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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Duberstein to Darman re Indian Land Claims Legislation (1 pp.)	2/24/82	~~P5~~
2. letter	Robert McConnell to Stockman re bill "Ancient Indian Land Claims Settlement Act of 1982" (17 pp.)	4/8/82	~~P5~~
3. memo	Fielding to Darman re Indian Land Claims Legislation (4 pp.)	2/16/82	~~P5~~ OA3 10/18/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
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- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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3/1 → CICCONI
JAB not seen
Suggest discussion
s/ JAB
pending

THE WHITE HOUSE

WASHINGTON

February 24, 1982

MEMORANDUM TO: Dick Darman

FROM: Ken Duberstein Ken D.

SUBJECT: Indian Land Claims Legislation

Fred Fielding has recommended that we avoid endorsement of any particular legislation on this issue at this time to the extent we can do so without seriously offending the Senators in question, and Congressman Lee.

As an interim position, he recommended that we:

1. State that the matter (of Indian Land Claims) is one that appropriately should be addressed by the Congress, and that;

2. Their bill represents a serious effort to come to grips with this problem and merits serious study by the Congress and the Administration...

We have no problems with this position as an interim one.

But we believe the Members will not be satisfied indefinitely with this. They will want Administration support, eventually, for their bill. And by stating this interim position, the conclusion to be drawn is that their bill, with modificiations, would have the Administration's support.

Having stated this, we then should try to find a way to support the legislation, after it has had the proper review from the Justice Department. We are not suggesting the Administration support a bad bill. But anything less than support will be unacceptable to the principals involved. We ought to make a good faith effort to work with them on what they have produced.

cc: Ed Meese
Jim Baker
Mike Deaver

4/9 -> JC NC

Document No. 044435CS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 4/9/82 ACTION/CONCURRENCE/COMMENT DUE BY: Wednesday, 4/14/82

SUBJECT: ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	GERGEN	☑	☐
MEESE	☐	☐	HARPER	☐	☐
BAKER	☐	☑	JAMES	☐	☐
DEAVER	☐	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☑	☐
CLARK	☐	☐	ROLLINS	☑	☐
DARMAN	☐P	☑SS	WILLIAMSON	☑	☐
DOLE	☐	☐	WEIDENBAUM	☐	☐
DUBERSTEIN	☑	☐	BRADY/SPEAKES	☐	☐
FIELDING	☑	☐	ROGERS	☐	☐
FULLER	☐	☐	_____	☐	☐

Remarks: Attached is a copy of the report from the Department of Justice on H.R. 5494 and S. 2084, identical versions of a bill entitled the "Ancient Indian Land Claims Settlement Act of 1982." This report was developed at our request as part of a review of pending legislation on Ancient Indian Land Claims.

Please review and provide any views you may have. Any policy differences that remain unresolved should be discussed in the Cabinet Council on Legal Policy.

Richard G. Darman
Assistant to the President
(x2702)

Response:

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 0 3 1982

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D. C. 20530

Dear Mr. Stockman:

This responds to your request for the comments of the Department of Justice on H.R. 5494 and S. 2084, identical versions of a bill entitled the "Ancient Indian Land Claims Settlement Act of 1982." The Department of Justice supports the purposes behind the bill -- to achieve a legislative solution to complex, costly and damaging litigation -- and has concluded that the contemplated method of resolving the dispute would probably be constitutional. The Department strongly recommends, however, consultation and negotiation with the parties affected in order to attain the most beneficial and acceptable solution.

I. The Bill

This bill would extinguish claims by various Indian tribes to lands and natural resources in New York and South Carolina which were transferred by the Tribes to States or non-Indians without the congressional ratification required by the Indian Non-Intercourse Act, 25 U.S.C. § 177. 1/ The bill would retroactively ratify any pre-1912 transfer of land or natural resources by Indian tribes 2/ and would extinguish any claim for trespass or mesne profits based on allegedly invalid transfers. The Secretary of the Interior (Secretary) would be authorized to enter settlement agreements with the tribes. The tribes would also be provided with an action against the United States in the Court of Claims for the difference between the fair market value of the land or natural resources at the time of the transfer and the compensation

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1/ The Non-Intercourse Act renders null and void any transfer of interests in land from Indian tribes to non-Indians, regardless of the amount of compensation received, unless Congress has ratified the conveyance. See text accompanying note 12, infra.

2/ The bill does not explain why transfers occurring in 1912 and thereafter are excluded.

actually received. The award would be increased by simple interest, from the date of the original transfer, computed at 2% for aboriginal title and 5% for recognized title. 3/

II. Policy Considerations

Although we agree with the basic concept of this bill, we have certain reservations which we regard as basic to our support of its concept. We are most concerned with the fact that the bill attempts to settle these claims without prior consultation and negotiation with the affected parties, including the private landowners, the States, and the Indian tribes. We also have a number of more specific concerns which we shall enumerate below.

