UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COVELO INDIAN COMMUNITY et al., Plaintiffs, v. JAMES WATT, Secretary of the Interior, et al., Defendants.	Civ. Action No. 82-2725

PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

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I. INTRODUCTION

The many relevant facts in this lawsuit create a danger of losing sight of the forest for the trees. It will put matters into perspective to point out an overall pattern into which the facts fit. Defendants no doubt would argue with the plaintiffs' characterization of the broad picture, but the court will be the judge of whether the following characterization is justified by a consideration of the individual facts.

Both sides have demonstrated what the claims program was intended to be: a top priority endeavor to identify, research and resolve all meritorious claims in consultation with tribes and potential claimants. Resolution according to the law was to be done in one of two ways -- through litigation or by legislation.

As the claims program progressed, however, the government was confronted with several troublesome realities. In addition to recurring budget problems, a majority of claims identified involved some complicity on the part of the federal government. This created a fox-in-the-hen house situation, with the federal government making decisions on whether cases should be brought against a third party tortfeasor who, if anything, was less culpable than the United States. The only totally innocent party was the Indian or tribal claimant. In addition, the fractionated heirship problem associated with Indian allotted lands created an administrative problem in distributing damages and in identifying and giving notice to unknown claimants.

The claims program became less of a priority. Faced with a choice between suing a comparatively innocent and politically powerful third party or sacrificing the interests of the Indian or tribal claimant, the defendants chose the latter.

Congress appreciated that given this situation, a decision not to litigate certain cases might be reasonable. However, Congress instructed

defendants that cases not considered suitable for litigation should be submitted for legislative solution. This Congressional mandate is all the more compelling when the basis for declining to litigate is because of equitable principles involving a conflict of interest. In such a situation, fundamental fairness requires liberal and creative use of the legislative approach. And yet, the only category of claim to be resolved legislatively is the least costly category of claims -- old age assistance. And half or more of the dollar amounts of those claims have been abandoned by the decision not to include claims under $50.00 in the legislative proposal. No proposal was made to handle small claims on a cy pres approach where at least Indians in general would benefit from harm done to individuals among them. The reason given for not proposing legislative resolution of other claims was that title was felt to be more important than damages and that legislation alone would not solve the entire problem (Attachment 1 to Defendants' Brief). No one has suggested there would be anything wrong with solving part of the problem by legislation and part by litigation. But just about any excuse is enough for defendants.

Defendants' predecessors felt the need for extensions of the statute of limitations each time the deadline approached. Defendants, however, have attempted to avoid such a need by categorically eliminating huge classes of claims from the Statute of Limitations Claim Program.

The government took a calculated risk that litigation would not be filed against it for breach of trust or that litigation would be unsuccessful if filed (Dep. Fringer, p. 55). It also protected the interests of the good faith purchaser who not only would not be subject to a trespass damage claim but who likely would never be faced with a quiet title action (Dep. Fringer, Ex. 36). The persons whose interests were not protected by the government's handling of the claims process were the potential Indian claimants to whom the government

owed the highest of duties, "the punctilio of honor" in the handling of the claims process. Meinhard v. Salmon, 164 N.E. 545, 546 (Ct. App. N.Y. 1928). Their expectations of having their wrongs remedied have been dashed by a government which suddenly acts as if the entire statute of limitations program was a mistake.

II. STATEMENT OF FACTS

A. Legislative Background.

It is important to note that Congress granted the last four extensions of the statute of limitations in 28 U.S.C. § 2415 at the request or recommendation of the Department of Interior who represented that extensions were necessary to complete the claims program in accordance with its trust responsibility to protect Indian lands and resources. Memorandum in Support of Request for Preliminary Mandatory Injunctive Relief (Plaintiffs' Brief pp. 11-15). Extensions were necessary despite the urgings and admonitions of Department officials to the field made in various memoranda and directives before the statutory deadlines which were described by defendants at pages 6-13 of their Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and In Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Def. Br.).

B. The Claims Program.

1. On paper, defendants themselves describe how the 2415 claims program was supposed to be operated (pp. 6-15 of Def. Br.). See also paragraphs 15-16, 18, & 34 of the Stipulation of Facts. The process was to be based on an orderly search of claims, consultation with tribes and their attorneys and other known affected groups and persons, issuance of contracts to organizations which might help in the identification of claims and legal analysis of the claims identified and developed (p. 6 of Def. Br.). Precautions were to be taken to

see that no claims were overlooked (id. p. 7). Extreme care was to be used in explaining the type of claims that the statute of limitations applied to (id. p. 7) and the claims program was to receive top departmental and agency priority (id. pp. 8-9, 11, 13). "Each and every claim" was to be analyzed to determine whether Section 2415 applied and if there was "any conceivable doubt" as to the applicability of the limitation, the claim was to be referred to the Solicitor of the Department of Interior (id. p. 8). If an area coordinator did not accept a claim's validity the claim was then subject to review by the Washington coordinator who would either concur in or reject the decision of the area and send the claims back for formulation of an action plan (id. p. 10, n.19).

The plan announced by Secretary Forrest Gerard in November, 1977 called for interagency coordination of the processing and filing of claims and a training program on the identification and development of claims. Individual plans of action keyed to the circumstances of each area were to be developed (id. p. 9). Directive 1 issued pursuant to that plan instructed an exhaustive search of records for possibly unresolved claims (id. p. 10).

The Priority Directive of October 18, 1979, issued by Solicitor Krulitz and Assistant Secretary Gerard permitted batching of claims where multiple claims with parallel facts and identical legal issues could be sued on in a single action and required the reporting of agencies who failed "to render the highest priority" to the claims process (Def. Br. App. 12).

While Departmental instructions called for the forwarding of only worthwhile claims (id. p. 14), Solicitor Krulitz, in a memorandum of August 17, 1979, to the Associate Solicitor for Indian Affairs and field and regional solicitors declined to set a minimum damage amount for claims indicating that the application of an absolute minimum dollar amount in all cases without consideration of other factors would be inconsistent with "our professional obligations as trustee" (Appendix A).

In addition, the Department stressed the importance of formulating legislative solutions for claims deemed unsuitable for litigation pursuant to Section 2 of P.L. 96-217 (Pl. Br., pp. 20-21, App. 15-16; Def. Br. App. 13).

Finally, instructions on claims processing called for notice to claimants of the status of their claims (Plaintiffs' Br. pp. 16-17 and Memorandum of September 22, 1982, from John Fritz, Deputy Assistant Secretary - Indian Affairs (Operations) to Area Directors (Def. Br. (Appendix 16)); notice to persons whose claims had been rejected (Jt. Memorandum of Solicitor and Assistant Secretary - Indian Affairs of October 18, 1979, Def. Br. (Appendix 12)); and notice to affected tribes (Memorandum of March 10, 1982 from John Fritz to all area directors (Def. Br. (App. 15)).

2. Realities.

Despite the apparent good intentions of Departmental directives and memoranda, and contrary to the conclusion drawn therefrom in Defendants' brief (p. 15), defendants did not carry out a systematic and thorough effort to identify and research potential claims which might have been subject to the statute of limitations in 28 U.S.C. § 2415.

The paucity of memoranda from the offices of the Solicitor and Assistant Secretary - Indian Affairs directed to the field during the last extension period, except in the last few months, compared to earlier extensions is reflective of the low priority placed on the program by the Department and the field. Guy Fringer, National 2415 Coordinator for the BIA, testified in his deposition on October 21 and 22, 1982 that the 2415 program has flowed in and out of Departmental awareness, sharing equally the across-the-board 10% budget cut in BIA programs in fiscal 1982 undertaken by that agency (Dep. Fringer, pp. 85, 98).

Identification of claims which could have been reasonably found and researched was not completed. The Aberdeen Area 2415 coordinator testified that agencies under his supervision in one of the largest BIA areas (Dep. Stevens

p. 27) had stopped identifying claims in mid-1982 because "he just didn't push hard enough" (Dep. Stevens, p. 69). Identification stopped despite a failed contract for identification and research of claims on one of the largest reservations in the Area, the Pine Ridge Reservation (Dep. Stevens, pp. 44-46). In fact, North Dakota agencies given additional monies by the Area Office in fiscal 1982 to hire staff to identify and research claims on the Devils Lake and Ft. Berthold Reservations where research contracts had been breached, did not hire the necessary staff nor do they intend to hire that staff before the statute of limitations runs (Dep. Stevens, pp. 47-48). Utility trespass identification remains largely undone in the Aberdeen Area (Dep. Stevens, p. 50). No systematic search was made for possible claims arising from nonpayment of Indians and tribes for railroad easements nor was an investigation made of a possible land fraud scheme on several reservations as recommended by a claims contractor (Dep. Stevens, pp. 135, 137-139).

Clark Madison, Rights Protection Specialist for the Billings Area, has never been designated the 2415 coordinator for that area office and 2415 claims work has only composed 25% of his duties over the past year in one of the largest reservation areas of the country (Dep. Madison, pp. 9-10 and Ex. 38). Despite the poor quality of claims identification and research done of regular individual claims as opposed to categories of claims under the previous extension and the gaps in certain contract work (Dep. Madison, pp. 44, 48) that area decided to do no regular claims investigation during the past two years. "[M]y primary concern was to clear my desk of the [regular] cases." (Dep. Madison, pp. 76-78).

The complete lack of interarea and interagency coordination resulted in incomplete claims identification and research and lack of uniform standards for claims evaluation.

While Guy Fringer described his job as National Coordinator of the Statute of Limitations Claim Program as "basically . . . trying . . . to get all my horses pulling the cart in the same direction" (Dep. Fringer, p. 6), his horses have for all practical purposes run amok. While regular reports, for example, were made by the Billings Area during the past extension period only two or three were filed in two years by the Aberdeen Area (Dep. Stevens, p. 94).

A painstaking action plan for identification and research of claims was implemented by the Minneapolis Area Office and was considered a model action plan by the Department of Interior, Stipulation of Facts, ¶ 32, but was never implemented by the Aberdeen or Billings Areas (Dep. Stevens, pp. 73, 79-80). In the latter two areas, tract by tract investigation and the search of all allotment folders was considered too time consuming (Dep. Stevens, p. 36; Dep. Madison, pp. 29-31). For example, Clark Madison testified that his area only looked for major unapproved road trespasses (Dep. pp. 24, 60). No special training was provided to Madison, previously a youth work program specialist for the BIA, on how to conduct a claims program (Dep. Madison, pp. 66, 11). No instructions were provided to agencies or contractors in the Aberdeen Area on how to identify and investigate claims (Dep. Stevens, pp. 73, 79, 163). Reservation profiles as a background for investigation of claims were not done (Dep. Stevens, p. 78; Dep. Fringer, p. 41). A physical investigation of the majority of claims was never done (Dep. Stevens, p. 77; Dep. Madison, p. 43). Rough estimates on damages were computed for all claims by the Aberdeen Area but were computed for only a few claims in the Billings Area (Dep. Stevens, p. 32; Dep. Madison, pp. 20, 31, 38).

While the Aberdeen Area identified and researched forced fee claims where land has been sold, mortgaged or lost at a tax sale (Dep. Stevens: Ex. 32), the Billings Area only researched claims where land was sold at a tax sale (Dep. Madison, pp. 17, 70), thus precluding the development of claims where land

was mortgaged or sold to prevent a tax forfeiture. While Aberdeen used the term "claim" as defined by the Central Office, i.e., damage incident per tract of land in identifying unapproved road rights of way (Dep. Stevens, p. 52; Dep. Fringer, pp. 74-75), the Billings Area considered a claim as an entire road so that damages to individual allotments were never evaluated (Dep. Madison, pp. 29-31). While the Portland and Minneapolis Areas apparently understood the April 2, 1982 memorandum of the Solicitor to regional and field solicitors (Def. Br., Appendix 22) to require evaluation by tract, of significant damages for unapproved rights of way claims, the Billings Area understood the task to be to determine whether an entire road (including a meandering or diagonal road through an allotment) was beneficial to the Indian or Indian community (Dep. Madison, pp. 29-31, 34, 59). No balancing of benefit versus detriment was done. If it provided some benefit, it was assumed to be beneficial (id.). The Aberdeen Area conducted no evaluation of its unapproved rights of way claims according to the April 2, 1982 memo (Dep. Stevens, pp. 53-54).

Although the Portland and Muskogee area offices identified welfare land sale claims,[1/] other areas made no such attempt (Stipulation of Facts, ¶ 29; Dep. Stevens, pp. 65-67; Dep. Madison, p. 51). Both areas used somewhat contorted arguments to determine that the claims were without merit without review by the Central Office or the Solicitor's Office (Dep. Stevens, Exs: 15 and 15(a)).

The National Coordinator essentially provided no coordination. While admitting that one of his duties was policy direction during the last extension period (Dep. Fringer, p. 14), he issued no directions on identification and research of claims, no direction or computation of damages or interest, no direction on implementation of the April 2, 1982 rights of way memorandum, and no direction on the use of minimum damage cutoffs (Dep. Fringer pp. 15, 44, 53, 66-68).

1/Seven-hundred and eighty -three of these claims involving 50,000 plus acres of land were identified in the Muskogee Area (Dep. Stevens: Ex. 15).

The handling of the memorandum of John Fritz, Deputy Assistant Secretary - Indian Affairs (Operations) of September 22, 1982, on notification of potential claimants is a case in point. Although he felt that a national coordinator could be quite useful in monitoring the progress made by the field under this memorandum (Dep. Fringer, p. 41), Mr. Fringer's office took no initiative to provide guidance to the field on how to accomplish such notice. Although deciding to furnish model notice packets to area coordinators which had been developed by the Minneapolis Area for its agencies, as of the date of his deposition (October 21, 1982) those packets had not been sent to area coordinators (Dep. Fringer, pp. 41-42, 65). Meanwhile, the Aberdeen Area Office had not communicated the memorandum or instructions under the memorandum to the field as of October 19, 1982 (Dep. Stevens, pp. 62-63). The Billings Area Office was confused by the Fritz memo and after inquires to other 2415 Area Coordinators, Clark Madison concluded that it required basically nothing more than notification of claimants who knew about their claims or who had inquired about them as was the previous Bureau policy (Dep. Madison, p. 41). [2/] As of the date of the depositions, tribes in both areas had not been notified of the status of their claims (Dep. Madison, p. 43). In the Aberdeen Area, tribes had not been notified because the Area Office had mistakenly assumed that all tribes in that area had waived their damage claims for unapproved rights of way (Dep. Stevens, pp. 61, 112). [3/] It is apparent that a good faith effort to provide the notification

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[2/] Even where notice was expressly requested of an agency to be made it was not made. For example, while the field solicitor on September 5, 1979, requested the Aberdeen Area Office to see that individual secretarial transfer claimants were notified of the decision not to litigate their claim (Appendix B), no such notice was given (Dep. Stevens, p. 57).

[3/] That error was pointed out to Mr. Stevens during the course of the depositions, Dep. Stevens: Ex. 27-28. Mr. Stevens indicated that agencies in his area represented to tribes that road and utility service on their reservation might be curtailed if they pursued damage claims on unapproved rights of way over tribal lands (Dep. Stevens, p. 109 and Ex. 26).

required in the Fritz memo has not been made in two of the largest areas supervised by the BIA and it is doubtful that it can be completed by November 1, 1982. Without such notice according to the Fritz memo "[Indians and tribes] may be barred from filing their own suits by the running of the statute of limitations."

Defendants acknowledge that the potential claimants of a large number of claims are unknown (Stipulation of Facts, ¶ 28). However, no attempt has been made by the BIA during the past extension to identify these claimants, although the technical capacity for such identifications has existed during this extension (Dep. Stevens, pp. 64-65; Dep. Fringer, pp. 82-83). Now at the eleventh hour, the Fritz memo acknowledges the importance of notice to potential claimants but places low priority on notification of these claimants except by publication.

C. Decisions Not to Litigate or Propose Legislation.

Defendants have stipulated that the majority of claimants were not consulted before the decisions to neither litigate their claims nor submit legislative proposals for their resolution were made (Stipulation of Facts, ¶ 28).

The depositions of Guy Fringer and Simon Stevens indicated that additional categorization of claims which precluded their individual evaluation took place with regard to other than the groups of cases discussed in plaintiffs' earlier brief at pp. 20-27. In contravention of the Krulitz memo discussed at page 5, supra, absolute minimum damage amounts were set by most areas and were not necessarily uniform (Dep. Fringer pp. 66-68). For example, approximately 200 cases remained at the Aberdeen Area Office as of October 21 which had not been reported or forwarded to the Associate Solicitor because they did not meet the $600 damage minimum set by the field solicitor. Because they did not meet what the Area Office considered to be the "legal minimum", the area coordinator did not feel pressed to complete his research before the statute of limitations

deadline nor will he be able to (Dep. Stevens, pp. 70-71, 54, 145). [4/] No interest had been computed on these claims (Dep. Stevens. p. 160). The National Coordinator confirmed that he had assured that the field was not pursuing claims that "weren't worth it" in terms of dollars regardless of other case factors such as the culpability of particular defendants (Dep. Fringer, pp. 68-69).

Old Age Assistance Claims

These claims were not litigated because of the fractionated heirship problem resulting in a "multitude of claims premised on each estate" and because the states which collected from deceased Indian estates "did only what the government itself required" (Defendants' Br. pp. 17-18).

