy
Tribe and Penobscot Nation

94TH CONGRESS
2D SESSION

S. CON. RES. 212

IN THE SENATE OF THE UNITED STATES

OCTOBER 1 (legislative day, SEPTEMBER 30), 1976

Mr. HATHAWAY (for himself and Mr. MUSKIE) submitted the following concurrent resolution; which was referred to the Committee on Interior and Insular Affairs

CONCURRENT RESOLUTION

To express the sense of the Congress that the Joint Tribal Council of the Passamaquoddy Tribe and the Penobscot Tribe and their representatives shall have a cause of action for monetary damages only for alleged violation of the 1790 Indian Non-Intercourse Act and that no cause of action for the return of aboriginal lands in the State of Maine shall lie.

Whereas there are potential aboriginal land claims on behalf of the Joint Tribal Council of the Passamaquoddy Tribe and the Penobscot Tribe and their representatives against the State of Maine or individual landowners based upon the allegedly unlawful purchase, grant, lease, or other conveyance of land by said tribes to the State of Maine, and its predecessor in interest, the Commonwealth of Massachusetts;

Whereas such potential aboriginal land claims arise from the allegedly wrongful purchase, grant, lease, or other convey-

ance of land without the consent of the United States as required by the 1790 Indian Non-Intercourse Act;

Whereas such potential aboriginal land claims and the threat of suit for the return of such land or possessory rights in such land have clouded the title of approximately two-thirds of the land in the State of Maine, thereby adversely affecting bond guarantees and real estate transactions in the State of Maine and threatening to halt for the indefinite future all real estate transactions and bond guarantees in the State of Maine; and

Whereas the Joint Tribal Council of the Passamaquoddy Tribe and the Penobscot Tribe and their representatives have not stipulated in a court of law that they will seek monetary damages only as compensation for such alleged wrongful purchase, grant, lease, or other conveyance of aboriginal land in pursuance of the claims which they may have in the State of Maine: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress of the United States that no action by or on behalf of the Joint Tribal Council for the Passamaquoddy Tribe or the Penobscot Tribe of the State of Maine for the return of any aboriginal land shall lie for any alleged violation of the 1790 Indian Non-Intercourse Act and no defect in the title of any land in the State of Maine based upon such potential aboriginal land claims shall be recognized in any court of law, but nothing herein shall be deemed to prejudice any pending or future cause of action for monetary damages arising out of such land claims.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Contact: Bob Neuman (225-2843) For Release: March 12, 1977

UDALL, RONCALIO SUGGEST CONGRESS STAY OUT OF INDIAN CLAIMS CASE

The Chairman of the House Interior Committee and the Chairman of the House Subcommittee on Indian Affairs and Public Lands today suggested that involvement by the Congress in the controversial Northeast Indian claims case would be "inappropriate... at this time."

Representatives Morris K. Udall, D-Arizona, and Teno Roncalio, D-Wyoming, released a statement today indicating the Committee's "concern about the growing dispute on the claims of certain Indian tribes of the Northeast to large tracts of land in Maine and Massachusetts."

Udall and Roncalio strongly urged the appointment of a federal mediator to negotiate a settlement rather than resort to a legislative remedy.

"Whether the matter is settled by negotiation, protracted litigation, or otherwise, it is still probable that the Congress will have to act in the matter," Udall and Roncalio stated.

"When that time comes, the Committee will take a dim view of the failure of any of the affected parties to enter into and participate in the proposed negotiations in good faith."

(See attached statement)

STATEMENT OF CONGRESSMAN MORRIS K. UDALL, CHAIRMAN OF THE HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, CONCERNING THE LAND CLAIMS OF THE INDIAN TRIBES OF THE NORTHEAST

As Chairman of the House Committee on Interior and Insular Affairs, I am making the following statement on behalf of myself and Congressman Teno Roncalio, Chairman of the Subcommittee on Indian Affairs and Public Lands.

Under the rules of the House, the Committee on Interior and Insular Affairs, with minor exceptions, has jurisdiction over all matters directly relating to the relationship of the United States to the Indian tribes. This includes land claims of Indian tribes.

It is for this reason that the Committee is actively concerned about the growing dispute centering on the claims of certain Indian tribes of the Northeast to large tracts of land in Maine and Massachusetts.

These claims are based, generally, on the Indian Trade and Intercourse Act of 1790 which provided that no sale of Indian lands to third parties would be valid unless approved by the United States. It is alleged that the United States did not approve of certain treaties entered into between the Indian tribes and the States in which the tribes ceded lands to the States. As a consequence, it is alleged, the Indian retained aboriginal title to the lands and they are being

occupied illegally by the States and other parties.

In the State of Maine, the Passamaquoddy and Penobscot Indians have asserted aboriginal claims to about 12.5 million acres and $300 million in damages. In Massachusetts, the Wampanoag Indians are asserting aboriginal claims to the lands of the town of Mashpee. In addition, the Narragansett tribe of Rhode Island has also filed claims based upon aboriginal title. It is possible that other eastern seaboard tribes may advance similar claims.

In the case of the Passamaquoddy and Penobscot, the Justice Department, acting under an order of the Federal District Court, is prepared to file suit against the State of Maine and certain private persons on behalf of the tribes.

Whatever the ultimate merit and legal validity of these claims, there is no denying the impact that they have had within the affected States and communities. The pendency of these claims has cast a cloud on land titles such as to disrupt the mortgage and municipal bond markets and to inhibit real estate transaction in the affected area. The social, economic, and political impact has been significant.

Yet, despite this impact, we must support the right of the tribes to initiate and proceed with litigation to try their claims. Under our Constitution and system of law, every individual has a right to his day in court, whatever the ultimate legitimacy of the claim. If we can deny it to one, we can deny it to all.

Nevertheless, we are not unsympathetic to the local problems caused by the claims nor the desire for an expeditious solution and settlement of the claims. Litigation to the bitter end may take years, during which time the severity of the impact will not lessen, but increase.

We are advised that there is a serious effort to achieve a negotiated settlement. We understand that the Indian tribes, the Interior Department, and the Justice Department support this approach and have obtained consent from the Federal District Court to extend, until June 1, the deadline for filing the Federal suit.

We also understand that, at the request of certain members of the Massachusetts Congressional delegation, President Carter has agreed to appoint a Federal mediator to work toward a negotiated settlement. At this time, we would strongly urge this approach.

Therefore, we feel that it is inappropriate for the Congress to involve itself in the dispute at this time. Under existing circumstance, it is our position that the House Committee will initiate no legislative or oversight activity on the matter in order to facilitate the possibility of a negotiated settlement.

In that spirit, the Committee would be willing to cooperate in a negotiation process on a non-participatory basis and, if requested by the Federal mediator, I would

be happy to designate a member of my Committee staff to serve as liaison with the Mediator.

Whether the matter is settled by negotiation, protracted litigation, or otherwise, it is still probable that the Congress will have to act in the matter. When that time comes, the Committee will take a dim view of the failure of any of the affected parties to enter into and participate in the proposed negotiations in good faith.