A. Desirability of Consultation and Negotiation

We strongly endorse the concept of a legislative settlement of these disputes. A legislative solution is far preferable to burdensome, protracted, and perhaps ultimately inconclusive litigation. 4/ The magnitude of these claims is evident given their size, the number of persons owning property in the disputed areas, the nature of the legal issues involved, and the nearly two hundred years that have intervened, in some cases, since the original land transfers. It was estimated that litigation of the comparable dispute in the State of Maine which was settled not long ago through legislation would have taken between 5 and 15 years. 5/ During the litigation, title to land in the entire claim area would be clouded, the sale of municipal bonds would be hampered, and property would be difficult to alienate.

3/ "Aboriginal title" refers to the Indian right of occupancy of their aboriginal homelands. "Recognized title" refers to lands guaranteed to the tribes by treaties, statutes, or other action by the non-Indian sovereign.

4/ In a 1977 memorandum, the Justice Department described litigation over Indian land claims in Maine as "potentially the most complex litigation ever brought in the federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." See H. Rep. No. 1353, 96th Cong., 2d Sess. 13-14 (1980) (report on Maine legislation).

5/ Id. at 14.

Moreover, there are compelling equities in favor of the private owners of land who have unexpectedly been subjected to these claims. It seems grossly unfair that these owners, who are innocent of any wrongdoing towards the Indians, should be forced to bear the expense of litigation or the loss in property value due to the sudden development of a cloud in their titles. On the other hand, while we are not in a position to evaluate the validity of specific claims which we have not examined, we are not unmindful of equities which would be cited on behalf of those Indians who claim that their ancestors were forced or tricked into alienating their homelands at unconscionably low compensation. The bill seeks to respond to such claims through the compensation remedy in the Court of Claims. The basic purposes of the bill -- avoiding potentially devastating litigation costs, removing private landowners from the dispute, and providing fair compensation for the Indian tribes -- therefore seem sound.

However, we urge that serious thought be given to additional consultation and negotiation by the Administration and the sponsors of this proposed legislation with all affected parties, particularly the Indian tribes. Legislation enacted in recent years to resolve Indian land claims has usually been the result of careful, deliberate, and comprehensive negotiations with the affected parties. Typically, a negotiated settlement is reached which is then embodied in legislation. This was the history of the statutes which settled the Rhode Island and Maine land claims. 6/

In the Maine case, for example, President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. A working group consisting of the Associate Director of the Office of Management and Budget, the Solicitor of the Department of the Interior, and a private attorney was then appointed to develop a settlement plan. This group negotiated with both the Indian tribes and with the State of Maine, finally arriving at a settlement agreement in 1980. The agreement was approved by the tribes, was ratified by the State of Maine, and was approved by the United States in the Maine Indian Claims Settlement Act of 1980. 7/

6/ Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 785; Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978).

7/ See generally, H.R. Rep. No. 1353, 96th Cong., 2d Sess. 13 (1980). The cost to the United States of this settlement was $81.5 million.

The practice of coordinated negotiation as a part of a legislative solution has continued in the 97th Congress. On February 11, 1982, Senator DeConcini, for himself and Senator Goldwater, introduced S. 2114, the "Southern Arizona Water Rights Settlement Act of 1982." In introducing this legislation, which would settle Papago Indian water rights claims in portions of the Papago Indian reservation in Arizona, Senator DeConcini stated:

> "[T]hrough years of determined effort by a small but intelligent and patient group of individuals, we believe we now have legislation which will avoid the many years of expensive, time-consuming and debilitating litigation that at one time seemed inevitable. This proposal has been hammered out word by word, line by line, by the Pima County Water Resources Coordinating Committee. The committee is comprised of individuals representing the interests of the Papago Tribe, the City of Tucson, Pima County, the agriculture industries, the mining industries, the individual landowners and the federal government." 8/

The proposed legislation does not appear to have had the benefit of consultation with the affected groups. We believe this process is highly desirable for several reasons. First, elementary principles of fairness suggest that the Indian tribes, as well as other affected groups, be given an opportunity to participate in the development of legislation which affects their interests. Without such a process of consultation, the bill may unjustifiably be perceived as having a bias against the Indian tribes.

Second, without the support or understanding of the Indian tribes, it will be more difficult for the bill to achieve its intended purposes. If the tribes believe that their interests are not adequately served by this bill, they are certain to challenge its constitutionality in litigation. Such litigation would impose additional and unwanted burdens on all concerned.

8/ 128 Cong. Rec. S 862 (daily ed. Feb. 11, 1982). The bill has passed the House and is now awaiting Senate action. Its sponsors believe that it could become a model for future Indian claims settlements. See "Parties to Water Dispute in Arizona Find Solution that Could be Model," Washington Post, March 30, 1982, p. A8. Although the Administration has opposed this bill, its opposition was based primarily on budgetary considerations and was not premised on any opposition to the process by which the bill was developed.