The Department of Interior reported to Congress that 1651 OAA claims had been identified (Plaintiffs Br. Appendix 24). The legislation submitted for the lameduck session covers only those claims where an individual claimant would receive at least $50.00 - approximately $1.5 million worth of claims (Defendants Br. Appendix 1). Many more OAA claims had been identified over the figure given Congress but the Department reported only those claims which they anticipated would qualify for remedy under the legislation (Dep. Fringer, pp. 34-35). The value of these claims is approximately another $1.5 million. Secretarial Decision Paper - Statute of Limitations Legislation (Dep. Fringer: Ex. 36). Defendants have no plans to litigate the smaller claims as class actions. Nor do defendants intend to file protective litigation should Congress not be able to consider or decide on their eleventh hour OAA proposal before the deadline of the statute of limitations. Contrast Memorandum of Deputy Solicitor to Steve Freudenthal, Executive Assistant to the Secretary, March 19, 1980, discussed in Plaintiffs' Br., p. 19, Appendix 14.

[4/] Informal discovery has indicated that the Justice Department has in the past filed 2415 claims involving sums less than $600.

Forced Fee Patent Claims

These were cases where the BIA erroneously converted many allotments from trust to fee status before the expiration of the trust period. Two thousand such claims had been identified but apparently only 175 covering 20,000 acres were lost to nonpayment of taxes (Stipulation of Facts, ¶ 21(b); Secretarial Decision Paper; Dep. Fringer, Ex: 36). It was considered inequitable to seek trespass damages from current occupants, the majority of whom were innocent purchasers and federal officials assumed that the likelihood of recovering damages was small. Letter of October 21, 1982 from Deputy Assistant Secretary of Interior Roy H. Sampsel to Honorable Thomas O'Neill, Speaker of the House, Defendants' Br.: Attachment 1.

In his recent letter to Congress, Roy Sampsel represented that "the decision not to seek legislative resolutions to these claims lies primarily in the fact that the most valuable aspect of these claims is the claim to land title, not trespass damages" (Defendants' Br.: Attachment 1, supra). This representation was made despite the fact that current land values were never compared with trespass damages for these claims (Stipulation of Facts, ¶ 33). The Aberdeen Area 2415 Coordinator indicated that damages for forced fee claims identified in his area ranged between $15,000 - $26,000 per allotment (Dep. Stevens, p. 21).

Furthermore, the Department's representation to Congress that these title issues would be resolved outside of the Statute of Limitations Program (Statement of Roy Sampsel before February 17, 1982 Oversight Hearing of the House and Subcommittee on Administrative Law & Governmental Relations. Defendants Br.: Attachment 2, Statement of Roy Sampsel before April 1, 1982 Oversight Hearing of the Senate Select Committee on Indian Affairs, Defendants' Br: Attachment 3), is misleading since the Solicitor's own guidelines on quieting title to these lands (Defendants' Br.: Attachment 21a) and the Department's own

Secretarial Issue Paper on the subject (Dep. Fringer: Ex. 36) indicate that such actions on behalf of Indians or by Indians without sufficient resources will be rare.

In his October 21, 1982 letter, Sampsel also indicates that most of the claimants to claims such as forced fees would be impossible to identify. This is contrary to the testimony of Guy Fringer, Dep. pp. 83-84, Simon Stevens, Dep. pp. 64-65, and the affidavit of Tom Wilson, former 2415 Coordinator for the Inter-Tribal Council of Michigan, Inc. (Appendix C).

Secretarial Transfers

These cases were not litigated, according to a memorandum of Solicitor Krulitz of August 20, 1979, on the erroneous assumption that most of the heirs involved in these claims had received compensation. Plaintiffs' Br. p. 17 (Appendix 11). In fact, in two of the largest areas under BIA supervision, no effort was made to systematically document whether or not heirs who had not consented to the transfers actually received compensation (Dep. Stevens, pp. 34, 40-41, Dep. Madison, p. 39; see also claims identification form for Secretarial transfers. Dep. Stevens: Ex. 21).

The Krulitz memo also pointed out, as does the Sampsel letter to Congress of October 21, 1982, that these claims, like forced fees, were rejected for litigation because of the complicity of the federal government in these claims and the determination that the likelihood of recovery was small. 5/

Unapproved Rights of Way

It was predictable that considerable confusion would be generated by the John Fritz memo of March 10, 1982, advising that "beneficial unapproved

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5/ The idea that the Solicitor's Office or the Justice Department would seriously use the decision in Sampson v. Andrus, 483 F. Supp. 240 (D.S.D. 1980) to now justify their prior decision not to litigate this category of claims is patently aburd. Defendants' Br. pp. 22-23. That case did not involve a secretarial transfer but the request of one of two quarreling heirs for the Secretary to partition, rather than to sell, their interests in an allotment. The court made a common sense decision in light of the very purpose of partition provided for by federal law and regulation.

rights of way will be validated administratively" (emphasis added) (Defendants' Br: Attachment 15) and the April 2, 1982 memorandum of the Solicitor to field and regional solicitors advising that "litigation to recover pre-1966 damages for unapproved rights of way should not be requested if there is no evidence of significant damages (emphasis added)." Defendants' Br: Attachment 22. The April 2, 1982 memorandum presented four alternative methods for determining if there was evidence of significant damages in such cases, including one alternative that would preclude litigation no matter what damage was done to the land if there was no evidence that a trespass was accomplished over the objections of the Indian landowners or the United States (Plaintiffs' Br. pp. 25-26 and 53-60). No such guideline had been used by the field prior to the April 2, 1982 memorandum. See, for example, the January 2, 1982 memorandum of the Regional Solicitor of the Pacific Northwest Region to the Portland Area Office (Defendants' Br. Ex. to Appendix 36). No additional guidelines were issued by the Solicitor on how to compute, for example, benefits vs. damages under alternative #1 of the April 2, 1982 memorandum and the National 2415 Coordinator issued no such guidelines (Dep. Fringer, p. 53).

Area offices were essentially left to their own devices. While the Portland and Minneapolis Areas may have evaluated rights of way damages on an allotment by allotment basis, instructions from the Regional Solicitor of the Pacific Northwest Region still parrotted the alternative test of the April 2, 1982 memorandum (Exhibit A of Affidavit of Ron Applebaum, 2415 Coordinator, Portland Area Office. Defendants Br. - Attachment 22(b)). Meanwhile, the Aberdeen Area Office did not reevaluate its rights of way according to the April 2, 1982 memorandum, nor did it bother to identify or research additional unapproved rights of way (Dep. Stevens, pp. 53-54). 6/ As previously pointed out, that

6/ On October 22, Guy Fringer indicated that Mr. Stevens would be instructed to carry out such an evaluation. Dep. Fringer, p. 93. However, he did not indicate when such an instruction would be given to Mr. Stevens and when such an evaluation would be completed.

area's utility rights of way for the most part have not yet been identified (Dep. Stevens, p. 50). The Billings Area on the other hand, despite sponsoring a training workshop put on by the Portland Area Coordinator on how to approach the April 2, 1982 memorandum, understood his Area's task as follows: "Your words 'significant damage'" bother me. It was more beneficial/nonbeneficial as the way I understood it. Was this benefiting the Indian or the Indian community. If it was, then we wouldn't prosecute that third party that had built it without [a] right of way" (Dep. Madison, p. 34). See also Dep. Madison, p. 30.[7/] This beneficial/nonbeneficial test was applied in the Billings Area not to each allotment touched by an unapproved road, but to each road in its entirety, regardless of whether it was a section line or meandering or diagonal trespass (Dep. Madison, pp. 29-30, 59). The National Coordinator was aware of the Billings Area's approach to evaluating its unapproved rights of way (Dep. Madison, p. 66).

The end product of this so-called reevaluation of unapproved rights of way according to defendants' affidavits is one unapproved right of way referral from the Minneapolis Area to the Associate Solicitor (Affidavit of Perry Baker, Defendants' Br.: Attachment 26) and according to informal discovery, another unapproved right of way referral involving a utility trespass from the Albuquerque Area. According to Guy Fringer, he knew of no new unapproved section line or utility rights of way identified since the Fritz memo of March 10, 1982 (Dep. Fringer, p. 38), and he doubted seriously if there would be any referrals from area offices of such claims to the Associate Solicitor as a result of Carol

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[7/] Note that this area, without considerable work, was not even prepared for an evaluation of damages vs. benefits since neither damages nor benefits had been computed on its rights of way (Dep. Madison, pp. 31, 38). Also note that except perhaps for the Portland and Minneapolis Areas who may have been alerted to various methods for computing damages for rights of way (Jan. 2, 1982 Memorandum of Regional Solicitor of Pacific Northwest, supra), other areas like the Aberdeen Area computed rights of way damages on rough estimates of fair annual rental value as opposed to rental value based on lost economic benefits or mesne profits (Dep. Stevens, p. 149).

Dinkins' memorandum of June 5, 1981, rejecting these claims for litigation (Defendants' Br: Attachment 15) and the April 2, 1982 memorandum of the Solicitor. The 14 right of way damage actions filed by the Department of Justice (Defendants Br. p. 25) were filed before the April 2, 1982 Solicitor's memorandum was issued.

Covelo Rights of Way Claims

Plaintiffs vehemently dispute the defendants' characterization of their handling of the Covelo claims, specifically:

1. The federal participation in land settlement negotiations to resolve airport trespasses consisted chiefly of dragging on negotiation for nine years without reaching an agreement. California Indian Legal Services (CILS) became involved in July, 1981 and negotiated a new agreement. The United States did not participate in the negotiations.

2. The BIA, after determining in August, 1973, that Highway 162 had no valid right of way sat on the case for six years until CILS requested files in 1979. Disputes developed between CILS and BIA on access to files, obtaining and paying for an appraisal (which dispute still exists), and whether a request for governmental assistance was still pending (the Tribe's position being that it still was).

Given the long-standing BIA knowledge about the existence of the trespass, the absolute failure to take any action to resolve the problem prior to CILS intervention, and the initial lack of cooperation in providing CILS with information needed to establish the existence of the trespass or trespass damages, it is not believable that the defendants failed to respond because they believed that the request had been withdrawn. Given the apparent contradiction between the June 2 request for Justice Department representation and the July 23, 1980 letter, why didn't the defendants request a clarification? In fact, the defendants knew that the tribe wanted assistance, but in furtherance of their general practice not to take action to resolve the trespasses, they

simply chose to ignore the request until plaintiffs filed this action. See Declaration of Les Marston, Plaintiffs' Br.: Appendix 40.

Saginaw Chippewa Dual Allotment Claims

For reasons similar to the categories of forced fees and secretarial transfers, the Saginaw Chippewa Dual Allotment Claims were rejected by the Department of Justice for litigation and the Department of Interior for legislation (October 21, 1982 Letter of Roy Sampsel, supra, Defendants' Br.: Attachment 1). [8/] In addition, the Department of Interior has justified its decision not to litigate this category in particular, because of the virtual impossibility of identifying the heirs of the original allottee who were wronged (id.). But see Affidavit of Tom Wilson, supra (Appendix C) and deposition of Guy Fringer, pp. 83-84.

Shoalwater Bay Tribal Claim

In December, 1979, this claim had in fact been recommended for litigation by the Solicitor of the Department of Interior (Affidavit of Sasha Harmon, Plaintiffs' Br. Appendix 29). The crowded conglomeration of ticky-tacky beach cottages alongside the virgin beach that borders the Shoalwater Reservation could hardly be considered an enhancement of the tribe's property and certainly would not have been put to such use by the tribe. After sitting on this claim for over three years the Department has yet to make a decision on whether it will present legislation to a lameduck session of Congress, Defendants' Br. pp. 27-29, and has yet to consult with the tribe on what kind of proposal will be made (Affidavit of Alexandra Harmon, supra).

The Legislative Approach

In introducing the bill to once again extend the statute of limitations in 28 U.S.C. § 2415, Senator William Cohen stated:

[8/] Note that an August 6, 1981 Statute of Limitations Legislative Recommendation by the Assistant Secretary - Indian Affairs had recommended legislative resolution of these claims (Dep. Stevens, Ex. 2).

> I do not agree with the conclusion of the Department of the Interior in its communication to this committee on June 25, that legislation to address the old-age assistance category of claims will bring the Government into substantial compliance with the requirements of Public Law 96-217 that the Department of the Interior in consultation with the Department of Justice submit to the Congress legislative proposals to resolve these outstanding Indian claims.
>
> A decision to waive a claim for damages on the grounds that the claim for title to land is not barred does not do justice to either the Indian claimant or the non-Indian who is occupying the land in good faith and under color of title.

Cong. Rec. S12669, September 29, 1982 (Appendix D).

Essentially, the legislative approach of the defendants has not been an approach of trust advocates but a self-centered approach based on cost effectiveness (Defendants' Br. p. 29), taken after the government had assured itself that its own flanks were covered.

> In each of the cases being considered for legislation, Federal officials appeared to have made an error or taken an action that was later deemed inappropriate. The Department is probably not liable in any of these cases. Individuals are prevented from suing the Department for redress either because the statute of limitations has run against the action (i.e., the injury took place more than six years ago) or because the U.S. government is proteced from suit by sovereign immunity. These cases have been deemed inappropriate for litigation because potential defendants are innocent third parties.

Secretarial Issue Paper, supra, Dep. Fringer, Ex. 36. In his testimony at his deposition, Guy Fringer testified that as a member of a secretarial task force on resolution of 2415 claims he had evaluated claims in the category of Secretarial transfers.

Defendants with the stroke of a pen reduced their active claims from 17,000 to 1,200, Dep. Fringer: Ex. 34. Small and large damage claims were lumped together in categories and effectively withdrawn from the Claims Program. Legislative approaches which might have recognized significant claims and at the very least, allowed as to small claims a type of fluid recovery

for the benefit of certain families or reservations in the form, for example, education or revolving loan funds, were not seriously considered. "The problem there was that the equities didn't merit such a proposal. How can you ask the United States government . . . to take $25 from 12 heirs and give it to a tribe without the consent of the heirs." Dep. Fringer, pp. 71-72. Defendants have no apparent problem with the equities of allowing unconsented trespasses which have occurred for years on Indian lands to go unremedied. The equities were for Congress to decide.

III.

PLAINTIFFS HAVE STANDING

Defendants argue that what plaintiffs ultimately seek is money - either in the form of damages awarded by a court, or in the form of payment by Congress. Since no order by this court can ensure that money will be awarded by either a court or Congress, defendants argue that plaintiffs have no standing. Defendants' argument is based both on a misapprehension of the nature of this case and a misreading of the law. Furthermore, defendants' argument is limited to those plaintiffs alleged to have small interests or whose claims are under consideration. It has no relevance to the majority of the plaintiffs.

A. Nature of the Case.

This case is not an action for money damages. It is one for review of agency action and inaction under the APA. What plaintiffs seek in this case is adherence to proper procedure in the administration of the claims process under P.L. 96-217. This court has the power to provide full relief in this regard. Whether, ultimately, plaintiffs will realize any money is not the issue. Clearly, if defendants do not follow proper procedure, many plaintiffs will lose whatever chance for money they have. The plaintiffs have money claims. This cannot be denied. This gives them the right to see that proper procedures are followed in processing these claims. The fact that one or two of the plaintiffs have relatively small claims (under defendants' restrictive theories of damage) is not relevant.

The Supreme Court has made clear that the monetary size of an interest is not important. In United States v. SCRAP, 412 U.S. 669, 689 (1973) at fn. 14 the Court stated:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 633, 82 S.Ct. 691; a five-dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101; and a $1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 16 L.Ed.2d 169, 87 S.Ct. 1079. While these cases were not dealing specifically with § 702 of the APA, we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L.Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970).

Furthermore, monetary value of the claims of the class represented may be enormous nationwide.

Throughout their discussion of the standing issue, defendants speak about either litigation of claims or legislation to resolve claims, but never about both at the same time. Thus, they argue that "The named individual and tribal plaintiffs admit they have no standing to question the non-prosecution of those claims not suitable for litigation." (Def. Br. p. 30.) This statement is meaningless, because if certain claims are not suitable for litigation they then become proper for legislative resolution, and plaintiffs therefore have standing to challenge the defendants' failure to propose legislation. Furthermore, one of the key issues in this suit is whether defendants made adequate attempts to determine which claims are suitable for litigation.

Defendants also argue that since decisions of federal officials not to file certain lawsuits have been based on a likelihood of failure in obtaining court awarded damages, plaintiffs cannot show the concrete injury in fact necessary to assert standing which they have suffered through non-prosecution of these claims (Def. Br. p. 31). This argument has the same two problems as their previous argument: (1) It assumes one of the very points in issue, i.e., whether defendants have properly identified those claims not suitable for litigation, and (2) it ignores standing to obtain review of defendants' failure to seek legislative proposals.

B. Misreading of the Law.

Defendants rely on the principle in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976) that the inquiry about standing "is whether ... the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Since this Court can ensure no monetary award in court or Congress, the argument goes, there is no standing. As has been pointed out, the defendants in so phrasing the issue have misapprehended the nature of the lawsuit. However, even if damages were the issue, defendants have misconstrued the test. The Supreme Court has not required that the relief available provide the ultimate benefit to a given plaintiff. Thus, in Bryant v. Yellen, 447 U.S. 352 (1980) the Court upheld the standing of residents of Imperial Valley, California, to intervene in litigation about the applicability of a limitation to irrigation water deliveries to 160 acres under single ownership. The Court held that the residents' hope to buy land below market value was enoughh to support the residents' standing. The residents did not allege financial capacity to buy the land and no facts were developed as to the probability that any resident who had the financial

capacity, would have the opportunity, among potential buyers who might number in the thousands or hundreds of thousands, to purchase any particular piece of property below market value. And in Regents of University of California v. Bakke, 438 U.S. 265, 280-81 (1978), Justice Powell, in announcing the judgment of the Court, said that "even if Bakke had been unable to prove that he would have been admitted [to medical school] in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiffs' demonstration of any injury to himself that is likely to be redressed by favorable decision of his claims." Here, one injury suffered by plaintiffs that can be redressed is the failure to have their claims decided according to proper procedure.

