ANNOUNCEMENTS
Native American Rights Fund
August 1977

Eastern Indians Assert Legal Claims to Land: Based On 1790 Act

The assertions of tribal claims to the lands in the Eastern United States have commanded the greatest attention and least understanding of any Indian-related issue to arise since the takeover of Wounded Knee in 1973. During that year, politicians decried extra-legal activities, often reacting violently to the image of M-16-toting Indians, and challenged Indians to take their collective case to the courts to test the validity of their historic claims. At that time, the Indian people in Maine had been pursuing tribal claims to their original homelands for nearly a year in the federal courts. Their case, which has become the cause celebre of the Eastern Indian land claims, was generally ignored by officialdom and unknown to the public, whose interest is rarely aroused by the quiet pursuit of remedies through legal channels.

In the post-termination era and for the first time in the history of the Federal-Indian relationship, Indian governments and individuals have access to the courts through their own attorneys' vigorous advocacy and through the federal government's recognition that, as a matter of law, not practice of policy, certain cases must be brought. Indian people throughout the country, following the advise and example of the increasingly litigious non-Indian society, have taken a collage of cases into the courts at an accelerative rate in recent years. Legal assertions of longstanding tribal claims to land, water and other resources have resulted in numerous affirmations of Indian rights and equally numerous attempts to dismantle decisions favorable to Indian interest. Indian advances in the courts have provided a national soapbox for demonstrations of demogogic skills by some politicians who, in 1977, raise the spectre of an armipotent Indian people brandishing weapons fashioned of legal technicalities and documents of antiquity and taking aim at the heart of private and corporate holdings. While this reaction has accompanied most recent assertions and confirmations of tribal rights, it is particularly prominent in the areas of Indian fishing rights in the Northwest, Indian water rights in the Southwest and Indian land rights in the East.

Court victories of the tribes in the East have evoked a flurry of political acts and rhetoric, the substance and timing of which indicate both the range of ignorance of the facts surrounding the cases and the lack of allegiance to the process defined by the American system of justice. In the Congress, the potential for legal return of tribal lands has been called "the controversy of the decade." Bills have been proposed to retroactively ratify the illegal transactions through which the tribal lands were taken—thus, by the rewriting of history, the bills' sponsors suggest that the legislative branch should deny the Indians their voice before the judicial branch.

Woven into and throughout the fabric of the land claims controversy is the thread of a policy articulated in another era—might makes right. In the name of practicality, more than one public representative has measured the value of justice against the cost of property, opted for the latter and recommended unilateral extinguishment of the rights of Indians. Those endorsing this approach may threaten more than the rights of Indian people by their view that the American judicial system cannot withstand the test of large and difficult cases.

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NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund is a national law firm specializing in the protection of Indian rights and resources. The Fund's priorities identified by the Steering Committee are the preservation of tribal existence; the protection of Indian resources; the promotion of human rights; the development of a body of law relating to Indian people; the accountability of the dominant society to American Indians and the advancement of self-determination.

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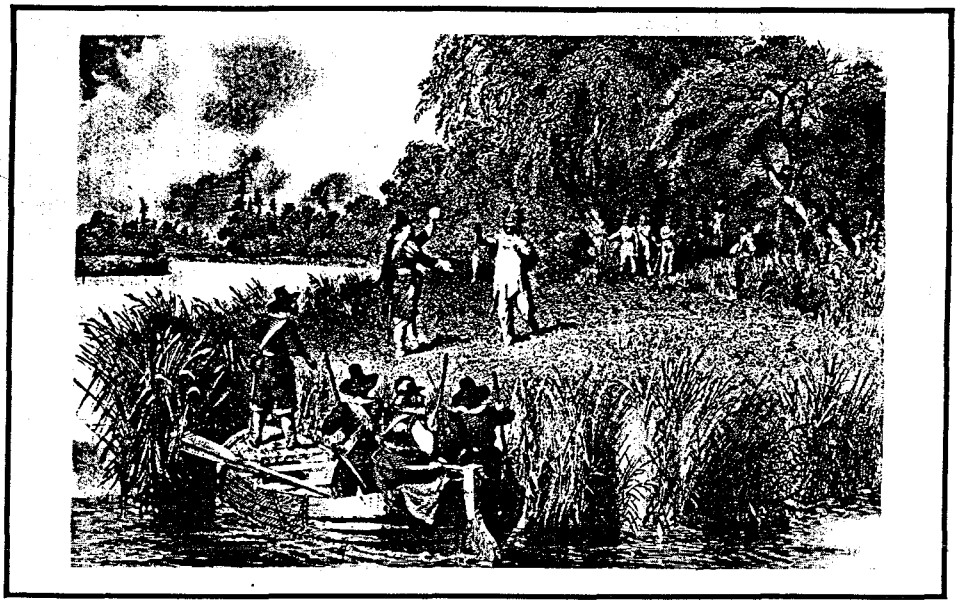
Indian people, with ever-present historic inhibition, well know the risk of taking matters to a win-or-lose forum. Loss can be devastating. Winning, however, often assures continuation of exhaustive challenges which sour the victory. Tribal leaders in the East have maintained a willingness to consider alternatives to prolonged litigation, demonstrating that theirs are not vengeance cases but, rather, vehicles for the return of a sufficient land base to assure future economic viability and cultural survival. Until this year there was little interest on the part of potential defendants in entering into settlement talks, leaving certain of the tribes with no alternative but to file and prosecute their cases. 1977 has seen much activity in the various cases and claims, which differ greatly from tribe to tribe and state to state. At present, a negotiation process is being defined in the claims against Maine; settlement talks are underway in South Carolina; mediation is occurring in Gay Head, Massachusetts. Elsewhere, tribal cases are at separate stages of trial preparation and settlement exploration. Everywhere, there is the search for the ultimate and overall solution to the Eastern Indian land claims, with the more thoughtful students of the issue having concluded that there is no single magic answer short of obtaining separate agreed upon settlements or allowing each case to continue in the courts.

It is predictable that, in the near future, the Indian tribes and American people will be called upon to make difficult decisions, the more honorable of which will be based upon fact, not rumor. It is for this reason that the following information is provided; although it must be emphasized that, while the facts and background information remain constant, the circumstances surrounding the separate claims are subject to rapid change. Others have distributed "factual" information in attempts to obtain support for expedient solutions. Taking the electoral adage approach—as Maine goes, so goes the Nation— the Governor of Maine has warned his counterparts of massive claims within their states, grimly predicting that "we could bankrupt America on the basis of $10 billion or $25 billion per state." The Governor failed to note that he was using the outer figures in the largest Indian land claim to arise since the Alaska Native settlement. He also neglected to mention that most Indian title questions have been settled for a century or more. Or, as it was put to the Governor by the Senate Indian Affairs Committee Chairman, "the Nonintercourse Act claims are only restricted to a very few states because the Congress was involved in every land taking after what happened in the original 13 colonies . . . . As my colleague, Senator Hayakawa, said, 'Most of the land was stolen fair and square from the Indians because Congress ratified, out in the West, each and every one of those.'"

Throughout this discussion, one important fact should be kept in mind. Although the Eastern Indian claims all arise out of violations of the Indian Nonintercourse Act, each claim in its historic and modern text is different. Each tribe once possessed a reservation and lost that reservation through disputed transactions. The reservations were created under vastly different circumstances, and were lost under equally different circumstances. The history, habits and cultures of each of the Eastern tribes are unique to each of the tribes. Their contemporary history differs. So do their plans and expectations for the future. No two tribes have approached their claims alike. And no two claims will be resolved alike.



The Historical/Legal Basis for the Claims

The claims of the tribes to lands in the East are based upon state and private takings of their lands in violation of the Indian Nonintercourse Act (25 U.S.C. 177). The Act provides that any conveyance involving any interest in Indian property which is not approved by the federal government is void *ab initio*. It is now settled law that this provision applied to both the recognized and unrecognized tribes, and to tribes located within the original thirteen states as well as other parts of the country.

The establishment rule of law is that transactions purporting to extinguish Indian possession and title to Indian lands must be executed with the participation and consent of the sovereign. This rule, recognized by the European Nations, was adopted in the "new world" to prevent hostilities between the Indians and non-Indians which often occurred when Indians dealt with individual colonies, states or private speculators or traders. This scheme of guaranteed federal protection of Indian lands was adopted in the Constitution, Article I, Section 8, and implemented by the First Congress with enactment in 1790 of the first of a series of Trade and Intercourse Acts, which provided in pertinent part:

> . . . . no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. 1 Stat. 137, 138.

Shortly after the passage of the first Trade and Intercourse Act, President George Washington interpreted the Act in a speech to the Seneca Nation in New York:

Here, then, is the security for the re-

mainder of your lands. No state, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights. But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. *But that, when you find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you make.* That, besides the before mentioned security for your land, you will perceive, by the Law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intends to take of the Indians . . .

American State Papers (Indian Affairs, Vol. I, 1832), p.142. Id. at 923-24. (Emphasis Added).

Subsequent Acts have slightly amended the original Act, but the central purpose of forbidding any and all purchases from the Indian people absent federal governmental consent remains unchanged to the present day.

From left to right: CORNPLANTER (1740-1836), Iroquois leader, chief of the Seneca Indians; OSCEOLA (1800-1838), Seminole Indian leader; TOMOCHICHI (1650-1739), Creek Indian chief.

Case Law Development Regarding Applicability of Such Defenses as Adverse Possession

Without exception, case law has developed on the side of the tribes in their claims to lands taken in violation of the Indian Nonintercourse Act.* Also without exception, the courts have ruled that the passage of time cannot defeat the tribal claims, judging as inapplicable the defenses of adverse possession, laches, statutes of limitations, bona fide purchaser for value and so forth.

*Pertinent cases are: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.)543 (1923); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1932); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Narragansett Tribe of Indians v. Southern R.I. Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

The most recent of these rulings was issued on July 12, 1977, by Senior U.S. District Judge Edmund Port (NDNY) in an Oneida test case against two New York counties for damages for two years of trespass. In the 47-page opinion, Judge Port defined the instant issues and addressed the broad concern:

> This case tests the consequences of the failure of the State of New York to comply with the provisions of the Indian Nonintercourse Act, enacted by the first Congress in 1790 and reenacted in substance by subsequent Congresses to the present date.

The issues can be summed up as follows: (1) Have the plaintiffs established that the transfer of land by the 1795 treaty to the State of New York was in violation of the Nonintercourse Act? (2) Have any of the defenses asserted by the defendants been established? (3) Are the defendants liable to the plaintiffs for damages resulting from defendants' use and occupancy of part of the subject land during 1968 and 1969? The answer to the first question is yes; to the second, no; and to the third, yes.

Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.

Although it may appear harsh to condemn an apparently good-faith use of a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result. *United States v. Southern Pacific Transportation Company*, 543 F.2d 676, 699 (9th Cir. 1976). Furthermore, it is incumbent upon "(g)reat nations, like great men, (to) keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

The posture in which this case has been presented is reminiscent of *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942), in which the Second Circuit said:

> Although there is directly before us only one lease, on which the annual rent is but $4, the question is of greater importance because the Nation, by resolution, has cancelled hundreds of similar leases.

Likewise, the impact of the Oneidas' claim will reach far beyond the boundaries of the present suit.

Nor is the problem limited to this case, this particular land transaction, the Oneida Indian Nation, or even this area. Other Indian tribes have similar claims in several other states. Litigation brought by the tribes themselves, or by the federal government in their behalf, is already pending. Further suits brought by the United States are imminent. The Department of Justice has alerted the United States Marshal for this district that, unless Congress extends the statute of limitations for such suits beyond July 18, 1977, an action on behalf of the Cayuga and St. Regis Mohawk tribes will be commenced immediately. The Marshal was given this advance notice because it is anticipated that the suit will involve some 10,000 defendants.

The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.

The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means—but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the state. The remedy afforded by Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission. Finally, it is within the power of Congress to dispose of the matter under the constitutional delegation of power.

The aptness of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law." *British Airways Board v. Port Authority of New York and New Jersey* [*footnotes and citations omitted*].

The statue of limitations referred to by Judge Port extends to claims for monetary damages (in trespass cases, for example) filed by the United States on behalf of Indian tribes and individuals. While the Senate had long since approved an extension of the statute, the measure had languished in the House since mid-March, blocked by Members intending to eliminate the claims altogether. The increased pressures of the impending deadline and possible court actions served as a bottleneck in settlement talks between parties who were about to meet under less amicable circumstances. Presumably related by time only, a few hours after Judge Port filed his decision in Federal District Court in New York, the Federal District Court in New York, the House passed an extension to the statue. With these events as a background, the nature and status of various tribal reservation claims will be next considered.

NEW YORK: Cayuga, Mohawk and Oneida Claims

As of September, 1977, three Indian land claims have been asserted in the State of New York by the Cayuga, Oneida and Mohawk Nations. The Departments of Interior and Justice have concluded that these tribal claims have merit and are prepared to file on their behalf for recovery of lands and monetary damages for 180-plus years of trespass. The Cayuga claim area of 62,000 acres includes a three-mile wide strip surrounding the northern half of Lake Cayuga in Cayuga and Seneca Counties. The St. Regis Mohawk claim area of 10,500 acres adjoins the existing reservation in Franklin and St. Lawrence Counties and includes two islands in the St. Lawrence River and meadow lands along the Grass River. (The Cayugas and Mohawks are represented in these claims by Gajarsa, Liss & Sterenbuch.) The Oneidas' claim 246,000 acres bordering Lake Oneida to the southeast in the Counties of Oneida and Madison. (The Oneidas' research is nearly completed on a larger claim to approximately six million acres of original Oneida homelands, which extend in a narrow strip through central New York from the northern to the southern borders of the state.)

The 246,000 acres, located in the heart of the Oneidas' aboriginal territory, were confirmed to the Oneida Nation in the 1794 United States Treaty with the Six Nations of the Iroquois Confederacy. One year later, the State of New York, embroiled in conflict with the new federal government over state authority to negotiate Indian land purchases, began a process of systematic erosion and coersion in attempts to gain title to the lands reserved in perpetuity as Oneida lands. Possession of practically all of the 246,000 acres was claimed and taken by New York State through a series of illegal transactions (25 unratified "treaties") forced upon the Oneida people between 1795 and 1842. Only a decade prior to the first of these transactions, the people of the Oneida Nation were hailed as "victorious allies" in the Treaty of 1784, in recognition of their significant contribution to the success of the Colonial government in the Revolutionary War, and assured of federal protection in the possession of their lands.

"By 1846, the Oneidas' landholdings in New York had been diminished to a few hundred acres," stated Senior U.S. District Judge Edmund Port in his July 12 ruling in the Oneida test case. "The social and economic pressures on the Oneidas naturally resulted in the alienation of their land," continued Judge Port's account of developments after 1795. "In addition, white settlers living in the areas continually encroached on the Oneidas' land. Land speculators were always urg-

ing the Oneidas to sell their reservations. At the same time, New York began agitating for the removal of the Oneidas and other Indians to western lands. The policy of removal was not universally accepted among the Oneidas, and the problem was exacerbated by the efforts of outsiders, clergy and advisors, to urge the Oneidas to move west. The Oneida Nation was split into several factions by these pressures. As a result, by the 1840's, three distinct bands of Oneidas existed. One band stayed on the remaining Oneida reservation land in New York; one group of almost 600 had settled on about 65,000 acres in Wisconsin; and another group of about 400 had moved to Ontario, Canada.

