CATAWBA INDIAN TRIBE OF SOUTH CAROLINA LAND CLAIMS SETTLEMENT ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON
NATIVE AMERICAN AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 2399

TO PROVIDE FOR THE SETTLEMENT OF LAND CLAIMS OF THE CATAWBA TRIBE OF INDIANS IN THE STATE OF SOUTH CAROLINA AND THE RESTORATION OF THE FEDERAL TRUST RELATIONSHIP WITH THE TRIBE, AND FOR OTHER PURPOSES

HEARING HELD IN WASHINGTON, DC
JULY 2, 1993

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CONTENTS

APPENDIX

July 2, 1993

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA LAND CLAIMS SETTLEMENT ACT OF 1993

FRIDAY, JULY 2, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 1:30 p.m., in room 1324, Longworth House Office Building, Hon. Bill Richardson (chairman of the subcommittee) presiding.

STATEMENT OF HON. BILL RICHARDSON

Mr. RICHARDSON. The Committee will come to order.

This afternoon we will be taking testimony on H.R. 2399, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993. The bill is sponsored by my good friend and fellow co-chief Deputy Whip, Mr. Butler Derrick. The bill would restore the Catawba Tribe as a federally recognized Indian tribe and settle their 150-year-old land claim.

The Catawba Tribe is one of the last tribes from the termination era of the 1950s that has not had its firmly recognized status restored by the United States. The policy of termination was a dismal failure and the Congress has expressly repudiated this policy.

The Catawba Tribe has land claims which stem from the treaties of 1760, 1763, and 1840 as well as aboriginal land claims to the lands in the State of South Carolina. This bill would extinguish those claims. The details of this settlement will be the main focus of this hearing.

The Committee notes there are several significant issues raised by this legislation. The bill provides for the waiver of many of the sovereign rights of the Catawba Tribe. In this settlement, the tribe has ceded substantial civil regulatory and adjudicatory jurisdiction as well as criminal jurisdiction to the State of South Carolina. The Committee needs to know why the tribe surrendered these rights for this settlement.

It should be noted the Department of the Interior was invited to this hearing but, given time limitations and the complexity of the bill, the Department asked to submit written comments at a later date.

Without objection, I ask that the bill, background and section by section analysis be made part of the record.

[The bill, H.R. 2399, and accompanying materials follow:]

I

103D CONGRESS
1ST SESSION

H. R. 2399

To provide for the settlement of land claims of the Catawba Tribe of Indians in the State of South Carolina and the restoration of the Federal trust relationship with the Tribe, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 10, 1993

Mr. DERRICK introduced the following bill; which was referred jointly to the Committees on Natural Resources and Ways and Means

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A BILL

To provide for the settlement of land claims of the Catawba Tribe of Indians in the State of South Carolina and the restoration of the Federal trust relationship with the Tribe, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993".

SEC. 2. DECLARATION OF POLICY, CONGRESSIONAL FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress declares and finds that:

(1) It is the policy of the United States to promote tribal self-determination and economic self-sufficiency and to support the resolution of disputes over historical claims through settlements mutually agreed to by Indian and non-Indian parties.

(2) There is pending before the United States District Court for the District of South Carolina a lawsuit disputing ownership of approximately 140,000 acres of land in the State of South Carolina and other rights of the Catawba Indian Tribe under Federal law.

(3) The Catawba Indian Tribe has also initiated a related lawsuit against the United States in the United States Court of Federal Claims seeking monetary damages.

(4) Some of the significant historical events which have led to the present situation include:

(A) In treaties with the Crown in 1760 and 1763, the Tribe ceded vast portions of its aboriginal territory in the present States of North and South Carolina in return for guaran-

tees of being quietly settled on a 144,000-acre reservation.

(B) The Tribe's district court suit contended that in 1840 the Tribe and the State entered into an agreement without Federal approval or participation whereby the Tribe ceded its treaty reservation to the State, thereby giving rise to the Tribe's claim that it was dispossessed of its lands in violation of Federal law.

(C) In 1943, the United States entered into an agreement with the Tribe and the State to provide services to the Tribe and its members. The State purchased 3,434 acres of land and conveyed it to the Secretary in trust for the Tribe and the Tribe organized under the Indian Reorganization Act.

(D) In 1959, Congress enacted the Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. 931–938. Federal agents assured the Tribe that if the Tribe would release the Government from its obligation under the 1943 agreement and agree to Federal legislation terminating the Federal trust relationship and liquidating the 1943 reservation, the

status of the Tribe's land claim would not be jeopardized by termination.

(E) In 1980, the Tribe initiated Federal court litigation to regain possession of its treaty lands and in 1986, the United States Supreme Court ruled in South Carolina against Catawba Indian Tribe that the 1959 Act resulted in the application of State statutes of limitations to the Tribe's land claim. Two subsequent decisions of the United States Court of Appeals for the Fourth Circuit have held that some portion of the Tribe's claim is bared by State statutes of limitations and that some portion is not barred.

(5) The pendency of these lawsuits has led to substantial economic and social hardship for a large number of landowners, citizens and communities in the State of South Carolina, including the Catawba Indian Tribe. Congress recognizes that if these claims are not resolved, further litigation against tens of thousands of landowners would be likely; that any final resolution of pending disputes through a process of litigation would take many years and entail great expenses to all parties; continue economically and socially damaging controversies; pro-

long uncertainty as to the ownership of property; and seriously impair long-term economic planning and development for all parties.

(6) The 102d Congress has enacted legislation suspending until October 1, 1993, the running of any unexpired statute of limitation applicable to the Tribe's land claim in order to provide additional time to negotiate settlement of these claims.

(7) It is recognized that both Indian and non-Indian parties enter into this settlement to resolve the disputes raised in these lawsuits and to derive certain benefits. The parties' Settlement Agreement constitutes a good faith effort to resolve these lawsuits and other claims and requires implementing legislation by the Congress of the United States, the General Assembly of the State of South Carolina, and the governing bodies of the South Carolina counties of York and Lancaster.

(8) To advance the goals of the Federal policy of Indian self-determination and restoration of terminated Indian tribes, and in recognition of the United States obligation to the Tribe and the Federal policy of settling historical Indian claims through comprehensive settlement agreements, it is appropriate that the United State participate in the

funding and implementation of the Settlement Agreement.

(b) PURPOSE.—It is the purpose of this Act—

(1) to approve, ratify, and confirm the Settlement Agreement entered into by the non-Indian settlement parties and the Tribe;

(2) to authorize and direct the Secretary to implement the terms of such Settlement Agreement;

(3) to authorize the actions and appropriations necessary to implement the provisions of the Settlement Agreement and this Act;

(4) to remove the cloud on titles in the State of South Carolina resulting from the Tribe's land claim; and

(5) to restore the trust relationship between the Tribe and the United States.

SEC. 3. DEFINITIONS.

For purposes of this Act:

(1) The term "Tribe" means the Catawba Indian Tribe of South Carolina as constituted in aboriginal times, which was party to the Treaty of Pine Tree Hill in 1760 as confirmed by the Treaty of Augusta in 1763, which was party also to the Treaty of Nation Ford in 1840, and which was the subject of the Termination Act, and all predecessors

and successors in interest, including the Catawba Indian Tribe of South Carolina, Inc.

(2) The term "claim" or "claims" means any claim which was asserted by the Tribe in either Suit, and any other claim which could have been asserted by the Tribe or any Catawba Indian of a right, title or interest in property, to trespass or property damages, or of hunting, fishing or other rights to natural resources, if such claim is based upon aboriginal title, recognized title, or title by grant, patent, or treaty including the Treaty of Pine Tree Hill of 1760, the Treaty of Augusta of 1763, or the Treaty of Nation Ford of 1840.

(3) The term "Executive Committee" means the body of the Tribe composed of the Tribe's executive officers as selected by the Tribe in accordance with its constitution.

(4) The term "Existing Reservation" means that tract of approximately 630 acres conveyed to the State in trust for the Tribe by J.M. Doby on December 24, 1842, by deed recorded in York County Deed Book N, pp. 340–341.

(5) The term "General Council" means the membership of the Tribe convened as the Tribe's

governing body for the purpose of conducting tribal business pursuant to the Tribe's constitution.

(6) The terms "internal matters" or "internal tribal matters" mean matters which include (but are not limited to) the relationship between the Tribe and one or more of its Members, the conduct of tribal government over Members, and the Tribe's exercise of the power to exclude individuals from the Reservation.

(7) The term "Member" means individuals who are members of the Tribe as determined in accordance with this Act.

(8) The term "Reservation" or "Expanded Reservation" means the Existing Reservation and the lands added to the Existing Reservation in accordance with section 14 of this Act, which are to be held in trust by the Secretary in accordance with this Act.

(9) The term "Secretary" means the Secretary of the Interior.

(10) The term "Settlement Agreement" means the document entitled "Agreement in Principle " between the Tribe and the State of South Carolina and attached to the copy of the State implementing legis-

lation and filed with the Secretary of State of the State of South Carolina.

(11) The term "State" means, except for sections 6(a) through (f) and subsections (d)(2) and (h) of section 18 of this Act, the State of South Carolina.

(12) The term "Suit" or "Suits" means Catawba Indian Tribe of South Carolina v. State of South Carolina, et al., docketed as Civil Action No. 80–2050 and filed in the United States District Court for the District of South Carolina; and Catawba Indian Tribe of South Carolina v. The United States of America, docketed as Civil Action No. 90–553L and filed in the United States Court of Federal Claims.

(13) The term "Termination Act" means the Act entitled "An Act to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe and for other purposes", approved September 21, 1959 (73 Stat. 592; 25 U.S.C. 931–938).

(14) The term "transfer" includes (but is not limited to) any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a

sale, grant, lease, allotment, partition, or conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land, water, minerals, timber, or other natural resources.

(15) The term "Trust Funds" means the trust funds established by section 13 of this Act.

SEC. 4. RESTORATION OF FEDERAL TRUST RELATIONSHIP.

(a) RESTORATION OF THE FEDERAL TRUST RELATIONSHIP.—On the effective date of this Act, the trust relationship between the Tribe and the United States shall be restored.

(b) ELIGIBILITY FOR FEDERAL BENEFITS AND SERVICES.—Notwithstanding any other provision of law, on the same date as the trust relationship is restored, the Tribe and the Members shall be eligible for all benefits and services furnished to federally recognized Indian tribes and their members because of their status as Indians. On the effective date of this Act, the Secretary shall enter the Tribe on the list of federally recognized bands and tribes maintained by the Department of the Interior; and its members shall be entitled to special services, educational benefits, medical care, and welfare assistance provided by the United States to Indians because of their status as Indians, and the Tribe shall be entitled to the spe-

cial services performed by the United States for tribes because of their status as Indian tribes.

(c) HEALTH CARDS.—In addition to any other entitlement or eligibility the Tribe or Members may have because of their status as Indians, the Indian Health Service shall issue health cards for use by any Member in a health care facility of their choosing approved by the Indian Health Service as to quality of care. Such health card shall entitle the Member to the same level of care as is available at any Indian health care facility or through contract health care for Indians.

(d) REPEAL OF TERMINATION ACT.—The Termination Act is repealed, and the provisions of the Termination Act shall not apply to the Tribe or Members after the effective date of this Act.

(e) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this Act, this Act shall not affect any property right or obligation or any contractual right or obligation in existence before the effective date of this Act, or any obligation for taxes levied before that date.

(f) EXTENT OF JURISDICTION.—This Act shall not be construed to empower the Tribe with special jurisdiction or to deprive the State of jurisdiction other than as expressly provided by this Act or by the State implement-

ing legislation. The jurisdiction and governmental powers of the Tribe shall be solely those set forth in this Act and the State implementing legislation.

(g) IMPACT AID.—For purposes of the Act of September 30, 1950 (Public Law 874, 81st Congress; 20 U.S.C. 236 et seq.), if any property within the school district of any local educational agency is occupied by any part of the Expanded Reservation, such local educational agency shall be considered to have fulfilled the requirements of section 2 of such Act and shall be eligible for payments under section 3 of such Act.

SEC. 5. SETTLEMENT FUNDS.

(a) AUTHORIZATION FOR APPROPRIATION.—There is hereby authorized to be appropriated $32,000,000 for the Federal share which shall be deposited in the trust funds established pursuant to section 13 of this Act or paid pursuant to section 6(g).

(b) DISBURSEMENT IN ACCORDANCE WITH SETTLEMENT AGREEMENT.—The Federal Funds appropriated pursuant to this Act shall be disbursed in five equal annual installments of $6,400,000 beginning in the fiscal year following enactment of this Act. Funds transferred to the Secretary from other sources shall be deposited in the trust funds established pursuant to section 13 of this

Act or paid pursuant to section 6(g) within 30 days of receipt by the Secretary.

(c) PRIVATE FUNDS.—Any private payments made to settle the claims may be treated, at the election of the taxpayer, as either a payment in settlement of litigation or a charitable contribution for Federal income tax purposes.

(d) FEDERAL, STATE, LOCAL AND PRIVATE CONTRIBUTIONS HELD IN TRUST BY SECRETARY.—The Secretary shall, on behalf of the Tribe, collect those contributions toward settlement appropriated or received by the State pursuant to section 5.2 of the Settlement Agreement and shall either hold such funds totalling $18,000,000, together with the Federal funds appropriated pursuant to this Act, in trust for the Tribe pursuant to the provisions of section 13 of this Act or pay such funds pursuant to section 6(g) of this Act.

SEC. 6. RATIFICATION OF PRIOR TRANSFERS; EXTINGUISHMENT OF ABORIGINAL TITLE, RIGHTS AND CLAIMS.

(a) RATIFICATION OF TRANSFERS.—Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Tribe, any one or more of its Members, or anyone purporting to be a Member, including but without limitation any transfer

pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer. Nothing in this section shall be construed to affect or eliminate the personal claim of any individual Member (except for any Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(b) ABORIGINAL TITLE.—To the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Tribe, any of its Members, or anyone purporting to be a Member, or any other Indian, Indian nation, or tribe or band of Indians had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of aboriginal title as of the date of such transfer.