Moreover, a process of consultation and negotiation may result in settlements of specific claims that do not involve the need for a compensation remedy in the Court of Claims. Litigation under the bill's compensation provisions could be quite complex and time-consuming. The issue of aboriginal title, for example, would require the tribes to demonstrate that, at the time of the transfer to non-Indians, their use, occupancy, and possession of the lands in question was (1) exclusive of other tribes; (2) longstanding; and (3) not voluntarily abandoned. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17, 70-71 (1979). The Court of Claims would be required to make determinations regarding facts that existed before this Nation was founded. Archeologists, historians, ethnologists and other expert witnesses would probably be brought forward by parties on both sides of the lawsuit. Moreover, Indian claimants would potentially conflict with one another with respect to the boundaries of their aboriginal title. Proof of facts on the other legal issues would be only slightly less complex. The Court of Claims would be asked to determine, for example: (1) whether the federal government recognized Indian title to specific lands, and, if so, what the boundaries of those lands were; (2) what was the fair market value of the property at the time of transfer; and (3) what were the terms of the agreement between the Indian tribe and the transferee.

Third, a process of consultation and negotiation would provide greater information about the claims involved. The factual issues in Indian land claims tend to be site-specific and may or may not be susceptible to resolution through comprehensive legislation. Moreover, a consultation process would assist the Administration in estimating the magnitude of its potential liability under a legislative settlement. As we note below, for example, there are serious questions about the scope of the potential United States liability on the aboriginal title claims. In light of current budgetary constraints, it seems desirable not to commit the United States to a financial obligation of uncertain but potentially significant dimension without careful thought and without first achieving the most accurate possible quantification of the government's potential liability.

The Justice Department therefore recommends that a serious effort at consultation, negotiation, compromise and settlement be undertaken as a part of the Administration's determination relative to the support of this legislative solution to these claims. While it may be asserted that such an effort will require the expenditure of public and private resources and may delay somewhat the solution to the problem the bill addresses, we believe that this process will yield a more expeditious, satisfactory, effective and permanent resolution.

B. Comments on Specific Sections of the Bill

1. Congressional Findings and Declarations of Policy. The congressional findings and declarations of policy contained in the bill may be improved in ways which will aid in establishing that the bill is not motivated by antipathy towards Indians. We suggest that some additional attention be given to revising the statement of the basis and purpose of the bill -- i.e., that the Non-Intercourse Act provided that transfers without congressional approval were invalid; that subsequent congressional approval is entirely permissible and comports fully with the purpose of the Act; that many transfers have taken place without awareness by the sellers or buyers that congressional approval was necessary; that transfers may have taken place generations ago in good faith at prices properly negotiated by both buyer and seller; that the absence of congressional approval does not mean that the terms of the transactions were not fair and reasonable to all the parties affected; that congressional ratification is necessary to remove a cloud on title to the property; that to the extent that full and fair market value was not received at the time, the sellers have long ago died; and that this bill provides a means of recovery of the imbalance, but precludes immense windfalls to descendents of sellers who in many cases received fair and adequate compensation for their lands.

2. Recovery for Aboriginal Title. There is some basis for concern regarding the provision authorizing recovery against the United States for the loss of aboriginal title, with simple interest computed at 2% per annum running from the date of the original transfer. The scope of the United States' potential liability under this provision is uncertain, but is potentially quite large. Without more facts -- which negotiations, consultation and congressional hearings can provide -- the exposure of the United States under this bill is difficult to quantify. Theoretically, all the land once held by aboriginal title in New York and South Carolina could be the subject of litigation. Although the evidentiary problems associated with proving (or disproving) valid aboriginal title are far more complex than is the case with recognized title, there would still be considerable incentive even at 2% interest to develop expansive claims. The litigation burden and the potential liability on the United States cannot be estimated at this time but the possibility of long-term, complex lawsuits leading to substantial liability cannot be discounted. It should also be emphasized that this bill, if enacted, may become an irresistible legislative precedent since there is little justification for providing a judicial remedy to Indians in two states and denying it to all others.

In addition, a number of unresolved questions may arise if transfers of land, held by aboriginal title, are retroactively validated. Since the thirteen original states have consistently claimed a fee simple title to the land held by aboriginal title, a validation of a purported transfer of such land by an Indian tribe creates the potential for a title dispute between the state (or its successor in interest) and the transferee (or his successor in interest). Such disputes would presumably be contrary to a basic purpose of the bill, namely to terminate the potential for litigation involving clouded titles resulting from alleged violation of the Trade and Intercourse Act. This concern underscores the advisability of including the affected states in the negotiation process associated with developing this legislation with ultimate approval by the state legislatures along with congressional approval.

Another unresolved question concerns the applicability of the bill to land held by aboriginal title and relinquished (voluntarily or otherwise) to settlers. The definition of "transfer" in § 3(f) includes "any event or events that resulted in a change of possession or control of land or natural resources". However § 6(b) precludes recovery if the United States can prove that the Trade and Intercourse Act "was not applicable to such transfer . . . ." Since the Trade and Intercourse Act applies only to sales of land, there appears to be an internal contradiction as to the bill's purpose and effect.