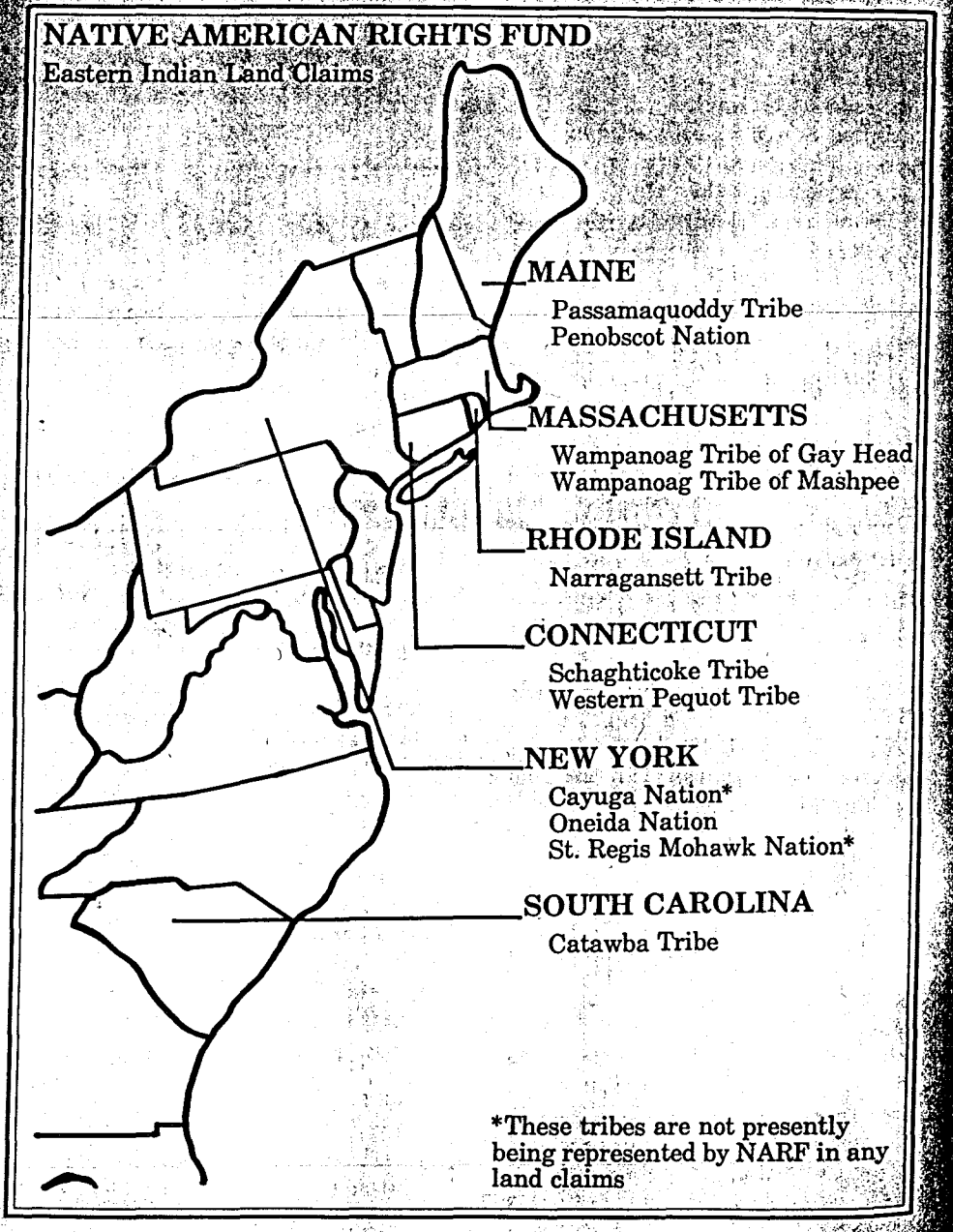
"Unfortunately, the pressures on the Oneidas to part with their land did not cease once removal had been effected. The Oneidas' meager landholdings in New York were reduced further as a result of a New York statute which divided the tribal landholdings and gave the Oneidas an option to sell their land. This option to sell, coupled with the state of extreme poverty in which they lived, more or less forced the sale of much of the remaining Indian land. The loss of land in Wisconsin was much more drastic. In 1887, the Dawes Act, or General Allotment Act, was enacted by Congress. This Act broke up tribal landholdings, distributed individual parcels to individual Indian families, and removed restrictions on the transfer of title. Again, because of the poverty of the Oneidas, they then lost their land through sales, tax sales, or mortgage foreclosures. By the time of the Depression, the extent of the Wisconsin Oneidas' landholdings had decreased from 65,000 acres to approximately 600.

"These forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. The Tribe was suffering from famine and widespread alcoholism. The poverty they then experienced became locked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to understand English orally. None could read or write. This state continued through the early 1800's, during the time of removal. In fact, up through the 1950's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. . . .

"Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. . . . The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today."

Today the three bands of the Oneida Nation, numbering over 10,000 people, remain in reservation communities in New York, Wisconsin and Canada. Since 1909, the Oneida people have documented their attempts to regain their original lands, petitioning each United States Administration since the turn of the century for relief and assistance. Finally, in response to a petition to President Carter and Interior Secretary Andrus, the Solicitor's Office completed its investigation, concluded that the claim was meritorious and requested the Justice Department to pursue the Oneida claim to lands reserved in the 1794 Treaty.

June 7, 1977 In a meeting with representatives of the New York Congressional delegation and the State's Gover-



ıor and Attorney General, Interior and Justice officials announced their intenion to bring actions on behalf of the Cay , Oneidas and Mohawks to reover land and monetary damages for illegal occupation of more than 315,000 ıcres in New York State. "The New York ıuits," stated Interior's public anıouncement, "would be based on the view hat the lands involved were ceded to the State in treaties not authorized or fornally participated in by the United States as required by the Indian Nonintercourse Act of 1790. The suits would eek ejectment and damages against hose persons claiming an interest in the ands.

"The position which we are now taking ın behalf of the tribes is that, as a matter ıf law, the United States should pursue heir claims," stated Solicitor Leo M. Krulitz in the Interior news release. However, we realize that the filing of a omplaint may have an adverse effect on and transactions in the claimed areas ınd meetings have been held with the ribes and representatives of New York State to discuss alternatives to litigaion."

June 8, 1977 The Oneida Nation Litiation Committee, responding to the Interior Justice announcement, delivered he following statement to members of he New York and Madison Congresional delegations:

"While it is not the intention of the people of the Oneida Nation to cause unlue hardship to our non-Oneida neighbors in New York State, neither is t our intention to continue our history of leprivation, denial and unjust treatnent. Our responsibility to the present ınd future generations of Oneida people equires that we seek redress for the past generations of hardship. Our historic reationship with the people of the United States, however, requires that we explore very possible alternative in order to ıvoid the economic disruption which proonged litigation may cause in New York State.

"We believe the fault lies with the overnment of New York State and the Jnited States. It was they who promised o secure and protect our title to these ands forever and then broke these promses. It should, therefore, we believe, be heir responsibility to right these centuries of wrongs. The burden and ıar p should not fall upon our ıon-Oneida neighbors.

"We commend the Administration of President Carter for taking steps to redress these wrongs and stand ready to cooperate with both governments in an attempt to secure a fair and just resolution to these claims. It is our hope that the federal government and New York State would join with us in obtaining such a resolution—one which could greatly reduce and possibly eliminate the danger of eviction to non-Oneida homeowners in the claim area. In the absence of a fair and just settlement, however, we will have no alternative but to pursue our remedies, including the return of all our lands, through the judicial system."

The land of Gahnona (New York) was once laced by our trails we had trod for centuries, trails worn so deep by the feet of the Iroquis that they became your roads of travel as your possessions gradually ate into those of my people. Have we, the first holders of this region, no longer a share of your history? Glad were your fathers to sit down on the threshold of the Long House; rich did they hold themselves in getting the mere sweepings from the door. Had our fathers spurned you from it when the French were thundering from the opposite side to get a passage through and drive you into the sea, whatever had been the fate of other nations, we might still have had a nation, and I might have had a country.

1808, Cayuga Chief, New York.

June 9, 1977 The New York State Conference of Mayors and Municipal Officials adopted a resolution presented by Oneida Township Mayor Herbert Brewer urging the Congress to extinguish all Indian claims to lands in the State because of the "immediate need for a fair and just settlement of all American Indian claims based upon aboriginal title." The resolution of the 475 New York cities and villages found that the claims to land —

"are based on allegations of aboriginal title and of violations of laws and treaties of the United States which occurred several generations earlier...

"are made against innocent citizens, and against municipalities themselves, who were not parties to any actions which constitute alleged violations of laws or treaties or which resulted in the termination of possession or title of American Indians...

"threaten to invalidate titles which have been recognized as valid for many scores of years and to dispossess from their homes, farms and businesses citizens who have relied on and have committed their lives and resources to the security and validity of those titles...

"(and) any wrongs done to American Indians came about because of the policies and actions of state and federal governments as representatives of all people and not from the actions of those individuals or municipalities who must now defend, risk and perhaps lose their property and finances...."

The association resolved to recommend and urge that the Congress declare:

"That no right, title and interest in and to land of any person, firm or corporation, state or any political subdivision thereof, or any municipality therein, shall be declared invalid, and (none) shall be deprived of right, title or possession of any lands by reason of existence of aboriginal title or violations of laws or treaties of the United States relative to aboriginal title;

"That all prior conveyances of any land or water in any state or territory, or any interest in said lands or water, including hunting and fishing rights, shall be deemed to have extinguished any aboriginal title to or interest in said areas; and,

"That all claims based on claims of aboriginal right or title or use and occupancy of land or water, including hunting and fishing rights, in any state or territory, shall be determined by, and if found valid, shall be paid only by the United States of America."

June 10, 1977 Representative William F. Walsh (R-N.Y.) attempted to amend the bill providing for fiscal year 1978 appropriations for the Justice Department by inserting the following language: "None of the funds appropriated by this title may be used to represent the Cayuga Indians in any action at law or suit in equity to recover any damages or real property from the State of New York or any owner or prior owner of any real property located in the State of New York." The amendment was supported by two other Republican Members from New York, Reps. Benjamin Gilman and Robert McEwen.

Opposing the amendment was Rep. John M. Slack, Jr. (D-W.Va.), who chairs the State-Justice-Commerce Appropriations Subcommittee: ". . . if the Indians in New York have a legitimate claim and the Department of Justice is authorized to represent them or authorized to be involved in some way in the matter, I think that the Department should be permitted to do so. The funds provided in this bill are to carry out programs which are authorized. Therefore, I urge the defeat of this amendment." The amendment was rejected on division by a vote of 27-43.

In urging for the amendment's passage, Rep. Walsh stated, "I am hopeful this matter can be settled without court action, but since the Department of the Interior has requested the Department of Justice to proceed on behalf of the Cayuga Nation, I feel we must act immediately on this matter before the House. If the case is not settled out of court, I hope to prevent use of any funds by the Justice Department for a lawsuit against the State of New York or any of its subdivisions or its residents. I am sure the argument will be made that the Cayuga Nation does not have the money to prosecute its claim. On the other hand, 6,000 residents of the cities, towns and villages of these two counties and the State of New York do not have the funds to defend such action either.

"It is about time we attempt to call a halt to the *mea culpa* attitude of the United Stated Government with respect to Indian nations. These treaties with the Indians were examined and found to be valid in New York more than 170 years ago. The present breast-beating posture continues to fly in the face of history. No doubt many crimes have been committed against the Indian nations of this country, but an equally serious crime will be committed against the citizens of this country if these actions against innocent parties are allowed to continue. I think it is totally improper for the federal government to finance legal action against a group of its citizens and possibly force upon them the unnecessary burden of legal expense.

"I am not unsympathetic to the Indian cause. In fact, I represent the Onondaga Indian Reservation which is located in my district. But this action involves some of the finest farming and recreational areas in the country, property valued in excess of one-half billion dollars, including Eisenhower College at over $30 million.

"Two wrongs will not make a right. The owners of these properties purchased them in good faith. Title companies have insured their title. Insurance companies, banks and other financial institutions have loaned money to mortgage these properties. The life savings of these 6,000 residents are wrapped up in their homes and farms.

"Now because some pointed-headed bureaucrat with nothing better to do decides the government should pursue this claim, these people may have to go to some tremendous legal expense to defend their lands. Frankly, I think it is time decent, law abiding, hard-working tax paying citizens of this Nation got a break. What an innovation it would be for the government to come to their assistance for a change. Well, here is our chance. Limit the funds of the Justice Department to the prosecution of criminals rather than the harassment of American citizens."

June 16, 1977 Rep. Walsh wrote a "Dear Colleague" letter to all Members of the House, urging for an extention to the statute of limitations on the United States filing of Indian claims for monetary damages: "In New York State a number of such land claims are being advanced, in particular by the Cayuga, Mohawk and Oneida Nations. The Indians have shown some willingness to discuss their claims out of court with the State of New York. If H.R. 5023 is not passed, however, the Indians will be forced to bring their suits immediately to avoid losing the option of seeking redress in the court. The same situation holds true nationwide, and if we force the Indians' position by defeating H.R. 5023, several state governments will be in the same position as New York . . . A meeting with the deputy attorney general of the State of New York convinced me New York and other states facing similar claims need more time to prepare their cases, and that it is absolutely imperative that we extend the deadline. The claims by the Cayugas alone involve almost $1 billion, so I'm sure you appreciate the scope and seriousness of this matter on a nationwide basis . . . . The states will need all the time they can get to assist them in settling these claims."

June 27, 1977 Rep. Lloyd Meeds (D.-Wash.) presented to the Judiciary Committee an amendment to H.R. 5023 which would prohibit the Attorney General from taking action on any claim for monetary damages on behalf of an Indian tribe or individual referred to the Justice Department after June 1, 1977.

June 29, 1977 Interior made its final recommendation to Justice to bring action on behalf of the Cayugas, Mohawks and Oneidas.

July 1, 1977 Interior issued its public announcement that Justice had agreed to bring the three New York suits. The news release made clear that two of the claims "were first referred to Justice in 1975 and the third was initially referred in 1976."

July 11, 1977 Rep. James Hanley (D.-N.Y.), in whose district lies a portion of the Oneida claim area, stated on the floor of the House of Representatives that he was considering the introduction of "harsh legislation" to extinguish the Oneida claim to land. He was later informed that such action would constitute a Fifth Amendment taking, compensable at fair market value at the time of taking—well in excess of one billion dollars.

July 12, 1977 Judge Port delivered his decision in the Oneida test case against two New York counties for two years of trespass, ruling on the Oneida side on every issue. The lands in question in the test case constitute roughly half of the lands involved in the case to recover the 246,000 acres from the same two counties.

July 21, 1977 Rep. Hanley wrote to New York Governor Hugh Carey, and the Justice and Interior Departments urging that discussions begin as soon as possible on a negotiated settlement of the Oneida claim. In his press release regarding the letter, Hanley said: "The recent decision by U.S. District Court Judge Edmund Port, upholding the Oneida Indian Nation's land claims in Central New York, calls for immediate legislative and administrative action to resolve this controversy. Judge Port's ruling puts to rest, for even the most skeptical observer, the hope that these Indian land claims are merely nuisance suits to harass the government. Whether we like it or not, the federal courts are taking these cases seriously. Regardless of how we feel personally about the merits of the case, and I, for one, consider the land claims to be nonsensical, the decision of the courts requires that we address ourselves to the problem at once. I have long warned of the potential disruptive impact of these lawsuits. Two years ago, I urged our state and federal governments to accept an out-of-court settlement which would have made this continued litigation unnecessary. Unfortunately, my warnings were not taken seriously, and today we find ourselves in our present predicament."