A failure to follow proper procedures reduced the chances of plaintiffs ultimately receiving compensation as well. This is a distinct injury and of itself provides standing. Footnote 14 of the Bakke opinion states: "The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race .... Hence, the constitutional requirements of Art. III were met." See also, Ludlow Corp. v. SEC, 604 F.2d 704 (D.C. Cir. 1979) (issuer of stock has standing to seek review of an SEC order granting an application of the Boston Stock Exchange for unlisted trading privileges in the stock, because the unlisted trading 'might destabilize' trading in the stock, "leading to the impairment of [the issuer's] ability to raise capital.").

Thus, even a rise in probabilities that one may attain one's ultimate goal is sufficient for standing. Here, the probabilities are increased that following proper procedures will increase the chance for recovery. Furthermore, it cannot be assumed that as to claims not

suitable for litigation that Congress will not be willing to pass a legislative remedy even for small claims, since Congress itself has requested the proposals.

C. Specific Plaintiffs.

1. Individuals.

Defendants attack some plaintiffs' right to standing on the grounds their monetary claims are small. See, e.g., Dennis Allen, Bertha Visser, Emma Little Chief Randall and Lillian Prue. As has been pointed out, the amount of the claims is not relevant.

Furthermore, as to Emma Little Chief Randall and Lillian Prue, after arguing that a reevaluation of its litigation program would not likely result in lawsuits to recover the plaintiffs' $918 and $114 dollar claims, the defendants point out that their claims will be resolved by proposed legislation. That is precisely the point made by plaintiffs - legislation is a viable means of resolution even where litigation may not be. Had defendants submitted this legislation in June of 1981 as required by P.L. 96-217, the claims of plaintiffs would have been moot since Congress would have had ample time to consider the proposal. However, defendants' professional responsibility as trustee to protect the interests of these plaintiffs given the eleventh hour submission of the OAA legislation to Congress, requires that protective legislation be filed should a decision on this proposal not be made before Congress adjourns.

Sampson Brings Them has an interest in a secretarial transfer made pursuant to Section 1 of the Act of June 25, 1910 (25 U.S.C. § 372). First, the legislative history of the law is at best inconclusive as to whether a consent of all the owners is required under the Act (App. F, hereto). Sampson Brings Them, according to Attachment 28 of Defendants' Brief, was

incompetent when he consented to the transfer and consents were not received from all of the other 5 heirs to the Benedict Brings Them allotment. Furthermore, defendants do not refute that Sampson was apparently not compensated for his interests as required by the Act.

There is one new plaintiff with a forced fee claim: Henry Rivers, a member of the Cheyenne River Sioux Tribe. (See second amended complaint). This plaintiff clearly has standing.

2. Tribal Plaintiffs.

a) Covelo's claim is under consideration only because this lawsuit was brought. There is no guarantee that if relief is not granted herein that defendants will continue to pursue the claim. As stated in United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952):

> when defendants are shown to have settled into a continuing practice ... courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

b) Shoalwater Bay Tribe. The same points made as to Covelo are relevant here. Defendants have not decided yet whether to propose legislation and will not decide until after the hearing on this case. Of course, since they have decided not to litigate, Section 2 of P.L. 96-217 requires a legislative proposal. Defendants' hesitation over their duty calls for this Court's intervention.

c) Saginaw Chippewa Tribe. The affidavit of Thomas Wilson (Appendix C, hereto), identifies members of the Tribe, so even if specific identification were an issue, it is solved.

d) Coeur d'Alene Tribe and Grand Traverse Band of Ottawa-Chippewa Indians. Defendants argue no specific members have been identified. Sierra Club v. Morton, 405 U.S. 727 (1972), does not require identification

of specific members for standing. The Club was dismissed in that case since it had not alleged that any members were among those specifically harmed. This requirement is met here. Pursuant to stipulation, the defendants admit that some members of these tribes do have claims (Stipulation of Facts, ¶9).

e) Blackfeet Tribe. Both the Tribe and its members have claims. This has been stipulated by the parties. Therefore, there is no problem with standing (Stipulation of Facts, ¶ 8). The defendants have stipulated both that members of the Tribe and the Tribe itself have interests in a number of claims (Stipulation of Facts, ¶ 8). The Tribe has clearly alleged legal injury and a right to damages. See ¶ 24 of First Amended Complaint.

D. Parens Patriae

The tribes clearly have a quasi-sovereign interest in ensuring that the trust obligation of the federal government is carried out. See pp. 9-10 of Plaintiffs' Initial Brief. Defendants' argument that no one can sue in parens capacity, an agent of the federal government, is effectively answered by Com. of Pa. By Shapp v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976), cert. den., 429 U.S. 977. See especially footnote 55. The doctrine is particularly appropriate where, as here, the executive branch has abandoned any parens role it has and has failed to present legislative proposals to Congress.

Defendants insinuation that since the Blackfeet Tribe now runs part of the land which was the subject of secretarial transfers somehow disqualifies the Tribe from acting as parens is not persuasive. Defendants consistently overlook the legislative remedy. Secretarial transfers may be an appropriate category for legislation and the Blackfeet Tribe has standing to seek to compel submission of legislation. Furthermore,

there is no impediment to the Tribe acting in a parens capacity as to other claims.

IV.

LACHES DOES NOT BAR THIS ACTION

Defendants argue that plaintiffs' action is barred by the doctrine of laches. Such defenses are unavailing against sovereigns, see Board of County Comm'rs of the County of Jackson v. United States, 308 U.S. 343, 351 (1939); United States v. Minnesota, 270 U.S. 181, 196 (1926), and restricted Indians, Ewert v. Bluejacket, 259 U.S. 129, 137 (1922). See also, Narragansett Tribe, Etc. v. So. R. I. Land Level, 418 F. Supp. 798, 805 (D. R.I. 1976); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 785 (D. Conn. 1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (bar against injunction of state taxation not applicable to Indian suit since bar would not be applicable to the United States if it had brought suit).

Even if we assume arguendo that the doctrine of laches would be available in principle, nevertheless, the facts in the present case indicate it is not appropriate here under the standards established in Independent Bankers Assn. of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980), which was cited by defendants (Defendants' Brief, p. 42).

First, for laches to be applicable, the plaintiffs must have unreasonably delayed the bringing of the lawsuit. Contrary to defendants' representations, the decisions that the Interior and Justice Departments have made about the handling of the majority of claims have not been opern or undertaken in consultation with tribes and their members (Stipulation of Facts, ¶ 28). Most of the decisions about litigation and legislation were made only recently, for example, the March 10, 1982 announcement of John Fritz, Deputy Assistant Secretary - Indian Affairs (Operations) indicating

that beneficial unapproved rights of way would be administratively validated, the guidelines on evaluating damages for unapproved rights of way issued by the Solicitor on April 2, 1982 (Plaintiffs' Brief, Appendix 27), and the September 30, 1982 decision of the Solicitor not to litigate forced fee claims. (See August 3, 1982 letter of Associate Solicitor Jensen to Steven Moore, Plaintiffs' Brief, Appendix 22). Defendants justify their tardy notice undertaking of September 22, 1982 on their late decisions on what constituted a 2415 claim. (Deposition of Fringer, p. 84.) A national contingent of attorneys was told only on June 16, 1982, that Secretarial Issue Documents were still being prepared on 10 types of possible pre-1966 damage claims and that the Department of Interior was still awaiting a decision on OAA claims from OMB. (Affidavit of Alexandra Harmon, Plaintiffs' Brief, Appendix 26.) Defendants have yet to make decisions on the Shoalwater Bay and Covelo claims. If the bringing of this suit seems late in the game to defendants, they can trace the timing directly to their ninth inning decisions on how to handle 2415 claims--decisions which largely reversed prior policy. It is not the plaintiffs' fault that defendants' actions have put everyone in the present situation.

Furthermore, as late as September 16, Senator William Cohen invited a proposal for an extension of 28 U.S.C. 2415 to be drafted by Harry Sachse and NARF's legislative liaison, Suzan Harjo. Oversight Hearings on Statute of Limitations Before Senate Select Committee on Indian Affairs, 47 Cong., 2d Sess. 90, Sept. 16, 1982. A proposal, the basis for the current bills before Congress, was immediately prepared and the possibility existed that an extension bill could be passed before Congress recessed.

Under the circumstances and with obvious logistical problems in gathering plaintiffs' documentation from reservations across the

country for the purpose of this litigation, any delay in the bringing of this lawsuit was reasonable. Thus, Heimann, supra is not applicable.

Nor have defendants suffered any injury from the plaintiffs' alleged delay in bringing this suit. Defendants have simply disposed of broad categories of claims in the past few months. All plaintiffs are asking is that defendants perform their duty as mandated by Congress. By definition, defendants cannot be harmed by being ordered to perform their duty under the law. Here, defendants have not taken any action in reliance on plaintiffs. They have totally controlled the process themselves.

Laches simply does not apply to the present case.

V. THERE IS NO POLITICAL QUESTION INVOLVED

A. Legislative Proposals.

Defendants argue that the present controversy presents a political question because the relief requested would thrust the court into a role of "continuing monitors of the wisdom and soundness of Executive action. . . ." Laird v. Tatum, 408 U.S. 1, 15 (1972). No monitoring is required. All that is involved is a question of interpretation of law so as to ascertain defendants' duties. Where, as here, the duty can be judicially identified, its breach is judicially determinable, and protection for the right asserted can be judicially molded, the issue is justiciable. Baker v. Carr, 369 U.S. 186, 198 (1962).

Here, the law is clear. Defendants predecessors themselves interpreted their duty to be to evaluate each and every claim (Plaintiffs' Br. p. 16) and P.L. 96-217, Section 2 mandates that for those claims not suitable for litigation, defendants propose legislation. While there may be discretion involved in formulating legislative proposals, there

is no room for a decision to administratively validate unapproved rights of way without also proposing legislation to settle the damage aspect of the claims. Nor is there room to decide to do nothing about forced fees, secretarial transfers and other types of claims. The letter of Roy Sampsel to Congress accompanying the proposed Old Age Assistance legislation (Defendants' Br: Attachment 1) indicates in a straightforward manner that legislative proposals will not be submitted to Congress. This is in direct disobedience to P.L. 96-217. P.L. 96-217 is a clear standard against which this failure can be judged.

Defendants rely heavily on National Wildlife Federation v. United States, 626 F.2d 917 (D.C. Cir. 1980). That case, however, fails to support the assertion of nonjusticability. The Court in that case withheld relief largely because no legislator had complained that the President's submission to Congress, required under the Forest and Rangeland Renewable Resources Planning Act of 1974, PUb. L. 93-378, 88 Stat. 476, violated the act, found "[t]he absence of congressional complaints highly relevant. . . ." 626 F.2d at 927. By contrast there is an extensive record of congressional dissatisfaction with the defendants' compliance with P.L. 96-217.

Senator Cohen, Chairman of the Senate Select Committee on Indian Affairs, clearly expressed this dissatisfaction at the time he introduced legislation pending in Congress to solve the limitations problem. Statement of Senator Cohen, Cong. Rec. p. 12669 (daily ed. Sept. 29, 1982). See also Oversight Hearing on Statute of Limitations Before Senate Select Committee on Indian Affairs, 97th Cong., 2d Sess. 20-21 (Testimony of Lawrence Jensen, Associate Solicitor of Indian Affairs, September 16, 1982 (Plaintiffs Br.: Appendix 37).

The defendants' reliance on Atchison T. & S.F. Ry. Co. v. Callaway, 459 F. Supp. 188 (D.D.C. 1978), aff'd in part and rev'd in part on other grounds, Izaak Walton League of American v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, sub nom. Atchison, T. & S.F. Ry. Co. v. Marsh, 454 U.S. 1092 (1981), also fails to support defendants' position. In Callaway, plaintiffs sought substantive review of a legislative proposal submitted by the Army Corp of Engineers. The court, while noting indications which might point towards the contrary result, declined to review "agency decisions to proposed legislation" and would not do so absen[t] compelling precedent for such judicial intervention in the legislative process." 459 F. Supp. at 194. The Court also noted that substantive review might have a chilling effect on the legislative process.

This does not describe the situation here. In this case, Congress imposed a duty on defendants to submit legislative proposals to resolve all claims believe not appropriate for litigation. There is no danger of a chilling effect in this instance. The only danger is the loss of plaintiffs' claims by the running of the statute without legislative resolution being proposed by Congress. No intervention with the legislative process is involved; the question presented is one of law; whether the defendants have complied with the law. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 178 (1802).

Defendants also argue that the decision to propose legislation is an executive branch decision and suggest that requiring such a submission may violate the President's Article II, Section 3 powers. (Defendants' Br., p. 46, n.64). There is no question that the executive branch

may itself decide to propose legislation. It is equally clear that Congress may direct the executive branch officials to take certain action. Thus, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court held that the Congress may direct the Administrator of General Services to take custody of the papers and taperecordings of former President Nixon and may require the Administrator to promulgate regulations for the handling and availability of these materials without violating the principle of separation of powers, 433 U.S. at 441-46. Moreover, in instances in which it is clear that Congress cannot effectively exercise its authority without executive assistance it may confer certain powers on the executive. These include the power to make subordinate rules and to determine facts. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). "Congress does not abdicate its functions when it describes what jobs must be done, who must do it, and what is the scope of his authority. In our complex economic system that indeed is frequently the only way in which the legislative process can go forward. Bowles v. Willingham, 371 U.S. 503, 515 (1944). See also Yakey v. United States, 321 U.S. 414 (1944).

The congressional directive set forth in P.L. 96-217 Sec. 2 is well within the authority of Congress to delegate power to the executive and to require executive action. First, the required submission of legislative proposals imposes no duty to offer any particular kind of proposal. Thus, executive discretion to formulate proposals is preserved. Moreover, inasmuch as executive officials, the defendants herein, alone have the needed information to formulate these proposals Congress is simply relying on the factfinding capability of these officials. As long as no particular content is required the Congress may direct the submission of this information in the form best suited to its purpose. Finally,

here as in Nixon v. Administrator of General Services, supra, 433 U.S. at 441, the signing of P.L. 96-217 into law by the President made the executive branch a party to the Act's requirement.

Congress, having acted, it is up to the Court to determine whether their response meets the statute's requirements. To do so expressed no lack of respect (see Defendants' Memorandum at 46) for the Executive Branch.

Nor are defendants correct in their assertion that there are no standards to apply to review the Secretary compliance with the law. Here, the statute itself establishes the standard of review: it requires that defendants submit legislative proposals to cover claims not believed appropraite for litigation. As the statute is mandatory, strict compliance is required; submission of a single legislative proposal while other claims not believed appropriate for litigation are overlooked violates this standard. See Statement of Senator Cohen, supra.

B. Litigation.

The prosecutorial discretion issues are adequately dealt with in plaintiffs' initial brief, pp. 62-66. Defendants cite Buckley v. Valeo, 424 U.S. 1, 141, 143 (1976), for the proposition that the Congress cannot constitutionally direct the filing of civil lawsuits. Plaintiffs' requested relief does not offend this rule. Plaintiffs seek review of defendants' handling of these claims. If judicial review establishes an error of law in the handling of these claims or if this question cannot be determined before the statute of limitations expires, then the proper relief requires also the filing of protective lawsuits to insure that the plaintiffs' rights are fully protected. Such protection is critical during the period where defendants formulate a process which meets the requirements

of the law or while the court considers the resolution of this claim. The relief requested is well within the power of the Court. The situation is precisely that which caused the Court to require the federal defendants to institute the protective action in Joint Tribal Council of Passamaquoddy v. Morton, supra. Where the power of the court to provide a remedy will be defeated if relief is not given during the pendency of this action, that relief can be granted. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929). To prevent the loss of all remedies a court can intervene. Where the interests of an innocent party are at stake in an officials' decision in the bringing of an action, and where the official is acting under statutes designed to protect the interests of that party, there is power in equity to give that party a remedy. Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969).

Defendants' discussion (Defendants' Memorandum at 49) of considerations relevant to the decision whether to prosecute these claims also misses the mark. The plaintiffs do not contend that the court must reevaluate each and every decision in each and every case made by the defendants. Rather, the plaintiffs' claim is that the defendants' process for handling these claims is defective under the requirements of the trust responsibility, the Administrative Procedures Act and the Fifth Amendment due process clause. Consideration of this claim does not require evaluation of each case, nor do plaintiffs request the court do do so. Thus, defendants' citation to National Coal Association v. Marshall, 510 F. Supp. 803 (D.D.C. 1981), is inapposite. There, plaintiffs sought review of the defendants' administration of Black Lung Benefits Program. The review requested would have required the court to examine literally thousands of cases. The process for granting these benefits included detailed evidentiary and eligibility standards. National Coal Ass'n v.

Marshall, supra, 510 F. Supp. at 803. This process is hardly comparable to that which defendants use. Indeed, plaintiffs seek to establish in this case that defendants must afford certain of the protections which the claimaints in National Coal Ass'n had secured.