3. Authority to Represent Tribal Interest. Another potential problem concerns the authority of the leaders of an Indian tribe or band to negotiate a settlement on behalf of its members. Not all tribes or bands possess a recognized government structure. Even those that do may suffer from severe political or other divisions which prevent any faction from exercising authority on behalf of the tribe as a whole. Consequently, the problem that the Secretary would face in settling claims is two-fold: first, whether those Indians presenting a claim actually possess authority to negotiate and, second, whether the land in question is claimed by rival bands within a tribe. While there is no perfect solution to this difficulty, it should be dealt with in a way that minimizes the potential for litigation on these questions. One possible approach would be to confer on the Secretary plenary and non-reviewable authority to determine for the purposes of settlement negotiations which tribal entity was empowered to represent the tribe's interests. Although the Secretary has such authority in other contexts, it may be preferable for this legislation specifically to confer this power in order to avoid any confusion or delay.

It would also appear, given the complexity of the factual questions involved, that the 180 day time limits in which the tribe must submit a claim to the Secretary (§ 5(b)) and in which the Secretary must determine the validity of claim and the amount of the award (§ 5(c)(1)) are too brief.

4. Final Judgments Under Indian Claims Commission Act. In order to avoid any possibility of relitigation of claims that have been previously resolved, it may be desirable to add a clause at the conclusion of § 6(a). Following the word "Act" this new language could read: "or with respect to which a final judgment has been entered pursuant to the Indian Claims Commission Act, 25 U.S.C. 70(2) et seq." Similarly, the Secretary could be precluded from determining monetary compensation involving claims that have been resolved pursuant to that Act.

5. Taxes. Under § 5(e), land acquired by tribes in lieu of monetary compensation would be subject to state and local taxes and would not be held in trust for the tribes by the United States. It is worth mentioning that if a tribe had acquired land through litigation or retained ownership, the land would be held in trust and would not be taxable. Furthermore, tribal ownership of land in fee simple would represent a departure from the traditional policy of preventing any possibility of selling or forfeiting Indian property.

6. Definitions. Section 3(a) of the bill incorporates the traditional definition of an Indian tribe. However, it would preclude claims by tribes which no longer inhabit a particular "territory" even though the loss of the land may have resulted from a violation of the Trade and Intercourse Act. This oversight could be corrected by adding the words "at any time" after "inhabiting."

As indicated above, the definition of "transfer" in § 3(f) encompasses more than sales or other conveyances; it includes voluntary and involuntary relinquishment of possession. The scope of the definition is too broad if the cause of action against the United States is predicated on a violation of the Trade and Intercourse Act. That Act only prohibits sales without the consent of the United States. Consequently, either the definition of transfer should be limited to sales or the cause of action should be expanded. While that choice is essentially a policy judgment, it should be pointed out that the potential liability of the United States may be smaller if the cause of action is limited to violations of the Trade and Intercourse Act.

III. Constitutionality

This bill is likely to be challenged on at least three constitutional theories: (A) it effects a taking of property without just compensation, in violation of the Fifth Amendment; (B) its limitation on the time period and fora available for constitutional challenges violates the Due Process Clause; and (C) it violates the trust obligation owed by the federal government to Indian tribes. We conclude, first, that the bill does not generally effect a taking of Indian property without just compensation. Second, we believe that the bill would be sustained against attack under the Due Process Clause. Finally, we conclude that the bill would not represent a violation of any trust obligation owed by the Federal Government to the Indian tribes.

A. Fifth Amendment Takings Clause

This bill may well be challenged on the ground that it effects a taking of Indian property without the payment of just compensation required by the Takings Clause of the Fifth Amendment. As noted, the bill would extinguish (1) Indian title to the disputed lands or natural resources; and (2) claims for trespass or mesne profits for use or occupancy of lands allegedly held in Indian title and wrongfully possessed by non-Indians. We discuss these claims separately because the Fifth Amendment analysis is somewhat different in the two cases.

1. Extinguishment of Indian Title

a. Aboriginal Title. Under prevailing doctrine, Congress has plenary authority to extinguish aboriginal title with or without the consent of the tribes. 9/ Moreover, it is established that the Indian right of occupancy created by aboriginal title is not a vested property right protected by the Fifth Amendment. E.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951). Thus, Congress can constitutionally extinguish any claims based on aboriginal title without the necessity of paying just compensation.

b. Recognized Title. The situation with respect to recognized title is more complex. Congress undoubtedly has power to extinguish recognized title as an incident of its plenary authority

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9/ See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). Cf. United States v. Wheeler, 435 U.S. 313, 319 (1978); Rosebud Sioux Tribe v. Kniep, 430 U.S. 584 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

to legislate with respect to the Indian tribes. 10/ However, recognized Indian title is a property right protected by the Fifth Amendment's Takings Clause. 11/ Thus, while the Federal Government may extinguish recognized title, it is generally under an obligation to compensate the tribe for the value of the title extinguished.

This bill, however, does not explicitly extinguish recognized title. Indeed, § 4(b) of the bill extinguishes only aboriginal title, thereby creating a negative inference that recognized title is not extinguished. Instead of extinguishing recognized title, § 4(a) of the bill retroactively ratifies all transfers of Indian lands within the subject states, including transfers of recognized title. If this ratification is within the power of Congress and does not extinguish recognized title or other vested property rights, payment of compensation should not be required.