MAINE: Passamaquoddy and Penobscot Claims

The President's special representative has expressed confidence that a negotiated settlement can be reached by the end of the year in the historic land claims case in Maine. Following a series of meetings in Maine during the month of August, Judge William B. Gunter (Georgia Supreme Court, Rtd.) stated that he will conclude his role in the matter by pressing for mediation and settlement within three months. Unless settlement is reached within this time, he predicts that the economic consequences will become severe within the state. Judge Gunter was assigned by the President in March to study the Indian land cases in Maine and in Mashpee, Massachusetts. Widely perceived as a mediator, negotiator and representative of OMB, he has described his role variously as catalyst, fact-finder and "more that of a judge."

Earlier, on July 15, 1977, Judge Gunter recommended that the President urge Congressional extinguishment of the legal rights of the Indians in Maine if they did not acquiesce in his proposed settlement terms. (Details of that recommendation appear in the chronological listing on page 12.) The Passamaquoddy and Penobscot Governors reacted to the recommendations in a joint statement of July 26, stating that they were shocked that the President's representative made no provision for negotiating with them and appalled that he had recommended that 90% of their claims be extinguished without compensation should they not accept his offer. "We spent five years getting the courts to force the federal government to act as our trustee. Now this man says that if we don't accept his terms, the President should protect the big timber companies by taking away our rights. I just don't understand it," stated Governor Francis Nicholas of the Pleasant Point Passamaquoddy Reservation.

Governors Nicholas, John Stevens of the Indian Township Passamaquoddy Reservation and Nicholas Sapiel of the Penobscot Indian Island Reservation said that the very recommendation that the claims should be settled was further affirmation of their longstanding belief in the validity of those claims and that, in this regard, "Judge Gunter has come to the only conclusion that any rational man could reach." The State's top political officials, Governor James Longley and Attorney General Anthony Brennan, have consistently maintained that the claims are without merit and, therefore, too weak to settle. However, when Interior and Justice concluded otherwise and informed the court that they intend to file suit on the Indians' behalf unless settlement is reached, the State's politicians recommended total extinguishment of the claims in order to avoid the test of litigation.

At the request of the White House, Indian, State and Congressional representatives from Maine met in late July to discuss the recommendation with Judge Gunter and Robert Lipshutz, Counsel to the President. In separate sessions, the State rejected the recommendation, the Congressional delegation urged that settlement talks continue and the Indian representatives insisted upon negotiation, stating that they would consider the recommendation "a point of departure." Following these sessions, Judge Gunter met with various parties in Maine and found the climate favorable for a negotiated settlement.

1777 - 1977 The Passamaquoddy Tribe and Penobscot Nation recounted the events of 200 years and the facts of their land case in their statement of March 8, 1977:

> Both our nations fought on the side of the Americans in the Revolutionary War pursuant to a treaty negotiated by a federal Indian agent in 1777. Because of our efforts, much of Maine is in the United States today rather than in Canada. In that 1777 treaty, the federal government promised to provide us with supplies and promised to protect our hunting grounds. That federal treaty, however, was never ratified by the Congress and, in a series of transactions starting in 1794, Maine and Massachusetts took practically all our lands (ten million acres, half of the present State of Maine) and left us totally destitute.
>
> For 150 years we knew nothing but hardship, although we did keep alive our reservation communities, our cultures and our languages. In 1971 our prospects brightened considerably when we discovered that, even though our 1777 federal treaty had not been ratified, the state transactions through which we lost our lands were legally void under the 1790 federal Indian Nonintercourse Act, since they had not been federally approved. When we asked the federal government to represent us in our claims, however, the government refused, saying that the Nonintercourse Act did not protect us. We sued the government (and the State of Maine), and in 1975 won a decision holding that the Nonintercourse Act does protect us and imposes a trust

responsibility on the federal government to represent us in our claims.

On February 28, 1977, the Department of the Interior and the Department of Justice announced that they had concluded that our tribes have valid claims to at least five million acres in the State of Maine, and they intend to file suit for return of between five and eight million acres of land on June 1, 1977, unless a settlement is negotiated before that time. The government also announced that it will seek monetary damages for the wrongful use of our lands. As a matter of grace, we agreed that the government should take no immediate action against any of the 350,000 homeowners and small business people within the claim area, and said that we would accept a substitute claim against the State of Maine or the federal government for the value of our claim against these individuals.

The State of Maine, which has steadfastly refused our offer to negotiate, responded to these developments the following day by having the Maine Congressional delegation submit identical bills in the House and Senate providing for the total elimination of our claims by retroactively ratifying these illegal transactions. While the members of the delegation tried to tell us that these bills would preserve our rights to sue for money (as though that should be enough), anyone who reads the legislation can see that it leaves no claim at all.

February 25, 1977 In its modified litigation report, the Department of the Interior committed itself to a central role in the efforts to achieve a just settlement of the Passamaquoddy and Penobscot claims. With tribal agreement, Interior recommended to the Justice Department that:

> Claims be filed on behalf of the Passamaquoddy and Penobscot Tribes for those lands which the Tribes actually used and occupied as of 1790. Thus, omitted from the claims are those coastal areas which had been substantially settled by non-Indians by that time, and those lands which had been granted prior to 1790, the date of the passage of the first Trade and Intercourse Act . . . these coastal areas are presently the most densely populated portions of the claimed area. Therefore, the Tribes have agreed at this time to seek an alternative legislative solution with respect to these coastal areas.
>
> With respect to those areas . . . in which a claim will be asserted, the Tribes have indicated their intention not to pursue any remedy against any homeowner or other small property owner if they can substitute a satisfactory monetary claim against an appropriate sovereign body for the full value of such claims. Accordingly, we have agreed to assist them in developing a legislative package submitting a monetary claim in lieu of other claims and to support them in obtaining passage of appropriate legislation.
>
> With respect to the coastal areas on which land and trespass claims will be withheld at this time, we have agreed to work with the Tribes for a similar just legislative solution for these claims.

February 28, 1977 The Justice Department announced its intention to proceed on the Tribes' behalf. In requesting an extension of time to report to the Court, the Justice motion stated:

> There are two basic reasons for the extension. First, an extension is necessary to enable plaintiffs to adequately prepare proposed claims discussed herein and to coordinate them with other claims against major landholders in the affected areas. While substantial work has been completed additional work is required.

Second, the President has announced that in response to the request of the Maine Congressional delegation he is appointing a special representative to help the parties reach an amicable settlement for submission to Congress. The extension of time is necessary to allow all parties to engage in meaningful settlement talks and to permit Congress sufficient time to adopt any agreement reached. As stated in our memorandum of January 14, 1977, only Congress can correct past injustice to the Tribes without causing new hardship to other citizens of Maine. We therefore fully support and endorse the settlement process. On the other hand, if it proves unsuccessful, we have no choice but to proceed with the litigative course.

March 4, 1977 Senate Indian Affairs Committe Chairman James Abourezk (D-S.D.) declined to hear the extinguishment bills, H.R. 4169 and S.842. He responded to the Justice announcement and to the proposed extinguishment legislation in a meeting of the American Indian Policy Review Commission. (The Maine delegation had requested that the Commission not take a position on the land claims issue at that time and the Indian Governors agreed, in order to avoid precipitous action in the Congress regarding their litigation and settlement talks. The Commission agreed to withhold full consideration of the issue and commended the Indian people in Maine for their patience and statesmanship. One Commission Member, however, later violated the agreement. Rep. Lloyd Meeds, D-Wash., within weeks of the meeting, published his Separate Dissenting Views to the Report of the Commission, which included a chapter recommending extinguishment of the legal rights of the Passamaquoddy and Penobscot people. As his views, prepared by a private attorney at a cost of $37,000 to the Commission, dissented to a non-existent Commission position, he urged for inclusion of a settlement on the Maine land claims in the Commission Report. At the final Commission meeting, a brief and hastily prepared state-

ment was inserted into the Report.) In the March 4 meeting, Sen. Abourezk made the following statement:

> I think it is highly commendable of the Administration to come out as they have with a very positive position on this, to say that we are going to help the tribes because we owe them that duty . . . I would say that, speaking only for the Senate Indian Affairs Committee, I do not intend to have any hearings on that legislation that was introduced . . . . If the time comes when we ever have to have hearings on anything, it will not just be on that legislation. It will be on the entire question of negotiations of the rights of the Indian tribes in Maine, and where the justice of the situation can be aired to the Congress. It is not going to be any one-sided consideration of that kind of a bill, and I don't much like the bill either myself. I just want to say that on the record. It just seems to me that it would be a very one-sided attempt to obviate and preclude any just claim on the part of the tribes. Now, for how many years have we been saying that the Indians ought to get into the political process and the legal process, and once they are in it they get screwed up against the wall. That is not very good encouragement for Indian tribes to do that kind of a thing; the same thing we have been encouraging them to do. They are entitled to their day in court, and I commend the Indian tribes of Maine . . . for their efforts to negotiate this matter in a very reasonable manner . . . . I don't know about the House, but I'm not going to hold any hearings . . . .

March 12, 1977 President Carter announced the appointment of his special representative in the Maine and Mashpee cases, Judge William B. Gunter, whose identity was unknown to the Indians prior to the public announcement. House Interior Committee Chairman Morris Udall (D.-Az.) and Indian Affairs & Public Lands Subcommittee Chairman Teno Roncalio (D.-Wy.) responded to the recent events in a news release the same day, stating that they would "take a dim view" of any party not participating in good faith in the negotiations:

> Whatever the ultimate merit and legal validity of these claims, there is no denying the impact that they have had within the affected states and communities . . . . Yet, despite this impact, we must support the right of the tribes to initiate and proceed with litigation to try their claims. Under our Constitution and system of law, every individual has a right to his day in court, whatever the ultimate legitimacy of the claim. If we deny it to one, we can deny it to all. Nevertheless, we are not unsympathetic to the local problems caused by the claims nor the desire for an expeditious solution and settlement of the claims . . . . We are advised that there is a serious effort to achieve a negotiated settlement. We understand that the Indian tribes, the Interior Department, and the Justice Department support this approach and have obtained consent from the Federal District Court to extend, until June 1, the deadline for filing the Federal suit. We also understand that, at the request of certain members of the Massachusetts Congressional delegation, President Carter has agreed to appoint a Federal mediator to work toward a negotiated settlement. At this time, we would strongly urge this approach.
>
> Therefore, we feel that it is inappropriate for the Congress to involve itself in the dispute at this time. Under existing circumstance, it is our position that the House Committee will initiate no legislative or oversight activity on the matter in order to facilitate the possibility of a negotiated settlement.

Brother, the white people on this river have come and settled down upon the land which was granted us. We have warned them off, but they say they despise us, and treat us with language only fit for dogs. This treatment we did not expect from Americans— particularly when the general court of this state granted the land to us themselves. We expect they will keep good and support their promise.

1778, Penobscot Chief Orono to Massachusetts Military Commander John Allan.

March 20, 1977 The President's special representative held a "get-acquainted meeting" with the State and Indian Governors and their counsel, the Maine Congressional delegation, Interior and Justice officials and members of the President's legal and public relations staff. Judge Gunter, who characterized his role as that of a "catalyst," was never to call a meeting of all the parties. Subsequently, Judge Gunter held separate sessions with all of the above parties, private interests, members of other Eastern states' Congressional delegations, representatives of the Office of Management and Budget and the chairmen of Congressional committees with jurisdiction over Indian legislative matters. At Judge Gunter's request, legal issues were briefed over the next two months by Maine Attorney General Brennan, Attorney Edward Bennett Williams (Special Counsel to the Maine State Governor), NARF attorney Tom Tureen for the Tribes, Professor Archibald Cox (Special Counsel to the Passamaquoddy Tribe and Penobscot Nation) and others.

One meeting held during Judge Gunter's period of review was with representatives of the American Land Title Association, which was reported in the ALTA publication, *Capital Comment*:

> ALTA representatives met in May with Judge William B. Gunter . . . . The purpose of the meeting was to express the title insurance industry's concern with pending and potential Indian land claims. The uncertainty of status of land titles in Maine and Mashpee because of such claims was given particular emphasis. Federal Legislative Action Committee Chairman Dawson described the difficulties of transferring land in the 'claim' areas because of the inability of sellers to provide assurance of marketable title. Dawson also stated that the interest of ALTA is essentially identical to that of the land owners. As long as there is a question regarding title to property, he explained, hardship and injustice will be experienced by land owners holding property in good faith.
>
> In order to alleviate these inequities, the ALTA representatives recommended that any federal legislative solution include the following two ingredients: (1) land owners, purchasers, lenders and local tax authorities must be assured that existing titles are marketable and insurable; and

(2) land owners must not be subject to financial liability for trespass damages or any other forms of damage.

Judge Gunter stated at the meeting that his primary concern is to relieve the economic uncertainties that have resulted from the Indian claims. However, the judge stated that if legislation is proposed to extinguish aboriginal title, he feels confident that the Indians would challenge such extinguishment on constitutional grounds unless it provides full compensation for the value of the extinguishment title.

Judge Gunter indicated that he had been told that the Maine Indian tribes, the Passamaquoddys and Penobscots, have placed a claim as high as $25 billion to reflect the full compensation for the value of 12½ million acres in Maine that are under dispute.

ALTA Special Indian Research Counsel John Christie, Jr., stated that he is confident Congress could devise a solution that would be upheld constitutionally and agreed to furnish the judge with a legal memorandum in support of this position. Later in May, ALTA forwarded to the Judge a legal analysis indicating that a legislative proposal can be—and should be—developed to resolve the hardships and inequities that have resulted from the pending Indian land claims. It was contended that such legislation would clearly be within the power of Congress to enact and would not give rise to any valid fifth amendment claims. Presently, ALTA's Indian Land Claims Committee is structuring a legislative approach and language that would protect present and past land owners from financial liability or any other form of damages and would make certain that present titles are marketable and insurable.

Judge Gunter said he was uncertain as to whether he would recommend a legislative solution. His present focus is on the need to devise a procedure by which the litigation will continue to an end, with Congress determining a ceiling on the amount of property and money damages that could be recovered if the Indians prevail.

Following a June meeting with the Chairmen of the Senate Indian Affairs Committee and the House Interior Committee, Rep. Udall and Sen. Abourezk communicated with Judge Gunter and President Carter and issued a joint statement calling for a Congressional-Administration effort to provide funds for neutral third party mediators for each claim, where needed. Such an initiative, the Chairmen stated, "places a premium on obtaining the agreement of all affected parties" without extinguishing "those Indian claims which are meritorious and thus repeating historical injustices to the Indian people." Their requests for the mediation effort and for consultation prior to the annnouncement of recommendations regarding the Passamaquoddy and Penobscot case went unanswered.

July 15, 1977 Judge Gunter submitted his written recommendation to the President:

A. MY ASSIGNMENT

My assignment was to examine the problem created by these claims for approximately ninety days and then make a recommendation to you as to what action, if any, you should take in an attempt to bring about a resolution of the problem.

I have not acted as a mediator in this matter; my role has been more that of a judge; I have read the law and examined the facts; I have met and conferred with affected parties and their respresentatives; I have attempted to be objective, realizing that no one person can ever attain total objectivity; I have tried to come forth with a recommendation that, in my

own mind, is just and practical; and I now proceed with a brief statement of the problem and my recommendation.