(c) EXTINGUISHMENT OF CLAIMS.—By virtue of the approval and ratification of any transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Tribe, any of its Members,

or anyone purporting to be a Member, or any predecessors or successors in interest thereof or any other Indian, Indian Nation, or tribe or band of Indians, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer.

(d) EXTINGUISHMENT OF TITLE.—(1) All claims and all right, title, and interest that the Tribe, its Members, or any person or group of persons purporting to be Catawba Indians may have to aboriginal title, recognized title, or title by grant, patent, or treaty to the lands located anywhere in the United States are hereby extinguished.

(2) This extinguishment of claims shall also extinguish title to any hunting, fishing, or water rights or rights to any other natural resource claimed by the Tribe or a Member based on aboriginal or treaty recognized title, and all trespass damages and other damages associated with use, occupancy or possession, or entry upon such lands.

(e) BAR TO FUTURE CLAIMS.—The United States is hereby barred from asserting by or on behalf of the Tribe or any of its Members, or anyone purporting to be a Mem-

ber, any claim arising before the date of enactment of this Act from the transfer of any land or natural resources by deed or other grant, or by treaty, compact, or act of law, on the grounds that such transfer was not made in accordance with the laws of South Carolina or the Constitution or laws of the United States.

(f) NO DEROGATION OF FEE SIMPLE IN EXISTING RESERVATION.—Nothing in this section shall be construed to diminish or derogate from the fee simple estate in the Existing Reservation or fee simple owned by members.

(g) COSTS AND ATTORNEYS' FEES.—The parties to the Suits shall bear their own costs and attorneys' fees except that the Secretary shall approve and pay to the Tribe's attorneys in the Suits reasonable attorneys' fees and expenses not to exceed 10 percent of the $50,000,000 obligated for payment to the Tribe by Federal, State, local, and private parties pursuant to section 5 of the Settlement Agreement.

(h) PERSONAL CLAIMS NOT AFFECTED.—Nothing in this section shall be deemed to affect, diminish, or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability (other than Federal common law fraud) that protects non-Indians as well as Indians.

SEC. 7. TRIBAL MEMBERSHIP.

(a) MEMBERSHIP CRITERIA.—A person shall be considered a member of the Tribe and his or her name shall be carried on the membership roll if the person is living on the date of enactment of this Act and—

(1) his or her name was listed on the membership roll published by the Secretary in the Federal Register on February 25, 1961 (26 Federal Register 1680–1688, "Notice of Final Membership Roll"), and he or she is not excluded under the provisions of subsection (b); or

(2) The Executive Committee determines, based on the criteria used to compile the roll referred to in paragraph (1), that his or her name should have been included on the membership roll at that time, but was not; or

(3) he or she is a lineal descendant of a Member whose name appeared or should have appeared on the membership roll referred to in paragraph (1).

(b) REVISION OF MEMBERSHIP ROLL.—The Tribe shall revise and update its membership roll to include those persons eligible for membership under subsection (a) and excluding any persons found to have been erroneously listed.

(c) FEDERAL REGISTER NOTICE.—As soon as practicable after the enactment of this Act, the Secretary shall publish in the Federal Register a notice stating:

(1) That the rolls of the Tribe are open and will remain open for a period of 90 days.

(2) The requirements for membership.

(3) The final membership roll as of September 21, 1959.

(4) The updated membership roll as prepared by the Executive Committee and approved by the General Council.

(5) The name and address of the tribal or Federal official to whom inquiries should be made.

(d) FINALIZING MEMBERSHIP ROLL.—Within 120 days after publication of notice under subsection (c), the Secretary, after consultation with the Tribe, shall prepare and publish in the Federal Register a proposed final roll of the Tribe's membership. Within 60 days from the date of publication of the proposed final roll, an appeal may be filed with the Executive Committee under rules made by the Executive Committee in consultation with the Secretary. Such an appeal may be filed by a Member with respect to the inclusion of any name on the proposed membership roll and by any person with respect to the exclusion of his or her name from the membership roll. The

Executive Committee shall review such appeals and render a decision, subject to the Secretary's approval. If the Executive Committee and the Secretary disagree, the Secretary's decision will be final. All such appeals shall be resolved within 90 days following publication of the proposed roll. The final membership roll of the Tribe shall then be published in the Federal Register and shall be final for purposes of the distribution of funds from the Per Capita Trust Fund.

(e) FUTURE MEMBERSHIP IN THE TRIBE.—The Tribe shall have the right to determine future membership in the Tribe; however, in no event may an individual be added to the final membership roll which is compiled in accordance with subsection (d) unless an individual is a lineal descendant of a person on such final membership roll.

SEC. 8. TRANSITIONAL AND PROVISIONAL GOVERNMENT.

(a) FUTURE TRIBAL GOVERNMENT.—The Tribe shall adopt a new constitution within 24 months after enactment of this Act.

(b) EXECUTIVE COMMITTEE AS TRANSITIONAL BODY.—(1) Until the Tribe has adopted a constitution, the existing tribal constitution shall remain in effect and the Executive Committee is recognized as the provisional and transitional governing body of the Tribe. For a period

not to exceed 24 months from the date of enactment of this Act, the Executive Committee shall—

(A) represent the Tribe and its Members in the implementation of this Act; and

(B) during such period—

(i) have full authority to enter into contracts, grant agreements and other arrangements with any Federal department or agency; and

(ii) have full authority to administer or operate any program under such contracts or agreements.

(2) Until the initial election of tribal officers under a new constitution and by-laws, the Executive Committee shall—

(A) determine tribal membership in accordance with the provisions of section 7; and

(B) oversee and implement the revision and proposal to the Tribe of a new constitution and conduct such tribal meetings and elections as required by this Act.

SEC. 9. TRIBAL CONSTITUTION AND GOVERNANCE.

(a) INDIAN REORGANIZATION ACT.—If the Tribe so elects, it may organize under the Act of June 18, 1934 (25 U.S.C. 461 et seq.; commonly referred to as the "In-

dian Reorganization Act"). The Tribe shall be subject to such Act except to the extent such sections are inconsistent with this Act.

(b) ADOPTION OF NEW TRIBAL CONSTITUTION.—Within 180 days after the enactment of this Act, the Executive Committee shall draft and distribute to each Member eligible to vote under the Tribal constitution in effect on the date of enactment of this Act, a proposed constitution and bylaws for the Tribe together with a brief, impartial description of the proposed constitution and bylaws and a notice of the date, time and location of the election under this subsection. Not sooner than 30 days or later than 90 days after the distribution of the proposed constitution, the Executive Committee shall conduct a secret-ballot election to adopt a new constitution and bylaws.

(c) MAJORITY VOTE FOR ADOPTION; PROCEDURE IN EVENT OF FAILURE TO ADOPT PROPOSED CONSTITUTION.—(1) The tribal constitution and bylaws shall be ratified and adopted if—

(A) not less than 30 percent of those entitled to vote do vote; and

(B) approved by a majority of those actually voting.

(2) If in any such election such majority does not approve the adoption of the proposed constitution and by-

laws, the Executive Committee shall prepare another proposed constitution and bylaws and present it to the Tribe in the same manner provided in this section for the first constitution and bylaws. Such new proposed constitution and bylaws shall be distributed to the eligible voters of the Tribe no later than 180 days after the date of the election in which the first proposed constitution and bylaws failed of adoption. An election on the question of the adoption of the new proposal of the Executive Committee shall be conducted in the same manner provided in subsection (b) for the election on the first proposed constitution and bylaws.

(d) ELECTION OF TRIBAL OFFICERS.—Within 120 days after the Tribe ratifies and adopts a constitution and bylaws, the Executive Committee shall conduct an election by secret ballot for the purpose of electing tribal officials as provided in the constitution and bylaws. Subsequent elections shall be held in accordance with the Tribe's constitution and bylaws.

(e) EXTENSION OF TIME.—Any time periods prescribed in subsections (b) and (c) may be altered by written agreement between the Executive Committee and the Secretary.

SEC. 10. JURISDICTION AND GOVERNANCE OF THE RESERVATION.

(a) POWERS OF TRIBE.—(1) Regardless of whether the Tribe elects to organize under the Act of June 18, 1934, under section 9(a), in any constitution adopted by the Tribe, the Tribe may be authorized to exercise authority as consistent with the Settlement Agreement and this Act—

(A) to regulate the use and disposition of tribal property;

(B) to define laws, petty crimes, and rules of conduct applicable to Members while on the Reservation, supplementing but not supplanting the criminal laws of the State;

(C) to regulate the conduct of businesses located on the Reservation and individuals residing on the Reservation;

(D) to levy taxes on Members and levy other taxes as provided by this Act and by the Settlement Agreement;

(E) to grant exemptions, abatements, or waivers from any tribal laws, tribal regulations, or tribal taxes, except the Tribal Sales and Use Taxes, otherwise applicable on the Reservation, including waivers of the jurisdiction of any tribal court;

(F) to adopt its own form of government;

(G) to determine membership as provided by this Act;

(H) to exclude non-members from its membership rolls and from the Reservation, except for—

(i) any public roads traversing the Reservation;

(ii) passage on and use of the Catawba River;

(iii) public or private easements encumbering the Reservation properly used by those with authority to use such easements;

(iv) Federal, State and local governmental officials and employees duly performing official governmental functions on the Reservation; and

(v) any other access to the Reservation allowed by Federal law; and

(I) to charter tribally-owned economic development corporations and enterprises provided the corporations or enterprises register with the Secretary of State for South Carolina as a domestic or foreign corporation when doing business off the Reservation.

(2) Except as otherwise provided in this Act and in the Settlement Agreement, the Tribe shall exercise full authority over internal matters.

(b) INDIAN CIVIL RIGHTS ACT.—The Tribe shall be subject to titles II through VII of Public Law 90–284, as amended (25 U.S.C. 1301 et seq.; commonly referred to as the "Indian Civil Rights Act") which shall apply to the Reservation, any tribal court, and anyone subject to the jurisdiction of the Tribe.

SEC. 11. CRIMINAL JURISDICTION.

(a) CRIMINAL JURISDICTION GENERALLY.—Except as provided in subsection (b), the State shall exercise exclusive jurisdiction over all crimes under the statutory or common law of the State of South Carolina.

(b) CRIMINAL JURISDICTION OF TRIBAL COURT.—(1) Any constitution adopted by the Tribe may provide for a tribal court with original and appellate criminal jurisdiction, subject to the following limitations:

(A) The territorial jurisdiction of the court shall be limited to the Reservation.

(B) The jurisdiction of the court over persons shall be limited to Members.

(C) The subject matter jurisdiction of the court shall be limited to crimes within the jurisdiction of the State's Magistrates' Courts and to any additional misdemeanors and petty offenses specified in the ordinances or laws adopted by the Tribe.

(D) The fines and penalties for such misdemeanors and offenses shall not exceed the maximum fines and penalties that a State magistrate's court may impose.

(2) In all cases in which the tribal court has jurisdiction over State law—

(A) its jurisdiction shall be concurrent with the jurisdiction of the Magistrates' Court of the State; and

(B) defendants shall have the right to remove such cases to the Magistrates' Court or appeal their convictions in tribal court cases to the General Sessions Court, in the same manner that Magistrates' Court's decisions may be appealed, or in accordance with such procedures as the South Carolina General Assembly may provide.

(3) In cases where the tribal court is applying those additional ordinances or laws adopted by the Tribe in accordance with this subsection, it shall have exclusive jurisdiction.

(c) PEACE OFFICERS.—For the purpose of enforcing the Tribe's powers under sections 10(a), 11, and 17 of this Act, the Tribe may employ peace officers. The employment and authority of peace officers shall be in the man-

ner prescribed in the Settlement Agreement and the State implementing legislation.

SEC. 12. CIVIL JURISDICTION OF TRIBAL COURT.

(a) JURISDICTION AS PRESCRIBED BY THIS ACT.—(1) The Tribe may provide in its constitution for a Tribal Court having civil jurisdiction which may extend up to, but not exceed, the extent provided by this Act. The Tribe may have a court of original jurisdiction, as well as an appellate court.

(2)(A) With respect to actions on contracts, the Tribal Court may be vested with jurisdiction over the following:

(i) An action on a contract to which the Tribe or a Member is a party, which expressly provides in writing that the Tribal Court has concurrent or exclusive jurisdiction.

(ii) An action on a contract between the Tribe or a Member and other parties or agents thereof who are physically present on the Reservation when the contract is made, which is to be performed in part on the Reservation so long as the contract does not expressly exclude jurisdiction of the Tribal Court.

(iii) An action on a contract to which the Tribe or a member of the Tribe is a party where more than 50 percent of the services to be rendered are

performed on the Reservation so long as the contract does not expressly exclude jurisdiction of the Tribal Court.

(B) For purposes of this paragraph, the delivery of goods or the solicitation of business on the Reservation shall not constitute part performance sufficient to confer jurisdiction.

(3) With respect to actions in tort, the Tribal Court may be vested with jurisdiction over the following:

(A) An action arising out of an intentional tort, as defined by South Carolina law, committed on the Reservation in which recovery is sought for bodily injuries and/or damages to tangible property located on the Reservation.

(B) An action arising out of negligent tortious conduct occurring on the Reservation or conduct occurring on the Reservation for which strict liability may be imposed, excluding, however, accidents occurring within the right-of-way limits of any highway, road, or other public easement owned or maintained by the State or any of its subdivisions, or by the United States, which abuts or crosses the Reservation. Any such action in tort involving a nonmember of the Tribe as defendant may be removed to a State or Federal court of appropriate jurisdic-

tion if the amount in controversy exceeds the jurisdictional limits then applicable to Magistrate's Courts in the State of South Carolina.