In contrast, the plaintiffs here seek only a review of existing law to conform the defendants' process to the requirement of the Administrative Procedures Act, the trust responsibility and due process of law. The application of these requirements to the defendants' process hardly requires the court to decide matters of managerial and public policy.

The major issue in the case is statutory construction and whether the executive has complied with the statutory standards laid down by Congress. It is, therefore, a justiciable questions. Michigan Head Start Directors Association v. Butz, 397 F. Supp. 1124, 1137 (W.D. Mich. 1975).

VI. DEFENDANTS' ACTIONS ARE REVIEWABLE

A. A Strong Presumption of Reviewability Exists and Can Be Rebutted Only by a Showing of Clear and Convincing Evidence to the Contrary.

Contrary to the position taken by the defendants, the Supreme Court has repeatedly declared that "only upon a clear showing of clear and convincing evidence of a contrary intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 141 (1967); quoting Rusk v. Cort, 369 U.S. 367, 379, 380 (1962); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). This presumption on reviewability of executive agencies is fully applicable to federal actions affecting Indians. Tooahnippah v. Hickel, 397 U.S. 598, 605-607 (1970).

1. The court may review defendants' errors of law.

The defendants correctly concede that when an administrative official's action 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." Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 666 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975); Perkins v. Elg, 307 U.S. 325, 349-350 (1939); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94 (1943); McGrath v. Kristensen, 340 U.S. 162, 168-71 (1950).

Defendants argue at footnote 67, page 52 of their brief that plaintiffs have not pointed out legal errors. One such error is contained

in footnote 73, pp. 57 and 58 of their brief where they argue that only if ejectment is sought, can mesne profits be sought. Based on this theory, tribes were warned that one consequence of seeking recovery might be curtailment of services (Dep. of Stevens, p. 109). The defendants' position is in error, and is inconsistent with the position they themselves have taken.

That their position is in error is established by Utah Power & L. Co. v. United States, 243 U.S. 389, 411 (1917):

> As the defendants have been occupying and using reserved lands of the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges named in the regulations, as prayed in the bill. However, much this scale of charges may bind one whose occupancy and use are under a license or permit granted under the statute, it cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or assented to the regulations in any way.

The United States has specifically supported a measure of damages based on the greater of rental value and profits, without ejectment being at issue. A copy of their recent brief in United States of America v. Southern Pacific Transportation Co., Civ. No. 2708BRT, contains a specific argument that the federal court may fashion its own remedy and that trespassers are precluded from reaping any benefits. (Attached hereto as Appendix E). 9/

9/ And in a court of appeals decision rendered in the same case, the court noted that the federal government had amended their complaint and dropped the claim for ejectment, leaving the claim for damages. United States v. Southern Pacific Transp. Co., 543 F.2d 676 (9th Cir. 1976).

In the context of rights of way claims, an evaluation of the government's decision to treat all rights of way as beneficial is set forth in a September 5, 1980 memorandum from the then Solicitor's 2415 Claims Coordinator to the Solicitor and others:

> One caveat only: DOJ objects to seeking damages in title claims without exception. They are dead wrong in this because exceptions are justified, as in the instances where an agribusiness has grown crops for years, a paper or timber company has denuded the land, a mining company has depleted the resources, or a railroad company has tracked or otherwise used the land. As between non-Indian jury awards can be won in such instances, and that should be our position. Furthermore, DOJ's "no exceptions" aspect of their policy is professionally embarassing because it is devoid of trust advocacy in general and discriminates without reason against valid Indian rights against culpable wrongdoers. (Appendix G).

Another example of legal error is the decision not to litigate damages claims for forced fees and secretarial transfers based on Brooks v. Nez Perce County, No. 80-34-3441 (9th Cir. 1982)(App. 41 to Plaintiffs' Br.). That case held damages were recoverable in such instances. Based on the court's observation that laches was a factor in determining the amount of damages, the defendants decided not to litigate any such claims, despite the Aberdeen Area's calculation of damages on forced fees as being in the range of $15,000 to $26,000 per allotment (Dep. Stevens, p.21 ; see Plaintiffs' Br. p. 18).

The court in Dunlop v. Bochowski, supra, anticipated circumstances when review is appropriate:

> [I]f the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogated his enforcement responsibilities . . . [or] if the Secretary prosecuted complaints in a constitutionally discriminatory manner . . . . [cite omitted.] Other cases might be imagined where

> The Secretary's decision would be "plainly beyond the bounds of the Act [or] clearly defiant of the Act." Devito II, 72 LRRM, at 2682 [emphasis added].

Id. at 574.

Under 28 U.S.C. § 2415, the United States, as trustee of Indians and Indian tribes, was charged with bringing claims on behalf of Indians. The defendants Secretary, however, has clearly "abrogated this enforcement responsibilities" and is "clearly defiant of the Act" by failing to identify, evaluate and prosecute the majority of valid claim on behalf of Indians. Instead, defendants have categorically abandoned and disposed of valid claims in an arbitrary and capricious manner. They have not notified individual Indian claimants within a reasonable time before the running of the statute of limitations that they will not litigate their claims. Since the defendants have abrogated their responsibilities in defiance of the Act, the court may review the decision and order compliance.

Review of decisions not to propose legislation is discussed, supra.

B. Defendants' Actions are in Violation of Their Trust Duties and Arbitrary and Capricious.

These arguments are adequately dealt with in plaintiffs' initial brief, pp. 44-60. Plaintiffs have adequately demonstrated that defendants' decision on the handling of claims were devoid of trust advocacy, inconsistent with the government's own directives and policies and internally inconsistent and without basis in law.

C. Due Process.

Defendants argue that issuing memoranda to field offices requesting that tribes be notified of the Secretary's disposition of potential claims satisfies due process. The identification of the

specific dictates of due process requires consideration of three factors: (1) private interests that will be affected by official actions; (2) risk of erroneous deprivation of such interest through procedures used, and probably value, if any, of additional safeguards; and (3) government's interests, including any administrative or fiscal burdens. Mathews v. Eldridge, 424 U.S. 319 (1978).

The notice provided by the government in this case is not notice appropriate to this case. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1954) (notice by publication sufficient to advise those who are unknown, but insufficient as to those who are known); Covey v. Somers, 351 U.S. 141 (1955) (notice by publication in a newspaper insufficient to advise an incompetent of a foreclosure action). The government has the names and addresses of certain named claimants and with respect to those persons notice by mail directed to them is required. With respect to those who are not known at the present time, the government has the ability to ascertain the names and addresses of those people so that personal mail can be sent to them advising them that their claims will not be litigated and that they can, if they desire, institute action personally.

It is also clear that the efforts to get notice out have been woefully inadequate. See Statement of Facts, supra, pp. 9-10. This Court should ensure adequate notice is given.

VII.

DEFENDANTS HAVE FAILED TO FOLLOW THE ADMINISTRATIVE PROCEDURES ACT

A. Rulemaking.

Defendants argue that their decisions whether to pursue litigation are not rules because these decisions do not "regulate [ ] the future conduct" of any nongovernmental person (Def. Br. p. 61). There is no requirement that the conduct of nongovernmental persons be regulated. If rules remove discretion

from governmental officials as to broad categories of cases, as is the case here, that is sufficient. See discussion at pp. 31-38 of Plaintiffs' Opening Brief, especially Guardian Federal S. & L. v. Federal S. & L. Ins. Corp, 589 F.2d 658 (D.C. Cir. 1978); United States Ex Rel. Parco v. Morris, 426 F. Supp. 976 (E.D. Pa. 1977). The rules passed by defendants affected thousands of claimants' eligibility to have the federal government prosecute their claims or submit legislation on their behalf and this case squarely falls within the rationale of Morton v. Ruiz, 415 U.S. 199 (1974) and Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982). These cases are anathema to the validity of defendants' actions despite their attempt to play them down by only discussing them in a footnote.

B. Statements of General Policy.

Defendants argue that their "instructions to the field" to guide processing of claims were not rules, but were mere statements of general policy. Where discretion is foreclosed a rule is involved. As pointed out by defendants at page 63 of their brief, the guidelines for review of rights of way were straightforward. But defendants refer only to the general statement that claims for rights of way would only be litigated when significant damages were involved. They neglect to point out what factors went into the decision of whether such damages exist or not. The key factor is number 4 which provides that significant damages are not involved when:

(4) No Flagrant Trespass. There is no evidence that the trespass upon Indian land, such as constructing and maintaining a road, was accomplished over the objections of the Indian landowners or the United States (Appendix 27 to Plaintiffs' Opening Brief).

Guideline #4 has no relation to damages whatsoever and reverses the normal process whereby one seeking the right of way must apply for it. Under these "guidelines" there is simply no room left for discretion. They are rules, pure and simple.

> The APA requirements in § 553 for rulemaking are expressly made inapplicable to "general statement of policy." Rules may be and usually are "general statements of policy;" when they are, they are still rules and therefore subject to the requirements of § 553.

Daves, Administrative Law (1958), p. 23 § 7.5.

The results of the application of these guidelines in the field are proof of the pudding. Statement of Facts, pp. 15-16 supra, i.e. the paltry number of referrals of rights of way cases for litigation since adoption of the guidelines, the beneficial/nonbeneficial approach of the Billings Area sans balancing and the do nothing approach of the Aberdeen Area which "saw the writing on the wall" as far as these claims were concerned.

The same is true as to defendants' categorical decisions not to litigage forced fees, secretarial transfers and other "title" claims. It is established that defendants did not analyze each and every claim as was their duty. Plaintiffs' Br. p. 16. Rather, without following procedures mandated by the Adminstrative Procedures Act they ruled claims out of existence.

C. Publication.

Defendants argue that 5 U.S.C. § 552(a)(2), which provides for public inspection and copying of "statements of policy and interpetations . . . adopted by the agency and . . . not published in the Federal Register" somehow obviates the need to publish "general statements of policy" as required by 5 U.S.C. § 552(a)(1)(D). But § 552(2)(B) applies only when there is no publication required by § 552(a)(1)(D). It does not excuse such publication.

VIII.

RELIEF IN THE NATURE OF MANDAMUS IS APPROPRIATE IN THIS CASE

Defendants argue that relief in the nature of mandamus is not appropriate in this case because "mandamus will issue only to compel a non-discretionary duty," and its duties under § 2415 are discretionary. Defendants' Brief at 65-66. Defendants thus contend: "Whether to file a lawsuit, to seek legislation, or to refrain from these actions is a matter of agency discretion." Defendants' Brief at 66. Defendants contentions must fail.

A. Defendants' Duties in this Case are not Discretionary.

Public Law 96-217, is unambiguous. It requires the Secretary of the Interior and the Attorney General to make a determination of which cases are suitable for litigation. For those claims not suited for litigation, the statute mandates submission of legislative proposals. Any discretion would only be as to the form of the proposal, but that is not the issue here since it is undisputed that defendants have not submitted legislative proposals as to large categories of claims, i.e., forced fees, secretarial transfers, and unapproved rights of way (Attachment 1 to Defendants' Brief).

Where, as here, the decisions not to litigate were in large part based on complicity by the federal government (Attachment 2, supra) the equities cry out for a requirement that defendants scrupulously perform their duties under Section 2 of P.L. 96-217.

B. Even If Statutory Interpretation Is Required, Mandamus Is Appropriate.

"As long as the statute, once interpreted, creates a preemptory obligation for the officer to act, a mandamus action will lie." 13th Regional Corporation v. U.S. Department of Interior, 654 F.2d 758,

760 (D.C. Cir. 1980); Knuckles v. Weinberger, 511 F.2d 1221, 1222 (9th Cir. 1975); Naporano Metal & Iron Co. v. Secretary of Labor, 529 F.2d 537, 542 (3rd Cir. 1976). Accordingly, "if the court's study of the statute and relevant legislative materials [causes] it to conclude that the defendant official had failed to discharge a duty that Congress intended him to perform, the court should compel performances and thus effectuate the congressional purpose." Carpet, Linoleum & Resilient Tile, Etc. v. Brown, 658 F.2d 564, 566 (10th Cir. 1981).

C. Action Can Be Compelled Even Where Discretion Is Involved.

Action may be compelled in cases involving judgment and discretion. This rule was first set forth in Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-19 (1930) (mandamus is available "to compel action, when refused, in matters involving judgment and discretion, but not ... in a particular way. ..."). However, because the tradition of mandamus or "mandamus medievalism," as the old rule is termed by Kenneth Culp Davis in his Administration Law Treatise, § 23.09 at 384 (1982 Supp.), was so ingrained in American jurisprudence, it has taken many years for the modern rule to become accepted by the courts.

Today, however, several circuit courts have adopted the rule that mandamus will issue to correct abuses of discretion. Standards delimiting the scope or manner in which such discretion can be exercised are found in applicable statutes and regulations. The Tenth Circuit states the modern rule thus:

> [I]t is the court's duty in a mandamus action to measure the allegations in the complaint against the statutory and constitutional framework to determine whether the particular official actions complained of fall within the scope of the discretion which Congress accorded the administrators. ... In other words, even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting

> the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated.

Carpet, Linoleum & Resilient Tiles, Etc. v. Brown, supra at 566; and see, Davis Associates, Inc. v. Secretary, Dept. of Hous. & U. D., 498 F.2d 385, 389 and 389 n.5 (1st Cir. 1974); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969); McGraw v. Farrow, 472 F.2d 952, 957 (4th Cir. 1973); Miller v. Ackerman, 488 F.2d 920, 922 (8th Cir. 1973).

Recent cases from the D.C. Circuit accept the rule. The District of Columbia Court of Appeals has in fact applied it in Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978). In that case, the court in a mandamus proceeding reviewed discretionary action by the Register of Copyrights denying a copyright, including the interpretation of an unclear statute. The court in Esquire in a footnote recognized the trend in the law toward acceptance of the rule permitting courts to set aside discretionary decision "if they fall outside the bounds of any rational exercise of discretion." Esquire at 806 n.28. Judge Leventhal in his concurrence expressly embraces the modern rule:

> The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1970), authorizes district courts generally to issue writs of mandamus to federal officials and "to issue appropriate corrective orders where Federal officials are not acting within the zone of their permissible discretion but are abusing their discretion or otherwise acting contrary to law." Although 28 U.S.C. § 1361 applies only in case of a "duty owed to plaintiff," it is not bounded by the hoary strictures of old mandamus law.

Esquire at 807. Even prior to Esquire the D.C. Circuit had distinctly indicated its tendency to depart from "the hoary strictures of old mandamus law." See, e.g., Haneke v. Sec. of Health, Ed. & Welfare, 535 F.2d 1291 (D.C. Cir. 1976); Peoples v. United States Dept. of Agriculture,

427 F.2d 561 (D.C. Cir. 1970).[10] And see the discussion of the recent trend of cases toward acceptance of the use of mandamus to review abuse of discretion issues, including an analysis of the D.C. Circuit cases, in K. Davis, Administrative Law Treatise § 23.09 at 384-91 (1982 Supp.).

D. Even If Relief Under 28 U.S.C. § 1361 Is Inappropriate, the Relief Requested is Appropriate Under the Declaratory Judgment Act and the Administrative Procedures Act.

Even if this court decides discretion is involved and that abuses of discretion are not reviewable under 28 U.S.C. § 1361, nevertheless plaintiffs have pleaded and are entitled to such relief under 28 U.S.C. § 1331, the declaratory judgment act and the APA. See, e.g., Carpet Linoleum & Resilient Tile, Etc. v. Brown, 656 F.2d 564, 567 (10th Cir. 1981); Cervase v. Office of Federal Register, 580 F.2d 1166 (2d Cir. 1970); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Michigan Head Start Directors Association v. Butz, 397 F.Supp. 1124 (W.D. Mich. 1975); and 1 Moore's Federal Practice ¶ 0.62[17] at 700.57-700.58 (1982).

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[10] Defendants cite Commonwealth of Pa. v. Morton, 381 F. Supp. 293 (D. D.C. 1974) (Judge Corcoran) in support of the rule that mandamus is not appropriate to review discretionary actions. However, that case was decided two years before Haneke, supra, and four years before Esquire.

IX. CONCLUSION

A. After more than ten years of effort, and the expenditure of millions of dollars, and the identification of more than 17,000 claims, what does the federal government have to show for its effort--70 cases filed and one legislative proposal. As for the rest of the claims--let them die a quiet death at midnight on December 31, 1982, without any attempts at creative approaches to rectify injustices. A disgraceful outcome to a program for which the executive promised much more and Congress demanded much more.

This Court can require that the obligation recognized by defendants and Congress be met. To do otherwise would be to allow defendants to make a mockery of the whole claims process and to allow untold claims to vanish. As Senator Cohen said in reporting the pending bill "To simply allow these claims to lapse--to administratively shove them under the rug--is damaging to the law; it is damaging to the Congress; and ultimately it is damaging to the country." Cong. Rec., supra, at S12670.