In assessing whether compensation is constitutionally required when Congress retroactively ratifies transfers of recognized title, it is necessary to examine the theory under which the Indian tribe claims that it has retained recognized title despite the transfer of the lands or natural resources to non-Indians. The primary basis for these Indian claims is the Non-Intercourse Act, 25 U.S.C. § 177. However, the bill would also ratify transfers in alleged violation of other provisions of law, including "other laws of the United States, the United States Constitution, the Articles of Confederation, or ancient treaties." (§ 2(a)(1)). It is impossible to analyze all of the potential legal theories upon which the tribes may base their claimed retention of recognized title, particularly since existing complaints may be amended and new claims may be filed after the effective date of this bill. We are able to discuss briefly, however, a number of the most likely legal theories.

(i) Non-Intercourse Act. The Trade and Intercourse Act of 1790, 1 Stat. 137, contained a provision that land transfers by Indian tribes to non-Indians were of no force and effect unless ratified by Congress. That provision was amended several times; the current version, enacted in 1834, provides:

10/ See note 9, supra.

11/ See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)(when Congress abrogates a treaty and thereby divests Indian property rights, Fifth Amendment requires payment of just compensation).

> "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 shall be made by treaty or convention entered into pursuant to the Constitution."

25 U.S.C. § 177. Although the Act refers only to ratification by "treaty or convention," it is well established that federal approval of tribal land transfers can be evidenced by any clear and affirmative act of Congress, including enactment of a statute. 12/

The rights guaranteed by the Non-Intercourse Act are explicitly conditioned on the possibility that they will be eliminated through subsequent congressional ratification. In fact, the "rights" created under the Act amount to nothing more than the right to invalidate a transaction in the absence of congressional approval. A clear and affirmative ratification by Congress fulfills the condition. Although the transfers at issue took place many years ago, we see no reason to conclude that the passage of time has impeded Congress' power to approve these transactions. Accordingly, we believe that congressional ratification of transfers in violation of the Non-Intercourse Act would not amount to a "taking" requiring just compensation under the Fifth Amendment.

(ii) Articles of Confederation and Proclamation of 1783. It appears that claims to recognized title in New York and South Carolina may also be based in part on Article IX of the Articles of Confederation, which provided in pertinent part:

> "The United States in Congress assembled shall . . . 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."

Pursuant to Article IX, Congress issued a proclamation on September 22, 1783, which declared:

> "[T]he United States in Congress assembled . . . do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians,

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12/ See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

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." 13/

In our view, these provisions have, at most, a legal effect similar to that of the Non-Intercourse Act, i.e., they invalidate any transfer without congressional authorization, but provide that Congress at any time can ratify the transfer and therefore eliminate the Indian claim. Hence, it would appear that Congress may, without paying compensation, ratify transfers of recognized title which were allegedly in violation of the Articles of Confederation or the Proclamation of 1783.

(iii) "Taking" by States. Indian tribes may also assert claims based on the allegation that a state in effect condemned their lands or natural resources held in recognized title by forcing the tribes to transfer these properties against their will. Such a claim would give rise to a claim for compensation under the Fourteenth Amendment insofar as the compensation paid to the tribes by the State fell short of the fair market value of the property at the time of transfer. This claim for compensation, unlike the claims based on the Articles of Confederation, the Proclamation of 1783, or the Non-Intercourse Act, is not inherently conditioned on the possibility that whatever rights are created may be eliminated through congressional action. Hence, there appears to be a reasonable argument that Congress cannot deprive Indian tribes of their claims against states for just compensation based on alleged takings of recognized title, unless Congress itself provides the tribes with just compensation for the loss of their claims. However, we note that these claims would apply only to transfers that took place after the ratification of the Fourteenth Amendment, and that they may also be barred by statutes of limitations. Accordingly, it is unlikely that these claims will be a significant factor in the pending litigation.

2. Claims for Trespass Damages or Mesne Profits. This bill would also extinguish Indian claims for trespass damages or mesne profits based on alleged wrongful use or occupancy

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13/ 25 Journal of the Continental Congress 602 (1783).

of Indian lands or natural resources after the date of any allegedly invalid transfer of recognized or aboriginal title (§ 4(c)). 14/ We believe that some such claims might be held to represent vested property rights which Congress cannot extinguish without payment of just compensation. Claims for trespass damages or mesne profits may well be a property interest protected by the Takings Clause. Cf. Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912) (compensation required for condemnation of contractual claims and other choses in action). The fact that Congress can prospectively extinguish Indian title does not appear sufficient to justify the uncompensated elimination of claims that arose before title was extinguished. Thus, with respect to claims based on legal theories other than the Non-Intercourse Act, the Takings Clause question appears substantial. To the extent such claims may exist, we, of course, are not in a position to evaluate their quantity, their value, or other defenses which may exist. With respect to claims based on the Non-Intercourse Act, however, it is not certain whether the congressional ratification validates the original transfer as of the date it occurred, so that any possession of lands or natural resources by the transferee or his successors in interest is retroactively made rightful as against the Indian claimant.