(4) The Tribal Court may be vested with exclusive jurisdiction over internal matters of the Tribe.

(5) The Tribal Court may be vested with jurisdiction over domestic relations where both spouses to the marriage are Members and both reside on the Reservation or last resided together on the Reservation before the separation leading to their divorce.

(6) The Tribal Court may be vested with jurisdiction to enforce against any business located on the Reservation, and any Member or non-Member residing on the Reservation, any tribal civil regulation regulating conduct on the Reservation enacted pursuant to section 10(a) or 17 of this Act. Such persons or entities are charged with notice of the Tribe's regulations governing conduct on the Reservation and are subject to the enforcement of such regulations in the tribal court unless the Tribe has specifically exempted the entity or person from any or all regulation and enforcement in tribal court.

(b) CONCURRENT JURISDICTION.—(1) The original jurisdiction of the Tribal Court over matters set forth in paragraphs (2) (if concurrent), (3), and (5) of subsection (a) shall be concurrent with the jurisdiction of the Court

of Common Pleas of South Carolina, the Family Court, and United States District Court for South Carolina where permitted by title 28 of the United States Code.

(2) The original jurisdiction of the Tribal Court over the matters set forth in paragraph (2)(A) of subsection (a) shall be concurrent or exclusive depending upon the agreement of the parties.

(3) The original jurisdiction of the Tribal Court over matters set forth in paragraph (4) of subsection (a) shall be exclusive.

(4) The original jurisdiction of the Tribal Court over matters set forth in paragraph (6) of subsection (a) shall be exclusive unless the Tribe has waived such exclusive jurisdiction as to any person or entity.

(5) As to all paragraphs in subsection (a) referred to in this subsection, jurisdiction over appeals, if any, is governed by subsection (d).

(c) WAIVER OF JURISDICTION.—The Tribe may waive Tribal Court jurisdiction or the application of tribal laws with respect to any person or firm residing, doing business, or otherwise entering upon the Reservation or contracting with the Tribe. Any Member may also waive Tribal Court jurisdiction or specify in a written contract the law of any appropriate jurisdiction to govern any com-

mercial transaction or the interpretation of a contract to which the Member is a party.

(d) APPEALS TO STATE OR FEDERAL COURT.—(1) All final judgments entered in actions tried in Tribal Court shall be subject to an appeal to the Family Court, the Court of Common Pleas, or the United States District Court depending upon whether that court would have had jurisdiction over the appealed matter had it been commenced in that court if—

(A) a party to the suit is not a member of the Tribe;

(B) the amount in controversy or the cost of complying with any equitable order or decree exceeds the jurisdictional limits then applicable in the Magistrate's Court of South Carolina; and

(C) the subject matter of the suit does not fall within the provisions of subsection (a)(2)(A)(i) if jurisdiction is exclusive, or subsection (a)(4) or (6).

(2) The Tribe may enlarge the right of appeal to include other subject matters and Members, subject to such rules and procedures as the applicable court and relevant State and Federal laws may provide.

(3) In any appeal under this subsection, the court, as appropriate, may—

(A) enter judgment affirming the Tribal Court;

(B) dismiss the case for lack of jurisdiction of the Tribal Court, but only in those cases where the Tribal Court has first addressed the issue of its jurisdiction;

(C) reverse or remand the case for retrial or reconsideration in Tribal Court; or

(D) grant a trial de novo in its court.

(4) In any appeal, trial, or trial de novo pursuant to this subsection, the reviewing court shall apply any regulation enacted pursuant to tribal authority.

(e) FULL FAITH AND CREDIT.—(1) In cases subject to the provisions of subsection (a)(3) or (d), all final judgments of the Tribal Court shall be given full faith and credit in the State or Federal court with appropriate jurisdiction, and the Tribal Court shall give full faith and credit to final judgments of the State and Federal courts.

(2) If a Member seeks to enforce against a non-Member in Federal court a final judgment of the Tribal Court in a case not subject to the provisions of subsection (a)(3) or (d), the judgment shall be reviewed by the Federal court in the manner provided in title 9, United States Code.

(f) SOVEREIGN IMMUNITY.—(1) The Tribe may sue, or be sued, in any court of competent jurisdiction; except, however, that the Tribe shall enjoy sovereign immunity,

including damage limits and except as provided in this subsection, immunity from seizure, execution, or encumbrance of properties, to the same extent as the political subdivisions of the State as provided in the South Carolina Tort Claims Act (Section 15–78–10, et seq., S.C. Code Annotated, 1976 as amended), and amendments of general applicability thereto adopted after the date of enactment of this Act. With respect to non-consumer liability based on contract, however, the Tribe may, in a written contract, provide that it is immune from suit on that contract as if there had been no waiver of sovereign immunity.

(2) Notwithstanding the provisions of this section, the Tribe shall be subject to suit as provided in section 17(a) of this Act.

(3) The nature and extent of this sovereign immunity shall be construed consistent with the Settlement Agreement and with applicable State and Federal law.

(4)(A) The Tribe shall procure and maintain liability insurance with the same coverage and limits as required of political subdivisions of the State.

(B) In the event that the Tribe's insurance coverage is inadequate or unavailable to satisfy a judgment within the limits of the South Carolina Tort Claims Act, neither the judgment nor any other process may be levied upon the corpus or principal of the Tribal Trust Funds or upon

any property held in trust for the Tribe by the United States; however, the Tribe or the Secretary shall honor valid orders of a Federal or State court which enters money judgments for causes of action against the Tribe arising after the consummation of the Settlement Agreement by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment or payments of income from the Tribal Trust Funds.

(g) INDIAN CHILD WELFARE ACT.—(1) The Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.) shall apply to Catawba Indian children except as provided in this section.

(2) Before the Tribe may assume jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978, the Tribe shall present to the Secretary for approval a petition to assume such jurisdiction, and the Secretary shall approve the petition in the manner prescribed in such Act. Any petition to assume jurisdiction over Indian child custody proceedings by the Tribe shall be considered and determined by the Secretary in accordance with the relevant provisions of such Act. The Secretary's determination that the Tribe may assume jurisdiction under such Act shall not affect any action or proceeding over which a court has assumed jurisdiction.

(3) Until the Tribe has assumed jurisdiction over Indian child custody proceedings, the State shall retain exclusive jurisdiction over Indian custody proceedings; however, the State Court shall apply the Indian Child Welfare Act of 1978 in such proceedings.

(4)(A) The Indian Child Welfare Act of 1978 shall not apply to private adoptions of Indian children under the jurisdiction of the Tribe under such Act where—

(i) both parents consent to the adoption; or

(ii) in the case of an unwed mother—

(I) where the mother consents to the adoption when the father's consent is not necessary for the adoption under South Carolina Law Section 20–7–1690 and any amendments thereto, and

(II) the parents or mother help choose adoptive parents, regardless of whether or not the adoptive parents are outside the preferences of the Indian Child Welfare Act of 1978.

(B) The court may consider any benefits, material and cultural, the child may lose in determining whether the proposed adoption is in the best interests of the child. Failure of the courts to make this consideration shall not be subsequently held to invalidate the adoption.

(5) In all cases of adoption, regardless of whether the Indian Child Welfare Act of 1978 applies, section 107 of such Act (25 U.S.C. 1917) shall apply.

(h) JURISDICTION OF STATE COURTS.—If no Tribal Court is established by the Tribe, the State shall exercise jurisdiction over all civil and criminal cases arising out of acts and transactions occurring on the Reservation or involving Members. If the Tribe establishes a Tribal Court, the provisions of subsection (b) and section 11(b) shall govern whether such jurisdiction is exclusive or concurrent.

SEC. 13. TRIBAL TRUST FUNDS.

(a) PURPOSES OF TRUST FUNDS.—All funds paid pursuant to section 5 of this Act shall be deposited with the Secretary in trust for the benefit of the Tribe. Separate trust funds shall be established for the following purposes: Economic Development, Land Acquisition, Education, Social Services and Elderly Assistance, and Per-Capita Payments. Except as provided in this section, the Tribe, in consultation with the Secretary, shall determine the share of settlement payments to be deposited in each Trust Fund, and define, consistently with the provisions of this section, the purposes of each Trust Fund and provisions for administering each, specifically including provi-

sions for periodic distribution of current and accumulated income, and for invasion and restoration of principal.

(b) OUTSIDE MANAGEMENT OPTION.—(1) The Tribe, in consultation with and subject to the approval of the Secretary, is authorized to place any of the Trust Funds under professional management, outside the Department of the Interior.

(2) If the Tribe elects to place any of the Trust Funds under professional management outside the Department of the Interior, it may engage a consulting or advisory firm to assist in the selection of an independent professional investment management firm, and it shall engage, with the approval of the Secretary, an independent investment management firm of proven competence and experience established in the business of counseling large endowments, trusts, or pension funds.

(3) The Secretary shall have 45 days to approve or reject any independent investment management firm selected by the Tribe. If the Secretary fails to approve or reject the firm selected by the Tribe within 45 days, the investment management firm selected by the Tribe shall be deemed to have been approved by the Secretary.

(4) Secretarial approval of an investment management firm shall not be unreasonably withheld, and any Secretarial disapproval of an investment management firm

shall be accompanied by a detailed explanation setting forth the Secretary's reasons for such disapproval.

(5)(A) For funds placed under professional management, the Tribe, in consultation with the Secretary and its investment manager, shall develop—

(i) current operating and long-term capital budgets; and

(ii) a plan for managing, investing, and distributing income and principal from the Trust Funds to match the requirements of the Tribe's operating and capital budgets.

(B) For each Trust Fund which the Tribe elects to place under outside professional management, the investment plan shall provide for investment of Trust Fund assets so as to serve the purposes described in this section and in the Trust Fund provisions which the Tribe shall establish in consultation with the Secretary and the independent investment management firm.

(C) Distributions from each Trust Fund shall not exceed the limits on the use of principal and income imposed by the applicable provisions of this Act for that particular Trust Fund.

(D)(i) The Tribe's investment management plan shall not become effective until approved by the Secretary.

(ii) Upon submission of the plan by the Tribe to the Secretary for approval, the Secretary shall have 45 days to approve or reject the plan. If the Secretary fails to approve or disapprove the plan within 45 days, the plan shall be deemed to have been approved by the Secretary and shall become effective immediately.

(iii) Secretarial approval of the plan shall not be unreasonably withheld and any secretarial rejection of the plan shall be accompanied by a detailed explanation setting forth the Secretary's reasons for rejecting the plan.

(E) Until the selection of an established investment management firm of proven competence and experience, the Tribe shall rely on the management, investment, and administration of the Trust Funds by the Secretary pursuant to the provisions of this section.

(c) TRANSFER OF TRUST FUNDS; EXCULPATION OF SECRETARY.—Upon the Secretary's approval of the Tribe's investment management firm and an investment management plan, all funds previously deposited in trust funds held by the Secretary and all funds subsequently paid into the trust funds, which are chosen for outside management, shall be transferred to the accounts established by an investment management firm in accordance with the approved investment management plan. The Secretary shall be exculpated by the Tribe from liability for

any loss of principal or interest resulting from investment decisions made by the investment management firm. Any Trust Fund transferred to an investment management firm shall be returned to the Secretary upon written request of the Tribe, and the Secretary shall manage such funds for the benefit of the Tribe.

(d) LAND ACQUISITION TRUST.—(1) The Secretary shall establish and maintain a Catawba Land Acquisition Trust Fund, and until the Tribe engages an outside firm for investment management of this trust fund, the Secretary shall manage, invest, and administer this trust fund. The original principal amount of the Land Acquisition Trust Fund shall be determined by the Tribe in consultation with the Secretary.

(2) The principal and income of the Land Acquisition Trust Fund may be used for the purchase and development of Reservation and non-Reservation land pursuant to the Settlement Agreement, costs related to land acquisition, and costs of construction of infrastructure and development of the Reservation and non-Reservation land.

(3)(A) Upon acquisition of the maximum amount of land allowed for expansion of the Reservation, or upon request of the Tribe and approval of the Secretary pursuant to the Secretarial approval provisions set forth in subsection (b)(5)(D) of this section, all or part of the balance

of this trust fund may be merged into one or more of the Economic Development Trust Fund, the Education Trust Fund, or the Social Services and Elderly Assistance Trust Fund.

(B) Alternatively, at the Tribe's election, the Land Acquisition Trust Fund may remain in existence after all the Reservation land is purchased in order to pay for the purchase of non-Reservation land.

(4)(A) The Tribe may pledge or hypothecate the income and principal of the Land Acquisition Trust Fund to secure loans for the purchase of Reservation and non-Reservation lands.

(B) Following enactment of this Act and before the final annual disbursement is made as provided in section 5 of this Act, the Tribe may pledge or hypothecate up to 50 percent of the unpaid annual installments required to be paid to this Trust Fund, the Economic Development Trust Fund and the Social Services and Elderly Assistance Trust Fund by section 5 of this Act and by section 5 of the Settlement Agreement, to secure loans to finance the acquisition of Reservation or non-Reservation land or infrastructure improvements on such lands.

(e) ECONOMIC DEVELOPMENT TRUST.—(1) The Secretary shall establish and maintain a Catawba Economic Development Trust Fund, and until the Tribe engages an

outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer this Trust Fund. The original principal amount of the Economic Development Trust Fund shall be determined by the Tribe in consultation with the Secretary. The principal and income of this Trust Fund may be used to support tribal economic development activities, including but not limited to infrastructure improvements and tribal business ventures and commercial investments benefiting the Tribe.

(2) The Tribe, in consultation with the Secretary, may pledge or hypothecate future income and up to 50 percent of the principal of this Trust Fund to secure loans for economic development. In defining the provisions for administration of this Trust Fund, and before pledging or hypothecating future income or principal, the Tribe and the Secretary shall agree on rules and standards for the invasion of principal and for repayment or restoration of principal, which shall encourage preservation of principal, and provide that, if feasible, a portion of all profits derived from activities funded by principal be applied to repayment of the Trust Fund.