B. Proposed Approach to Decision of the Case.

This litigation presents unique timing problems. This Court is being asked to render a decision based on a wide variety of wrongful actions and inactions on the part of defendants. Plaintiffs acknowledge that some problems may be solved in pending legislation passes in the lame duck session of Congress. Therefore, the plaintiffs suggest a three step process in deciding this case.

a) First step. The first step would involve making factual findings and legal conclusions as to the extent of the deficiencies in the defendants' handling of the claims process and entering limited

orders to rectify certain deficiencies. Findings would cover such matters as: (1) failure to complete investigation and identification of all potential claims; (2) failure to evaluate each and every claim based on appropriate legal standards in order to ascertain its suitability for litigation; (3) failure to propose legislation for all meritorious claims not suitable for litigation as required by P.L. 96-217; Section 2; (4) failure to give required notice to claimants whose claims will nto be litigated, nor resolved legislatively; (5) failure to follow APA rulemaking or publication requirements.

b) Step two. Limited orders could be entered based on these findings as follows: (1) an order requiring notice by a date certain to all reasonably identifiable claimants whose claims are not to be resolved by either litigation or legislation; (2) an order requiring the evaluation of claims according to relevant measures of damages and on an individual basis rather than as categories; (3) an order requiring legislative proposals for claims determined not to be suitable for litigation; (4) an order requiring efforts to complete the claims identification process prior to December 31, 1982; (5) the gathering of the information necessary to file protective suits if legislation should not extend the limitation period.

c) Third step. The most drastic remedy, the filing of protective suits, would be held in abeyance until Congress acted on the proposed legislation. If the legislation is passed, the protective suits will not be necessary. If it is not passed, then the suits could be ordered filed by this Court.

Plaintiffs feel that this proposed procedure makes the best of the difficult situation created by defendants.

Dated: 28 October 1982

Respectfully submitted,

James C. Moore, II

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Moore & Foster, P.C.
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ATTORNEYS FOR PLAINTIFFS

TABLE OF APPENDICES

APPENDIX A

2415 file

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 17 1979

Memorandum

To : Associate Solicitor, Indian Affairs
All Regional and Field Solicitors
All Statute of Limitation Claims Coordinators

From : Solicitor

Subject: Minimum dollar amounts on Statute of Limitations claim barred after April 1, 1980

Several inquiries have been received from the field as to whether the Solicitor has established a minimum dollar amount below which no claim should be pursued in Indian third party claims barred after April 1, 1980. It has been suggested that if there is no minimum, that such a minimum be established. No such minimum has yet been established. I am advised, however, that some field offices, and certain BIA Area Offices, observe minimum dollar amounts. It is understandable also that small claims may interfere with responsible pursuit of larger, more valuable claims; and that often small claims may require extensive litigation far out of proportion to probable recovery. I believe, therefore, that minimum amounts should be a consideration provided such remain consistent with our professional obligations as trustee attorneys.

I do not believe, however, that an absolute minimum dollar amount can be established to apply to all cases. Such a valuation may not comport with obligations of the trustee in view of other factors. For example, no worthwhile claim for recovery of title to, or interest in, or possession of land should be rejected simply because the damage claim, ancilliary to the land claim, is low in dollar value and for that reason rejected. My view is that a minimum dollar amount should be left to the prudent professional judgment of field officials most familiar with all relevant aspects of any given claim. Accordingly, the Associate Solicitor for Indian Affairs, and All Regional and Field Solicitors are authorized to reject claims with low dollar values within the following guidelines:

1. No claim low in dollar value should be rejected for that reason alone if it can easily be combined with other similar or identical claims in a single complaint against the same defendant so as to make prosecution worthwhile.

2. No claim low in dollar value should be rejected for that reason alone where liability is clear, the proof simple, the third party vulnerable to redress, and amicable settlement a real possibility.

3. No claim low in dollar value should be rejected for that reason alone where the legal issues are sufficiently important to justify prosecution.

4. No claim low in dollar value should be rejected for that reason alone in any instance where to do so would work manifest injustice on the Indian claimant in some way.

5. All claims low in dollar value rejected for that reason alone should be so rejected according to the standard procedures used in the case of any other rejection except insofar as these guidelines may indicate to the contrary.

6. All rejections of claims low in dollar value rejected for that reason should take the form of written recommendations back to the BIA requesting its concurrence, or as written concurrence of prior BIA rejections for low dollar value.

7. In all instances where other reasons exist for rejection of claims as well as low dollar value such reasons should also be relied on in recommendations for rejection.

(sgd) Leo Krulitz

APPENDIX B

United States Department of the Interior
OFFICE OF THE SOLICITOR

ROOM 211 - FEDERAL BUILDING
P.O. BOX 549
ABERDEEN, SOUTH DAKOTA 57401

RECEIVED
SEP 10 1979
SDSI Agency

September 5, 1979

Memorandum:

To: Area Director, Bureau of Indian Affairs

From: Field Solicitor

Subject: "2415 Claims"&"Unconsented Transfer."

We have enclosed and are returning to the Bureau of Indian Affairs eight "2415 claims." The Associate Solicitor, Division of Indian Affairs has by memorandum dated August 20, 1979, (copy enclosed) advised that they will not file those claims concerning conveyances of inherited allotments without the consents of all the Indian owners on reservations governed by Indian Tribes organized under The Indian Reorganization Act (IRA). However, please forward a list of all claims of that nature by number, name and amount of damage for each claim.

Please be advised that this office recommends that your Agency give notice to those claimants and heirs involved in the enclosed cases in clear, concise language that:

1. Their "claim" will not be pursued by the Bureau of Indian Affairs in its responsibility as trustee;

2. That your Agency does not feel the "claim" is proper, but that each claimant may seek private counsel, be it from Legal Assistance or otherwise, to pursue his (her)"claim";

3. That if they intend to pursue their "claim", they should properly serve and file the same in the proper Court of Law before April 1, 1980.

[redacted]

APPENDIX B

We further are advising South Dakota Legal Services, Legal Assistance of North Dakota, Inc., and Inter-Tribal Legal Services of Nebraska of the foregoing; and further that we suggest they contact their clients and properly pursue their claims prior to April 1, 1980. Of course, the legal basis for the Solicitor's Opinion is available from the Division of Indian Affairs, United States Department of the Interior, Office of the Solicitor, Washington, D.C. 20240, Phone number 343-9401.

Roger W. Thomas
For the Field Solicitor

Enclosure

cc: Regional Solicitor
Mr. George Bourgeois
South Dakota Legal Services
Legal Assistance of North Dakota, Inc.
Inter-Tribal Legal Services of Nebraska, Inc.
Mr. Simon Stevens, Area Coordinator

* Tender offer to Legal Assistance Organizations of eight "2415 Claims" identified as follows:

1.	Sihamzawin Allotment #301	Claim No. A05-303-002
2.	Kenneth Coe King	A05-303-014
3.	Suna Waamatan; Heirs of Mary Lohnes Allot. #384	
4.	Suna Waamatan; Heirs of Mary Lohnes	A05-303-017
5.	Benedict Bear (Matowanapeya Allotment No 664 #85	A05-303-080
6.	John Winnepeg, Allotment #1073	A05-303-009
7.	Rosalie Dance Eagle	A05-303-009
8.	John Coy Adams, Emma Woods Adams Allotment #578	A05-303-090

APPENDIX C

AFFIDAVIT

STATE OF MICHIGAN)
)ss
COUNTY OF ISABELLA)

I, THOMAS L. WILSON, being duly sworn, deposes and states:

1) I was formerly the 28 U.S.C. 2415 Claims Coordinator for the Inter-Tribal Council of Michigan, Inc. under a contract with the Bureau of Indian Affairs for the State of Michigan.

2) That in my capacity as coordinator, I was aware of the need for funding for the identification of the heirs of "dual allottees" who are members of the Saginaw Chippewa Indian Tribe and discussed this matter with the Bureau of Indian Affairs.

3) That because of the limited amount of funds available, the Bureau of Indian Affairs did not provide funding to conduct an investigation to identify heirs of "dual allottees" who are members of the Saginaw Chippewa Indian Tribe.

4) That I am aware that Susan Eggleston; Doreen Eggleston; and Iva Eggleston are members of the Saginaw Chippewa Indian Tribe and are the heirs of Archie Eggleston "deceased" who was a "dual allottee."

5) That upon information and belief, there are numerous members of the Saginaw Chippewa Indian Tribe that would be identified as the heirs of "dual allottees" if an investigation was undertaken.

Dated: October 21, 1982

Thomas L. Wilson
THOMAS L. WILSON

Subscribed and sworn to before me this 21st day of October, 1982.

Ruth A. Moses, Notary Public

RUTH A. MOSES
Notary Public, Isabella County, Mich.
My Commission Expires Oct. 27, 1982

APPENDIX D

new projects are authorized, Congress will surely address the question of cost sharing between Federal and non-Federal interests. Currently, the Corps of Engineers is completing a study of the feasibility of a Federal flood control project in the Lower Rio Grande Valley. For such a project to ultimately be constructed, it must have a favorable benefit/cost ratio, strong local support, congressional construction authorization, and the necessary appropriations. This process will take many years.

In the meantime, the people of the lower valley are compelled to act on their own to respond to the prospect of continued flood damage. Let me say at this point that flooding in the Lower Rio Grande Valley has some unique aspects. Because the land around the river is so flat, there is little runoff. Under severe flooding conditions water can stand across the area for weeks, backing up septic tanks and devastating cropland. I have worked for years to speed the process of determining whether or not this project should get the green light. In spite of my efforts, progress has been slow. Consequently, the local authorities are developing their own flood control efforts. After a several-year delay in obtaining a dredge-and-fill permit under section 404 of the Clean Water Act, the Hidalgo County Drainage District No. 1 is constructing a drainage network in the area.

My bill would instruct the Corps of Engineers to include the costs and benefits of local improvements that are compatible with its ultimate project. This bill does not authorize any Federal funds. It does, however, protect the local investment in the event that a Federal project is authorized and built to control flooding in the Lower Rio Grande Valley.●

By Mr. CHAFEE (for himself and Mr. PELL):

S. 2975. A bill to amend title 10, United States Code, to authorize an alternative to the conventional construction of military family housing within the United States, Puerto Rico, and Guam; to the Committee on Armed Services.

ALTERNATIVE TO CONVENTION CONSTRUCTION OF MILITARY FAMILY HOUSING

● Mr. CHAFEE. Mr. President, on behalf of Senator PELL and myself, I am today introducing legislation which would allow the Secretary of Defense to select an alternative to the conventional construction of military family housing. The alternative would permit the Secretary of Defense to enter into a long-term lease for family housing.

This alternative could provide an attractive and economical method of procuring family housing in certain situations, and I believe we should make this alternative available.

A companion measure has been introduced in the House of Representatives. It is my hope that the Department of Defense and the appropriate committees of Congress will give this measure their early and favorable attention.●

By Mr. MATHIAS:

S. 2976. A bill to facilitate the economic adjustment of communities, industries, and workers to civilian-oriented initiatives, projects, and commitments when they have been affected by reductions in defense or aerospace contracts, military facilities, and arms export which have occurred as a result of the Nation's efforts to pursue an international arms control policy and to realine defense expenditures according to changing national security requirements, and to prevent the ensuing dislocations from contributing to or exacerbating recessionary effects; to the Committee on Governmental Affairs.

DEFENSE ECONOMIC ADJUSTMENT ACT

● Mr. MATHIAS. Mr. President, I am introducing today the Defense Economic Adjustment Act. The purpose of this bill is to plan and provide technical assistance to States and localities which may experience sudden unemployment increases due to loss of defense contracts.

Defense Department decisions on facility locations, employment levels, weapons procurement, and contracts can severely affect a local employment base. The result can be sharp declines in employment which wreak havoc with local economic stability.

The social costs, economic disruptions, and human stress caused by sudden layoffs and shifts in defense spending are substantial. This bill establishes a mechanism to plan for such slowdowns in spending, retrain workers, recycle defense facilities, identify new markets and new products for current defense suppliers, and assure a stable transition to a domestic civilian economy.

Although the defense sector of our national budget is currently programed for real growth, we must be prepared for that time when defense spending slows. The enormous number of military contractors (20,000) and the 400 U.S. military bases located throughout the United States are a sizable segment of our national economy. The spin-off employment of these employers in subcontractors is even greater.

No locality or region can afford to become overly dependent on one part of its employment base. This bill is aimed at those towns and cities where the principal employer is a military base or defense contractor. Should the need for the base or product of a contractor decline, the local economy is caught in the lurch. A diversified, balanced local economic base can insure that this does not occur.

Furthermore, by seeing that new markets, products, and types of employment are assured in the future, this bill makes it easier for national spending decisions to be made without a bias to existing defense suppliers and contractors, whose product or service may no longer be necessary to national needs.

Reindustrialization is a term bandied about these days as means to move our Nation out of its current recession. This bill would see to it that the meaning of reindustrialization would be clearly defined and a program for getting there was agreed upon.

There are numerous national priorities which beg to be addressed: Our methods of public transportation; our methods of homebuilding; our space program; the health of our citizens; or urban infrastructure—streets, bridges, water and sewer lines; our water and air quality research and technology; new energy conservation and recycling technologies; our merchant ship fleet; and business communication needs.

All of these areas and many more call for priority national attention and the directing of careful thought and a skilled work force. The Defense Economic Adjustment Act is a step in the direction of such economic conversion.●

By Mr. COHEN, from the Select Committee on Indian Affairs:

S. 2978. An original bill entitled the "Indian Claims Settlement Act of 1982"; placed on the calendar.

INDIAN CLAIMS SETTLEMENT ACT OF 1982

Mr. COHEN. Mr. President, I am today reporting legislation to extend the statute of limitations as it pertains to claims of Indian tribes or individuals for monetary damages arising prior to 1966.

Prior to 1966, there was no limitation on the time in which the United States could bring an action for damages either for itself or on behalf of an Indian tribe or an individual. In 1966 the Congress enacted 28 U.S.C. 2415 to establish a time limit of 6 years for claims based on contracts and 3 years for damage claims for most torts. Six years was allowed for trespass or conversion damages affecting lands. There is no time limit on actions to establish the title to, or right of possession of, real or personal property.

In 1972, at the request of the Departments of the Interior and Justice, the statute was amended to extend by 5 years the time in which the United States could bring an action on behalf of an Indian tribe or individual for a claim arising before 1966. In 1977, the statute again was extended by 2½ years to April 1, 1980. In 1980, the statute was extended a third time to December 31, 1982. The 1980 extension directed the Secretary of the Interior, after consultation with the Attorney General, to submit to the Congress legislative proposals to resolve those Indian claims that they believed were not appropriate to resolve by litigation.

Mr. President, to date neither the Department of the Interior nor the Department of Justice has presented the Congress with a single proposal

for legislative resolution of any outstanding Indian claim. In September of last year I wrote to the Secretary of the Interior urging compliance with this act in order that the Congress might have adequate time to deal with the complex issues that would arise. I again wrote in December of 1981.

Mr. President, in an effort to stimulate action by the executive branch, the Select Committee on Indian Affairs held oversight hearings on April 1 of this year. This hearing revealed that the Department of the Interior had placed some 17,000 claims on its statute of limitations tracking system and that of these 17,000 claims, only 1,200 remained under active consideration. Many of these claims were disposed of by the simple expedient of deciding that the value of the trespass claim is not as significant as the underlying claim to title to land or a determination that a certain category of trespass such as roadway and utility easements could be considered beneficial to the Indian and therefore to have an offsetting value. The one category of claims the Department was prepared to recommend for legislative solution, that of old-age assistance claims, has never been forwarded to the Congress. The select committee held further hearings on September 16 to determine the current status of progress. Cases which had been referred to Justice for litigation in 1978 and 1979 had been returned to Interior for reconsideration and many of the larger claims simply have not been filed or are still pending decision on litigation.

I do not agree with the conclusion of the Department of the Interior in its communication to this committee on June 25, that legislation to address the old-age assistance category of claims will bring the Government into substantial compliance with the requirements of Public Law 96-217 that the Department of the Interior in consultation with the Department of Justice submit to the Congress legislative proposals to resolve these outstanding Indian claims.

A decision to waive a claim for damages on the grounds that the claim for title to land is not barred does not do justice to either the Indian claimant or the non-Indian who is occupying the land in good faith and under color of title.

A decision to administratively resolve rights-of-way claims in a manner that waives a claim for past damages without notification to the Indian whose claim is affected does not reflect the good faith owed by the trustee. Also, a waiver of past damages on water rights claims and claims for degradation of the environment resulting in destruction of fish stocks will almost certainly adversely affect the bargaining position of the United States and the tribes in attempting to reach settlement of these claims.

I would like to say that in granting these various extensions to the statute, there have been three overriding concerns of the Congress. First, is to assure substantial justice to the Indians in the prosecution of their claims.

Second, is to assure substantial justice to innocent third parties by avoiding unnecessary litigation, particularly where settlements might be achieved or where timely review of the cases would establish that a claim lacked merit.

Third, is to assure that third parties who are not wholly innocent and who have reaped the gains through tortious action will bear the costs of that conduct rather than having the burden fall on the United States.

I feel that the dispositions that have been made by the Department of the Interior and the Department of Justice of these claims falls far short of the intent of Congress in enacting Public Law 96-217.

From the information that has come to this committee through our oversight hearings, our correspondence to the Departments of Interior of Justice, and from concerned Indians, I am satisfied that none of these three objectives is now being met. I am deeply disturbed that the administration has failed to provide the Congress with a single recommendation for legislative resolution of any of the identified claims.

Mr. President, each time the Congress has extended the statute of limitations, witnesses for the tribes have stressed the potential liability of the United States for failure to diligently prosecute the claims of Indians. Witnesses for the Government have never specifically stated that the United States would in fact be liable to the Indians for failure to bring a trust-related claim, but in each of these extensions the Government witnesses have acknowledged that such liability is a very distinct possibility.