B. THE PROBLEM

The pending court actions based on these tribal claims have the unfortunate effect of causing economic stagnation within the claims area. They create a cloud on the validity of real property titles; and the result is a slow-down or cessation of economic activity because property cannot be sold, mortgages cannot be acquired, title insurance becomes unavailable, and bond issues are placed in jeopardy. Were it not for this adverse economic result, these cases could take their normal course through the courts, and there would be no reason or necessity for you to take any action with regard to this matter. However, I have concluded that this problem cannot await judicial determination, and it is proper and necessary for you to recommend some action to the Congress that will eliminate the adverse economic consequences that have developed to date and that will increase with intensity in the near future.

I have concluded that the Federal Government is primarily responsible for the creation of this problem. Prior to 1975 the Federal Government did not acknowledge any responsibility for these two tribes. Interior and Justice took the position that these two tribes were not entitled to Federal recognition but were "State Indians." In 1975 two federal court decisions, one at the trial level and another at the appellate level, declared that the Constitution adopted in 1789 and a Congressional enactment of 1790 created a trust relationship between the Federal Government and these two tribes. In short, the Federal Government is the guardian, and the two tribes are its wards. After the appellate decision, Interior and Justice concluded that the tribal claims would be prosecuted against private property owners owning property within the claims area and against the State of Maine for the properties owned by it within the claims area. Therefore, we have the unusual situation of the Federal Government being, in my mind, primarily responsible for the creation of the problem, and it is now placed in a position by court decisions of having to compound the problem by court actions that seek to divest private property owners and Maine of title to land that has heretofore been considered valid title. The prosecution of these cases by the Federal Government brings about the adverse economic consequences already mentioned.

I have concluded that the states of Maine and Massachusetts, out of which Maine was created in 1820, bear some responsibility for the creation of this problem. The states procured the land in the claims area, whether legally or illegally I do not now decide, and sold much of it. The State of Maine now owns, I am informed, somewhere between 400,000 and 500,000 acres of land in the claims area.

I have concluded that the two tribes do not bear any responsibility for the creation of the problem, and I have concluded that private property owners owning property within the claims area do not bear any responsibility for the creation of the problem.

The problem is complex and does not lend itself to a simple solution because it is old and large. The factual situation giving birth to the problem goes back to colonial times and the early years of our life as a nation under the Constitution. Adding to the complexity is the fact that the problem is social, economic, political, and legal.

Enough about the problem—I move on to my recommended solution.

1790, Cornplanter (Seneca) to George Washington: When your army entered the country of the Six Nations, we called you the Town Destroyer . . . When you gave us peace, we called you Father, because you promised to secure us in possession of our lands. Do this, and so long as the lands remain, the beloved name will remain in the heart of every Seneca.

C. THE SOLUTION

I have given consideration to the legal merits and demerits of these pending claims. However, my recommendation is not based entirely on my personal assessment in that area. History, economics, social science, justness, and practicality are additional elements that have had some weight in the formulation of my recommendation.

My recommendation to you is that you recommend to the Congress that it resolve this problem as follows:

(1) Appropriate 25 million dollars for the use and benefit of the two tribes, this appropriated amount to be administered by Interior. One half of this amount shall be appropriated in each of the next two fiscal years.

(2) Require the State of Maine to put together and convey to the United States, as trustee for the two tribes, a tract of land consisting of 100,000 acres within the claims area. As stated before, the State reportedly has in its public ownership in the claims area in excess of 400,000 acres.

(3) Assure the two tribes that normal Bureau of Indian Affairs benefits will be accorded to them by the United States in the future.

(4) Request the State of Maine to continue to appropriate in the future on an annual basis state benefits for the tribes at the equivalent level of the average annual appropriation over the current and preceding four years.

(5) Require the Secretary of Interior to use his best efforts to acquire long-term options on an additional 400,000 acres of land in the claims area. These options would be exercised at the election of the tribes, the option-price paid would be fair market value per acre, and tribal funds would be paid for the exercise of each option.

(6) Upon receiving the consent of the State of Maine that it will accomplish what is set forth in numbered paragraphs

(2) and (4) above, the Congress should then, upon obtaining tribal consent to accept the benefits herein prescribed, by statutory enactment extinguish all aboriginal title, if any, to all lands in Maine and also extinguish all other claims that these two tribes may now have against any party arising out of an alleged violation of the Indian Nonintercourse Act of 1790 as amended.

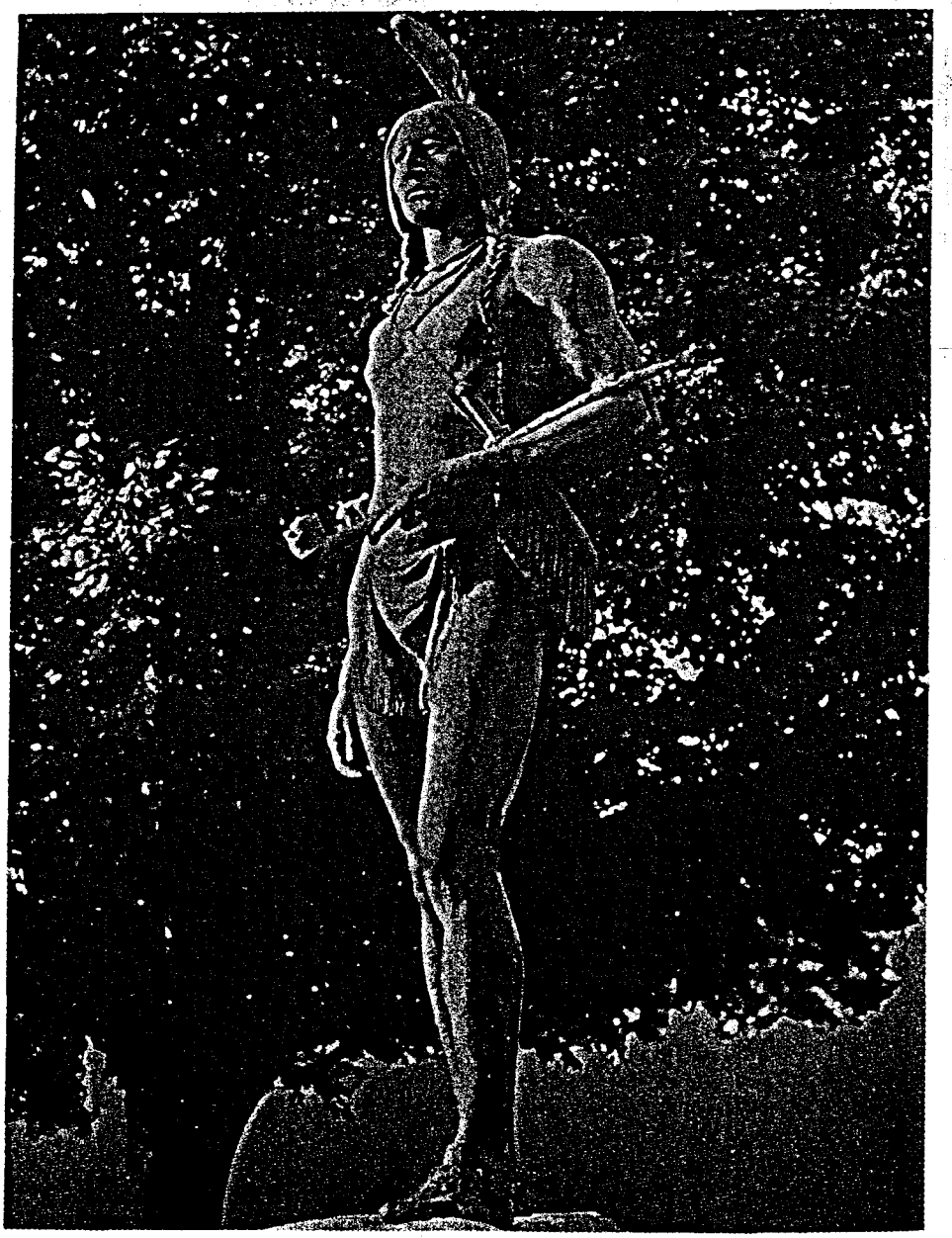
(7) If tribal consent cannot be obtained to what is herein proposed, then the Congress should immediately extinguish all aboriginal title, if any, to all lands within the claims area except that held in the public ownership by the State of Maine. The tribes' cases could then proceed through the courts to a conclusion against the state-owned land. If the tribes win their cases, they recover the state-owned land; but if they lose their cases, they recover nothing. However, in the meantime, the adverse economic consequences will have been eliminated and Interior and Justice will have been relieved from pursuing causes of action against private property owners to divest them of title to land that has heretofore been considered valid title.

(8) If the consent of the State of Maine cannot be obtained for what is herein proposed, then the Congress should appropriate 25 million dollars for the use and benefit of the tribes (see paragraph numbered (1)), should then immediately extinguish all aboriginal title, if any, and all claims arising under an alleged violation of the 1790 Act as amended, to all lands within the claims area except those lands within the public ownership of the State. The tribes' cases could then proceed through the courts against the state-owned land. If the tribes win their cases they recover the land; but if they lose their cases they recover nothing against the state of Maine. However, in the meantime, they will have received 25 million dollars from the United States for their consent to eliminate economic stagnation in the claims area and their consent to relieve Interior and Justice from pursuing causes of action against private property owners to divest them of land titles that have heretofore been considered valid.

It is my hope that the Congress can resolve this problem through the implementation of numbered paragraphs (1) through (6) above. Paragraphs (7) and (8) are mere alternatives to be utilized in the event consensual agreement cannot be obtained.

Reaction to the proposal was immediate. One-half hour after receiving the recommendation, and minutes before Judge Gunter's press conference, President Carter called the proposal "fair, very judicious and wise." Judge Gunter later told reporters that the President "wants to think about it some more" and "to study it in a little more detail." The Maine Congressional delegation called it a "positive step toward resolution of a very complex issue," but would make no "definitive statement" until "numerous questions" raised by the proposal were answered.

Senator Abourezk called the recommendations "precipitous" and "devoid of fairness and understanding of the historical nature of the land claim." Sen. Abourezk stated that Judge Gunter "was appointed to mediate," but, "instead, the recommendation by Judge Gunter seeks to interfere in the controversy by recommending that the legal rights of the In-



Massasoit, Chief of the Wampanoags

dian tribes be arbitrarily taken away by Congress. What is more unfortunate about the recommendation is that Judge Gunter has acted as though he were conducting a trial without benefit of the rules of evidence and other aspects of due process."

A *Washington Star* account of the Judge's press conference noted that Judge Gunter "recalled that Carter is in an effort to balance the budget in the fourth year of his administration." The account translated the proposal in this way: "For every $1 that the two Indian tribes want, they would get a tenth of a penny. For every acre they want, they would get about 350 square feet—about equal to the space in a two-room apartment. That would be the price the federal and state governments would pay to bring to an end the tribes' attempt to get back or be paid for nearly two-thirds of all the land in the state of Maine." It was already plain, though, that the proposal would have wide appeal in Maine: it would provide complete protection for owners of private property, including individual citizens and small businessmen as well as the 'big seven' paper companies that dominate the Maine economy."

> "The conclusion is inescapable that, as a matter of simple statutory interpretation, the Nonintercourse Act applies to the Passamaquoddies. The literal meaning of the words employed in the statute, used in their ordinary sense, clearly and unambiguously encompasses all tribes of Indians, including the Passamaquoddies; the plain language of the statute is consistent with the congressional intent, and there is no legislative history or administrative interpretation which conflicts with the words of the Act."
>
> *Judge Edward T. Gignoux in* Joint Tribal Council of the Passamaquoddy Tribe v. Morton

A *Boston Globe* news analysis stated that the proposal "rests unbalanced on the scales of justice. On one side are the property rights of private landowners in the state of Maine. On the other side are the legal rights of the Penobscot and Passamaquoddy Indian tribes. In the settlement proposed . . . the scales appear tipped somewhat in favor of property rights. The implication of the imbalance is that Gunter's proposal, which has not yet been accepted by either the President or the state or Indian tribes, may cloud the legal rights of the Indians. Gunter's proposal appears to deprive the two tribes of their right to pursue their land claims in Federal court, particularly if they do not go along with the proposal. . . . The reason for Gunter's action is clear. He has stated time and again that his chief concern was the economic cloud over all land and business transactions in the state because of doubt over the eventual outcome of the Indian claims."

In numerous expressions of public concern, including a three-page telegram with an 11-page listing of signatories, President Carter was urged not to adopt the proposed approach by top Democratic and Republican leaders in Maine, five former Commissioners of the Bureau of Indian Affairs, civil and human rights activists, celebrities, Indian people respected as representative of the range of voices throughout Native America, members of the established bar and public interest concerns and representatives of the religious and international communities:

DEAR MR PRESIDENT:

WE THE UNDERSIGNED URGE YOU NOT TO ADOPT THE APPROACH TO THE MAINE INDIAN LAND DISPUTE RECOMMENDED BY YOUR SPECIAL REPRESENTATIVE. WHILE WE APPLAUD JUDGE GUNTER'S UNDERSTANDING THAT THE INDIAN CLAIMS WARRANT AN OUT OF COURT SETTLEMENT, AND AGREE THAT THE FEDERAL GOVERNMENT HAS A DUTY TO PROVIDE RELIEF FOR THE SMALL DEFENDANTS IN THESE ACTIONS, WE DEPLORE HIS FAILURE TO CONSIDER THE RIGHTS OF THE INDIANS AND PARTICULARLY HIS SUGGESTION THAT THE UNITED STATES WIPE OUT 90 PERCENT OF THEIR CLAIMS TO LAND WITHOUT ANY COMPENSATION IF THEY DO NOT ACCEPT HIS OFFER.

THE PASSAMAQUODDY AND PENOBSCOT PEOPLE HAVE WON EVERY ROUND IN THEIR LONG BATTLE TO OBTAIN JUSTICE WITHIN THE AMERICAN LEGAL SYSTEM. WHILE THEY HAVE CONSISTENTLY INDICATED THEIR WILLINGNESS TO DISCUSS A NEGOTIATED SETTLEMENT, THEY HAVE NEVER ASKED THAT THE MATTER BE REMOVED FROM NORMAL LEGAL CHANNELS. YOUR REPRESENTATIVE HAS NEITHER ATTEMPTED TO MEDIATE BETWEEN THE PARTIES NOR NEGOTIATE THE FEDERAL GOVERNMENT'S CONTRIBUTION TOWARD A SETTLEMENT. THE FIGURES IN HIS PROPOSED SETTLEMENT WERE "PULLED OUT OF A HAT," ACCORDING TO ALL ACCOUNTS OF HIS 7/15/77 PRESS CONFERENCE. THE SIZE OF THE PROPOSED SETTLEMENT AMPLY DEMONSTRATES THAT ONE WHOSE PRIMARY RESPONSIBILITY IS TO GUARD THE TREASURY CANNOT HOPE TO FULFILL THE FUNCTION OF AN INDEPENDENT JUDICIARY. IT IS UNFORTUNATE ENOUGH THAT JUDGE GUNTER DID NOT SERVE AS A MEDIATOR. BUT TO SAY THAT THE INDIANS MUST ACCEPT HIS PROPOSAL OR FACE EXTINGUISHMENT OF THEIR CLAIMS BY THE POLITICAL BRANCHES IS TO MAKE A MOCKERY OF THIS NATION'S LEGAL AND MORAL TRUST OBLIGATIONS TO INDIANS AND TO TELL THE WORLD THAT THE UNITED STATES IS UNWILLING TO ABIDE BY THE DICTATES OF ITS OWN LEGALLY CONSTITUTED COURTS.