3. Payment of Compensation. The preceding analysis concluded that just compensation may be constitutionally required for some of the claims extinguished by this bill. The bill does provide for a cause of action in the Court of Claims in which tribes can recover compensation from the United States for the loss of their claims. Unless this compensation is "just," however, the courts might well hold the United States liable for the difference between the amount of just compensation and the compensation authorized by this bill.

We are unable to judge whether the measure of compensation provided in the Court of Claims -- the difference between the fair market value at the time of transfer and the compensation actually received, with simple interest computed at 2% for aboriginal title and 5% for recognized title -- is adequate to satisfy the requirements of the Fifth Amendment. We would note that the bill's compensation provision is arguably both overinclusive and underinclusive. It compensates more than is required by the Fifth Amendment insofar as it provides any compensation for the loss of aboriginal title. It may well compensate less than required by the Fifth Amendment insofar

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14/ These claims would arise under state law and would have validity only insofar as they are not barred by state statutes of limitations.

as it fails to provide any compensation for the extinguishment of claims based on trespass damages or mesne profits. The bill's provision for compensation and interest for the loss of recognized title might or might not be held sufficient to satisfy Fifth Amendment requirements. It is thus impossible to assess in advance of any particular litigation whether the bill's compensation scheme would be adequate to satisfy Fifth Amendment requirements. If it were not adequate in a given case, a court might well award compensation above that provided in the bill in an amount sufficient to satisfy the Takings Clause.

B. Due Process Clause

Section 9(a) of the bill provides that, notwithstanding any other provision of law, "any action to contest the constitutionality or validity of this Act shall be barred unless the action is brought in the federal district court for the district in which the land or natural resources that are the subject of the Indian claim are located within 180 days of the date of enactment of this Act." Objection could be raised to this section on the ground that its limitation on judicial review of constitutional claims violates the Due Process Clause of the Fifth Amendment.

There is some precedent supporting the view that § 9(a) would be sustained against a due process challenge. The Supreme Court has never questioned that, because of the strong public interest in finality, a reasonable statute of limitations could be imposed even on constitutional claims. Although 180 days is considerably shorter than most limitations periods, it seems a reasonable period in light of the fact that the Indian claimants can be expected to have full notice of the bill's consideration and enactment and need only file a protective claim in the appropriate federal court within the 180 day period. Nor do we have reason to doubt that persons wishing to challenge the bill's validity will have an adequate opportunity to be heard in the district court proceeding.

The provision for bifurcating the litigation, with the constitutional challenge taking place in the federal district court and the compensation suit being brought in the Court of Claims, finds support in Yakus v. United States, 321 U.S. 414 (1944). That case upheld, under the Due Process Clause, provisions of the Emergency Price Control Act of 1942 which required that challenge to certain administrative regulations be brought before the agency with appeal to a special federal court, and which further provided that the invalidity of the regulations could not be raised as a defense in criminal prosecutions in federal district court. The Court stated:

> "[W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue."

Id. at 444.

Accordingly, we believe that § 9(a) is probably constitutional insofar as it limits the time period and the fora in which facial challenges to the bill may be brought.

C. Trust Responsibility

It is commonly said that the Federal Government owes a trust responsibility to Indian tribes. The origins of this maxim are found in Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1830), in which the Court held that the Cherokee Nation was not a foreign state for purposes of the Supreme Court's original jurisdiction. Instead, the Chief Justice characterized the Indian tribes as "domestic dependent nations" which "look to our government for protection; rely upon its kindness and its power; appeal to it for relief for their wants; and address the President as their great father." Id. In his view, this relationship of Indian tribes to the United States "resembles that of a ward to his guardian." Id.

The notion that the Federal Government acts in a sense as trustee for the Indian tribes has become ingrained in the structure of federal Indian law. Early intimations of it are an unstated premise of the Indian Non-Intercourse Act of 1790, the primary subject of this bill. It has been relied on by the Supreme Court in sustaining exercises of congressional power over Indians that probably would have been struck down if exercised with respect to other classes of persons. See Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979); Morton v. Mancari, 417 U.S. 535 (1974) (minimal equal protection scrutiny of racial preference for Indians); United States v. Kagama, 118 U.S. 375, 383-84 (1886)(trust responsibility provides independent constitutional authority for federal

actions involving Indians). The trust responsibility concept also underlies the various principles of statutory and treaty interpretation that require ambiguous enactments to be read favorably to Indian litigants. See, e.g., Washington v. Fishing Vessel Association, 443 U.S. 658, 676 (1979); Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

It might well be argued by spokesmen for Indian groups that any proposed legislation which does not deal "fairly and honorably" with the Indian tribes would be unconstitutional because it breached the trust duties owed to Indians by Congress. However, setting aside the issue of the "fairness" of the legislation to the Indians, it probably would not be invalidated as a violation of the trust obligation. It has long been established that Congress has plenary power to constrict or terminate the Nation's guardianship over the Indians. United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Sandoval, 231 U.S. 28, 46 (1913). Thus, the underlying responsibility of the United States Government "is essentially a moral obligation, without justiciable standards for its enforcement." Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1227 (1975). There is, in short, no constitutional provision which establishes the guardian-ward relationship or which creates the trust responsibility. Those relationships are strictly a matter for Congress to create or assume, and the terms, conditions, and expiration of those relationships are matters solely within the jurisdiction of Congress.