(3) Following the enactment of this Act and before the final annual disbursement is made as provided in section 5 of this Act, the Tribe may pledge or hypothecate

up to 50 percent of the unpaid annual installments required to be paid by section 5 of this Act and by section 5 of the Settlement Agreement to secure loans to finance economic development activities of the Tribe, including (but not limited to) infrastructure improvements on Reservation and non-Reservation lands.

(4) If the Tribe develops sound lending guidelines approved by the Secretary, a portion of the income from this Trust Fund may also be used to fund a revolving credit account for loans to support tribal businesses or business enterprises of tribal members.

(f) EDUCATION TRUST.—The Secretary shall establish and maintain a Catawba Education Trust Fund, and until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer this Trust Fund. The original principal amount of this Trust Fund shall be determined by the Tribe in consultation with the Secretary; subject to the requirement that upon completion of all payments into the Trust Funds, an amount equal to at least 1/3 of all State, local, and private contributions made pursuant to the Settlement Agreement shall have been paid into the Education Trust Fund. Income from this Trust Fund shall be distributed in a manner consistent with the terms of the Settlement Agreement. The principal of this Trust

Fund shall not be invaded or transferred to any other Trust Fund, nor shall it be pledged or encumbered as security.

(g) SOCIAL SERVICES AND ELDERLY ASSISTANCE TRUST.—(1) The Secretary shall establish and maintain a Catawba Social Services and Elderly Assistance Trust Fund and, until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer the Social Services and Elderly Assistance Trust Fund. The original principal amount of this Trust Fund shall be determined by the Tribe in consultation with the Secretary.

(2) The income of this Trust Fund shall be periodically distributed to the Tribe to support social services programs, including (but not limited to) housing, care of elderly, or physically or mentally disabled Members, child care, supplemental health care, education, cultural preservation, burial and cemetery maintenance, and operation of tribal government.

(3) The Tribe, in consultation with the Secretary, shall establish eligibility criteria and procedures to carry out this subsection.

(h) PER CAPITA PAYMENT TRUST FUND.—(1) The Secretary shall establish and maintain a Catawba Per Capita Payment Trust Fund in an amount equal to 15

percent of the settlement funds paid pursuant to section 5 of the Settlement Agreement. Until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer the Catawba Per Capita Payment Trust Fund.

(2) Each person whose name appears on the final roll of the Tribe published by the Secretary pursuant to section 7(c) of this Act will receive a one-time, non-recurring payment from this Trust Fund.

(3) The amount payable to each member shall be determined by dividing the trust principal and any accrued interest thereon by the number of members on the final roll.

(4)(A) Subject to the provisions of this paragraph, each enrolled member who has reached the age of 21 years on the date the final roll is published shall receive the payment on the date of distribution, which shall be as soon as practicable after date of publication of the final roll. Adult Members shall be paid their pro rata share of this Trust Fund on the date of distribution unless they elect in writing to leave their pro rata share in the Trust Fund, in which case such share shall not be distributed.

(B) The pro rata share of adult Members who elect not to withdraw their payment from this Trust Fund shall be managed, invested and administered, together with the

funds of Members who have not attained the age of 21 years on the date the final roll is published, until such Member requests in writing that their pro rata share be distributed, at which time such Member's pro rata share shall be paid, together with the net income of the Trust Fund allocable to such Member's share as of the date of distribution.

(C) No member may elect to have their pro rata share managed by this Trust Fund for a period of more than 21 years after the date of publication of the final roll.

(5)(A) Subject to the provisions of this paragraph, the pro rata share of any Member who has not attained the age of 21 years on the date the final roll is published shall be managed, invested and administered pursuant to the provisions of this section until such Member has attained the age of 21 years, at which time such Member's pro rata share shall be paid, together with the net income of the Trust Fund allocable to such Member's share as of the date of payment. Such Members shall be paid their pro rata share of this Trust Fund on the date they attain 21 years of age unless they elect in writing to leave their pro rata share in the Trust Fund, in which case such share shall not be distributed.

(B) The pro rata share of such Members who elect not to withdraw their payment from this trust fund shall

be managed, invested and administered, together with the funds of members who have not attained the age of 21 years on the date the final roll is published, until such Member requests in writing that their pro rata share be distributed, at which time such Member's pro rata share shall be paid, together with the net income of the Trust Fund allocable to such Member's share as of the date of distribution.

(C) No Member may elect to have their pro rata share retained and managed by this Trust Fund beyond the expiration of the period of 21 years after the date of publication of the final roll.

(6) After payments have been made to all Members entitled to receive payments, this Trust Fund shall terminate, and any balance remaining in this Trust Fund shall be merged into the Economic Development Trust Fund, the Education Trust Fund, or the Social Services and Elderly Assistance Trust Fund, as the Tribe may determine.

(i) DURATION OF TRUST FUNDS.—Subject to the provisions of this section and with the exception of the Catawba Per Capita Payment Trust Fund, the Trust Funds established in accordance with this section shall continue in existence so long as the Tribe exists and is recognized by the United States. The principal of these Trust Funds shall not be invaded or distributed except

as expressly authorized in this Act or in the Settlement Agreement.

(j) TRANSFER OF MONEY AMONG TRUST FUNDS.—The Tribe, in consultation with the Secretary, shall have the authority to transfer principal and accumulated income between Trust Funds only as follows:

(1) Funds may be transferred among the Catawba Economic Development Trust Fund, the Catawba Land Acquisition Trust Fund and the Catawba Social Services and Elderly Assistance Trust Fund, and from any of those three Trust Funds into the Catawba Education Trust Fund; except, that the mandatory share of State, local, and private sector funds invested in the original corpus of the Catawba Education Trust Fund shall not be transferred to any other Trust Fund.

(2) Any Trust Fund, except for the Catawba Education Trust Fund, may be dissolved by a vote of two-thirds of those Members eligible to vote, and the assets in such Trust Fund shall be transferred to the remaining Trust Funds; except, that (A) no assets shall be transferred from any of the Trust Funds into the Catawba Per Capita Payment Trust Fund, and (B) the mandatory share of State, local and private funds invested in the original corpus of

the Catawba Education Trust Fund may not be transferred or used for any non-educational purposes.

(3) The dissolution of any Trust Fund shall require the approval of the Secretary pursuant to the Secretarial approval provisions set forth in subsection (b)(5)(D) of this section.

(k) TRUST FUND ACCOUNTING.—(1) The Secretary shall account to the Tribe periodically, and at least annually, for all Catawba Trust Funds being managed and administered by the Secretary. The accounting shall—

(A) identify the assets in which the Trust Funds have been invested during the relevant period;

(B) report income earned during the period, distinguishing current income and capital gains;

(C) indicate dates and amounts of distributions to the Tribe, separately distinguishing current income, accumulated income, and distributions of principal; and

(D) identify any invasions or repayments of principal during the relevant period and record provisions the Tribe has made for repayment or restoration of principal.

(2)(A) Any outside investment management firm engaged by the Tribe shall account to the Tribe and sepa-

rately to the Secretary at periodic intervals, at least quarterly. Its accounting shall—

(i) identify the assets in which the Trust Funds have been invested during the relevant period;

(ii) report income earned during the period, separating current income and capital gains;

(iii) indicate dates and amounts of distributions to the Tribe, distinguishing current income, accumulated income, and distributions of principal; and

(iv) identify any invasions or repayments of principal during the relevant period and record provisions the Tribe has made for repayment or restoration of principal.

(B) Prior to distributing principal from any Trust Fund, the investment management firm shall notify the Secretary of the proposed distribution and the Tribe's proposed use of such funds, following procedures to be agreed upon by the investment management firm, the Secretary, and the Tribe. The Secretary shall have 15 days within which to object in writing to any such invasion of principal. Failure to object will be deemed approval of the distribution.

(C) All Trust Funds held and managed by any investment management firm shall be audited annually by a certified public accounting firm approved by the Secretary,

and a copy of the annual audit shall be submitted to the Tribe and to the Secretary within four months following the close of the Trust Funds's fiscal year.

(l) REPLACEMENT OF INVESTMENT MANAGEMENT FIRM AND MODIFICATION OF INVESTMENT MANAGEMENT PLAN.—The Tribe shall not replace the investment management firm approved by the Secretary without prior written notification to the Secretary and approval by the Secretary of any investment management firm chosen by the Tribe as a replacement. Such Secretarial approval shall be given or denied in accordance with the Secretarial approval provisions contained in subsection (b)(5)(D) of this section. The Tribe and its investment management firm shall also notify the Secretary in writing of any revisions in the investment management plan which materially increase investment risk or significantly change the investment management plan, or the agreement, made in consultation with the Secretary pursuant to which the outside management firm was retained.

(m) TRUST FUNDS NOT COUNTED FOR CERTAIN PURPOSES; USE AS MATCHING FUNDS.—None of the funds, assets, income, payments, or distributions from the trust funds established pursuant to this section (except funds distributed from the Catawba Per Capita Trust Fund) shall at any time affect the eligibility of the Tribe

or its Members for, or be used as a basis for denying or reducing funds to the Tribe or its Members under any Federal, State, or local program. Distributions from these Trust Funds may be used as matching funds, where appropriate, for Federal grants or loans.

SEC. 14. ESTABLISHMENT OF EXPANDED RESERVATION.

(a) EXISTING RESERVATION.—The State, after obtaining any necessary judicial approval, shall convey the Existing Reservation to the United States as trustee for the Tribe, and the obligation of the State as trustee for the Tribe with respect to this land shall cease.

(b) EXPANDED RESERVATION.—(1) The Secretary, in consultation with the Tribe, shall develop an Expanded Reservation in the manner prescribed by the Settlement Agreement.

(2) The Secretary, after consulting with the Tribe, shall engage a professional land planning firm and a registered land surveyor as provided in the Settlement Agreement. The Secretary will bear the cost of all services rendered by the surveyor and the planning firm.

(3) After the effective date of this Act, the Secretary, in consultation with the Tribe, may identify, purchase, and place in Reservation status tracts of lands in the manner prescribed by the Settlement Agreement.

(4) The Secretary shall bear the cost of all title examinations, preliminary subsurface soil investigations, and level one environmental audits to be performed on each parcel contemplated for purchase for the Expanded Reservation, and shall report the results to the Tribe. Payment of any option fee and the purchase price shall be drawn from the Catawba Land Acquisition Trust Fund.

(5) The total area of the Expanded Reservation shall be limited to 3,000 acres, including the Existing Reservation, but the Tribe may exclude from this limit up to 600 acres of additional land under the conditions set forth in the Settlement Agreement. The Tribe may seek to have the permissible area of the Expanded Reservation enlarged by an additional 600 acres as set forth in the Settlement Agreement.

(6) All lands acquired by the Secretary for the Expanded Reservation will be held in trust together with the Existing Reservation which the State is to convey to the United States.

(c) EXPANSION ZONES.—(1) Subject to the conditions, criteria, and procedures set forth in the Settlement Agreement, the Secretary and the Tribe shall endeavor at the outset to acquire contiguous tracts for the Expanded Reservation in the "Catawba Reservation Primary Expansion Zone", as defined in the Settlement Agreement.

(2) Subject to the conditions, criteria, and procedures set forth in the Settlement Agreement, the Secretary, in consultation with the Tribe, may elect to purchase contiguous tracts in an alternative area, the "Catawba Reservation Secondary Expansion Zone", as defined in the Settlement Agreement.

(3) The Tribe may propose different or additional expansion zones subject to the approval of the Secretary and to the additional authorizations required in the Settlement Agreement and the State implementing legislation.

(d) NON-CONTIGUOUS TRACTS.—The Secretary, acting on behalf of the Tribe, shall take such actions as are reasonable to expand the Existing Reservation by assembling a composite tract of contiguous parcels that border and surround the Existing Reservation. Before placing any non-contiguous tract in Reservation status, the Tribe, in consultation with the Secretary, shall submit to the county council in any county where it proposes to purchase such non-contiguous tracts a Non-Contiguous Development Plan Application, as provided by the Settlement Agreement and the State implementing legislation. Upon the approval of any such application by each affected county council, the Secretary, in consultation with the Tribe, may proceed to place non-contiguous tracts in Reservation status. No purchases of non-contiguous tracts

shall be made for the Reservation except as set forth in the Settlement Agreement and the State implementing legislation.

(e) VOLUNTARY LAND PURCHASES.—(1) The power of eminent domain shall not be used by the Secretary or any governmental authority in acquiring parcels of land for the benefit of the Tribe, whether or not the parcels are to be part of the Reservation. All such purchases shall be made only from willing sellers by voluntary conveyances subject to the terms of the Settlement Agreement.

(2) Conveyances by private land owners to the Secretary for the Expanded Reservation will be deemed, however, to be involuntary conversions within the meaning of section 1033 of the Internal Revenue Code of 1986.

(3) Notwithstanding any other provision of this section and the provisions of the first section of the Act of August 1, 1888 (ch. 728, 25 Stat. 357; 40 U.S.C. 257), and the first section of the Act of February 26, 1931 (ch. 307, 46 Stat. 1421; 40 U.S.C. 258a), the Secretary may acquire Reservation land for the benefit of the Tribe from the ostensible owner of the land if the Secretary and the ostensible owner have agreed upon the identity of the land to be sold and upon the purchase price and other terms of sale. If the ostensible owner agrees to the sale, the Secretary may use condemnation proceedings to perfect or

clear title and to acquire any interests of putative co-tenants whose address is unknown or the interests of unknown or unborn heirs or persons subject to mental disability.

(f) TERMS AND CONDITIONS OF ACQUISITION.—All properties acquired by the Secretary for the Tribe shall be acquired in fee simple subject to the terms and conditions set forth in the Settlement Agreement. The Secretary, acting on behalf of the Tribe and with its consent, is also authorized to acquire Reservation and non-Reservation lands using the methods of financing described in the Settlement Agreement.