AT THE HEART OF THE RECOMMENDATION IS AN ASSUMPTION THAT THIS NATION, BECAUSE IT IS POWERFUL, HAS THE RIGHT TO TAKE LAND OR CLAIMS TO LAND FROM INDIAN NATIONS BECAUSE THEY ARE SMALL. THIS ATTITUDE, ALL TOO PREVALENT AT VARIOUS TIMES DURING OUR HISTORY, HAS BEEN REJECTED BY EVERY HUMANE AND THOUGHTFUL AMERICAN PRESIDENT SINCE GEORGE WASHINGTON. TO RETURN TO IT NOW CAN ONLY REOPEN THE WOUNDS OF A DISHONORABLE PAST, BRING SHAME TO THIS COUNTRY AND PRODUCE FUNDAMENTAL DISRESPECT FOR THE RULE OF LAW, NOT ONLY AMONG INDIANS BUT AMONG ALL CONSTITUTIONALLY MINDED PEOPLE.

WE URGE YOU TO RESIST THE TEMPTATION TO FOLLOW WHAT MUST SEEM AN EXPEDIENT SOLUTION, AND INSTEAD, IMMEDIATELY APPOINT A MEDIATOR TO SEEK A TRULY VOLUNTARY SETTLEMENT OF THIS DISPUTE

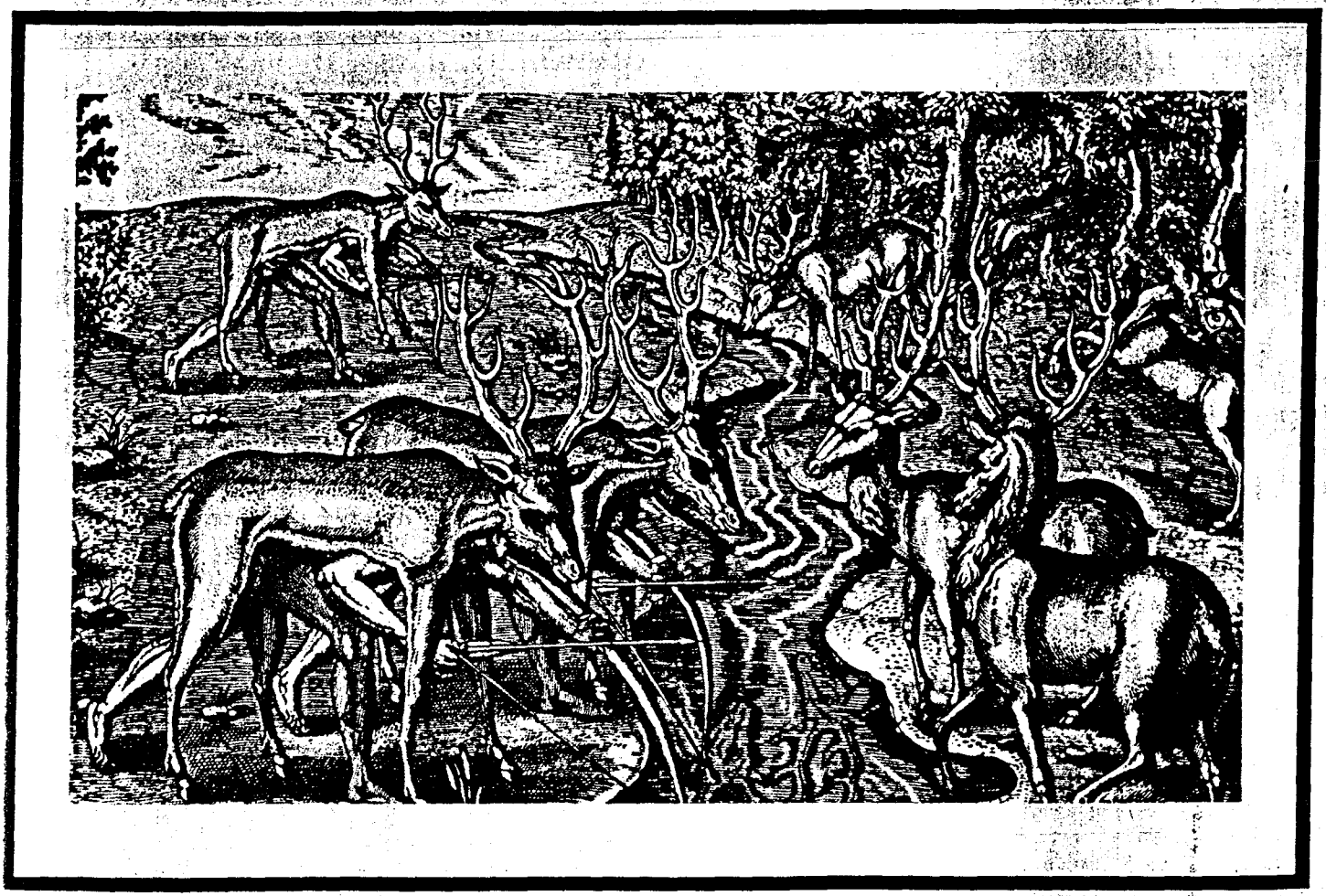
SOUTH CAROLINA: Catawba Claim

On August 30, 1977, the Department of the Interior announced that the federal government is prepared to initiate an action on behalf of the Catawba Tribe for return of 144,000 acres in South Carolina. Concluding a year's review of the Catawba Tribe's litigation request by the Departments of the Interior and Justice, Interior Solicitor Leo M. Krulitz has recommended that "the appropriate form of action be a suit for ejectment of the current possessors of the tract and mesne profits for the period of time the tribe has been dispossessed. This is the third time the Catawba Tribe has petitioned the Department to seek relief on their behalf and they have been twice refused for legally incorrect reasons."

The 144,000 acres, located in York and Lancaster Counties, were reserved by the Catawba Tribe in 1763 at the Treaty of Augusta with the British Crown. In return for secured possession of these reservation lands, the Catawbas ceded a tract of land 60 miles in diameter. In 1840, the State of South Carolina negotiated a transaction with the Catawba Indians, which purported to extinguish Indian title to the 1763 reservation. The United States was not a participant in the transaction, nor did the Congress approve the alienation of the Catawba Indian Reservation. It is this transaction resulting in the loss of the 144,000 acre Catawba Reservation which will be challenged by the United States.

For six months, settlement talks have been underway between the Catawba Tribe and the State Attorney General, on behalf of the Governor, in an effort to achieve an out of court solution. The settlement talks have centered on the development of a Catawba Indian Land Claims Settlement Act, which would include the establishment of a Catawba Reservation and tribal development fund, as well as federal recognition for the Catawba Tribe. Rep. Kenneth Holland (D.-S.C.), in whose district the claim area is situated, has represented the South Carolina Congressional Delegation in many of the settlement talks. Describing his role in the process as that of "a pipeline of communications," Rep. Holland has stated that he will introduce the settlement measure in the Congress as soon as the State and the Tribe reach agreement on the major provisions.

In October of 1976, the Catawba Tribe wrote to South Carolina State Governor



James B. Edwards, suggesting alternatives to litigation and detailing the history of their claim. The Catawba Nation was first secured a 15-mile square, 144,000-acre reservation in the 1760 Treaty of Pine Tree Hill. While no copy of that treaty is currently available, the reservation was confirmed in the 1763 Treaty of Augusta between the Southern Indian Tribes, including the Catawba, and the Governors of the Southern Colonies and the King's Superintendent of Indian Affairs. Article Four of the Treaty of Augusta stated:

> And We the Catawba Head Men and Warriours in confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square, a survey of which by our consent, and at our request has been already begun, and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be completed and that the Catawbas shall not in any respect be molested by any of the King's subjects within the Said Lines but shall be indulged in the usual Manner of Hunting Elsewhere.

Pursuant to this treaty, a survey of the tract, begun after the earlier Treaty of Pine Tree Hill, was completed. This survey by Samuel Wyly clearly delineates the recognized boundary of the Nation's lands. Despite the explicit terms of the treaties signed at Pine Tree Hill and Augusta, the Nation's lands remained the subject of continuing encroachments by white settlers.

By early in the 19th century, most of the lands of the Catawba Reservation had been leased to non-Indians, in violation of both South Carolina law and federal law.

Despite repeated requests for assistance by the Tribe to both state and federal authorities, no action was taken to protect the Catawbas in the possession of their land. In 1840, in response to pressure from the lessees of Catawba lands, the State of South Carolina acted to extinguish Catawba Indian title to the 144,000-acre reservation. On March 13, 1840, the Treaty of Nation Ford was signed by the Catawba Indians and the Commissioners representing the State of South Carolina. On December 18, 1840, the South Carolina legislature ratified and confirmed the treaty. Because the United States in no way participated in or consented to the alienation of the Catawba Reservation as required by the Indian Nonintercourse Act, the Catawba Tribe retains the right to use and occupy the lands of the 15-mile square tract.

While the failure of performance of the State under the treaty is not relevant to the federal cause of action, it is interesting to note that the State did not honor the terms of the Treaty of Nation Ford. Rather than securing $5,000 worth of land in North Carolina or an unpopulated area, as called for by the treaty, in 1842 the State instead purchased for $2,000 a 630-acre farm within the boundary of the original 1763 reservation as the new home for the Catawba Indians. The treaty also called for additional payments totaling $16,000 to be made by the State to the Catawbas, and as a result the State sporadically appropriated varying amounts of money for the welfare of the Catawba Indians. In apparent recognition of its unfulfilled obligations, the State continued to appropriate funds in a sporadic manner long after the sums required by the treaty had been paid. The Tribe continues to reside on the 630-acre reservation to this day.

> We know our lands are now become more valuable. The white people think we do not know their value; but we are sensible that the land is everlasting, and the few goods we receive for it are soon worn out and gone. . . . Besides, we are not well used with respect to the lands still unsold by us. Your people daily settle on these lands, and spoil our hunting. We must insist on your removing them.
>
> *1742, Treaty Negotiation, Philadelphia*
> *Canassatego, Six Nations Spokesman.*

In 1848 and again in 1854, Congress enacted legislation authorizing the use of federal funds to remove the Catawbas to Indian country west of the Mississippi. The federal monies were not spent because of the failure of the Catawba Tribe to find a new reservation.

In the early 1900's, the Catawba Tribe petitioned the United States for assistance in securing a return of its reservation or payment of compensation for its loss. On June 29, 1909, the Commissioner of Indian Affairs denied the petition of the Catawba Tribe. The Tribe's petition was supported by several extensively researched briefs which argued that the reservation was lost in violation of the Indian Non-Intercourse Acts and therefore the United States was under a duty to prosecute the claim for the Tribe. The Tribe's request was apparently denied because the Department of the Interior viewed the Catawba Indians as "State Indians," notwithstanding the fact that Congress had acknowledged in 1848 and 1854 the tribal sovereignty of the Catawba Tribe.

This interpretation of the scope of Non-Intercourse Act protections and the federal trust responsibility has been thoroughly repudiated by *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 61 (1974), and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

Throughout the 1930's efforts were made to bring the Catawba Indians under federal jurisdiction. In 1937 and again in 1939, legislation which would have extended federal jurisdiction over the Catawba Tribe was introduced but not reported out of committee, apparently because of opposition within the Department of the Interior. With the failure of the proposed legislation, the Bureau of Indian Affairs entered into negotiations with the State of South Carolina and the Tribe to provide limited assistance for a rehabilitation project. These negotiations culminated in a 1943 Memorandum of Understanding whereby the State of South Carolina purchased a 3,434-acre reservation, entirely within the boundary of the original 1763, 15-mile square reservation. The State conveyed the 3,434 acres to the Secretary of the Interior in trust for the Catawba Tribe of Indians. The State did not convey the 630-acre "Old Reservation" to the United States.

The Tribe organized under the Indian Reorganization Act and adopted a constitution and bylaws which were approved by the Secretary of the Interior. Pursuant to the Memorandum of Understanding, the Bureau of Indian Affairs provided limited services to the Catawba Tribe, mostly in the areas of soil and moisture conservation and timber resource management. Civil and criminal jurisdiction remained in the State of South Carolina and education remained the responsibility of the State. Neither the Department of the Interior nor the

Catawba Indians have ever maintained that the United States assumed full guardianship jurisdiction over the Catawbas despite the use by the Department of the Interior of the Indian Reorganization Act as authority to acquire lands for the rehabilitation of the Tribe.

In establishing this limited and unique relationship with the Catawba Indians, the Unitcd States, as well as the State of South Carolina, was aware of the existence of the unresolved claim arising out of the 1840 Treaty and it is clear that none of the parties to that agreement intended the purchase of lands by the State or the establishment of a limited federal relationship to have any effect whatsoever upon the Tribe's land claim.

The federal relationship lasted only sixteen years. In 1959 the 3,434-acre federal reservation was sold pursuant to the Catawba Division of Assets Act, 25 U.S.C.931, et seq. The sparse legislative history and the files of the Bureau of Indian Affairs indicate that the Act was limited to lifting federal restrictions from the 3,434-acre federal reservation, thereby returning the Tribe to its pre-Federal reservation status—the objective of "rehabilitating" the Tribe supposedly having been accomplished.

The history of relations between the Catawba Indians and both the State of South Carolina and the federal government reveal a pattern of continuous and persistent efforts by the Tribe to have both State and federal law enforced to protect its lands from non-Indian encroachment. The requests were repeatedly and effectively ignored both before and after the State purported to extinguish Indian title to the reservation. But the unresolved claim has persisted to this day and the State has periodically acknowledged its existence. Thus, shortly after the Treaty of Nation Ford, the Governor of South Carolina reported to the legislature that the treaty had not been carried out and that an "informal" experiment had been developed which would allow the Catawba Indians to reside on a farm near their old reservation. As late as 1941, the State was attempting, through the purchase of the small federal reservation, to reach a final settlement with the Catawba Indians. The attempt was unsuccessful. The Catawba Tribe believes that it is in its interest, as well as the interests of the citizens who reside upon Catawba Reservation lands and indeed the State of South Carolina itself, to seek a final determination of this longstanding and unresolved claim.

Native American Rights Fund

Connecticut, Massachusetts and Rhode Island

The following five tribal claims to lands within the States of Massachusetts, Connecticut and Rhode Island are in various stages of trial preparation, some having been in the courts for several years, with mediation and negotiation occuring to varying degrees in the normal course of litigation.

This section will outline those tribal cases in the courts as of September, 1977 to be presented in greater detail in subsequent issues.

Wampanoag Tribal Council of Gay Head v. Town of Gay Head

In this suit, the Wampanoag Tribal Council of Gay Head is seeking return of approximately 250 acres of "town-owned" land, although the Tribe's potential claim could include all of the town area, 3,600 acres. Over a year ago, the Town began seeking a negotiated settlement to the case. The first negotiating session was held last November and, on December 9, 1976, the Town voted to cede 243 acres of "common land" to the Tribe. The transfer of this land would require enabling legislation by the State of Massachusetts. The Gay Head Taxpayers Association, representing the non-Indian landholders, protested legislative action prior to the establishment of overall ownership. On July 8, at the request of all parties, Massachusetts Governor Dukakis appointed Harvard Law School Dean Albert M. Sacks to mediate in the dispute. Mediation is underway and continues as of date of publication.