Moreover, the trust responsibility does not limit the Administration's ability to support legislation involving Indians which it believes to be in the public interest. As Attorney General Bell stated in 1979 in a letter outlining his views of the trust responsibility:

> "the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes [affecting Indians] in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may -- indeed must -- be framed with the interest of the Nation as a whole in mind. In so doing the President has the constitutional authority to call on [cabinet officials] for [their] views on legislation to change existing law notwithstanding the duty to execute that law as it now stands."

Accordingly, we do not believe that this bill itself, or actions by the Administration supporting this or similar legislation, would be held to violate any constitutionally-based trust obligation to the Indian tribes.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

ccLA

THE WHITE HOUSE

WASHINGTON

February 16, 1982

FOR: RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Indian Land Claims Legislation

I have reviewed the proposed legislation on Indian land claims sponsored by Representative Gary Lee and supported by Senators Thurmond and D'Amato, as well as the background materials you attached and a summary prepared by the Justice Department of actions some persons in the Administration have already taken with respect to this legislation. My comments and recommendations are as follows:

Comments

-- On balance, the Indian land claims problem is something that probably should, if possible, be addressed by appropriate legislation.

The various lawsuits being filed by Indian tribes are based primarily on alleged noncompliance with a section of an Act first passed in 1790 and now codified at 25 U.S.C. § 177, which provides that any acquisition of land from Indian tribes be accomplished "by treaty or convention entered into pursuant to the Constitution" -- i.e., approved by the Federal Government. The courts are being asked, under this law, to declare invalid titles to land held by innocent 20th century purchasers, on the basis of alleged title defects created by their 18th or 19th century predecessors-in-interest. The problem is exacerbated by the fact that the courts have been hostile to state-law defenses, such as statutes of limitations or "adverse possession" laws, that normally foreclose challenges to present title on the basis of ancient title irregularities.

The grounds for rejecting such state-law defenses involve the Supremacy Clause of the Constitution (which establishes, in general, that Federal law

prevails over inconsistent state law) and the power given to Congress under Art. I, § 8, cl. 2 "[t]o regulate commerce . . . with the Indian tribes." The latter clause, which was the basis for the 1790 legislation, strongly suggests that Congress has authority to enact legislation now to address and resolve the Indian land claims problem.

-- Despite the general authority of Congress to legislate with respect to Indian affairs, legislation of the sort proposed by Lee raises serious Constitutional questions. Specifically, assuming an Indian tribe does have a valid legal claim to contested land, and the claim cannot be defeated by "adverse possession" or other defenses, a bill that requires the tribe to accept compensation based on fair market value in the 18th century could violate the Fifth Amendment's prohibition of taking private property without "just compensation." Valid or not, this challenge is certain to be raised. This is potentially a fairly complicated and arcane legal issue involving a possible conflict between two clauses of the Constitution. A further complicating legal factor involves whether some or all aspects of this problem are covered by the "political questions" doctrine, under which the courts will not second-guess actions on "political" matters where authority is expressly granted by the Constitution to the Executive or Legislative Branch.

All of these are issues that should be thoroughly examined by the Justice Department before the Administration could take an intelligent and defensible position on the Constitutional validity of this proposal.

-- There are a number of other legal issues presented by the proposed legislation, some of which have policy overtones and all of which also merit careful study before a particular legislative solution is publicly embraced by the Administration.

For example, the draft legislation covers land in only three states -- Connecticut, New York and South Carolina. As a legal matter (assuming, as is apparently true, that there are potential Indian claims to lands in other states), is it permissible to provide special compensation rules

for some states and not others? As a policy matter, is this something one wants to do even if permissible?

Also, there are a number of suits already filed, as well as some that apparently have already gone to judgment. What legal effect, if any, would or could the legislation have on such pre-existing actions? If those actions are not affected, what are the policy implications of ratifying a windfall of several millions of dollars for tribes who filed lawsuits early while limiting subsequent claimants to 18th century value plus nominal simple interest?

In addition, the particular compensation formulas set forth in the Lee bill, as well as the particular mechanisms that bill provides for the processing of claims, raise a number of policy and political questions -- in an area in which any proposal of the sort offered by Lee is certain to be vehemently attacked by Indian organizations and groups sympathetic to them. Some of these questions may have legal implications as well, to the degree that one formula or another may be more likely to survive a challenge under the "just compensation" clause.

In all these areas, the risks of embracing a particular proposal prior to thorough legal and policy review should be apparent.

Recommendations

Obviously, our options have been somewhat limited to the extent that actions taken by persons purportedly acting on behalf of the Administration have already publicly committed us in the eyes of the bill's supporters and others. Absent the political pressures created by such actions, this would probably not be the kind of "burning" issue that demands rapid formulation of an official Administration position (if indeed any specific position would have needed to be taken prior to a bill reaching the President's desk). Given that fact and the need for careful review, through normal channels, of the legal and policy issues outlined above, I recommend that we avoid endorsement of any particular proposal to the extent we can do so without seriously offending Representative Lee, Senators Thurmond or D'Amato or others who may think the Administration has already made a commitment to this legislation.