(g) AUTHORITY TO ERECT PERMANENT IMPROVEMENTS ON EXISTING AND EXPANDED RESERVATION LAND AND NON-RESERVATION LAND HELD IN TRUST.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys to the United States lands purchased pursuant to the provisions of this section and the Settlement Agreement. The Secretary or the Tribe may erect permanent improvements of a substantial value, or any other improvements authorized by law on such land after such land is conveyed to the United States.

(h) EASEMENTS OVER RESERVATION.—(1) The acquisition of lands for the Expanded Reservation shall not extinguish any easements or rights-of-way then encumbering such lands unless the Secretary or the Tribe enters into a written agreement with the owners terminating such easements or rights-of-way.

(2)(A) The Secretary, with the approval of the Tribe, shall have the power to grant or convey easements and rights-of-way, in a manner consistent with the Settlement Agreement.

(B) Unless the Tribe and the State agree upon a valuation formula for pricing easements over the Reservation, the Secretary shall be subject to proceedings for condemnation and eminent domain to acquire easements and rights of way for public purposes through the Reservation under the laws of the State in circumstances where no other reasonable access is available.

(C) With the approval of the Tribe, the Secretary may also grant easements or rights-of-way over the Reservation for private purposes, and implied easements of necessity shall apply to all lands acquired by the Tribe, unless expressly excluded by the parties.

(i) JURISDICTIONAL STATUS.—Only land made part of the Reservation shall be governed by the special juris-

dictional provisions set forth in this Act and the Settlement Agreement.

(j) SALE AND TRANSFER OF RESERVATION LANDS.—At the request of the Tribe, and with approval of the Secretary, the Secretary may sell, exchange, or lease lands within the Reservation, and sell timber or other natural resources on the Reservation under circumstances and in the manner prescribed by the Settlement Agreement.

(k) TIME LIMIT ON ACQUISITIONS.—All acquisitions of contiguous land to expand the Reservation or of noncontiguous lands to be placed in Reservation status shall be completed or under contract of purchase within 10 years from the date the last payment is made into the Land Acquisition Trust; except that for a period of 20 years after the date the last payment is made into the Catawba Land Acquisition Trust Fund, the Tribe may, subject to the limitation on the total size of the Reservation, continue to add parcels to up to two Reservation areas so long as the parcels acquired are contiguous to one of those two Reservation areas.

(l) LEASES OF RESERVATION LANDS.—The provisions of the first section of the Act of August 9, 1955 (ch. 615, 69 Stat. 539; 25 U.S.C. 415) shall not apply to the Tribe and its Reservation. The Tribe shall be au-

thorized to lease its Reservation lands for terms up to but not exceeding 99 years.

(m) NON-APPLICABILITY OF BIA LAND ACQUISITION REGULATIONS.—The general land acquisition regulations of the Bureau of Indian Affairs, contained in part 151 of title 25, Code of Federal Regulations, shall not apply to the acquisition of lands authorized by this section.

SEC. 15. NON-RESERVATION PROPERTIES.

(a) ACQUISITION OF NON-RESERVATION PROPERTIES.—(1) The Tribe may draw upon the corpus or accumulated income of the Catawba Land Acquisition Trust Fund or the Catawba Economic Development Trust Fund to acquire and hold parcels of real estate outside the Reservation for the purposes and in the manner delineated in the Settlement Agreement.

(2) If the ownership of any such properties by the Secretary or the Tribe, or any sub-entity of the Tribe, results in the removal of the property from ad valorem taxation, then payments shall be made by the Tribe in lieu of taxation that are equivalent to the taxes that would otherwise be paid if the property were subject to levy.

(3) Notwithstanding any other provision of law, the Tribe may lease, sell, mortgage, restrict, encumber, or otherwise dispose of such non-Reservation lands in the same manner as other persons and entities under State law, and

the Tribe as land owner shall be subject to the same obligations and responsibilities as other persons and entities under State, Federal, and local law.

(4) Ownership and transfer of non-Reservation parcels shall not be subject to Federal law restrictions on alienation, including (but not limited to) the restrictions imposed by Federal common law and the provisions of the section 2116 of the Revised Statutes (25 U.S.C. 177).

(b) JURISDICTION ON NON-RESERVATION PROPERTIES.—(1) All non-Reservation properties, including such properties held by the Tribe as a corporate entity and such properties held in trust by the United States, and all activities conducted on such properties, shall be subject to the laws, ordinances, taxes, and regulations of the State and its political subdivisions in the same manner as such laws, ordinances, taxes, and regulations would apply to any other properties held by non-Indians in the same jurisdiction, except as provided in section 16 of this Act.

(2) Activities on non-Reservation land shall be eligible for Federal grants and other Federal services for the benefit of Indians.

SEC. 16. GAMES OF CHANCE.

(a) INAPPLICABILITY OF INDIAN GAMING REGULATORY ACT.—The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the Tribe.

(b) GAMES OF CHANCE GENERALLY.—The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State implementing legislation with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement, the State implementing legislation, and this Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.

SEC. 17. GOVERNANCE AND REGULATION OF RESERVATION.

(a) ENVIRONMENTAL LAWS.—(1) All Federal, State, and local environmental laws and regulations shall apply to the Tribe and to the Reservation, and shall be fully enforceable by all Federal, State, and local agencies and authorities. Similarly, all requirements that a license, permit, or certificate be obtained from any Federal, State, or local agency shall also apply to the Tribe and to the Reservation. This provision shall extend without limitation to all environmental laws and regulations adopted after the date of enactment of this Act.

(2) The Tribe, the Executive Committee, and all Members shall have the same—and no special or preferential—status under all such laws as other individuals or groups of individuals to contest, object to, or intervene in any proceeding or action in which environmental regulations are being made, adjudicated, or enforced, or in which licenses, permits, or certificates of convenience and necessity are being issued by any agency of Federal, State, or local government.

(3) The Tribe shall have the authority to impose regulations applying higher environmental standards to the Reservation than those imposed by Federal or State law or by local governing bodies; but such tribal regulations shall apply only to the Reservation, and not to property surrounding the Reservation or non-Reservation property, or to the use of the Catawba River. Such tribal regulations shall not apply to activities or uses off the Reservation, even if those activities affect air quality on the Reservation.

(4) The Tribe shall not be authorized to invoke sovereign immunity against any suit, proceeding, or environmental enforcement action involving any Federal, State, or local environmental laws or regulations, and shall be subject to all enforcement orders, restraining orders, fees,

fines, injunctions, judgments, and other corrective or remedial measures imposed by such laws.

(5) This section shall not impose different standards or requirements on the Tribe or the Secretary, when acting on the Tribe's behalf, than would be applied to a private corporation.

(b) BUILDING CODE.—The Tribe shall incorporate by reference and adopt the York County Building Code, and any amendments thereto adopted after the date of enactment of this Act, and may contract with York County, South Carolina, for the services necessary to enforce, inspect, and regulate compliance with its Building Code. Such services shall be provided by York County as provided in the Settlement Agreement. In addition, those local jurisdictions which exact any fee, permit, or inspection services shall waive the fees otherwise charged for building permit or inspection services on the Reservation. The Tribe may adopt building code provisions to be applied on the Reservation in addition to, but not in derogation of, the York County Building Code, as amended from time to time.

(c) PLANNING AND ZONING.—With respect to any land use regulation within the Reservation, the Tribe shall have the power to adopt and enforce a land use plan after consultation with York County and Lancaster County, for

those parts of the Reservation located in those respective jurisdictions. The Tribe and the affected governing bodies shall follow the consultative procedures created for settlement of the claim of the Puyallup Tribe in the State of Washington, as set out in House Report 101–57, pages 161–64, of the 101st Congress. In determining whether to permit the construction of any buildings or improvements on the Reservation, the Tribe shall consider—

(1) the protection of established or planned residential areas from any use or development that would adversely affect residential living off the Reservation;

(2) protection of the health, safety, and welfare of the surrounding community;

(3) preservation of open spaces, rivers, and streams; and

(4) provision of public facilities to support development.

(d) HEALTH CODES.—All public health codes of the State and any county in which the Reservation is located shall be applicable on the Reservation.

(e) HUNTING AND FISHING.—Subject to the provisions of section 17.5 of the Settlement Agreement concerning the acquisition of hunting and fishing licenses, hunting and fishing, on or off the Reservation, shall be

conducted by members in compliance with the laws and regulations of the State.

(f) RIPARIAN RIGHTS.—(1) The littoral and riparian rights of the Tribe in the Catawba River, or in any other streams or waters crossing their lands, shall not differ in any respect from the rights of other owners whose land abuts non-tidal bodies of water or non-tidal water courses in South Carolina. The rights and obligations covered by this provision shall include, but not be limited to—

(A) the title to the river bed;

(B) the right to flood, pond, dam, and divert waters to the river or its tributaries;

(C) the right to build docks and piers in the river;

(D) the right to fish in the river or its tributaries; and

(E) the right to discharge waste or withdraw water from the river or its tributaries.

(2) The Tribe shall have the same rights and standing as all other riparian owners and users of the Catawba River to intervene in any proceeding or otherwise to contest or object to proposed actions or determinations of the Federal Energy Regulatory Commission or of any other governmental agency, commission, or court, whether Federal, State, or local, with respect to the use of the Catawba

River and its basin, including (without limitation) withdrawal of water from the river; navigability on the river; and water power and hydroelectric usage of the river.

(3) Notwithstanding any other provision of law effective now or adopted after the date of enactment of this Act, the Tribe shall have no special right or preferential standing greater than other riparian owners and users of the Catawba River to intervene in or contest any such agency action, determination, or proceeding, including specifically any actions or determinations by the Federal Energy Regulatory Commission regarding the licensing, use, or operation of the waters impounded by the existing reservoirs above and below the Reservation. These qualifications shall apply to the Existing Reservation, to lands acquired for the Expanded Reservation, to other lands acquired by or for the benefit of the Tribe, and to non-Reservation lands.

(g) ALCOHOLIC BEVERAGES.—Alcohol shall be prohibited on the Reservation unless the Tribe adopts laws permitting the sale, possession, or consumption of alcohol on the Reservation consistent with the terms of the Settlement Agreement.

SEC. 18. TAXATION.

(a) INDIAN TRIBAL GOVERNMENT TAX STATUS ACT.—Section 7871 of the Internal Revenue Code of 1986

(26 U.S.C. 7871; commonly referred to as the "Indian Tribal Government Tax Status Act) shall apply to the Tribe and its Reservation. In no event, however, may the Tribe pledge or hypothecate the income or principal of the Catawba Education or Social Services and Elderly Trust Funds or otherwise use them as security or a source of payment for bonds the Tribe may issue.

(b) GENERAL TAX LIABILITY.—The Tribe, its Members, the Tribal Trust Funds, and any other persons or entities affiliated with or owned by the Tribe, Members, or the Tribal Trust Funds, whether resident or located or doing business on the Reservation or off the Reservation, shall be subject to all Federal, State, and local taxes, licenses, levies, and fees except as expressly provided in this section or in the State implementing legislation. Any other person or business entity which locates, operates, or does business on the Reservation shall be subject without exception to all Federal, State, and local taxes, licenses, and fees, unless otherwise expressly provided in this section. To the extent that the Tribe may be subject to any taxes under this section, the Tribe shall be taxed as if it were a business corporation incorporated under the laws of South Carolina unless otherwise expressly provided.

(c) TAXES ON GAMES OF CHANCE.—(1) If the Tribe elects to sponsor and conduct games of bingo under the

provisions of section 16 of this Act, no Federal, State, or local taxes shall apply to the Tribe's bingo revenues except for the special bingo tax provided in the State implementing legislation. If the Tribe elects to sponsor and conduct games of bingo under a regular license allowed non-profit organizations under the State's Bingo Act (Title 12, Chapter 21, Article 23, South Carolina Code of Laws, 1976), the Tribe shall be taxed as a non-profit corporation under that Act with respect to all revenues generated from the bingo games.

(2) Should the Tribe obtain a license to operate electronic play devices as provided by the State implementing legislation, the Tribe shall be subject to all taxes, license requirements and fees governing electronic play devices provided by State law.

(d) INCOME TAXES.—(1) Income of the Tribe, subdivisions and governmental agencies of the Tribe, including entities owned by the Tribe or the Federal Government and the Tribal Trust Funds, and tax revenues collected by the Tribe by levy or assessment, shall be non-taxable for Federal income tax purposes to the extent provided by Federal law for recognized or restored Indian Tribes. Any tribal income and tax revenues which are non-taxable for Federal income tax purposes because of the Tribe's status as a recognized or restored Indian Tribe shall also

be non-taxable for purposes of State income taxes and local income taxes.

(2)(A) Except as provided in this subsection, Members shall be liable for payment of Federal, State, and local income taxes to the same extent as any other person in the State.

(B) Income earned by Members for work performing governmental functions solely on the Reservation shall be exempt from State taxes for a period of 99 years after the effective date of this Act.

(C) Income earned by Members from the sale of Catawba Indian pottery and artifacts, whether on or off the Reservation, which are made by Members, shall be exempt from Federal, State, and local income taxes.

(D) For purposes of Federal income taxes, the income of Members earned on the Reservation shall be taxable to the extent provided by Federal law for members of recognized or restored Indian tribes.

(E) No funds distributed per capita pursuant to section 13(h) of this Act shall be subject at the time of distribution to Federal, State, and local income taxes; however, income subsequently earned on shares distributed to Members shall be subject to the same Federal, State, and local income taxes as other persons in the State would pay.

(F) Compensation paid to members of the Executive Committee shall be subject to Federal payroll taxes to the extent provided by Federal law for members of tribal councils of recognized or restored Indian tribes.

(3) Any person or other entity which is not exempt from income taxes under provisions of this section shall be liable for all Federal, State, and local income taxes otherwise due regardless of whether they are doing business on the Reservation.