In hearings before the Select Committee on Indian Affairs in December of 1979, I asked the then Associate Solicitor for the Division of Indian Affairs, Hans Walker, whether a suit would lie against the United States as trustee for failure to carry out a fiduciary obligation if it failed to bring an action on behalf of an Indian tribe or individual.

Mr. Walker stated that that was very possible. In hearings before this committee in May of 1977 at the time of that extension, Mr. Krulitz, then Solicitor of the Department of the Interior, when asked the same question responded to the chairman by saying, "I must say that in my mind I think there is a clear exposure and substantial risk of liability in this situation."

Peter Taft, then Assistant Attorney General for Land and Natural Resources, Department of Justice, while not conceding liability, acknowledged that there was no question that the Government would be used. On September 23, 1982, a class action law suit was filed in the U.S. District Court for the District of Columbia seeking declaratory relief against the United States premised on failure of the United States to timely file claims and failure to timely notify claimants. It also seeks mandatory injunction to compel the United States to file remaining claims within the time allowed.

Mr. President, I cannot overstate my frustration with the manner in which the executive branch has handled this problem. It is not just this administration. The problem has been known for 10 years and successive administrations must share the blame. Nevertheless, I am deeply disappointed. To simply allow these claims to lapse—to administratively shove them under the rug—is damaging to the law; it is damaging to the Congress; and ultimately it is damaging to this country. For these reasons I am reporting this bill today.

By Mr. PRYOR (for himself, Mr. BUMPERS, Mr. SASSER, Mr. BOREN, and Mr. SARBANES):

S. 2979. A bill to establish a Federal Grain Storage Insurance Corporation to protect farmers who store grain in certain warehouses against losses caused by the insolvency of such warehouses, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

FEDERAL GRAIN STORAGE INSURANCE ACT OF 1982

Mr. PRYOR. Mr. President, I want to take this opportunity to address the Senate on an issue that has, unfortunately, become a factor in the lives of American farmers. This subject has captured regional and national headlines and has generated discussion at all levels of government and within the agricultural community. Farmers, already plagued by high-interest rates, high fuel costs, and high seed and fertilizer costs, have now been hit by still another problem—bankruptcies and failures of grain elevators.

More than 110 elevators have failed in the United States in recent years, leaving in the lurch at least 3,200 farmers with over $25 million in grain. While the number of occurrences of grain elevators is relatively small compared to business failures in general, few other types of bankruptcies can have such a devastating effect on farmers who, in effect, are innocent bystanders. We have heard far too many stories of financial failure.

On April 7, the 20-year old Coast Trading Co. filed to reorganize under chapter 11 of the Federal Bankruptcy Law. Coast had a 6 State chain of 22 grain elevators, feed mills, barge facilities, and other related services. The debt includes $14 million to secured creditors and $20 million to an estimated 200 unsecured creditors—mostly farmers and local elevators that sold to Coast Trading.

In Stockport, Iowa, an elevator collapsed 2 years ago where too much grain was delivered without receiving a

APPENDIX E

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WALKER RIVER PAIUTE TRIBE OF NEVADA, et al., Plaintiffs, v. SOUTHERN PACIFIC TRANSPORTATION CO., et al., Defendants.	CIVIL NO. 2707 BRT
UNITED STATES OF AMERICA, Plaintiff, v. SOUTHERN PACIFIC TRANSPORTATION CO., et al., Defendants.	CIVIL NO. 2708 BRT Consolidated Cases

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN SUPPORT OF ITS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Statement

The defendant, Southern Pacific Transportation Company, has moved this court for partial summary judgment on the question of the measure of damages to be applied in the present case. The

defendant has presented three alternative measures of damages from which it requests the court to select one. The defendant alleges that with respect to this question there is no issue as to any material fact and that this question is appropriate for summary judgment. It is undisputed that the defendant has been trespassing upon land held by the United States in trust for the Walker River Paiute Tribe and individual Indian allottees since the construction of its railroad across the tribe's reservation. It is also undisputed that the plaintiffs are entitled to an award of damages based upon the defendant's trespass. United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976).

We do not contest the defendant's basic premise that the court may by summary judgment prescribe an appropriate measure of damages to be applied in this case. We do, however, take issue with the methods proffered by the defendant as being appropriate. For the reasons to be outlined below, the United States moves this court to deny the defendant's motion for partial summary judgment; but moves the court to enter a partial summary judgment in favor of the United States adopting the measure of damages which we believe is appropriate for trespasses upon Indian lands.

I

THE FEDERAL COURTS MAY FASHION ITS OWN REMEDY FOR TRESPASSES UPON INDIAN LANDS

Where the United States exercises a constitutional function which is governed by federal law, and where there is no federal statute regulating the exercise of that function, the federal courts are free to fashion their own rules of decision. Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367 (1943). All three requirements for the application of federal common law are met in this case.

Indian title is a matter of federal law, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974); United States v. Sante Fe Pacific R. Co., 314 U.S. 339, 345 (1941); and the management of lands held by the United States for Indians is a constitutional function. U.S. CONST. art. IV, §3; art. I, §8. Additionally, there is no federal statute regulating the measure of damages to be applied against those who have trespassed upon Indian lands. Thus, the federal courts are free to fashion their own rules of decision with respect to the measure of damages to be used to compensate Indians for the deprivation of the use and occupancy of their lands. Clearfield Trust Co., supra.[1/] The United States urges the court to fashion a measure of damages to be applied in this case based upon the analysis outlined below.

II

THE FEDERAL STATUTORY SCHEME REGULATING THE MANAGEMENT OF INDIAN LANDS PRECLUDES TRESPASSERS UPON INDIAN LAND FROM REAPING ANY BENEFITS

It is well settled that where rights protected by a federal statutory scheme have been invaded, the federal courts will provide whatever remedies necessary to effectuate the Congressional purpose. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946). Congress has established a complete statutory scheme providing for the protection of Indian lands and providing for the manner in which one may acquire valid rights-of-way across such lands. Among the most important statutes regulating Indian lands are: (1) the Non-Intercourse Act (25 U.S.C. 177) which precludes the acquisition of interests in Indian lands except by treaty or statute, (2) Section 16 of the Indian Reorganization Act (25 U.S.C. 476) which empowers Indian tribes organized under the act to give its consent prior to the acquisition by third

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1/ Upon this point, the United States and the defendant are apparently in agreement. (See Defendant's Memo. pp 15-16).

parties of any interests in their lands, and (3) the General Rights of Way Act (25 U.S.C. 323 et seq.) which authorizes the Secretary of the Interior to grant rights-of-way across Indian lands to those who comply with the provisions of the act and any regulations promulgated pursuant to the act. The purpose of the Non-Intercourse Act is "to prevent unfair, improvident or improper disposition" of Indian property. Southern Pacific, supra at 698. Section 16 of the Indian Reorganization Act was intended to give the Indians "control of their own affairs and of their own property." 78 Cong. Rec. 11125 (1934); see Plains Electric & Transmission Cooperative Inc. v. Pueblo of Laguna, 542 F.2d 1375, 1380 (10th Cir. 1976). And the General Rights of Way Act was intended to assure the protection of Indian interests by the Secretary of the Interior when rights-of-way were granted across Indian lands. Pueblo of Laguna, supra, at 1380-1381. All three of these acts have been violated by the defendant's trespass in this case.

This statutory scheme was intended to prevent non-Indians from taking unfair advantage of Indians by making use of their property and reaping unjust profits. See Southern Pacific, supra, at 698; Bunch v. Cole, 263 U.S. 250, 254, 255 (1923). That being the case, those who invade the federally protected rights of Indians by wrongfully taking possession and making use of their lands should be precluded from retaining any benefits received as a result of the wrongful use and occupation. This approach to damages has been adopted in cases dealing with Indian lands as well as other government property.

In Bunch v. Cole, supra, an individual Indian allottee sued to recover for the wrongful occupancy and use of his land. The land had been leased to the defendants in violation of restrictions imposed by Congress for the Indians' protection. The defendants subsequently sublet the premises and realized a substantial profit.

In addition to seeking a declaration that the leases were invalid, the Indian plaintiff sought to recoup the profits derived by the defendants. The Court, after holding that the leases were invalid, recognized that the protection intended to be afforded to the Indians by Congress would be effectuated by allowing the Indians to recoup those profits. Id., at 254-255.

In Pine River Logging Co. v. United States, 186 U.S. 279 (1902), the Court was concerned with the proper measure of damages to apply against those who had trespassed upon government land for the purpose of wrongfully seizing timber. In arriving at its decision, the Court stated:

> If trespassers under these circumstances were permitted to escape by the payment of the mere stumpage value of the standing timber, there would be a strong inducement upon the part of these operators to avail themselves of every opportunity of seizing this timber, since they would incur no greater liability than the payment of a nominal sum. It is only by denying them a credit for their labor expended upon it that the government can obtain an adequate reparation for this constantly growing evil, and trespassers be made to suffer some punishment for their depredations. at 295 [Emphasis added].

Accord, Wooden-Ware Co. v. United States, 106 U.S. 432, 437 (1883). In the present case, if the defendant is permitted to retain the benefits it has obtained as a result of its trespass, there would be a strong inducement for others to encroach upon Indian property, "since they would incur no greater liability than the payment of a nominal sum." Unless the defendant is denied "a credit" for its use of this land, the statutory scheme established by Congress will not be effectuated nor will the Indians receive an adequate reparation for the injuries inflicted upon them.

The Supreme Court has apparently recognized the validity of requiring a railroad that has trespassed upon Indian lands to forfeit any benefits it obtained by virtue of its wrongful occupation. In United States v. Sante Fe Pacific R. Co., 314 U.S. 339 (1941), a case very similar to the present case, the United States brought suit against the defendant railroad for the purpose of quieting title to the Indian land across which the defendant had constructed its railroad, and also for the purpose of requiring the railroad to "account for all rents, issues and profits derived from the leasing, renting or use of the lands" in question. Id. at 344. After holding that the Indians did have title to some of the lands in question, the Court ruled that the United States was entitled to such an accounting. Id. at 359.[2/] Therefore, in fashioning a form of relief in this case, the court should be guided by the principle that the defendant railroad may not retain any of the benefits it has acquired by the wrongful use of the lands in question.

III

AS BETWEEN RENTAL VALUE AND PROFITS, THE PLAINTIFFS ARE ENTITLED TO THE GREATER OF THE TWO

We have previously demonstrated that the defendant in this case may not retain the benefits of its wrongful occupation of the Indian land in question. Thus, in order to arrive at a compensatory award, it will be necessary to inquire as to the benefits actually received by the defendant. Such an inquiry involves questions

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2/ It is important to note that Sante Fe Pacific R. was required to account for all of its profits, notwithstanding the fact that ejectment of the railroad was not at issue. Subsequent to the filing of the lawsuit, the defendant railroad had quit claimed to the United States all the lands it had claimed within the Indian reservation in question. Sante Fe Pacific, supra, at 358-359. Therefore, the fact that the ejectment question has in effect been mooted by the position of the Department of the Army does not preclude the court from granting the relief we seek. The defendant's assertion that the measure of damages to be applied in this case turns on whether the railroad will or will not be ejected must fail. (See Defendant's Memo pp. 16-18).

of fact which may not be disposed of by this motion. However, standards for measuring these benefits can be formulated at the present time by the court.

At the very minimum, the defendant has received the benefit of the actual use and occupation of the land in question since the construction of its railroad line. Therefore, at the very minimum, it must respond in damages for the value of the use and occupancy of this land based upon its extent and duration.[3/] Utah Power & Light Co. v. United States, 243 U.S. 389, 411 (1917); United States v. Bernard, 202 F. 728 (9th Cir. 1913). However, the defendant may have received by way of profits an economic benefit which exceeded the rental value of the land. If this in fact proves to be the case, the Indians are entitled to recoup those benefits. In Green v. Biddle, 21 U.S (8 Wheat.) 1 (1823), the Court stated that:

> Whoever takes and holds the possession of land to which another has a better title, . . . is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not; and the owner may seize them, although removed from the land. . . . Id., at 35.

The courts have recognized that a trespasser should not profit from his wrongful use of another's property. Thompson & Ford Lumber Co. v. Dillingham, 223 F. 1000, 1003, 1004 (5th Cir. 1915); Edwards v. Lee's Administrator, 265 Ky. 418, 96 S.W.2d 1028 (1936); Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). Thus, the owner of land may choose between the rental value measure or the profit measure depending upon which produces the greater result. McCormick, The Law of Damages, §126 (1935); see Nathan v. Dierssen, 146 Cal. 607, 130 P. 12, 14 (1913); Dime Savings Bank v. Altman,

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3/ This is commonly known as the rental value measure of damages.

275 N.Y. 62, 9 N.E.2d 778, 781 (1937). Based upon these well settled rules of law with respect to the wrongful use of another's property, the court should adopt a measure of damages in this case which allows the plaintiffs to choose between the rental value[4/] of the land in question, or the profits derived by the defendant as a result of the use of this land, depending upon which proves to be greater.[5/]

IV

THE MEASURES OF DAMAGE SUGGESTED BY THE DEFENDANT ARE CLEARLY INAPPROPRIATE FOR THIS CASE

The defendant has suggested three measures of damage for the court to apply in this case. The three measures are: (1) the diminution of value measure, (2) the inverse condemnation measure and (3) an alternative measure based upon a 1902 Act of Congress. Although the defendant acknowledged the existence of the rental value measure, not suprisingly it contends that this measure is inappropriate.[6/] A review of these suggested measures and the defendant's bases for suggesting them will demonstrate that they are completely inappropriate for this case.

4/ The question of how you measure rental value can and most likely will be the subject of an entire brief. We are not asking the court to rule on the proper method of valuation at this time. We are only seeking a ruling that rental value is an appropriate measure, assuming the profits do not prove to be greater.

5/ Where the trespasser has maintained his occupation of the land in bad faith, he will not be allowed to deduct from the award to the plaintiff the value of any improvements made upon the land. In cases where profits are used as the measure of damages, the bad faith trespasser will not be able to deduct his costs and expenses. Jeems Bayou Club v. United States, 260 U.S. 561 (1923); Woodenware Co., supra.

We believe it can be demonstrated that the defendant has trespassed in bad faith. We do not intend to seek a final determination as to the defendant's good or bad faith through this motion. This question should be left for trial. However, it should be recognized that the result of the court's determination on this question will have an effect on the amount of the final damage award.

6/ It is interesting to note that the defendant completely ignored the profit measure of damages.

A. Diminution In Value

The defendant has suggested that damages in this case should be based upon the difference between the value of the land immediately before and immediately after the trespass occurred. (See Defendant's Memo, pp. 16-17). The basis for the defendant's position is that the trespass in question is of a permanent nature, and the dimunition measure is applied in such cases.

It should first be noted that this same argument was made by the defendants in Utah Power and Light Co., supra, at 393-394, where a power project was operating wrongfully upon land owned by the United States. The Court rejected the application of this measure of damages, since it required that the defendant compensate the United States for the use and occupancy of the land, based upon its extent and duration. Id., at 411. Upon the same basis, the court should reject the use of this measure of damages in the present case.

Secondly, it is our view that the application of this measure to trespasses across Indian lands would completely frustrate the statutory scheme established by Congress relating to these lands. (See Section II, supra). A defendant, after a long trespass such as we have here, could escape with the mere payment of a nominal fee. It is conceivable that rather than decrease the value of the land, the presence of the railroad has increased its value. If this is in fact the case and the diminution measure is applied, the defendant will have had the free use of this land for nearly 100 years, while the Indians would obtain nothing in damages. The federal policy underlying the Non-Intercourse Act would be completely undermined if the court adopted this measure.

More importantly, however, the trespass in question is not permanent in nature, as the defendant suggests. The defendant, relying upon a line of cases where the courts refused to enjoin trespasses

by railroads, argues that the public nature of this railroad would preclude the granting of injunctive relief against its continued operation. The cases relied upon by the defendant, however, do not apply to the facts of this case.

Two major distinctions can be drawn between this case and the cases relied upon by the defendant. The first distinction stems from the fact that the trespass in question is over Indian lands which are specifically protected by an Act of Congress. 25 U.S.C. 177. The Non-Intercourse Act precludes the acquisition of interests in Indian lands except by treaty or statute. The Ninth Circuit has already found that Congress never authorized the right-of-way in question. Southern Pacific, supra. If the defendant's trespass is considered to be permanent in nature, it would effectively result in the granting of an interest in Indian land to the defendant contrary to the explicit provisions of the Non-Intercourse Act. None of the cases upon which the defendant relies involved trespasses by railroads across Indian lands.

Additionally, in all the cases cited by the defendant, the landowner had either consented to the entry by the railroad, or knew of the entry and failed to act. In the present case, the Indians, at the time of the defendant's entry, were incompetent to authorize the defendant's permanent occupation of the land. Southern Pacific, supra, at 697-699. The United States, owner of the legal title to this land, never consented to the defendant's entry. Congress repeatedly refused to approve the right-of-way across the reservation. Id. at 681. Furthermore, it may not be contended that the failure of the Indians or the United States to act would preclude the issuance of an injunction in this case. Once again, the Non-Intercourse Act prevents the application of laches or estoppel against Indians where there is a threat that their interests in property may be lost. United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1956). Therefore,

the defendant is incorrect when it asserts that its trespass is permanent in nature.[7/]

Lastly, the legal authorities relied upon by the defendant for the use of the diminution measure of damages are not applicable here. The defendant has cited Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933) and the RESTATEMENT OF TORTS (Second) §930 in support of its position. Both of these sources concern invasions of interests in property by virtue of nuisances where the courts have consistently applied a balancing of interests approach to the issuance of an injunction. See Smith v. Staso Mining Co., 18 F.2d 736 (2nd Cir. 1927); Stockdale v. Agrico Chemical Co. Div. of Con. Oil Co., 340 F.Supp. 244 (N.D. Iowa 1972). This case involves a trespass, not a nuisance.