Mashpee Tribe v. New Seabury Corporation

The Mashpee Tribe is seeking a declaration of ownership to approximately 13,000 acres in the Town of Mashpee, Massachusetts, and has exempted from their claim all individual homeowners within the claim area. The defendants include the Town of Mashpee, represented by Attorney James St. Clair, and the State of Massachusetts, several real estate developers, a utility company and a nationwide group of title insurance companies. Judge William B. Gunter, the President's special representative, has been assigned to study the case.

The area of Mashpee was guaranteed to the Tribe by the Plymouth Colonists in 1685. At that time, the Colony pledged that the land would be perpetually owned by the Tribe's descendants and that it would never be sold without the consent of all of the Indians of Mashpee. In 1869, the State Commissioners sought the opinions of the Mashpee Indians of a plan to end the Tribe's ownership of the lands and to allot them to individual Indians or sell them at auction. The large majority of the Tribe voted against any plan to make their lands alienable. Nonetheless, the State adopted laws, in 1870, which resulted in the alienation of virtually all of the Tribe's territory.

Few non-Indians moved into Mashpee, however, until shortly after World War II, when a wave of development began which continued until the filing of this lawsuit. This massive development brought a large influx of non-Indian residents, who took control of the Town government away from the native population and who closed off access to the many ponds, rivers and shore areas of Mashpee, preventing the Indian people from continuing their traditional activities of shell-fishing and related endeavors. This process was gradually eroding the way of life of the Mashpee Indians and these grievances, as well as the historic violation of their rights under both the Nonintercourse Act and the promises of this country's first European colonists, led to

the filing of their claim for recovery of their ancestral lands.

The Tribe hopes that this suit will enable it to preserve the remaining open space and wetlands of Mashpee, which still cover most of the land, and half the massive overdevelopment which could destroy their territory. The Tribe has made a series of settlement proposals to the Town, based on the conservation of most of the remaining open spaces, and has offered to share that open land with other Mashpee residents. While the Town government and real estate developers have resisted such proposals, a growing group of non-Indian homeowners and residents have supported the Tribe's call for a negotiated settlement based on principles which would conserve both the Tribe's heritage and the beautiful character of Mashpee's woodlands and marshes.

The defendants will attempt to challenge the Mashpee Indians' very existence as a Tribe at a trial now scheduled for October 17. The Tribe views that attempt as a strategy of desperation and is preparing to present its own members and a group of expert historians and anthropologists to refute what the Tribe regards as an outrageous attack upon its identity and heritage. The Tribe will show that its members and their ancestors have lived together continuously upon this same land for more than three centuries. The Tribe will also show that, while they have been forced to coexist with the colonists who arrived in Massachusetts in the 1600's and their descendants, they have retained their tribal identity and their community against all of the pressures from the dominant society which urge them to simply disappear. The defendants' efforts to revitalize the idea of termination and deny the right to survival of the Mashpee Tribe, and to repudiate the first promises made by white Americans to Native Americans, will be the focus of the forthcoming litigation.

Narragansett Tribe v. Southern Rhode Island Land Development Corporation and Narragansett Tribe v. Murphy

In 1880, the State of Rhode Island purported to dissolve the Narragansett tribal government and require sale of the remaining 3,200 acres of tribal lands, without the participation and consent of the United States. The Tribe is seeking return of this land. Last summer, the State moved to dismiss the case on sovereign immunity grounds, but the motion was denied. A stay in litigation has been requested by both sides in the case and the Tribe is making progress in negotiating a settlement with property owners. The Tribe is preparing a settlement proposal through which part of the undeveloped land would return to the Tribe, with landowners receiving compensation from the federal government.

Western Pequot Tribe of Indians v. Holdridge Enterprise, Inc., and Schaghticoke Tribe of Indians v. Kent School Corporation

In the first action, the Western Pequot Tribe is seeking the return of 800 acres of land. In the second action, the Schaghticoke Tribe seeks the return of approximately 1,300 acres of land. The Tribes' complaints allege that the aboriginal and reservation lands of the Tribes have been taken from them without the consent of the federal government in violation of the Nonintercourse Act.

In recent months, the Tribes have won two important decisions in Connecticut which held that affirmative defenses based on passage of time cannot bar claims by Indian tribes under the Nonintercourse Act. *Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc.*, Civ. No. H-76-193 (D. Conn.) (Ruling on Motion to Strike, March 4, 1977); Schaghticoke Tribe of Indians v. Kent School Corporation, 423 F. Supp. (D. Conn. 1976). These decisions followed an earlier opinion by Judge Pettine in *Narragansett Tribe of Indians v. Southern*

Rhode Island Land Development Corporation, 418 F. Supp. 798 (D. R.I. 1976). In the Western Pequot case, the defendants also raised the defense that claims under the Nonintercourse Act could only be brought by the United States. The Court denied the Tribe's motion to strike this defense without prejudice in order to give the United States an opportunity to decide whether it would participate and voluntarily intervene in the case. There has been no decision to date.

In the *Schaghticoke* case, both sides are now in the middle of discovery and preparation for trial. One defendant in the case, Connecticut Light and Power, has offered to deed to the Tribe the land claimed in this suit in exchange for a drainage easement which would be obtained pursuant to the Federal Power Act. The return of this land is highly significant to the Tribe because it now cuts off the Tribe from access to the Housatonic River.

Where today are the Pequot? Where are the Narragansett, the Mohican, the Pocanet, and other powerful tribes of our people? They have vanished before the avarice and oppression of the white man, as snow before the summer sun.

1811, Shawnee Chief Tecumseh

Conclusion

As noted earlier, the Indian land claims differ vastly in their sets of historical and contemporary facts, reflecting the unique past and present of each Indian nation. In the process of pursuing its claim, each tribe is evaluating its internal needs and organization, as well as its future relationship with both the United States and the individual states. Different relationships will emerge. Some tribes may retain their state relationship, while others may seek to establish new ties with the United States. From this process should emerge enlarged and united reservations in the East, with the Western Indian nations joining with the tribes of the West to give a broader perspective of Native Americans in the United States. From this process will emerge, therefore, both a new profile of American Indians and a new understanding of Native America, past, present and

Indian Claims Set by Statute of Limitations Amendment

An amendment to the statute of limitations provisions in 28 U.S.C. 2415 was signed into law on August 15, 1977. Public Law 95-103 extends until April 1, 1980, the deadline for claims, for monetary damages; occurring prior to 1966, to be filed by the United States on behalf of Indian tribes and individuals. Congressional deliberations of an extension to the July 18, 1977 deadline spanned four months, with the various proposals serving as legislative focal point for debate of all issues related to Indian claims and legal rights. The new election-year deadline represents a compromise between the Senate-passed bill, which called for a four and one-half year extension, and the House passed version of two years, with House managers stating for the record that no further extension would be granted.

In mid-March, Rep. Ted Risenhoover (D-Okla.) introduced H.R. 5023, providing for a ten-year extension, and Senator James Abourezk (D-S.Dak.) sponsored S. 1377, an identical bill, the following month. The Office of Management and Budget, in developing an Administration position on the bill considered the Interior Department request for a ten-year extension and the Justice Department request for a three-year extension for the Passamaquoddy and Penobscot claims only. The OMB opted for an overall two and one-half year extension authorizing Justice to testify to the need in the Maine claim only, in the event Congress rejected the general extension. Interior objected to this position, maintaining that four and one-half years was the minimum time needed to identify and process all the claims, and received authorization to testify to the general need for an extension of that period. During the May 3 Senate Indian Affairs Committee hearing, Senator Abourezk stated that he would amend his bill from ten to four and one-half years. After a review of the Senate testimony, Rep. George Danielson (D-Cal.), Chairman of the House Subcommittee on Administrative Law and Governmental Relations, reported an identically amended bill to the full Judiciary Committee.

On May 24, the Senate Indian Affairs Committee reported the bill without objection and the House Judiciary Committee approved the extension by a 26-5 vote. On May 27 the Senate passed S. 1377 by unanimous consent and H.R. 5023 was placed on the suspension calendar for June 6 as a non-controversial bill. (A two-thirds vote is needed under the procedure for suspension of the rules.) During the June 6 debate on the House floor Democratic Caucus Chairman Tom Foley (D-Wash.) maintained that the bill was highly controversial and should be opened to amendment, pressing for its defeat under the assigned process. The bill failed on suspension by a vote of 162-128, and was sent to the Rules Committee for a determination on its future progress. In the June 14 Rules Committee Proceeding, a decision was temporarily delayed for lack of a quorum—the member most familiar with Indian legislation, Rep. Lloyd Meeds (D-Wash.), failed to appear when the committee needed one additional member to conduct business. When a quorum was finally reached, the Committee quickly granted an open rule for one-hour's debate with amendments to be read on the five-minute rule.

In preparation for the final vote, Congressional opponents of the four and one-half year extension began an informal process of seeking compromise with the bill's managers. Rep. William Cohen (R-Me.), supported a two-year extension maintaining that he was informed by the President's special representative in the Maine case that the administration backed an extension of lesser time. To clarify this point, Interior Secretary Cecil Andrus, on June 16, wrote to the managers that "any amendment to extend the statute of limitations for a one- or two-year period will have the same deleterious effect we have predicted from a failure to extend the statute at all; that is, a sudden filing of massive cases, leading to economic disruption in several areas of the country, and injustice to smaller valid claims of Indian individuals which may be overlooked in the effort to timely file larger, known cases."

Rep. Meeds, for himself and Rep. Foley, offered the Judiciary Committee an amendment for a two-year extension with the exception that "no such action shall be brought by the Attorney General on the basis of matters referred to him by a Federal agency or department unless such referral was made before June 1, 1977." Rep. Morris Udall (D-Ariz.), in a June 29, "Dear Colleague" letter, urged rejection of all amendments, stating that "the United States, of its own volition has assumed the role of trustee for these people and their rights and resources. Until we are ready to repudiate that role—until we are ready to return to the disastrous Indian policy of the 1950's—we have a legal and moral obligation to pursue diligently our responsibilities as trustee." By this time, Rep. Foley was calling the Judiciary Committee's bill "a hunting license for the Interior Department and the Justice Department to unearth claims for money damages which threaten to dislodge and question the settled property rights of hundreds of thousands of American citizens."

As the controversy escalated and the July 4 recess neared, Reps. Udall and Danielson secured the June 30 passage of H.J.Res. 539, an emergency 30-day extension until August 18. Senator Abourezk informed the Senate that the House was having "difficulty" in passing the bill, and the resolution was agreed to without objection. On July 11, the President signed the 30-day measure as the House returned from its holiday to consider the granting of a rule for H.R. 5023. Following an hour's debate, the rule was granted by a 299-0 vote.

On July 12, Rep. Foley offered the Meeds-Foley amendment with the referral restriction date changed to July 18, 1977, urging his colleagues to "support an amendment that will put to final rest any continuation of this process of digging up these old, infectious claims." The six House members of the South Carolina delegation had objected to the proposal in a July 7 "Dear Colleague," stating that the "Foley Amendment would, in effect, penalize innocent tribes for the failure of the BIA to investigate and promptly forward to the Justice Department meritorious claims. Furthermore, to the extent that the tribes for financial or other reasons are incapable of bringing suit in their own right, or to the extent that there are defenses which are inapplicable to the United States but applicable to a tribe, a provision attempting to retroactively bar the Attorney General from commencing suit on a tribe's behalf will be tantamount to extinguishing the cause of action itself. This result would, at the minimum, raise serious constitutional questions because it would retroactively extinguish a prop-

(Cont'd on page 24)

Supreme Court Declares Rosebud Reservation Diminished

Last April, the United States Supreme Court ruled that three-fourths of the original Rosebud Sioux Reservation in South Dakota is not part of the present reservation area. The Tribe had requested a judicial declaration that the reservation boundaries established by Congress in 1889 had not been diminished by subsequent acts passed in 1904, 1907 and 1910, which opened up three areas to non-Indian settlement. However, the Court concluded that the acts clearly indicated a congressional intent not only to open the areas to non-Indian settlement, but to remove them from reservation status and to diminish the boundaries accordingly.

In the past, Congress has acted to diminish and even to terminate* Indian reservations without tribal consent. That Congress has this power there is no doubt. The question in *Rosebud* was whether Congress actually intended to diminish the reservation. In order to understand the potential effect of the *Rosebud* case and the disestablishment issue generally, it is necessary to examine the allotment period.

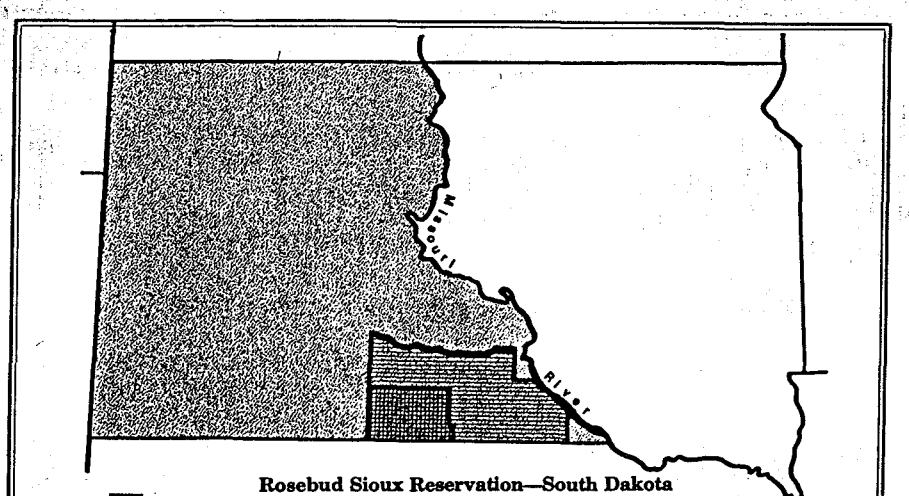
From the beginning, the policy of the United States in its administration of Indian affairs has fluctuated between one of assimilating the Indians into the mainstream of American society to one of preserving tribal existence and internal independence. The fifty-year period from approximately 1880 to 1934 was an era of assimilation, marked by the allotment policy. Although various motives have been assigned to the reasons for the policy—mainly that it was designed to satisfy white settlers eager for Indian lands—its avowed purpose was to make Indians independent of both their tribes and the federal government. This was to be accomplished by breaking up the reservation land base into individual land holdings. Prior to this, reservation land was held in trust by the United States for the beneift of the Tribe and all its members. In 1887, Congress passed the General Allotment Act, commonly known as the Dawes Act, and this Act served as a model for the various allotment statutes subsequently enacted for individual reservations. Typically, an allotment act provided for a land selection for each Indian family suitable as a homestead for farming or ranching.

The allotments were to be held in trust for 25 years, with the President having the discretionary authority to extend the trust period, and then conveyed outright to the Indian allottee or his heirs. Some acts provided for the setting aside of land for such tribal purposes as schools, hospitals, timber gathering, communal grazing, and burial grounds. The reservation land that was left, called "surplus" land, was to be sold to white settlers when the reservation was opened to settlement. The federal government intended that this policy would convert the Indians from their tribal, traditional ways of life to the life styles of the white farmers and ranchers, and that 25 years would be ample time for this transition. The policy unquestionably envisioned eventual termination of the allotted reservations.