(e) REAL PROPERTY TAXES.—(1) The Reservation and all non-residential buildings, fixtures, and real property improvements owned by the Tribe or held in trust by the United States for the Tribe on the Reservation shall be exempt from all property taxes levied by the State or by any political subdivision of the State. If the Tribe owns a partial interest in property or a business, the property tax exemption provided in this section is applicable to the extent of the Tribe's interest.

(2) Single and multi-family residences, including mobile homes, that are situated on the Reservation shall be exempt from all property taxes levied by the State or by any political subdivision of the State, if they are owned by the Tribe, Members, or Tribal Trust Funds and meet the requirements of the State implementing act concerning

the ownership and occupation of single and multifamily residences.

(3) All buildings, fixtures, and real property improvements located on the Reservation which are not exempt from real property taxes under subsections (e)(1) and (e)(2) of this section, shall be subject to all property taxes levied by the State or any political subdivision of the State to the same extent that similar buildings, fixtures, or improvements are assessed and taxed elsewhere in the same jurisdiction. However, the underlying land or leasehold in the land shall not be subject to real property taxes. All buildings, fixtures, and improvements subject to real property taxes shall be eligible for any tax abatement or temporary exemption allowed new business investments to the same extent as similar properties qualify for exemption or abatement in the same county.

(4) The Tribe is authorized to levy taxes on buildings, fixtures, improvements, and personal property located on the Reservation, even though such properties may be exempt from property taxation by the State or its subdivisions, and may use such tax revenues for appropriate tribal purposes. The Tribe may also exempt or abate any such taxes. York and Lancaster Counties and the South Carolina Tax Commission will provide in accordance with the Settlement Agreement the necessary assistance to the

Tribe if the Tribe chooses to assess tribal property taxes as if they were property taxes imposed by a political subdivision.

(5) Real property and improvements owned by the Tribe or Members, or both, and not located on the Reservation shall be subject to all property taxes levied by the State, the county, the school district, special purpose districts, and other political subdivisions where such property is located.

(6) To the extent that any non-Reservation real property held in trust by the Secretary is not taxable for property tax purposes, it shall be subject to the payment of a fee or fees in an amount equivalent to the real property tax that would have been paid to the applicable taxing authority had the property not been held in trust.

(f) PERSONAL PROPERTY TAXES.—(1) For a period of 99 years after the effective date of this Act, all personal property owned by the Tribe and used solely on the Reservation shall be exempt from personal property taxes. During such period motor vehicles owned by the Tribe shall be exempt from personal property taxes even if used off the Reservation.

(2) All personal property owned by Members shall be subject to personal property taxes levied by the State or

any political subdivision of the State where the property is deemed to be located.

(3) All personal property located on the Reservation which is not exempt from personal property taxes under subsection (f)(1) of this section shall be subject to personal property taxes levied by the State or by any political subdivision of the State encompassing the Reservation to the same extent that similar personal property is assessed and taxed elsewhere in the jurisdiction.

(4) For purposes of subsections (e) and (f) of this section, the determination of whether the Tribe is the owner of property shall be made in the same manner as is used by the State for other taxpayers for State property tax purposes.

(g) LEVY AGAINST PROPERTY FOR FAILURE TO PAY PROPERTY TAXES.—(1) Subject to perfected security interests, if any person or entity (referred to in this subsection as the "taxpayer") who is subject to property taxes under subsections (e) and (f) of this section fails to pay such taxes, the appropriate taxing authority for the county or other political subdivision shall have the power to levy against personal property subject to personal property taxes owned by the taxpayer within the county, on or off the Reservation, in order to satisfy the taxes due.

(2) If this levy against the personal property is not sufficient to satisfy the tax lien, the county or other political subdivision may certify the deficiency to the State and the State may levy against other taxable property of the taxpayer in the State and remit any proceeds to the county or appropriate taxing authority which is owed the tax.

(3) If the county or other political subdivision cannot satisfy its lien, it may require the Tribe to cease allowing the taxpayer to do business on the Reservation.

(4) If the taxpayer is in bankruptcy, the bankruptcy statutes shall apply to this section.

(5) The State or any political subdivision may not seize real property located on the Reservation.

(h) VEHICLE LICENSE FEES.—The Tribe and its Members shall be subject to all license and registration fees and requirements, all periodic inspection fees and requirements, and all fuel taxes imposed by Federal, State, and local governments on motor vehicles, boats, and airplanes, and other means of conveyance.

(i) SALES AND USE TAXES.—(1) The Tribe, its Members, and the Tribal Trust Funds shall be liable for the payment of all State and local sales and use taxes to the same extent as any other person or entity in the State, except as provided in this section.

(2) Purchases made by the Tribe for tribal government functions during the period of 99 years from the effective date of this Act shall be exempt from State and local sales and use taxes.

(3) Catawba pottery and artifacts made by Members and sold on or off the Reservation by the Tribe or Members shall be exempt from State and local sales and use tax.

(4)(A) During the period of 99 years from the effective date of this Act, the sale on the Reservation of all other items, whether made on or off the Reservation, shall be exempt from State and local sales and use taxes, but shall be subject to a special tribal sales tax levied by the Tribe equal to the State and any local sales tax that would be levied in the jurisdiction encompassing the Reservation but for this exemption.

(B) The South Carolina sales and use tax laws, regulations, and rulings shall apply to the special tribal sales tax, and the special tribal sales tax must be administered and collected by the South Carolina Tax Commission in accordance with the Settlement Agreement.

(C) In accordance with the Settlement Agreement, the South Carolina Tax Commission will separately account for the special tribal sales tax, and the State Treas-

urer will remit the special tribal sales tax revenues periodically to the Tribe at no cost to the Tribe.

(D) The tribal sales tax shall not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are $100 or less. In such case, the State sales tax shall apply.

(E) The Tribe shall impose a tribal use tax on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State when the vendor does not collect the tax. However, any use taxes which are collected by a vendor which is not located in the State will be subject to State use taxes and the use tax shall be remitted to the State and not the Tribe. Use taxes not collected by the vendor and remitted to the State shall be subject to the Tribal use tax and shall be collected directly by the Tribe.

(j) PAYMENTS IN LIEU OF TAXES.—The Tribe shall pay a fee in lieu of school taxes. That fee shall be determined by the county or other appropriate taxing authority in the same manner and shall be the same amount that is paid by students from outside the county entering schools in the county. Fees payable by the Tribe shall be reduced by any funds received under the Act of September 30, 1950 (Public Law 874, 81st Congress; 20 U.S.C. 236

et seq.; commonly referred to as the "Impact Aid Act") pursuant to section 4(g) of this Act or any other Federal funds designed to compensate school districts for loss of revenue due to the non-taxability of Indian property. Any fee in lieu of school taxes paid on behalf of a child under this section shall be excluded from Federal and State income of the child or his family for Federal and State income tax purposes.

(k) ESTATE TAXES.—Members shall be liable for payment for all estate and inheritance taxes, except, however, that the undistributed share of any member in the Catawba Per Capita Payment Trust Fund shall be exempt from Federal and State estate and inheritance taxes.

(l) ELIGIBILITY FOR CONSIDERATION TO BECOME AN ENTERPRISE ZONE OR GENERAL PURPOSE FOREIGN TRADE ZONE.—Notwithstanding the provisions of any other law or regulation, the Tribe shall be eligible to become, sponsor and/or operate (1) an "enterprise zone" pursuant to 42 U.S.C. 11501–11505 or any other applicable Federal (or State) laws or regulations; or (2) a "foreign-trade zone" or "subzone" pursuant to the Foreign Trade Zones Act of 1934, as amended (19 U.S.C. 81a–81u) and the regulations thereunder, to the same extent as other federally recognized Indian tribes.

SEC. 19. GENERAL PROVISIONS.

(a) GENERAL APPLICABILITY OF STATE LAW.—The Tribe, its Members, and any lands, natural resources, or other property owned by the Tribe or its Members (including any land or natural resources or other property held in trust by the United States or by any other person or entity for the Tribe) shall be subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person, citizen or land in the State except as otherwise expressly provided in this Act and by the State implementing legislation.

(b) IMPACT OF SUBSEQUENTLY ENACTED LAWS.—The provisions of any Federal law enacted after the date of enactment of this Act shall not apply in the State if such provision would materially affect or preempt the application of the laws of the State, including application of the laws of the State applicable to lands owned by or held in trust for Indians, or Indian Nations, tribes or bands of Indians. However, such Federal law shall apply within the State if the State grants its approval by a law or joint resolution enacted by the General Assembly of South Carolina and signed by the Governor.

(c) SEVERABILITY.—If any of the provisions of sections 4(a), 5 or 6 of this Act are held invalid by a court,

then all of this Act is invalid. Should any other section of this Act be held invalid by a court, the remaining sections of this Act shall remain in full force and effect.

(d) INTERPRETATION CONSISTENT WITH SETTLEMENT AGREEMENT.—Wherever possible, this Act shall be construed in a manner consistent with the Settlement Agreement. In the event of a conflict between the provisions of this Act and the Settlement Agreement, the terms of this Act shall govern. The Settlement Agreement shall be maintained on file and available for public inspection at the Department of the Interior.

SEC. 20. EFFECTIVE DATE.

The provisions of this Act shall become effective upon the transfer of the Existing Reservation to the Secretary.

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BACKGROUND ON H.R. 2399

On November 10, 1763, in a Treaty at Augusta, Georgia, the Catawba Tribe sought and was guaranteed protection from the onslaught of white settlement. In return for an agreement by the King of England and the Governors of the Southern Colonies that the Tribe would be forever protected in possession of its lands, the Tribe reserved a 144,000 acre tract and ceded its aboriginal territory (comprising much of the present state of North and South Carolina) to the King. But in 1840, the State of South Carolina took the Tribe's lands, attempting to extinguish forever the Catawba Tribe's title to the 144,000 acre Reservation through a "treaty" in which the United States did not participate.

The State did not honor the terms of the "treaty". And because federal law has, since 1790, plainly stated that only Congress may extinguish Indian title to land, the Tribe's dispossession by the State of South Carolina has precipitated a political and legal struggle that has spanned a century and a half.

In 1943, the United States entered into an agreement with the Catawba Tribe and the State of South Carolina to provide services to the Tribe and its members. The State purchased 3,434 acre of land and conveyed it to the Secretary in trust for the Tribe and the Tribe organized under the Indian Reorganization Act.

In 1959, Congress enacted the Catawba Tribe of South Carolina Division of Assets Act. Federal agents assured the Tribe that if the Tribe would release the government from its obligation under the 1943 agreement and agree to Federal legislation terminating the federal trust relationship and liquidating the 1943 reservation, the status of the Tribe's land claim would not be jeopardized by the termination.

In 1980, following the failure of a four-year effort to settle the claim without resorting to litigation, the Catawba Tribe sued 76 individuals and corporations seeking a return of the Treaty Reservation and trespass damages. The Defendants were sued as representatives of the tens of thousands of non-Indians who currently occupied the Tribe's Treaty Reservation.

In 1992, the federal courts refused to allow the case to proceed as a class action. This refusal started the running of a statute of limitations and left the Tribe no choice but to sue each occupant of the Treaty Reservation individually. In the Spring and Summer of 1992, as the Tribe finalized its preparations to sue 61,767 individuals for possession of the land they occupied before the October 18, 1992 deadline, the need for a legislative solution became more apparent to both the Indian and non-Indian communities in and around Rock Hill. The filing of such a massive lawsuit would have placed a cloud on virtually all land titles in the area.

To give the settlement process more time, Congress, in July, 1992, extended the statute of limitations until October 1, 1993. In August, 1992, the Tribe and state negotiators made substantial progress toward an agreement to settle the claim. Based on the hope that a just settlement might at last be possible, the Tribe voted unanimously to rely on the

Congressional statute of limitations extension and postpone filing suit against the 61,767 occupants. Settlement talks aimed at finalizing the agreement continued, and in the early morning hours of January 12, the negotiators finalized an Agreement in Principle. On February 20, 1993, the Catawba Tribe met in General Council and overwhelmingly approved the proposed agreement.

H. R. 2399 is the measure which would enact the terms of the agreement between the State of South Carolina and the Catawba Tribe into law. The bill restores the Catawba tribe to full federal recognition. It provides that the existing state reservation would be expanded to a 4,200 acre federal reservation. The bill requires the United States to pay the Catawba Tribe $32 million over 5 years. State, local and private sources are required to pay the Tribe $18 million. in exchange, the Tribe agrees that its 1840 land claim arising out of the treaty of Nation ford will be extinguished along with any claims arising out of the 1760 Treaty, the 1763 Treaty or aboriginal title claims.

The Tribe asserts that if the settlement is not approved by the Congress, it will be forced to sue 61,767 persons individually who presently claim ownership over the Tribe's 144,000 acre-reservation.

SECTION-BY-SECTION ANALYSIS OF H.R. 2399

SECTION 1. SHORT TITLE

Section 1 cites the Act as the "Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993".

SECTION 2. DECLARATION OF POLICY, CONGRESSIONAL FINDINGS AND PURPOSE

Section 2 declares the policy of the Congress.

Subsection (a) provides the Findings of the Congress which delineates the history of the Catawba land claim.

Subsection (b) provides the Purpose of the Act which are to (1) ratify the Settlement agreement between the tribe and the non-Indian parties; (2) direct the Secretary to implement the Agreement; (3) authorize appropriations and actions; (4) remove the cloud on South Carolina land titles resulting from the Catawba's claim.

SECTION 3. DEFINITIONS

Section 3 provides the definitions of various terms used under the Act.

SECTION 4. RESTORATION OF FEDERAL TRUST RELATIONSHIP

Subsection (a) provides for the restoration of the Federal trust relationship between the Catawba tribe and the United States.

Subsection (b) makes the Catawba tribe eligible for federal benefits and services which flow to recognized Indian tribes.