This review of the bases for the defendant's assertions that the diminution measure of damages is applicable in this case clearly reveals that the defendant is in error. The diminution measure must be rejected as an alternative.

B. Inverse Condemnation

The second measure suggested by the defendant is based upon an inverse condemnation of the right-of-way in question. If this method of computing damages is adopted, the defendant would merely have to pay the value of the land on the date of its original entry, plus interest. This method of assessing damages must also be rejected.

As was the case with the diminution measure of damages, computing damages in this case based upon an inverse condemnation

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7/ Although the Department of the Army has indicated it will condemn the right-of-way, if necessary, in order to keep the defendant's line operating across the reservation, that fact has no bearing on classifying the nature of the trespass for purposes of damages. The fact that the Army may come to the defendant's aid cannot alter the amount of damages the defendant must pay for its wrongful occupation of the Indians' land.

method of valuation would also frustrate the statutory scheme established by Congress for the protection of Indian lands. (See Section II, supra). It too would allow the defendant to escape after a 100-year trespass by the payment of a nominal sum. In addition, it must be noted that no statutory authority exists authorizing a railroad to condemn Indian tribal land.[8/] An Act of Congress specifically authorizing the condemnation of tribal trust lands must exist before such land may be taken. United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976). Absent the ability of the defendant to adversely condemn the land in question, no rational basis for computing damages on that basis exists. Therefore, the inverse condemnation method of computing damages must also be rejected.[9/]

C. Alternative Measure

The third measure of damages suggested by the defendant is based upon a 1902 Act of Congress. 32 Stat. 134. This method should also be flatly rejected. If adopted, it would require the defendant to pay a minimal amount over and above the condemnation value of the land in 1882. The method is in effect a modification of the inverse condemnation formula suggested by the defendant. As with the other measures proferred by the defendant, it too, if adopted, would frustrate the Congressional statutory scheme established for the protection of Indian lands. Furthermore, the method bears absolutely no relation to traditional measures for compensating

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8/ There is statutory authority authorizing the condemnation of Indian allotted land. 25 U.S.C. 357.

9/ Although tribal land may not be inversely condemned, a recent Ninth Circuit decision held that allotted land may be inversely condemned. United States v. Clarke, 590 F.2d 765 (9th Cir. 1979), cert. granted, 48 U.S.L.W. 3187 (1979). We do not believe, however, that allotted land should be treated any differently than tribal land with respect to the measure of damages for trespasses. The measure suggested by the defendant as applied to allotted land would also frustrate Congress' statutory scheme for the protection of Indian lands. We also point out that the Supreme Court will pass upon the validity of the holding in Clarke, a holding with which we strongly disagree.

landowners for trespasses. Utah Power & Light, supra; Green v. Biddle, supra. It is folly to suggest that this is a method which Congress would have fashioned to remedy a wrongful trespass. The use of this method has absolutely no basis in the law and must be rejected.

Conclusion

The defendant has wrongfully possessed land held by the United States in trust for the Walker River Tribe and its members for almost a century. The plaintiffs are entitled to be compensated for the wrongful deprivation of their land. The parties have asked the court to fashion a means of measuring the amount of compensation due the plaintiffs in this case. The resolution of the question is appropriate for summary judgment.

The measure of damages to be used for compensating Indians for trespasses upon their lands is a matter of federal common law. In formulating the measure, the court is free to develop its own rule of decision. In so doing, the court should be guided by the principal that trespassers upon lands may not retain the benefits acquired as a result of their wrongful action. To rule otherwise would frustrate the statutory scheme established by Congress for the protection of Indian property.

Since the defendant has received the benefit of the use and occupancy of the Indian land in question, it must, at a minimum, pay for the value of that use and occupancy. If by way of profits the defendant has received more in benefits than the value of the use and occupancy of the land, the plaintiffs may recoup these profits. The application of such a measure of damages in cases dealing with the wrongful use of land is well established.

The methods suggested by the defendant, however, are clearly inapplicable to the case at hand. Initially, all the methods, if adopted, would frustrate the statutory scheme estab-

lished by Congress for the protection of Indian lands. Secondly, none of these methods are appropriate for factual situations such as we have in this case.

Based upon all of the foregoing, the United States requests that the court grant its motion for partial summary judgment declaring that the defendant must answer to the plaintiffs for damages based upon either the rental value of the land occupied by the defendant for the period of the trespass, or based upon the amount of profits derived by the defendant by virtue of the use of this land, whichever is greater.[10/] The United States also asks the court to deny the defendant's motion for partial summary judgment.

Respectfully submitted,

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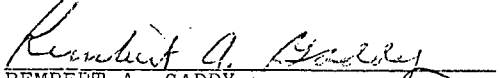

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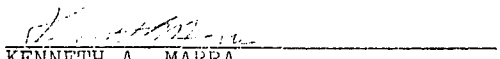

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10/ Since the defendant in two of its suggested methods of damages has indicated interest should be applied, we infer that the defendant concedes that interest applied to the damage award would be appropriate. As the court stated in New Orleans v. Gaines, 82 U.S. (15 Wall.) 624 (1873), unless interest up to the time of trial is added to an award for the detention of land, the plaintiff would not obtain a "full and complete indemnity for the injury to his rights." Id., at 632. Unless the defendant contends otherwise, we see no need to discuss that question in this memorandum.

APPENDIX F

March 7, 1979

Memorandum

To: Solicitor, Washington, D.C.
Attention: Associate Solicitor, Indian Affairs

From: Field Solicitor, Twin Cities, MN

Subject: Sale of Indian Allotments without Consent

In reviewing many of the allotment files at the Minnesota Agency, Bemidji, it recently became apparent that great numbers of allotments were sold during the 1950's. In checking further on some of these sales, it seems that many were made with only partial consent of the heirs of the original allottees, and some were made with no consent whatsoever. The documents from three representative sales are enclosed for your information, and the Agency Realty Officer has begun a systematic review of the files. He estimates, from his initial stages of review, that upwards of 2,000 parcels of land were sold during that period with less than full consent of the beneficiaries and in questionable circumstances. If there were 2,000 of such sales on the six Minnesota Chippewa Tribe reservations alone, it is likely that the figure is even greater on the reservations under the jurisdiction of the Great Lakes Agency and the Michigan Agency.

With regard to the sales of Minnesota Chippewa Allotments, the allotments in question were trust allotments and were made pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388, and the Nelson Act of January 14, 1889, 25 Stat. 642, though some few allotments on the Fond du Lac and Grand Portage Reservations were made previously under the Treaty of September 30, 1854, and were in restricted status. The allotments were either not made until after 1909 or were extended at some point by Executive Order, and were then extended indefinitely when all six reservations voted to accept the provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 985. Section 4, 25 U.S.C. § 464, provides:

> Except as provided in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title,

APPENDIX F

> no sale, . . . or other transfer of restricted Indian lands . . . shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located . . . .

The extent to which the above section is applicable to trust allotted lands on reservations where the Indian Reorganization Act was adopted does not appear to have been judicially determined, though the Solicitor spoke to the question in Scope of the Secretary's Authority Under the Act of May 14, 1948, M-36003, June 7, 1950, as follows:

> This prohibition applies to all "restricted Indian lands," including trust lands, [See Estate of Ke to sah Jefferson, IA-19, May 4, 1950.] held by individual Indians who are members of tribes that brought themselves within the compass of the 1934 act. [See Solicitor's memorandum of November 20, 1934, to Commissioner of Indian Affairs.] Thus, all such lands are "held under," or subject to, the provisions of the 1934 act.

The above interpretation seems consistent with the interpretation placed on Section 4 of the I.R.A. by the Bureau of Indian Affairs during the balance of the 1930's and the 1940's, since no allotted lands appear to have been sold on I.R.A. reservations during that period except in accordance with that section. However, with the passage of the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483, the interpretation appears to be, at least with respect to sales of allotted lands, that the provisions of Section 4 of the I.R.A. were repealed. The 1948 act provides:

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances.

The only reported decision on this question, though only a brief Per Curiam opinion on unstated facts, seems to support this interpretation. Lac du Flambeau Band of Lake Superior Chippewa Indians v. McKay, 221 F.2d 886 (D.C. Cir. 1955), states cryptically,

> We agree with the District Court that the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C.A. § 483, released certain Indian lands in Wisconsin, including those here involved, from prohibitions against sale or transfer imposed by the Act of June 18, 1934, 48 Stat. 985, § 4, 25 U.S.C.A. § 464,

Apart from the plain language of the 1947 act, if it were true that it simply repealed restrictions on sale or transfer of allotted lands imposed by Section 4 of the I.R.A., it would also, in turn, reinstate the act of June 25, 1910, 48 Stat. 647, 25 U.S.C. § 372, which provided in part,

> If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: . . . Provided, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests may appear: . . .

The statute specifically requires a finding, prior to effectuation of the sale of allotted lands, that one or more of the heirs are incompetent. It does not, however, speak to the question of whether or not all heirs must consent to the sale. As recently as June 15, 1971, a fairly comprehensive legal memorandum was prepared by your office in connection with an appeal of Mrs. Cynthia Tidthun for sale of Fort Peck Allotment No. 1279, a copy of which is attached for your ready reference. It initially correctly points out that one or more of the heirs must be found incompetent before the Secretary has authority to sell the land, and then proceeds to discuss the various Solicitor's Opinions which hold that sales may be made with less than full consent, being a memorandum of August 14, 1937, an opinion entitled Authority of Commissioner of the General Land Office to Issue Patents in Fee Covering Indian Allotments with Reservations of the Minerals Underlying the Allotments in Favor of Indian Owners, M-33967, 59 I.D. 100 (August 29, 1945), a footnote in an opinion on another subject, entitled Patents in Fee, M-36184, 61 I.D. 293 (February 15, 1954); and a questionable reference in an opinion entitled Consent of Indians for Sale of Allotted Timber, M-36477, 65 I.D. 101 (March 5, 1958). The 1971 opinion concludes,

> I have found no case law dealing with the specific question of whether sales by the Secretary under 25 U.S.C. § 372 require consent of all the owners. However, the statute on its face does not require such consent and the legislative history is, at best, inconclusive. Bureau policy has authorized such sales for many years and we have previous Solicitor's opinions which support the concept that consent is not required. An argument could be made that the Bureau s

policy under 54 IAM 2.2.3A(1) suffers from ambiguity and thus increases the possibility of nonuniform application of the policy to individual cases, which may cause a court to strike down this administrative practice. 2 Am. Jur. 2d Administrative Law §§ 249-250 (1962). However, there seems to be sufficient authority to sustain the Bureau's present policy of allowing sale of inherited lands without the consent of some of the owners as long as the conditions mentioned in 54 IAM 2.2.3A(1) are present.

The opinion does, however, recognize, on page 3, that the question is being answered only with reference to "reservations not under the Indian Reorganization Act."

Again assuming that the 1948 act reinstated full application of the 1910 act, and assuming that the various Solicitor's Office opinions are correct in that consents from all heirs are not necessary prior to sale, many of the sales which took place on the reservations of the Minnesota Chippewa Tribe did not even meet the minimal requirements of the 1910 act. Of the three examples enclosed, the only mention made of incompetency is contained in the letter from the Superintendent to the Area Director recommending approval of the sale, and that is contained only in the files on Fond du Lac #14B and Fond du Lac #1d. No mention whatsoever of incompetency is made in the file on Leech Lake #15. In the letter relating to Fond du Lac #14B, the Superintendent states that, of the 46 heirs, 17 consented, 15 failed to reply to his inquiry, addresses were unknown for 10 of the heirs, 3 were deceased, and 1 was insane. No supporting documentation whatsoever is provided concerning the insanity. In the letter on Fond du Lac #1d, the Superintendent states that, of the 41 heirs, 31 consented, 4 were deceased and 6 failed to reply, though the letter goes on to state that 2 of the 6 who did not reply objected to the proposed sale in writing. He then goes on to note that a number were incompetent, naming 2 and stating that 5 others were minors, though presumably these 7 were among those who consented, and again, there is no supporting documentation. Of the 5 heirs to Leech Lake #15, none consented and one of these voiced oral objections to the sale. Here there was no statement that any of the 5 was incompetent.

It does not, however, appear to be a reasonable interpretation of the 1948 act to hold that it merely repealed Section 4 of the Indian Reorganization Act, reinstating the authority of the Secretary under the 1910 act. The language of the 1948 act specifically states that the Secretary is authorized to issue patents and approve conveyances "upon application of the Indian owners.". This imposes an additional condition upon the existence of Secretarial authority to sell, issue patents or approve conveyances, which condition was not specifically contained in the 1910 act. The fact that application or consent of the Indian owners is required for sale of an allotment subject to the

provisions of the I.R.A. and the 1948 act would seem to parallel the requirement of participation by heirs to sell timber, under the provisions of the act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 406. While the precise language of that statute is a bit different, it likewise does not specifically say that all heirs or trust beneficiaries must consent prior to a sale of timber from the allotment, but, nevertheless, the Solicitor, in Consent of Indians for Sale of Allotted Timber, supra, held,

> There are numerous acts of Congress delegating broad powers of discretion to the Secretary with respect to selling, leasing, or granting easements or other interests in Indian lands or disposing of the products thereof, or approving such actions by Indian restricted owners, but unless the statute specifically empowers the Secretary to act without the consent or approval, express or implied, of all co-owners, as in the partition statutes to which you refer (acts of June 25, 1910 (36 Stat. 855), and May 18, 1916 (39 Stat. 127), as amended; 25 U.S.C. secs. 372 and 378), he has been reluctant to face possible litigation from a hostile minority ownership, even if the transaction appears in the best interests of all co-owners.
>
> In conclusion, in view of the provisions of the 1910 act, supra, [25 U.S.C. § 406] the Secretary should approve no sale of timber on allotted Indian lands without the consent, express or implied, of all owners thereof, . . . (Emphasis added)

An even stronger analogy exists to the interpretations placed on Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended by Act of May 8, 1906, 34 Stat. 182, which provides,

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; . . .

Though there is a complete absence in the above language of any provision requiring application or consent by the allottee, it has been consistently held, not only by the Solicitor but also by judicial and Congressional

interpretation, that application and consent is a vital prerequisite to issuance of a fee patent to the allottee.

During the period from approximately 1915 to 1921 or 1922, thousands of fee patents were issued to allottees around the country, all without application on the part of the allottee. Many were issued to heirs of a deceased allottee again without application. The Acts of February 26, 1927, 44 Stat. 1247, 25 U.S.C. § 352a, and February 21, 1931, 46 Stat. 1205, 25 U.S.C. § 352b, were passed specifically to alleviate the situation and authorized cancellation of fee patents issued without application or consent of the patentee. They were described thus in Authority to Cancel Patent of Indian Allottee After Land is Incumbered by Lien - Acts of February 26, 1927, and February 21, 1931, 54 I.D. 160, February 13, 1933:

> The object of both statutes, of course, was to correct or remedy the administrative error of casting the fee title upon the Indian without his application or consent, by authorizing the Secretary to cancel the patent so issued.

The language which the courts have applied in striking down patents issued to allottees and their heirs without application or consent is even more compelling when applied to sales without application or consent of heirs, particularly in light of the application requirement contained in the 1948 act, which does not appear in the General Allotment Act. Even so, the court in United States v. Nez Perce County, 16 F.Supp. 267 (D. Ida. 1936), reversed on other grounds, 95 F.2d 232 (9th Cir. 1938), held that "[t]he statute is clear that the consent and application must precede actual issuance of patent, and such consent must be positive and certain." See also, United States v. Lewis County, Idaho, 95 F.2d 236 (9th Cir. 1938); Glacier County v. Frisbee, 117 Mont. 578, 164 P.2d 171 (1945), Lyall v. Yakima County, 130 Wash. 537, 228 P. 513 (1924); Bacher v. Patencio, 232 F.Supp. 939 (D. Cal. 1964), aff'd 368 F.2d 1010 (9th Cir.); and United States v. Ferry County, 24 F.Supp. 399 (D. Wash. 1938), which held,

> The Indians' vested right in this private property can only be divested by due process of law; it may not be impaired by legislative act, even when the Indian is a subject of guardianship, Jones v. Meehan, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49; Choate v. Trapp, 224 U.S. 665, at page 677, 32 S.Ct. 565, 56 L.Ed. 941, supra. The Congress may remove restrictions to alienation with or without the consent of the allottees, Williams v. Johnson, 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358, but such is a clear distinction from depriving the allottees, without their consent, of the vested right to hold land free from taxation for 25 years. U.S. v. Benewah County, Idaho, 9 Cir., 290 F. 628, supra; Choate v. Trapp, . . . "It is

noteworthy that, in other contemporaneous general provisions for granting Indian allotees patents in fee simple, it was expressly provided that such action might be had 'upon application' of the Indians."