The allotment policy, however, was a failure. Tribal Indians did not turn into farmers and ranchers in one generation; federal aid had to be continued since families were not making sufficient incomes from their allotments; and most seriously, thousands of Indians were selling their allotments to whites as soon as they received their fee patents. Over 80 million acres of tribal land were lost under the "surplus" land and allotment policy. By the late 1920's, the trust period on allotments was regularly being extended. Realizing the castastrophic effect of the allotment policy, Congress ended the allotting of reservations in 1934 with the passage of the Indian Reorganization Act.

The issue that frequently arises today is whether Indian reservations, or portions thereof, which were allotted and opened to non-Indian settlement by special allotment and opening acts were thereby terminated. If termination did occur, then the reservation, or the affected area, is no longer reservation land, and the states have jurisdiction over the former reservation lands except where trust land remains.

For many years the issue of termination did not arise. There were various reasons for this but the main ones were: (1) the general weakness of tribal governments in asserting jurisdiction; (2) the temporary view of the Supreme Court that citizenship under the allotment acts meant automatic termination of the federal guardianship of Indians except for property still in trust; and (3) the majority rule followed by the courts before 1948 that Indian reservation lands not in trust were not Indian country. As a result of these prevailing views and conditions,



Rosebud Sioux Reservation—South Dakota

1868: The Great Sioux Reservation as set out by the Treaty of 1868. Actual boundaries extended into parts of present day North Dakota, Wyoming and Montana.

1889: Original area of the Rosebud Sioux Reservation established by Congress when the Great Sioux Reservation was broken up, one half becoming public domain and remainder divided into seven separate reserves.

1977: Present Rosebud Reservation area after United States Supreme Court decision holding that rest of reservation area was terminated by Congress in 1904, 1907 and 1910 when area was allotted and opened to non-Indian settlement.

*"Termination" and "terminate" are used in this article to indicate congressional action to end the reservation status of a certain land area. They refer to reservation status and not to recognition of tribes. By contrast in the termination era of the 1950's and 1960's, Congress terminated the reservation status and tribal status of some tribes by removing federal recognition and the associated trust responsibilities of the United States. "Disestablishment" is used interchangeably with "termination." Either term can refer either to an entire reservation or a portion thereof.

The Nature of Indian Tribal Jurisdiction

Tribal jurisdiction over non-Indians continues to be a major subject of concern for tribes located throughout the country. Jurisdictional disputes pitting tribal authority against state governments and non-Indian residents, or visitors range from hunting and fishing to taxation and criminal misdemeanors. The nature and scope of tribal jurisdiction over non-Indians is of critical importance to tribes. Without such jurisdiction, tribes are unable to assert governmental control over their reservations, their resources and all persons residing or visiting their reservations. With such control, tribal governments can plan for the governing and development of their reservations free of state and non-Indian interference.

During the last few years, tribes have brought about a significant increase in litigation dealing with jurisdiction over non-Indians through the enactment of tribal government codes. These codes deal with hunting and fishing, taxation, resource development, and misdemeanor criminal matters. This enactment has been an instrumental part of the efforts of tribes to reestablish their sovereign authority. The reemergence of tribal sovereignty has enabled tribes to undertake long-term and comprehensive planning for their reservations. Such long-term planning and governmental decision making is an absolute necessity to the political and economic development of reservations. It is for these reasons that the questions of the scope of tribal authority over non-Indian residents and visitors has moved to such prominence.

Indian tribes believe that their authority to regulate non-Indians is part and parcel of their sovereignty. One of the basic tenents of federal Indian law is that Indian tribes continue to possess those sovereign powers that are neither inconsistent with their status, nor expressly terminated by Congress. Congress through the years has enacted legislation breaking up Indian lands—the General Allotment Act of 1887—and acts granting states limited civil and criminal jurisdiction over Indians— Public Law 280. However, Congress has also enacted legislation designed to strengthen tribal self-government, i.e., the Indian Reorganization Act of 1934, the Indian Civil Rights Act of 1968, and the Indian Self-Determination and Education Assistance Act of 1974. In addition, Congress has enacted other more specific pieces of legislation strengthening tribal sovereignty over matters such as liquor (18 U.S.C. § 1161) and hunting and fishing (18 U.S.C. § 1165). The recent increase in disputes regarding jurisdiction over non-Indians has followed the actions of many tribes to bring their sovereign authority over their reservations, their resources, and over members and non-members up to the level of tribal sovereignty recognized by the federal courts and confirmed by Congress. In effect, tribes have moved recently to fill a governmental vacuum which had historically existed on Indian reservation—a vacuum caused, on one hand, by the failure of state and federal authorities to protect Indians and their resources, and, on the other hand, by the historical failure of tribes to exercise fully their sovereign powers.

> The most basic of all Indian rights, the right of self-government, is the Indians' last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department.
>
> **Felix S. Cohen**
> **Federal Indian Law**

The extent of tribal jurisdiction over non-Indians has recently reached the United States Supreme Court, and the issue will soon again be the subject of Supreme Court consideration. In 1975, the Supreme Court decided in *United States v. Mazurie*, that Congress could properly delegate to Indian tribes the right to regulate non-Indian liquor businesses on their reservations. In the 1977-78 term, the Supreme Court will consider in *Oliphant v. Schlie*, whether, in the absence of an Act of Congress delegating authority to the tribes, an Indian tribe can impose general misdemeanor criminal jurisdiction over a non-Indian. *Oliphant* involves a situation where the Suquamish Indian Tribe found it necessary to pass a Tribal code to regulate the misdemeanor conduct of persons within its territory, in part because of ineffective federal and state law enforcement on its reservation. Indeed, when the non-Indian committed his offense on the Suquamish Reservation, the only law enforcement officials available to deal with the situation were Tribal police deputies. The argument of the Suquamish Tribe is that a fundamental aspect of Tribal sovereignty is the right of tribes to protect their reservations from injurious and unlawful conduct. The tribes contend that Congress has never taken away that authority. The Supreme Court, probably in the spring of 1978, will resolve this issue and in doing so will provide tribes with important guidance relating to the nature and scope of their inherent jurisdictional authority over non-Indian residents and visitors.

Perhaps the most widely disputed aspect of tribal jurisdiction over non-Indians centers on hunting and fishing. In a number of states, Indian tribes are battling states to determine who has the right to regulate non-Indian reservation hunting and fishing, and in addition, who has the right to tax the privilege of hunting and fishing on Indian reservations. Thus, in North Carolina, the Eastern Band of Cherokee Indians and the State of North Carolina have argued their cause before the United States Court of Appeals for the Fourth Circuit. In the United States Court of Appeals for the Ninth Circuit, the Confederated Tribes of Washington and the Quechan Tribe of Southern California are presently preparing their arguments. Moreover, the Mescalero Apache Tribe of New Mexico has filed suit seeking to prevent the State of New Mexico from regulating and licensing non-Indians from hunting on the Mescalero Reservation. In each of these cases, the tribes have contended that development and management of reservation resources is the exclusive responsibility of tribal governments. The tribes have contended that since the states provide only limited wildlife management assistance and no direct financial contributions, they should have no right to either condition or restrict reservation wildlife activity.

These hunting and fishing disputes, like the criminal dispute involved in *Oliphant v. Schlie*, raise basic and fun-

damental questions about the nature and scope of tribal sovereignty. Tribal authority over criminal conduct is required rder to allow tribes as governments to tect themselves and their people from unlawful conduct. Similarly, the ability of tribes to regulate and tax those who come to the Indian reservations to hunt and fish is an important component of sovereignty, because the non-Indian activity deals with a primary resource of the reservation which must be subject to exclusive tribal control if tribes are to have the ability to develop the economy of their reservations.

The third and, as of to date, least developed area of expanding tribal authority over non-Indians deals with reservation minerals. On many reservations, the extraction of valuable mineral resources, such as oil, gas and coal, represents the major source of tribal revenues. Historically, tribes have leased their resources as resource owners and have not participated in the governmental aspects of resource development. That is, tribes have refrained from imposing severance taxes, or from imposing rules and regulations involving the manner of mineral development and the protection of the environment. Now that is all changed. In recent years, tribes have begun adopting tax codes, mining codes and environmental codes. A conflict has evolved with the adoption of new tribal codes and the old state laws. Perhaps the most significant aspect of this conflict lies in the efforts of the tribes to eliminate the onerous state taxation of mineral development. The Crow and Blackfeet Tribes in Montana are both currently engaged in developing taxation schemes designed to bring to the tribes a significant increase in resource revenues through the elimination of state taxing authority. The outcome of these struggles will be of great significance to these tribes and others, which are blessed with abundant natural resources.

The tribes engaged in all of these disputes hope to take over all aspects of reservation government. They hope to establish a new principle for future reservation governments. That principle requires that members and non-members and state and federal governments recognize that tribal sovereignty means that tribes exercise primary governmental thority over their reservations and er all activities taking place on their reservations unless otherwise prohibited by acts of Congress.

Alternatives to Incarceration: The Swiftbird Model

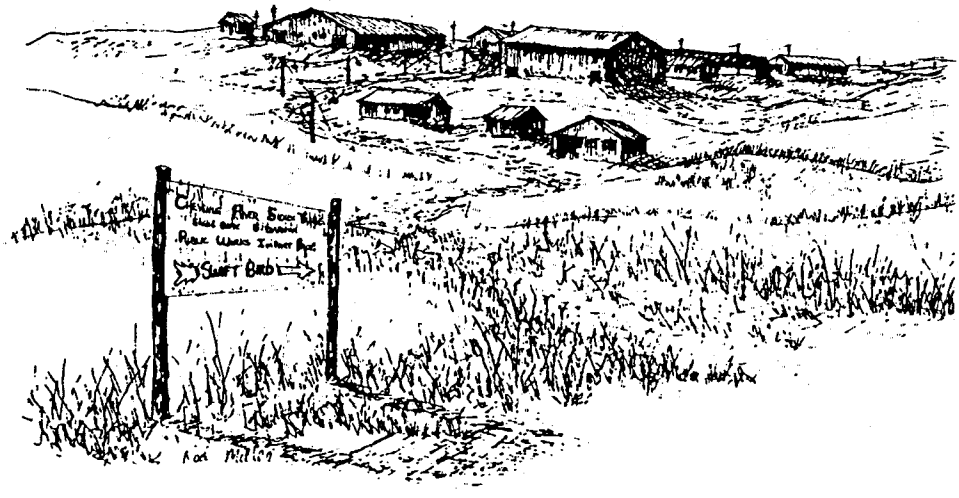
Since 1973 NARF has done extensive work on behalf of Indian inmates. NARF has been working to secure equitable treatment for Indian inmates incarcerated in the nation's penal institutions as well as a respect and realization on the part of non-Indian administrators that Indian inmates should be allowed to practice their religious and traditional Indian customs in concert with other religions, without fear of being punished for their practices.

One concept that has developed throughout NARF's involvement with Indian inmates is the plan for development of an alternative method of incarceration for Indian inmates. The idea for a minimum-security facility, run by and for Indians, using traditional correctional methods, was born over three years ago and is finally becoming a reality. The Cheyenne River Sioux Tribe of South Dakota has offered the use of an abandoned job corps facility for implementation of an alternatives to incarceration center. The former job corps is known as the Swiftbird Corrections Center. It will serve minimum-security Indian inmates from five states in the Northern Great Plains. Those states are: Montana, South Dakota, North Dakota, Nebraska and Minnesota.

During the latter part of July, NARF received a grant from the Law Enforcement Assistance Administration(LEAA) to develop an operational manual for the alternative corrections facility at Swiftbird. NARF is working with the Cheyenne River Sioux Tribe, the Community Corrections Resource Programs, Inc., and LEAA in drafting and refining a workable Swiftbird manual. NARF and its subcontractors must complete the proposed manual by this Christmas.

Following completion of the manual, it will be reviewed by LEAA and then used as the basic document for Swiftbird's operation. In addition, plans have been made to renovate the Swiftbird Center so that it will be suitable for minimum security clients.

A core staff has been hired by the Center's Tribal Advisory Board. Those staff members are assisting in the manual's preparation and learning necessary techniques for operation of the facility. The Cheyenne River Tribe hopes to open the facility by next spring.



A Sketch of the Swiftbird Facility

Major Case Developments

As it has been two years since the last issue of *Announcements* was published, this report is intended to bring our readers up to date by summarizing developments in major cases that NARF has been involved in during this period. By major cases, we mean those court decisions which have an important impact in the area of American Indian law. Since there are separate articles on the Eastern land claims cases and on the Rosebud Reservation diminishment case, these cases are not included in this summary. Unless otherwise indicated, NARF was the lead counsel in the cases.

Aboriginal Hunting Rights

In November of 1976, the Idaho Supreme Court ruled that the Kootenai Tribe, a non-treaty, federally recognized tribe in northern Idaho, still held an aboriginal right to hunt free of state law on open and unclaimed land, but were subject to state game laws when hunting upon private land.

NARF argued on behalf of the Indian defendant that she possessed an aboriginal right to hunt on any land within the Tribe's aboriginal area free from state regulation on the basis the Tribe retained such aboriginal rights that were never relinquished nor limited by the United States. The Court held that although the Tribe was never a signatory to a treaty with the United States, the Senate's ratification in 1859 of the Treaty of Hellgate, which mistakenly included the Tribe's aboriginal hunting area, extinguished the Tribe's "title" to their aboriginal lands.

However, the Court also stated that the Kootenai Tribe was left with the right to hunt upon "open and unclaimed lands," since that right was not extinguished by the terms of the mistaken treaty. Since "open and unclaimed land" includes national forest land, this case may be considered a tribal victory since only 10percent of the land involved is in private ownership. The Tribe will then be able to regulate their own hunting within the area consistent with their economic needs and traditional way of life. [*Idaho v. Coffee*, 556 p.2d 1185 (Ida. 1976).]

Eastern Cherokee Fishing Rights

Most Indian hunting and fishing cases during the last 15 years have been concerned with the nature of tribal rights outside present reservations but within aboriginal hunting areas which were relinquished under treaties with the United States. However, there are still unsettled issues regarding the extent of tribal authority over hunting and fishing activities within reservations.

In August of 1976, a United States District Court ruled that North Carolina could not require non-Indians fishing within the Eastern Cherokee Reservation under the supervision of the Tribe to first obtain a state license. The court ruled that the state's authority was preempted by the federal government with the creation of the Eastern Cherokee Reservation, thereby giving the Tribe certain powers of self-government; and specifically, by the federal establishment of a comprehensive reservation wildlife management program. The state's argument that the license requirement does not interfere with tribal self-government since it applies only to non-Indians was also rejected. The court found that the tribal economy, which is heavily dependent upon its tourist and recreational activities and of which sport fishing is a major part, would be seriously harmed by the application of the state license tax upon those already required to pay the tribal license fee.

The state has appealed the ruling to the United States Court of Appeals for the Fourth Circuit and a decision is expected later this year. [*Eastern Band of Cherokee v. North Carolina*, Civ. No. BC-C-76-65 (W.D. N.C. Aug. 27, 1976), appeal docketed, No. 76-2161 (4th Cir. Sept. 7, 1976).]

Indian Employment Preference

Prior to 1934, there existed a few federal laws giving Indians employment preference for Indian agency jobs. However, in the Indian Reorganization Act (IRA) of 1934, Congress enacted a general Indian preference policy, which required that qualified Indians be given employment preference in job vacancies within federal offices which administer Indian affairs. The passage of the IRA marked a reversal from an assimilation policy to one of protecting tribal exi[illegible]e by strengthening tribal governm[illegible]s, and the inclusion of the Indian preference provision was intended to increase Indian participation in the federal administration of Indian affairs. However, in the years since, federal officials have reluctantly, and seldom, followed the Indian preference policy. In 1974, the United States Supreme Court upheld the constitutionality of the IRA Indian preference provision.