Subsection (c) provides that the Indian Health Service is to issue health cards to tribal members who may choose health facilities subject to the approval of IHS.

Subsection (d) repeals the Catawba Termination Act.

Subsection (e) provides that the Act is not to affect existing property rights.

Subsection (f) provides that the jurisdiction of the tribe is set forth in this Act.

Subsection (g) provides that schools are to be eligible for impact aid funds.

SECTION 5. SETTLEMENT FUNDS

Subsection (a) authorizes to be appropriated $32 million of federal funds.

Subsection (b) provides that the federal funds are to be disbursed in five installments of $6.4 million.

Subsection (c) provides that private funds which are paid for the settlement are to be treated as either a payment in settlement of litigation or a charitable contribution for Federal tax purposes.

Subsection (d) provides that the Secretary is to collect $18 million in contributions toward settlement received by the State
and hold them in trust for the tribe.

SECTION 6. RATIFICATION OF PRIOR TRANSFERS; EXTINGUISHMENT OF ABORIGINAL TITLE, RIGHTS AND CLAIMS

Subsection (a) provides that prior transfers of land or natural resources by the Tribe are ratified.

Subsection (b) provides that any aboriginal title claims are extinguished.

Subsection (c) provides that all claims pursuant to land or natural resources transfers by the Tribe against the United States or any State are deemed to be extinguished as of the date of the transfer.

Subsection (d) provides that all land title claims by the tribe are extinguished, and that any hunting, fishing, water rights or other natural resource claims are extinguished.

Subsection (e) provides that the United States is barred from asserting claims on behalf of the Tribe arising before the date of enactment.

Subsection (f) provides that the Section is not to be construed to diminish the existing reservation of fee lands owned by members.

Subsection (g) provides that parties to the suit are to pay their own attorney's fees, but the Secretary is to approve and pay the Tribe's attorneys in an amount not to exceed $5 million.

Subsection (h) provides that personal claims of individual Indians are not affected by the Act.

SECTION 7. TRIBAL MEMBERSHIP

Subsection (a) provides for the membership criteria of the tribe which shall be based on: 1) being listed on the 1961 membership roll; 2) if the Executive Committee determines that a person should have been on the 1961 roll; 3) if a person is a lineal descendant of someone on the membership roll.

Subsection (b) provides that the tribe shall update its membership roll and exclude persons listed erroneously.

Subsection (c) provides that the Secretary is to publish the rolls in the federal register.

Subsection (d) provides that within 120 days after publication, the Secretary shall publish a proposed final membership roll. Appeals are to be resolved within 90 days following publication.

Subsection (e) provides that the Tribe shall have the right to determine future membership.

SECTION 8. TRANSITIONAL AND PROVISIONAL GOVERNMENT

Subsection (a) provides that the Tribe shall adopt a constitution within 24 month s of enactment.

Subsection (b) provides that until the tribe has adopted a constitution, the Executive Committee is the provisional government.

SECTION 9. TRIBAL CONSTITUTION AND GOVERNANCE

Subsection (a) provides that if the tribe elects, it may organize under the Indian Reorganization Act.

Subsection (b) provides that within 180 days after enactment, a constitution is to be drafted and distributed. Within 90 days of distribution, an election to adopt the constitution must be held.

Subsection (c) provides the constitution must be adopted by a majority vote.

SECTION 10. JURISDICTION AND GOVERNANCE OF THE RESERVATION

Subsection (a) permits the Tribe to regulate the conduct of its members, use and disposition of its property, to regulate conduct of non-member businesses or persons living or conducting business on the Reservation, and to exclude non-members from the Reservation.

Subsection (b) provides that the Indian Civil Rights Act shall apply to the Tribe's reservation.

SECTION 11. CRIMINAL JURISDICTION

Section 11 provides that South Carolina retains all criminal jurisdiction except that the Tribe may have Court with jurisdiction limited to members, Reservation, and crimes within the jurisdiction of South Carolina's Magistrates' Courts. Tribal court jurisdiction is concurrent with Magistrates' Courts and defendants can remove their case to Magistrates' Court or appeal to General Sessions Courts. The bill requires the cross-deputization of peace officers.

SECTION 12. CIVIL JURISDICTION

Subsection (a) provides that Tribal civil court may have original and appellate jurisdiction over:

1. actions on contracts to which Tribe a party, member a party and made on Reservation, or contract where more than 50%of services to be rendered on Reservation which do not expressly exclude Tribal court jurisdiction;

2. actions in tort for intentional torts under South Carolina law is cause bodily injury or damage to property, or negligence or strict liability except for automobile accidents on reservation;

3. internal tribal matters;

4. domestic relations involving members residing on Reservation; and,

5. enforcement of business regulations applicable to businesses on Reservation.

Subsection (b) provides that in several matters jurisdiction is concurrent with state courts.

Subsection (c) provides that the Tribe may waive Tribal court jurisdiction.

Subsection (d) provides that appeals lie to court in which could have been brought originally if matter exceeds amount of Magistrates Courts' jurisdiction.

Subsection (e) provides that full faith and credit applies only to judgements subject to appeal.

Subsection (f) provides that the Tribe has sovereign immunity similar to state for torts subject to requirement that they procure similar insurance.

Subsection (g) provides that the Indian Child Welfare Act applies when Secretary approves.

SECTION 13. TRIBAL TRUST FUNDS

Section 13 provides for trust funds with an option to have them managed by outside manager. Funds include Land Acquisition Trust, Economic Development Trust Fund, Education Trust Fund, Social Services and Elderly Assistance Trust Fund, and Per Capita Trust Fund. Per Capita Trust Fund will distribute $7,500,000 in one time payments to members.

Payments from trust funds (other than original per capita payments) not counted for eligibility for federal benefits.

SECTION 14. ESTABLISHMENT OF EXPANDED RESERVATION

Section 14 permits the acquisition of up to 3600 acres (not counting 600 undevelopable acres) in defined area of York and Lancaster Counties. Purchases must be from willing sellers, but sellers can treat as involuntary conversions.

SECTION 15. NON-RESERVATION PROPERTIES

Section 15 provides that the Catawbas are free to acquire non-reservation properties, but obligated to make payments in lieu of taxes if acquisition removes property from tax rolls.

SECTION 16. GAMES OF CHANCE

Section 16 provides that the Indian Gaming Regulatory Act shall not apply. The Tribe has the ability to establish two high stakes bingo games under terms of state bill. One must be within claim area, the other requires approval of county and any municipality in which located.

SECTION 17. GOVERNANCE OF RESERVATION

Section 17 provides that all federal, state and local environmental laws apply to reservation, and the Tribe has no special status. The building code is the same as York County, but can be more stringent. Planning and zoning require consultative procedures described in the Puyallup bill. The Tribe and its members are subject to state hunting and fishing regulations. Alcohol is prohibited unless the Tribe permits it.

SECTION 18. TAXATION

Section 18 provides that the Indian Tribal Government Tax Status Act applies. The Tribe is generally subject to federal, state and local tax unless exempted by the Act. State taxes on games of chance is 10%. The Tribe's income is non-taxable to extent non-taxable for recognized tribes. Members are liable for taxes to same extent as other citizens of the state, with exceptions for members working on Reservation, or engaged in sale of pottery. Real property on reservation exempt from taxes to extent owned by Tribe. Residences are exempt to the extent they are occupied by members. The Tribe is required to make payment to school districts for students attending. Members are liable for personal property taxes.

The reservation is eligible for special status as Enterprise or Foreign Trade zone.

SECTION 19. GENERAL PROVISIONS

Section 19 provides that State law is generally applicable. Subsequent general laws preempting state jurisdiction are not applicable to the Catawba Tribe or the State of South Carolina unless the State consents. The entire bill is invalid if the extinguishment provisions or the restoration provisions are invalidated.

SECTION 20. EFFECTIVE DATE

Section 20 provides that the Act shall become effective upon the transfer of the Existing Reservation to the Secretary.

Mr. RICHARDSON. At this time, I would ask witnesses, except for Chairman Spratt, to summarize their statements. They are reminded their full written statements will be made part of the record, which will be kept open for two weeks.

Before I ask Chairman Spratt to open the hearing, let me first commend him for the valiant effort he has led to resolve this issue. He has been incessant and persistent in making sure we deal with this issue at this Subcommittee.

Let me say at the outset that this Subcommittee is committed to dealing with this issue in an expeditious manner, and we look forward to this hearing. We know there is urgency involved.

Let me just thank my friend and colleague, the Chairman of a very key Armed Services subcommittee and a gracious friend of mine to open the hearing. Chairman Spratt, please proceed.

STATEMENT OF HON. JOHN M. SPRATT, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. SPRATT. Thank you very much. Mr. Chairman, I certainly won't try your patience with 37 pages of single-spaced testimony, but I appreciate the dispensation of not having to summarize my testimony.

You noted that this bill was filed by Butler Derrick, and Butler Derrick has prepared testimony and submitted it for the record. If there is no objection, I would like to tender his testimony and ask that it be made part of the record.

Mr. RICHARDSON. Without objection.

[Prepared statement of Mr. Derrick follows:]

Statement of U.S. Representative Butler Derrick
Hearing on H.R. 2399 - The Catawba Indian Settlement Act
House Subcommittee on Native American Affairs
July 2, 1993

Mr. Chairman, I am pleased to submit this testimony in support of H.R. 2329, a bill I introduced to settle the Catawba Indian dispute. I want to thank you for agreeing to hold a hearing on this important bill. I regret an illness in my family prevents me from being in Washington and testifying in person and I appreciate the opportunity to provide testimony for the record.

Let me begin by saying that I introduced this bill at the request of my colleague, Congressman John Spratt, whose district includes the entire claim area. Congressman Spratt was unable to introduce the bill because he is a named defendant in the law suit.

H.R. 2329 will resolve, once and for all, a 150 year old claim by the Catawba Indians to 144,000 acres of land in York, Lancaster and possibly Chester Counties, South Carolina. Permit me to give a brief history of the claim. The Catawbas were granted this land by the King of England in a 1760 treaty and the tribe purported to sell it in 1840 to the State of South Carolina. The sale was never ratified by Congress, as required by the Indian Non-Intercourse Act; consequently, the Catawbas claim the sale was invalid. Thus, the Catawba indians have been pressing their claim to recover the land for well over a century.

In 1980, after requests to the federal government were rebuffed, the tribe filed a suit in federal district court against the state of South Carolina, the local governments and 77 named defendants. They demanded trespass damages and title to 140,000 acres of land. For thirteen years, this case has been bouncing back and forth between the District Court, Court of Appeals and the U.S. Supreme Court and no end to the litigation is in sight. Last summer, the tribe was concerned that a 20 year state statute of limitations would expire in October 1992. Consequently, they made preparations to sue 62,000 innocent landowners before the deadline. They had already printed 62,000 summonses and complaints which were sitting in a warehouse in Falls Church, Virginia. These suits, if filed, would have represented one of the largest suits in the history of the federal civil court system. Fortunately, we were able to avoid this litigation disaster when Congress extended the statute of limitations for one year. But this statute expires again at the end of 1993.

Negotiations to settle the dispute began, in earnest, three years ago. They have been long, drawn out and contentious. On several occasions, they almost broke apart. Finally, last August, the parties struck a deal. H.R. 2329 and the companion state legislation embody the fruits of those efforts. All parties had to make significant compromises to reach an agreement. The Catawbas, the State of South Carolina, Congressman Spratt and Senators Hollings and Thurmond all support this legislation in its current form and oppose any changes to it. All of the parties realize that any changes to this legislation could easily unhinge the entire agreement.

H.R. 2329 contains several important provisions. First, it restores the Catawbas as a federally recognized tribe. Interestingly, the Catawbas are the last terminated tribe to be restored. In addition to the restoration, this bill will provide $50 million to the tribe over five years. The federal government will pay 64% ($6.2 million over five years), the state will pay $12.5 million and local authorities and private sources will pay the balance. The compensation will be paid into five different trust funds. The legislation also grants the tribe limited sovereignty on a reservation whose size may reach 4,200 acres.

It is true that my Congressional district does not include the Catawba land claim. But I agreed to introduce this legislation, in part, because the settlement makes sense for the State of South Carolina and for the federal government. If this case is not settled, 62,000 innocent landowners will be sued. Each would be forced to pay hundreds of dollars to lawyers to defend their title. They will be unable to sell their land, borrow against it or obtain title insurance until the litigation ends. Development in one of the fastest growing parts of South Carolina will be frozen. Because resolution of this claim is important to South Carolina, the State, local governments and private sources have agreed to pay $18 million to settle the claim.

The federal government also has an important interest in settling the claim. The federal government does not want to see innocent landowners become victims to expensive and endless litigation. The merits of this case are particularly compelling because the State of South Carolina will probably be dismissed from the suit. Most of the large landowners have already been dismissed from the suit. That means the only remaining defendants are individuals owning very small parcels who can least afford the cost of litigation. Moreover, the federal government has pursued for the past decade a policy of restoring tribes which Congress terminated in the 1940s and 1950s. The Catawbas are the last terminated tribe to have their trust relationship restored.

Once again, I want to thank you Chairman Richardson for holding the hearing, and I urge swift approval of the bill.

Mr. SPRATT. Mr. Chairman, I want to thank you, not only on behalf of myself but on behalf of thousands of my constituents for holding today's hearing on H.R. 2399, which is the Catawba Indian settlement bill.

To avoid literally 61,676 lawsuits against innocent landowners in my district this October, H.R. 2399 needs to become law before Congress ends this session. I am grateful for your willingness to, as you put it, act expeditiously.

At the outset, Mr. Chairman, I need to state that I am a landowner in the claim area, and not only am I a landowner but I am one of 77 defendants named in the lawsuit, Catawba Indian Tribe of South Carolina versus the State of South Carolina, et al., docketed as civil action 802050 in the U.S. District Court for the District of South Carolina.