The above quotations from United States v. Perry County, supra, and United States v. Pemenah County, Idaho, 290 F. 823 (9th Cir. 1928) could be equally applicable to sale of inherited interests without application or consent, for the interest of each heir is a vested right in private property which cannot be divested without due process of law. In fact, it is difficult to find a distinction between issuance of a fee patent to the heir of an allottee without his application and sale of the property of an heir of an allottee without his application. If anything, the latter is a more flagrant violation of due process, particularly in light of the specific requirement of application contained in the 1948 act.

Assuming that you concur in our ultimate conclusion that these sales, absent consent of all heirs, were unauthorized, the question remains as to how to deal with these cases. We would initially recommend that cancellation of the patents issued to purchasers be requested. There is some authority to the effect that notice to the current record title owner must be given of the intent to cancel such a patent. Black v. Bellanger, 5 F.2d 994 (D. Minn. 1925), states, "[t]here could be no cancellation without notice to the person actually interested and opportunity for a hearing in reference to the action proposed." Given such notice and hearing, any subsequent litigation could be in the form of Administrative Procedure Act review of agency action, rather than quiet title action by the United States on behalf of the heirs of the allottee. This would seem the more logical approach, though could not be followed in all cases. The file on Leech Lake #15, which is enclosed, is representative of a sizeable percentage of less than full consent sales on the Leech Lake Reservation where the purchaser was the United States Forest Service. Administrative negotiation with the Department of Agriculture will be necessary to resolve these cases, and it is likely that similar sales to the Forest Service and other Federal agencies have taken place on other reservations, such as Lac Courte Oreilles and Lac du Flambeau in Wisconsin, where National Forests now include portions of Indian Reservations.

Similar to the situation where the United States Forest Service was purchaser of the allotted lands, there are cases of properties sold with less than full consent during the 1950s which have since been purchased by the United States in trust for the tribe or band. The Realty Officer of the Minnesota Agency has identified one such tract which has been purchased in fee by the Minnesota Chippewa Tribe subject to a substantial purchase money mortgage and on which the Tribe has constructed extensive improvements. Easiest to deal with will be those parcels sold to private parties which have passed to counties or

at once through tax forfeitures or other methods. The bulk of these cases, however, will undoubtedly consist of sales to private persons who have either retained the properties or sold them to other private interests.

Complicating each of these cases is the question of liability for damages. In each case the appraised value of the property was paid to the Bureau of Indian Affairs by the purchaser to whom the fee patent or deed was issued. One court has held that any refund of the purchase consideration must come from the beneficiaries who received the consideration initially. The court in Sinigal v. United States, 208 F.2d 466 (9th Cir. 1953), cert. denied 348 U.S. 918, 75 S.Ct. 29, 99 L.Ed. 645, stated,

> No portion of the public treasury may be used to refund the purchase price of lands subject to control of the United States where the purchase was set aside as having been made in violation of the applicable laws and regulations.

However, in many of the cases, the heirs of the original allottee received nothing or very little of the actual consideration paid for the lands, the proceeds instead being applied to claims against the estates of the allottee or previous beneficial owners or to state social security or Old Age Assistance claims. The file on the sale of Leech Lake Allotment #15 is an example of a case where the entire proceeds from sale were applied to an Old Age Assistance claim.

A number of Solicitor's Opinions uphold the practice of paying such claims from the proceeds accruing to an estate after the death of an allottee, even where the estate has been settled, and the property distributed to the heirs. State Social Security Claims Against Restricted Indian Estates, 61 I.D. 37, June 2, 1952, discusses a number of these and discards many of the arguments against such practice. The Solicitor said:

> The jurisdiction of the Secretary of the Interior over the trust or restricted estates of deceased Indians, including the determination of heirs and the approval of wills, is based upon sections 1 and 2 of the act of June 25, 1910, as amended (25 U.S.C., 1946 ed., secs. 372, 373). . . . the practice of considering and allowing claims against the estates of deceased allottees was almost immediately instituted.[1] [1See Grace Cox et al., 42 I.D. 499, 501-502 (1913, where it was said apropos of claims: Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate.]

> The property of paying claims out of the trust or restricted estates of Indians has been recognized in recent years by the Solicitor of the Department, who expressed the view that such claims might be paid not only from income to the credit of the estate at the time of the decedent's death but also from income accruing to the estate subsequent to the death of the decedent." [The letter dated June 20, 1940, from Solicitor Margold to the Solicitor of the Department of Agriculture, and letter dated September 29, 1944, from Solicitor Harper to Senator Karl E. Mundt of South Dakota.]
>
> It is clear that the 1910 statute confers upon the Secretary of the Interior an implied power to allow claims against trust restricted Indian estates. . .
>
> It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 8, 1887, (24 Stat. 389), as amended (25 U.S.C., 1946 ed., sec. 348), which states that at the expiration of the trust period of an allotment the United States will convey the same "free of all charges or incumbrance whatsoever," and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U.S.C., 1946 ed., sec. 394), which states that no allotted land shall become "liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor. Ever conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims.

A directly contrary holding resulted from the appeal from an order of a Departmental Hearing Examiner allowing a sizeable Old Age Assistance claim and directing payment from future income from the trust property devolving upon the heirs. The Ninth Circuit, in Mary Hit Him Running Horse v. Udall, 211 F.Supp. 586 (d. D.C. 1962), stated emphatically,

> Neither 25 U.S.C. § 372 nor 25 U.S.C. § 410 authorizes the defendant to direct payment of the debts of a deceased Indian out of the moneys accruing after death from trust lands in the hands of such decedent's Indian heirs.

[illegible] the Secretary violates the statutory requirement that the trust property shall not be liable to the satisfaction of any debts contracted prior to the issuance of a patent in fee.

Insofar as the opinion of defendant's Solicitor reported as 71 I.D. 37 (1964) is inconsistent herewith, that decision is erroneous.

In the only opinion which we have found since 1969 dealing with the subject, the Interior Board of Indian Appeals dismissed the decision in Spotted Horse as being simply inapplicable, though the facts in that case, Estate of Martin Spotted Horse, Sr. (Crow Allottee No. 2576, deceased), 2 IBIA 265, 81 I.D. 227, April 25, 1974, were vastly different from those in Spotted Horse.

We thus need three issues determined:

1. Whether or not sales of allotted lands on Indian Reorganization Act Reservations with less than full consent of the beneficial owners violated applicable statutes and regulations, and are void or voidable.

2. If either void or voidable, the proper procedure for recovering the lands or interests in lands. Determination should be made as to whether recovery can or should be made of the entire interest in such lands or only of those fractional shares held by heirs who did not consent to the sale.

3. The appropriate source for and measure of damages. If refund of consideration paid for purchase of the lands is to be derived from the beneficial owners at the time, further review and a definitive position must be taken on the payment of such funds to outside sources in satisfaction of claims against the estates of deceased Indians.

In light of the fact that vast numbers of these cases appear to exist and would require processing prior to the expiration of the statute of limitations at 28 U.S.C. § 2415, we would appreciate your expedited review of these problems. If you require further information, please ask and we will do everything possible to provide it.

(Sgd) Elmer T. Wittschen

Elmer T. Wittschen
Field Solicitor

Enclosures

cc: Minneapolis Area Office BIA, Phx., AZ,
[illegible]
[illegible]
Boston, MA

APPENDIX G

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

SEP 05 1980

MEMORANDUM

To: Solicitor
Under Secretary
Assistant Secretary, Indian Affairs

From: George Bourgeois, Solicitor's 2415 Claims Coordinator, CIMS Contact Officer

Subject: Statute of Limitations Claims Program (SLCP) - Future Implementation

By this time I am certain you have reviewed my exit memoranda of August 29, 1980 outlining the most serious problems obstructing the completion of the SLCP; and of August 15, 1980 regarding the critical central office direction needed for the fishery damage claims in the Pacific Northwest. This memorandum is to outline additional aspects regarding the program.

A. The CIMS Aspect

A second six month Milestone Schedule must be prepared before the end of September, 1980, calling for, among other things, the following:

1. A due date assignment for the preparation of legislative proposals covering the following claims, or categories of claims:

   a. Old Age Benefits recovery;

   b. Rights of way claims;

   c. Secretarial transfer without consent;

   d. Shoalwater Bay.

2. A report from all BIA Area Offices handling SLCP matters on the status of the SLCP in each Area Office including a description of the remaining work to be done in each Office with deadline and an estimate of funds needed to complete the program for each specific category of claims.

3. A report from all Field and Regional Solicitor Offices handling SLCP matters on the status of the program in each office including a description of the remaining legal services to be done in each office with deadlines for each specific category of claims.

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4. Setting deadlines for the BIA, and the ASol-IA for determinations in all categories of claims for legislative proposals.

5. Setting early deadlines for the BIA Area Offices to produce final lists for identified claims by categories for use in the central office oversight hearings in early 1981.

6. Completion of a computerized tracking system for all SLCP claims, whether rejected, pending, viable, referred, to the Department of Justice, sued on, and/or deferred to the legislative process under Section 2 of the extention act.

7. Setting a final date for completing a review of all litigation reports submitted to the Department of Justice, or to U.S. Attorneys, for incompleteness, or other deficiency.

8. Setting a final date for completing of all supplementation of deficiencies uncovered in items above.

9. Setting a final deadline for ASol-IA regarding cuts on identified types of claims that will be referred to the Department of Justice, and those that will not be.

10. Reimpose Milestones not completed from the first six months Milestone Schedule.

All of the foregoing must be completed within the next six months for th to stay on track.

B. The Heirship Aspect

Since beginning my efforts in this program in May, 1979, I have become i creasingly conscious of heirship circumstances which contribute so heavi the dilemma we face in the SLCP. These circumstances are in dire need c addressed by the central office.

All of us are aware of the so-called "fractionated heirship problem" and impact it has had in generating Indian trust burdens on the Federal Gove There have been legislative proposals to inventory the holdings, or by v means to account for or even dispose of these numerous interests. I do believe these proposals will solve the problem until we know who these i belong to, and whether the owners are Indians entitled to trust protecti In the past these considerations have been assumed and I no longer think should be.

I know of no study to date that has adequately treated or evaluated just who these people are (much less identifying them by name and location) who own the fractionated interests that we have been pursuing so diligently. I think that a great percentage of them are no longer Indians. If I am correct, it means we have unwittingly been developing claims to recover interests in lands that should no longer be considered held in trust. Moreover, in a large number of instances we are in fact pursuing claims against bona fide enrolled Indians who happen to be the record fee owner of the fractionated interests we are seeking recovery of and damages on, and whose titles to land are rendered void by questionable trust obligations in favor of unknown persons.

As you may already know the fractionated interests involve numerous heirs. An example will illustrate my point. In Aberdeen, SD, the Field Solicitor, with the help of the BIA Area Office, developed educated guesses on the number of heirs involved in 828 road rights of way claims on North and South Dakota reservations that were forwarded late last year to the Department of Justice in nine litigation reports. The Field Solicitor reported that the number of heirs was about 6,800. Most of these heirs do not live on the land or the reservation and most are unknown to the BIA. Many are thought to be no longer tribal. If true, we are representing them to no good purpose, and only by operation of law.

I recommend that a study be contracted for to investigate and determine who composes the ownership of the fractionated interests. Whatever portion determined to be non-Indian should have, by legislative act if necessary, the trust status of their interests rescinded. I believe the government's trust responsibility will be greatly reduced as a result of this.

C. Practical Legal Aspects.

This portion of my report deals with steps that may be taken in the event Congress fails to restore or provide funds for FY 81 that will allow us to meet the deadline, December 31, 1982, or in the event finding funds should prove critical in any regard.

1. Jury damage award factor in title claims. Since the inception of the program we have referred damage claims to the Department of Justice in plaintiff style, i.e. with damage in the highest and broadest mode we could justify them. Such damages have admittedly been embellished in many instances where circumstances may not warrant it because of ardent Indian advocacy. For example, in tax loss claims where we are going after a county for recovery of title, the land has lain fallow since the tax sale, and while the county may technically be liable to us for trespass damages, my opinion is that jury awards in such instances would seldom exceed one dollar. As damage claims, for all practical purposes such claims are worthless.

Recovery of title, of course, is the real reason for pursuing these claims. I have never recommended curtailing these claims as worthless damage claims because it was an all expenses paid chance to get the title back. I realized soon after becoming the Solicitor's coordinator that we should do this since title claims never prescribe and pursuit thereof by this Department or the Department of Justice (DOJ) may never otherwise materialize. So the option to retain these claims within the SLCP was taken because it was probably the quickest way to get something done.

In February, 1980, after DOJ had had a chance to review a few of the numerous title claims with damage aspects, the Assistant Attorney General suggested at a meeting in the Solicitor's Office that DOJ was willing to go after title but not damages, and gave his reasons.

While I may not agree with the Assistant Attorney General's reasons, the fact that DOJ has taken this position is important because title to land is the piece de resistance. I recommend therefore that we accommodate DOJ to a certain extent by reviewing all title claims to evaluate the jury award factor with regard to trespass damages and reduce our requests for litigation to that of recovery of title alone in instances where jury awards would be insignificant. One caveat only: DOJ objects to seeking damages in title claims without exception. They are dead wrong in this because exceptions are justified, as in the instances where an agribusiness has grown crops for years, a paper or timber company has denuded the land, a mining company has depleted the resources, or a railroad company has tracked or otherwise used the land. As between non-Indians jury awards can be won in such instances, and that should be our position. Furthermore, DOJ's "no exceptions" aspect of their policy is professionally embarrassing because it is devoid of trust advocacy in general and discriminates without reason against valid Indian rights against culpable wrongdoers.

Concluding, a rough estimate is that viable jury damage claims are present in less than 10% of the title recovery type claims. This will, of course, reduce the number of claims drastically and thereby assist you in meeting the deadline set by Congress and arrange for recovery of title in instances where we may never have done so but for our current SLCP efforts.

2. Trust liability factor. You might consider a further policy option in attempting to meet the deadline given you by Congress that has to do with the liability of the United States for failure in its trust responsibility. This option is simple: direct all of the Solicitor's Regional and Field Offices to review all SLCP claims for trust liability under the rationale of the United States v. Mitchell, et al., ___ U.S. ___ (1980), Slip Opin. April 15, 1980.

The rationale of the Mitchell case seems to me to be that the liability of the United States for failure in its trust responsibility is not to be presumed, and can be sustained only where a foundation is laid which obligated the United States with regard to the particular matter at issue. I believe that it would be a simple matter to show that the United States is obligated

to protect the integrity of title to trust lands; and that it is obligated, possibly to the extent of mandamus, to recover title and possession of such lands from third party title claimants or possessors. On the other hand a concomitant obligation to sue for tresspass damages in connection with recovery of title or possession seems tenuous to me. Practical considerations seem to govern the seeking of trespass damages in such matters, creating no more than a discretionery responsibility on the part of the government. One must not rule out, however, a special relationship of some kind, statutory language, or an agreement whereby the United States obligated itself to sue for such damages.

The foregoing views are admittedly legal policy, and should be researched carefully. They are suggested, however, as an option to pursue in resolving once and for all the SLCP problems before December 31, 1982. I believe several categories of claims may be eliminated in this manner.

In any case I don't mean to scuttle damage claims. My recommendation is to concentrate the remaining time left in the program on high liability, big money damage claims against deep pocket defendants such as the fishery destruction claims of the Pacific Northwest, some of the forced fee claims, or other illegal fee or sale claims endemic in the Indian areas west of the Mississippi. Legislative solutions, of course, may resolve certain of these problems as well.

D. Legislative Proposals Aspect

Thus far only three categories of claims, and one specific additional claim, seem eligible for preparation of legislative proposals under Section 2 of the 1980 act extending the bar date for the SLCP to December 31, 1982. These are:

1. Rights of way claims which include (a) Road rights of way - about 2,000 claims nationally, (b) Co-op rights of way claims which include about 1,000 claims nationally;

2. Old Age Benefits recovery claims which include about 3,000 claims nationally;

3. Secretarial transfers without consent claims which include about 1,000 claims nationally; and

4. Shoalwater Bay claims which is listed as a single tribal claim against multiple landowners in the Section 11 portion of the Shoalwater Bay Indian Reservation in the State of Washington.

With regard to items 1, 2, & 4 above, DOJ initially moved to consider the issues for legislative proposals, but to date we have nothing in writing from them. DOJ should be addressed about this. As for item 3, Solicitor Krulitz made a cut in writing last year, and Bruce Landon has done work on a legislative proposal. DOJ, however, must be consulted on this matter since consultation with them is required by Section 2 of the 1980 extension act.

E. Practical Administrative Aspects

In reviewing data in my files and that of the BIA Office of Trust Responsibility I have become convinced that several of the BIA Area Offices handling SLCP claims have substantially completed serious major claims in their areas. These are Anadarko, Pawhuska, and Muskogee in Oklahoma; and Navajo and Juneau. Oklahoma has few claims left to handle because potential claims are subject to the state statutes of repose. Navajo has had fewer allotments than most areas, and fewer tax losses and encroachments on Indian rights than other places. Juneau is similar, especially, because of ANSCA, 43 U.S.C. 1601, et seq.

I suggest, therefore, that in the future funds designated for these Areas be directed to more critical needs in other BIA Areas.

I have already written up specifications for an attorney-coordinator to work out of the Office of the Assistant Secretary for Indian Affairs who would serve in a role similar to that I have performed for the last year and a half. He should work discreetly and closely with the BIA Office of Trust Responsibility and allow that office to continue administering the SLCP since that office has the servicing capability to do that. The coordinator's function would be high level central office direction, an input essential in this particular program.

George A. Bourgeois (CDE)

George A. Bourgeois