The Indian Health Service (IHS), though no longer within the Bureau of Indian Affairs, is nevertheless required to follow the Indian preference policy. In January of 1976, Don Tyndall, an Indian, applied for a vacancy announced by the IHS for the Oklahoma City area. Soon thereafter, the announcement was cancelled, Tyndall's application returned without consideration, the grade classification changed, and the position was given to a non-Indian. In January of 1977, NARF filed a class action suit on behalf of Tyndall and other Indians to compel the local IHS officials to abide by the federal Indian preference policy.

On April 22, pursuant to a settle[illegible]nt between the parties, a judgment w[illegible]tered in the United States District Court for the District of Columbia compelling federal IHS officials to vacate the position, re-advertise it for a reasonable time and to hire a qualified Indian if available before considering non-Indian applicants. Most importantly, IHS was ordered to accord Indian preference *without exception* in the filling of all vacancies and to advertise such vacancies to allow Indians to apply. [*Tyndall v. United States*, Civ. No. 77-0004, D. D.C., April 22, 1977.]

Indians Exempt: State License

A United States District Court has held that Alex Zaste, a member of the Turtle Mountain Band of Chippewa, was not required to obtain state and local liquor licenses in order to operate a retail liquor business on the reservation.

The court reasoned that since the federal government has exclusive authority to regulate liquor transactions on Indian reservations and has delegated the authority to those tribes which have enacted approved liquor laws, the st[illegible]s preempted from requiring tribal l[illegible]sees to also obtain state licenses where the Tribal law does not require it. The

state has decided not to appeal the decision. [*Zaste v. North Dakota*, Civ. No. 1-75-29 (D. N.D. May 24, 1977).]

Federal Recognition

In 1974, NARF prepared and submitted a petition to the Secretary of the Interior on behalf of the Stillaguamish Tribe, a small western Washington tribe, in which the Secretary was requested to acknowledge the Tribe's status as a federally-recognized tribe based upon its treaty relations with the federal government, subsequent acts of Congress and continuing contacts with the Bureau of Indian Affairs. Because no action was taken on the petition, a suit was filed in 1975 in the United States District Court for the District of Columbia seeking a declaration that the Secretary's failure to act on the petition was arbitrary and capricious. A motion for summary judgment was then filed in May, 1976.

In an opinion issued August 24, 1976, the District Court ordered the Secretary to act upon the Tribe's petition for recognition within thirty days and retained jurisdiction in the case. By letter from the Secretary dated October 27, 1976, NARF was informed that the Department of the Interior had determined that the federal government has a trust responsibility to the Stillaguamish Tribe for treaty fishing purposes and that the Stillaguamish Tribe is eligible for various federal services. The Secretary, however, refused to put in trust land willed to the Tribe. NARF is now in the process of formulating a response to the court concerning the Secretary's decision on the land issue.

State Tax Under Public Law 280

In 1953, Congress enacted Public Law 280, which provided for unilateral assumption of civil and criminal jurisdiction by the states over Indians. One of the controversies concerning Public Law 280 since its passage was whether it was a congressional grant to the states, and their political sub-divisions, to tax Indians residing on reservations. In *Bryan v. Itasca County*, the Minnesota Supreme Court held that the County of Itasca had authority under Public Law 280 to apply its personal property tax upon an enrolled member of the Minnesota Chippewa Tribe for his mobile home located on trust land within the reservation.

On appeal, the United States Supreme Court reversed, holding that absent congressional consent, states had no authority to levy taxes on reservation Indians and that Public Law 280 was not such a grant of taxing power to the states. The Court concluded that Public Law 280 was simply intended by Congress to provide a state court forum for resolving disputes between Indians arising on reservations.

Pursuant to the *Bryan* decision, in which NARF was of counsel, the Supreme Court reversed the ruling in *Omaha Tribe v. Nebraska*, a NARF case in which the Eighth Circuit had also interpreted Public Law 280 as federal authorization to states to apply their income taxes upon reservation Indians in Nebraska. [*Bryan v. Itasca County*, 426 U.S. 373 (1976); *Omaha Tribe v. Nebraska*, 516 F.2d 1333 (8th Cir. 1975), *vacated*, 427 U.S. 902 (1976).]

Land Condemnation

In 1970, NARF undertook representation of the Winnebago Tribe of Nebraska in an attempt to save tribal lands which the Army Corps of Engineers was attempting to condemn in order to build a recreation and flood control complex on the Missouri River.

The proposed complex was bordered on two sides by Indian land. The Corps had initiated condemnation proceedings against the Tribe because it owned land on both the Iowa and Nebraska side of the river. There were also many non-Indian land owners affected by the proposed complex.

In September, 1976, the Eighth Circuit Court of Appeals delivered its opinion in the case known as *United States v. The Winnebago Tribe of Nebraska*. The Court said the Corps had no specific authority from Congress to initiate condemnation proceedings against the Tribe since the Corps could not abrogate the Tribe's treaty which had guaranteed the Tribe the ownership of the land forever. As a result, the project was stopped. Should the Corps wish to pursue the project, it must petition the Congress for specific enabling legislation. [(*United States v. Winnebago Tribe of Nebraska*, 542 F. 2d 1002 (8th Cir. 1976).]

Land Trespass Action

After nearly seven years of research and litigation, the Walker River Paiute Tribe of western Nevada was successful in winning a trespass action for damages against the Southern Pacific Railroad Company. In September, 1976, the Ninth Circuit Court of Appeals rendered a decision in the case titled: *Walker River Paiute Tribe of Nevada v. Southern Pacific Transportation Company*. NARF served as lead counsel for the Tribe in this action.

At issue was whether the Southern Pacific Railroad ever obtained a valid right-of-way for its railroad to cross the reservation, or if by failing to obtain a right-of-way, it nevertheless obtained an implied license from the Tribe.

The Ninth Circuit found in favor of the Tribe and said the railroad had been trespassing for 90 years on those lands which have been continuously reserved for the Tribe. But the Court also found that the railroad acquired a right-of-way in 1906 over those lands which the Tribe ceded to the United States and which became public lands by a 1906 Presidential Proclamation. Because of the favorable ruling, the Walker River Paiutes have the option of stopping the railroad from operating on the reservation or negotiating a new agreement with the railroad for its future use of a right-of-way. NARF has been assisting the Tribe in administrative procedures as well as attempting to determine a formula for payment of past damages owed it by the railroad. [(*U.S. v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976).*]

AKIN: Indian Water Rights

Tribal property rights have traditionally been adjudicated in federal courts rather than state courts. This is so mainly because the federal government, as trustee for American Indians, has preempted the states from exercising any control over tribes within their borders. Tribes have also felt that their interests are better protected in federal courts due to the historical animosity between tribes and the states in which they are located. One of the critical areas in which tribes and states now find themselves at odds is that of water rights.

Thus tribes are very apprehensive about a decision rendered by the United States Supreme Court in May, 1976. In that case, the Court ruled that a Colorado State court has jurisdiction to adjudicate reserved water rights of the two Colorado Ute Tribes. Specifically, the Court was interpreting a 1952 Congressional act, known as the McCarran Amendment, which gave the consent of the United States to be joined in state court litigations involving federal water rights. In

1971, the Court had interpreted the McCarran Amendment to encompass federal *reserved* water rights as well.

In the Colorado case, the Supreme Court was called upon to decide if the McCarran Amendment also applied to *Indian* reserved water rights. In holding that it does, the Court reasoned that in its earlier considerations of the McCarran Amendment, it did not distingquish between Indian and non-Indian reserved rights; that the legislative history demonstrated that "the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians;" and that since the underlying policy of the Amendment is to adjudicate the rights to the use of water of a complete river system, it would defeat the policy to find that Indian rights were not included. The Court then held that since federal and state courts had concurrent jurisdiction over Indian water rights, the lower federal district court's dismissal was justified since it furthered the policy of the Amendment by having one court adjudicate all rights.

NARF filed an *amicus curiae* brief on behalf of the two Ute tribes and the National Tribal Chairmen's Association in the Court of Appeals, and when the Supreme Court agreed to review the case on petition of the non-Indian water users, NARF filed another *amicus curiae* brief on the Indian jurisdiction issue on behalf of the two Ute tribes as well as twelve other tribes and the National Tribal Chairmen's Association. NARF is now representing the two Colorado Ute tribes in the state court proceedings.[*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); reversing *U.S. v. Akin*, 504 F.2d 115 (10th Cir. 1974).]

Adoption of Indian Children

A matter of growing concern among Indian tribes is the foster care and adoption of Indian children by non-Indian families. Indian tribes feel that this practice is wrong for a couple of reasons. First, the Indian child suffers the loss of his own people and culture; and, secondly, the tribe itself loses a son or daughter. The loss of children in this manner could affect the very existence of a small tribe.

Consequently, many tribes have taken the matter to state and federal courts, asserting that the tribe should legally and morally have control over the foster care and adoption of Indian children. In early 1976, NARF filed an *amicus curiae* brief on behalf of the Northern Cheyenne Tribe of Montana in the United States Supreme Court in *Fisher v. District Court of Montana*. On March 1, 1976, the Supreme Court reversed a decision of the Montana Supreme Court by ruling that the Northern Cheyenne Tribe has exclusive jurisdiction over adoption matters where all the parties involved were tribal members and reservation residents. The Supreme Court held that the Tribal court's jurisdiction was exclusive since it had a federally-protected right to govern itself independently of state law regarding internal tribal matters; that state court jurisdiction would interfere with the power of self-government of the tribe; and whatever jurisdiction the state may have had, it was preempted when the tribe was formerly organized pursuant to the Indian Reorganization Act in 1935. [*Fisher v. District Court*, 424 U.S. 382 (1976).]

Voting Rights and Reapportionment

Arizona's Apache County, over half of which lies within the Navajo Reservation, was divided in 1972 into three districts. However, according to the 1970 census the districts were extremely malapportioned because, although Indians constituted over 75 per cent of the county population, they were restricted to one of three districts.

In 1973, consolidated suits were brought by the United States against Arizona and by DNA Legal Services on behalf of tribal members, requesting that the county be reapportioned into districts with substantially equal populations and that new elections be held as soon as possible.

In September, 1975, a special three-judge District Court for Arizona ordered that Apache County's supervisorial districts be reapportioned according to the entire population of the county. The court held that the federal law granting citizenship to reservation Indians was constitutional; that Indians are not first required to be subject to state taxation before citizenship can be granted; and, therefore, Indians as eligible voters are entitled to reapportionment of the county, pursuant to the one-man, one vote constitutional requirement. NARF joined DNA Legal Service in representing the Indians on appeal to the United States Supreme Court. In October, 197 the Supreme Court affirmed the decisio After reapportionment, two of the thr districts are now located entirely on th Navajo Reservation. The election i November resulted in a Navajo-electe majority of the Board of Supervisor [*Goodluck v. Apache County*, 411 F.Sup 13 (D. Ariz. 1975); *aff'd sub nom.* *ch County v. United States*, 45 U. .W 3279 (No. 75-1572) (U.S. Oct.12, 1976)

News Notes

A Note to Our Readers

Please accept our apology for the absence of the NARF *Announcements* during the past two years. We have had a few administrative staff changes which have affected the orderly publication of NARF *Announcements*. NARF's former Controller/Technical Writer Joan C. Lieberman resigned from the Fund last year and is now doing independent management consulting work.

Prior to Ms. Lieberman's departure, the NARF Steering Committee decided to divide her functions into two different positions—that of Business Manager/Treasurer and Technical Writer/Corporate Secretary. Mr. James A. Laurie was chosen to fill the Business Manager's role and I was chosen to fill the latter position. Because Mr. Laurie and I were new to the organization and required a rather long orientation period, the publication of *Announcements* was further delayed. We would like to thank all of you for your continued interest in *Announcements* and the work of the Native American Rights Fund. We look forward to resuming publication of *Announcements* on a regular basis and in sharing our thoughts and information with you.

Lorraine P. Edmo
Editor

NARF DIRECTORSHIP

After serving for over two years as Executive Director of the Native American Rights Fund, Thomas W. Fredericks left the Fund on July 22, 1977 to assume a new position as Associate Solicitor for Indian Affairs with the Department of the Interior.

Mr. Fredericks, a Mandan-Hidatsa Indian from the Fort Berthold Reservation in North Dakota, joined NARF as a staff attorney in 1972 upon his graduation from the University of Colorado School of Law. He served as Vice-Executive Director from April, 1974 until his appointment as Executive Director in June, 1975.

Prior to Mr. Fredericks' departure, Mr. John E. Echohawk was appointed to serve as Acting Director until the NARF Steering Committee makes a permanant appointment. Mr. Echohawk has been with the firm since it began and has served previously in the capacity of Executive Director.

STAFF POSITIONS

The Native American Rights Fund is interested in support staff applicants who possess good skills in legal secretarial work, accounting, and legal research. Preferece is given to qualified American Indians.

Attorney applicants should address their inquiries and résumés to the Executive Director at the Boulder office. Support staff applicants should contact the NARF Business Manager.

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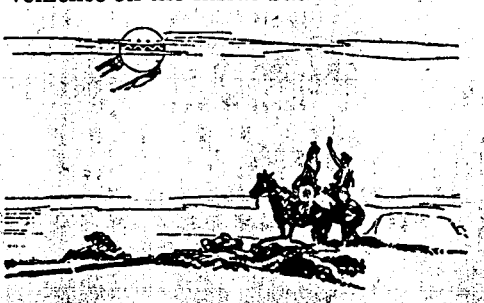
Contributions to NARF

The work of the Native American Rights Fund is supported solely by grants from private foundations, federal funds for special projects, and individual donations.

NARF continues to seek financial support from individual donors. Private contributions are especially important because the flexibility of unrestricted funds allows NARF to more effectively represent its clients.

Contributions to NARF are tax deductible. A coupon is provided for your convenience on the inside back cover.



NARF is a non-profit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501(c)(3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The ternal Revenue Service has ruled that ARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

National Indian Law Library

Shortly after its own beginning in 1971, the Native American Rights Fund established the National Indian Law Library (NILL) as a special project to serve as a clearinghouse for materials on American Indian law. Carnegie Corporation provided the funding for the first three years, and since then NILL has been supported by NARF's general funds and by HEW's Office of Native American Programs.

The holdings of the Library consist of briefs and court decisions in Indian cases since the mid-1950's; law reviews; congressional legislative materials on Indian laws; legal opinions and memoranda; monographs and studies; and various other materials on American Indian law.

In order that these materials could be available to those not able to visit the Library in person, NILL provides a catalogue service listing all the holdings of the Library. The 700-page catalogue includes a subject listing, a numerical listing, a table of cases and an author-title index. The catalogue is in a loose leaf binder format and is supplemented quarterly.

At present, both the catalogue and copies of the materials are provided free of charge to tribes, legal services, Indian organizations and Indian individuals. For others, the catalogue is $20 and the materials are available at ten cents per page. NARF asks that those who are entitled to the waiver of costs but can afford to pay, to please do so. A coupon for ordering the catalogue is on the inside back cover. All inquiries and requests regarding NILL should be directed to the librarian at the Boulder office.

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