Specifically, if the present political context requires it, we can probably state that we believe this matter is one appropriately addressed by the Congress, rather than being

left to case-by-case disposition by the courts that could create enormous administrative problems and substantial hardship to individual residential and commerical title holders. We can probably state as well that the Lee bill represents a serious effort to come to grips with this problem, one that merits serious study by the Congress and the Administration.

If at all possible, however, we should not become any more publicly wedded than we may already be to particular aspects of the Lee legislation. There are too many legal and policy questions that need careful, disinterested review by Justice and others to risk taking a public position from which we might later have to back away, with attendant embarrassment and other adverse political consequences. Plainly, given the present situation, that review must continue apace. But until it has been completed and both the Cabinet Council on Legal Policy and senior staff have had an opportunity to evaluate the results, we should not rush to get out front on the Lee bill or any other proposal in this area.

cc: Edwin Meese III
James A. Baker III
Michael K. Deaver
Kenneth M. Duberstein

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 9, 1982

Mr. James Cicconi
Special Assistant to the President
and Special Assistant to the Chief of Staff
The White House
Washington, D.C. 20500

Dear Jim:

Pursuant to our discussion of this date, I write to set out the critical chronological events in this Department regarding the proposed Ancient Indian Lands Act.

Of critical significance is the fact that within the Department of Justice, the Office of Legislative Affairs is the central and controlling office for the review of all legislative proposals. All OMB contacts with the Department regarding legislation approval or DOJ comment come out of OLA. OLA's OMB contacts are with the OMB Legislative Reference Division. In this instance OMB's own internal process was violated and OMB did not honor this Department's review and clearance process.

The critical events prior to our telephone call of this morning are attached.

I hope this information is helpful to you. Please do not hesitate to call if I can be of further assistance.

Yours sincerely,

Robert A. McConnell
Assistant Attorney General

cc: William French Smith
Attorney General

Edward Schmults
Deputy Attorney General

Theodore Olson
Assistant Attorney General

Carol Dinkins
Assistant Attorney General

1/6/82	Completely ignoring established procedures and channels, Mike Horowitz calls the DOJ Land and Natural Resources Division directly. He states that Congressman Gary Lee was drafting a bill to solve Indian land claims and that he (Horowitz) wants expedited clearance.
1/7/82	DOJ receives a draft bill from OMB. The draft provided no identification as to source and the Office of Legislative Affairs, having no independent information, routed the draft to LNR Division for initial review as a matter of course.
1/12-15	Mike McConnell of Horowitz's office again called LNR directly to check on progress.
Week of 1/25	Office of Legislative Affairs at DOJ calls OMB (Legislative Reference Division) to request more time. OMB requests that we complete as soon as possible.
1/22/82	Mike McConnell continues to call the LNR Division, directly discussing substance of bill.
2/1/82	At Horowitz's request, Department of Interior representatives met with Horowitz's staff, a representative of Congressman Lee and one individual from LNR Division to whom Horowitz had directed his inquiries.
2/3/82	The Legislative Reference Division of OMB phones DOJ Office of Legislative Affairs informing that their office (Legislative Reference Division) has been instructed to clear a new draft bill which was being prepared by Congressman Lee's office immediately. OMB now informs DOJ that Mike McConnell, Al Regnery, Deputy Assistant Attorney General of the LNR Division (who cannot clear legislative views for the Division), and Moody Tidswell (Interior) have cleared for the Administration. OLA was further told that the rush was because Horowitz wanted to accommodate Congressman Lee who was planning a press conference the next afternoon to announce Administration support and that Lee and Senators Thurmond and D'Amato were introducing the bill. DOJ/OLA informs OMB that it will not clear the matter; no policy official in any Division has ever even seen the proposal. OLA further requested that normal procedures be followed.

Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, (one of the Divisions to which the first draft had been sent) called Richard Hauser, Deputy Counsel to the President, to alert him that Congressman Lee had an understanding that a draft had Administration "clearance" and that he was going to announce such the following day. Dick reported back to Ted Olson that Horowitz had told Hauser that the press conference was not until the 5th of February but that the bill was approved by the appropriate people at Justice, Interior and OMB, that very delicate and complicated negotiations had taken place with Congressman Lee and that everyone should stay away from this; serious consequences would result if Administration "withdrew" its support.

2/4/82 DOJ, Assistant Attorney General, Robert McConnell, advised Senator Thurmond's staff of the fact that the Department had not cleared the bill.

Also, on this date Horowitz sent the LNR Division a new draft of the proposed legislation with a request for immediate clearance because of rescheduled press conference on February 9th.

2/8/82 Washington Post story detailing Administration support of the bill.

Congressman Lee informs DOJ that press briefing had been completed. Briefings, embargoed until 12 noon on 2/9/82, states that Administration supports bill.