Along with other named defendants in this suit, I moved for summary judgment. The District Court granted my request for summary judgment and issued an order releasing all of my land from the suit. The Fourth Circuit Court of Appeals sustained the district court as to all but about 90 acres of the land I own. Because of this remaining interest I have in the lawsuit, the court required that I, on remand, make a further showing as to the status of title of the 90 acres.

Because of this remaining interest, I have sought the guidance and advice of the House Committee on Standards of Official Conduct, literally from the very outset of this matter, so that I am conducting myself properly. The Committee has told me that I should not introduce this settlement legislation. Hence, it was introduced by Congressman Butler Derrick. But they have told me that I may testify and speak about it so long as I disclose my interest.

Part of the reason the Committee allowed me to testify and speak and work for settlement of this lawsuit is that it is critically important to my constituents. The Federal Government is essential to any settlement. And I as a Congressman from this district, knowing what I do of the claim believe that I am an essential participant in the settlement effort. The Congressman from this district, my predecessor, Ken Holland, took the same position. I have to be involved in this matter.

The Committee has allowed me to take this position as long as I disclose my interest and refrain from voting on the bill itself. So you should have note of my interest.

This bill will settle a land claim outstanding for more than 150 years and a lawsuit brought by the Catawbas which has been pending for more than 13 years. The bill will grant Catawbas Federal recognition as an Indian tribe and restore a relationship with the tribe which Congress terminated in 1962.

This settlement, Mr. Chairman, has not come easily. For the past four years we have engaged in long, hard and sometimes contentious negotiations. This bill, H.R. 2399, is the fruit of our labor. It is supported by the tribe, by the State of South Carolina, by York and Lancaster County where the claim area principally lies, by Senator Hollings and Senator Thurmond, by the Native American Rights Fund, and by the National Congress of American Indians.

The agreement in principle which embodies the settlement was basically formulated last August, the end of August. So the settle-

ment was reviewed by Secretary of the Interior Manny Lujan, approved by him—in fact, he issued a press release supporting it—and we will offer that to the clerk to be made a part of the record in this hearing.

[The memorandum of cooperation follows:]

MEMORANDUM OF COOPERATION

The signatories to this Memorandum of Cooperation represent the Governor and General Assembly of South Carolina, the Member of Congress representing the Fifth Congressional District of South Carolina, and the Catawba Indian Tribe of South Carolina. Each subscribes his name below in order to indicate agreement and commitment to the following:

1. Beginning nearly four years ago, the undersigned assumed responsibility for settling the long-standing claim of the Catawba Indian Tribe to some 140,000 acres of land in York, Lancaster, and Chester Counties, and the suit pending in the United States District Court for the District of South Carolina entitled the Catawba Indian Tribe of South Carolina, Inc. v. State of South Carolina, et al, docketed as Civil Action No. 80-2050.

2. To that end, the undersigned engaged in lengthy negotiations, culminating in a session of more than a week in August 1992. The results of those negotiations were memorialized in document entitled "Agreement in Principle," consisting of approximately fifty pages. The basic elements of this Agreement in Principle were approved by a meeting of the Catawba Indian Tribe of South Carolina on August 27, 1992. The undersigned agreed to use their "good offices and best efforts" to carry out the Agreement in Principle, but recognized that it could only be effectuated through the enactment of State and Federal implementing laws.

3. Following the negotiating session of August 1992, discussions to refine and extend the terms of settlement continued. Attorneys and advisors to the Catawbas identified provisions of the Agreement requiring revision. State gaming laws were reviewed by the Supreme Court of South Carolina and amendments to state gaming laws came under active consideration in the General Assembly.

4. A final negotiating session was convened in January 1993. At the end of five days, the negotiations resulted in a revised "Agreement in Principle," which was approved by the Catawba Indian Tribe of South Carolina at a meeting held on February 20, 1993. This revised draft of the "Agreement in Principle" is the document attached to this Memorandum as Exhibit A and is the "Agreement in Principle" referred to in South Carolina Statutes 27-16-100, et seq. (the "State Implementing Legislation").

5. The negotiations were intense and spirited but civil and conducted in the utmost good faith on all sides. Every

element of the Agreement in Principle was negotiated in detail. In the end, each side made major compromises and concessions in order to reach agreement.

6. After the Agreement in Principle was approved by the members of the tribe, work began to convert the Agreement in Principle into State and Federal implementing legislation. Further negotiations and additional accommodations on all sides were necessary. As a result, the State Implementing Legislation differs in some respects from the Agreement in Principle and the Federal legislation introduced and filed as H. R. 2399 in the U.S. House of Representatives differs in some respects from the Agreement. Most notably, events occurring after the Agreement in Principle was last revised required that the legislative provisions treating games of chance be modified.

7. In all cases, however, the language in the State Implementing Legislation and in H. R. 2399 resulted from agreement of the parties represented by the undersigned; no change or amendment was made without the concurrence of such parties; and the legislative language accurately reflects their final agreement.

8. The undersigned agree that the State Implementing Legislation, which is to be executed by the Governor of South Carolina concurrently with this Memorandum and the bill introduced in the U.S. House of Representatives and filed as H. R. 2399, are consistent with the Agreement in Principle, as finally revised. The undersigned further agree that the process of negotiating the Agreement underlying this legislation was difficult, complex, and time-consuming; that the undersigned will, therefore, apply their best efforts to secure enactment of H. R. 2399 in the form it was introduced; and that the undersigned, and the parties they represent, will not seek to alter or modify the bill. Each signatory pledges to work faithfully and diligently to secure passage of H. R. 2399 in the form it has been introduced.

9. The undersigned acknowledge that the State Implementing Legislation and H. R. 2399 express the understanding and agreement of the parties, and that events and negotiations occurring after the Agreement in Principle was last revised have caused the State Implementing Legislation and H. R. 2399 to differ in some respects from the Agreement in Principle. In all cases where there are differences, the enacted legislation shall control and supersede the Agreement in Principle. The Agreement in Principle is otherwise a comprehensive statement of the parties' terms of settlement. The Agreement in Principle will be maintained on record permanently as an official source for those provisions which have been incorporated by reference in the implementing legislation, and it may be used as a reference to

illuminate the intent of the parties and the background of the State and Federal implementing legislation.

Signed this 14th day of June, 1993, at the State House in Columbia, South Carolina by:

Gilbert Blue
Chief,
Catawba Indian Tribe
of South Carolina

Carroll A. Campbell, Jr.
Governor
State of South Carolina

E. Fred Sanders
Assistant Chief

Robert W. Hayes, Jr.
South Carolina State Senator

Carson Blue
Secretary-Treasurer

John M. Spratt, Jr.
Member of Congress

Buck George

Claude Ayers

Foxx Ayers

Dewey Adams

Wilford Harris

Don B. Miller
Native American Rights Fund

AGREEMENT IN PRINCIPLE

1. Parties. This Agreement in Principle is made by and between the following parties:

1.1 The Catawba Indian Tribe of South Carolina, represented by Gilbert Blue, Chief; E. Fred Sanders, Assistant Chief; Carson Blue, Secretary-Treasurer; and Tribal Executive Committee Members - Buck George, Claude Ayers, Foxx Ayers, Dewey Adams and Wilford Harris; and by Don B. Miller, Native American Rights Fund, and Robert M. Jones, Jay Bender, Richard Steele, Cheryl Perkins and Ross Swimmer, attorneys for the Catawbas.

1.2 The State of South Carolina, represented by Governor Carroll A. Campbell, Jr., and by A. Crawford Clarkson, Jr., Chairman of the Governor's Advisory Committee on the Catawba Indian Claim; by Senator Robert W. Hayes, Jr., representing the Legislative Delegations of York, Lancaster, and Chester Counties, South Carolina; by Representative John M. Spratt, Jr., representing the South Carolina Congressional Delegation.

2. Definitions. When used in this Agreement, the following words, terms or abbreviations shall have the meanings given below:

2.1 "Agreement" shall mean this written document, entitled "Agreement in Principle."

2.2 "Catawba Indian Tribe," "Catawbas," or "Tribe" shall mean the Catawba Indian Tribe of South Carolina as constituted in aboriginal times, which was party to the Treaty of Pine Tree Hill in 1760 as confirmed by the Treaty of Augusta in 1763, which was party also to the Treaty of Nation Ford in 1840, and which was the subject of the Catawba Indian Tribe of South Carolina Division of Assets Act, enacted September 29, 1959, codified at 25 U.S.C. Sections 931-938, and all predecessors and successors in interest, including the Catawba Indian Tribe of South Carolina, Inc.

2.3 "State Government" or "State" shall mean the State of South Carolina.

2.4 "Executive Committee" shall mean the body of the Catawba Indian Tribe of South Carolina composed of the Tribe's executive officers as selected by the Tribe in accordance with its constitution.

2.5 "General Council" shall mean the membership of the Tribe convened as the Tribe's governing body for the purpose of conducting tribal business pursuant to the Tribe's constitution.

2.6 "Member" or "tribal member" shall mean individuals as determined in accordance with Section 7.

2.7 "Secretary of the Interior" or "Secretary" shall mean the Secretary of the Department of the Interior or his designee, and "Department" or "Department of the Interior" shall refer to the United States Department of the Interior.

2.8 "Federal Government" shall mean the Government of the United States of America.

2.9 "Catawba Claim Area" shall mean that area of

approximately 144,000 acres in York, Lancaster, and Chester Counties, South Carolina claimed by the Catawba Tribe under the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763, and surveyed by Samuel Wylie in 1764, and ceded by the Catawba Indian Tribe to the State of South Carolina by the Treaty of Nation Ford in 1840.

2.10 "Suit" or "Suits" shall mean the Catawba Indian Tribe of South Carolina v. State of South Carolina, et al., docketed as Civil Action No. 80-2050 and filed in United States District Court for the District of South Carolina and the Catawba Indian Tribe of South Carolina v. United States of America, docketed as Civil Action No. 90-553L and filed with the United States Court of Claims.

2.11 "Claim" or "Claims" shall mean any claim which was asserted by the plaintiffs in either Suit, and any other claim which could have been asserted by the Catawba Indian Tribe or any Catawba Indian of a right, title, or interest in property, to trespass or property damages, or of a hunting, fishing or other right to natural resources, if such claim is based upon aboriginal title, recognized title, or title by grant, patent, or treaty, including the Treaty of Pine Tree Hill of 1760, the Treaty of Augusta of 1763, or the Treaty of Nation Ford of 1840.

2.12 "Termination Act" shall mean the "Catawba Indian Tribe Division of Assets Act," enacted September 21, 1959, 73 Stat. 592, 25 U.S.C. Section 931-938.

2.13 "Reservation" shall mean the tract of land now held in trust for the Tribe by the State of South Carolina, as described in Exhibit A, sometimes referred to herein as the "existing reservation," and lands added to the existing reservation in accordance with Section 14, sometimes referred to herein as the "expanded reservation," which are to be held in trust for the Tribe by the United States of America, acting through the Secretary of Interior, in accordance with this Agreement.

2.14 "Tribal Trust Funds" shall mean those funds set aside in trusts established for the benefit of the Tribe, as provided in Section 13.

2.15 "Implementing legislation" shall mean all appropriate federal, state and county laws and ordinances and tribal action necessary to enact and effect the terms, provisions, and conditions of settlement, as specified in Section 3.1 of this Agreement.

2.16 "Transfer" includes, but is not limited to, any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

2.17 "Internal Matters" or "Internal Tribal Matters" are matters which include, but are not limited to the following examples: the relationship between the Tribe and one or more of

its members, the conduct of Tribal government over members of the Tribe, or the Tribe's exercise of the power to exclude individuals from its Reservation.

3. Purpose; Duration of Certain Provisions Relating to Hunting and Fishing Licenses and Tax Treatment.

3.1 Purpose. The purpose of this Agreement is to record the understanding of the parties with respect to settlement of the claims and suits pending in the United States District Court for the District of South Carolina entitled Catawba Indian Tribe of South Carolina Inc. v. State of South Carolina, et al., docketed as Civil Action No. 80-2050, and in the United States Claims Court entitled The Catawba Indian Tribe of South Carolina v. United States of America, docketed as Civil No. 90-553L, and any other suit or claim, which is filed now or which may be filed in the future, all, as further defined in Sections 2.10 and 2.11. By signing this document, each party signifies its good faith commitment to fulfill the terms of settlement set forth in this Agreement. All parties recognize, however, that this Agreement is an agreement in principle; that to complete this Agreement, terms of settlement and implementing legislation in more explicit detail will have to be defined and drafted; and that to consummate this Agreement, formal ratification will be required by the Catawba Indian Tribe and legislation will be required to be enacted by the governing bodies of York and Lancaster Counties, by the General Assembly of South Carolina, and by the Congress of the United States. The parties agree that they will use their best efforts to ensure passage of federal, state and local legislation and tribal action implementing the provisions of this Agreement without any material change and will attempt throughout the legislative process to fulfill the intent of this Agreement. Legislation adopted by the State shall not become effective until federal legislation is enacted and reviewed by the Governor to ensure it is consistent with the provisions of this Agreement.

3.2 Licenses and Tax Treatment. The Tribe and its members shall be eligible to receive the hunting and fishing licenses described in Section 17.5 and the tax treatment described in Sections 18.4.2, 18.5.1, 18.5.2, 18.6.1, 18.9.1, 18.9.3 and 18.10 of this Agreement for a period of 99 years from the effective date of the State implementing legislation required to effectuate the settlement described herein.

4. Restoration of the Federal Trust Relationship.

4.1 Establishment of Trust Relationship. Upon final enactment of all local, state and federal legislation implementing this settlement, the trust relationship between the Tribe and the United States shall be restored. On the same date as the Tribe is restored, the Tribe and the members of the Tribe shall be eligible for all benefits and services furnished to federally recognized Indian Tribes and their members. The federal legislation implementing this settlement will,

prospectively, repeal the Termination Act. Such repeal shall not divest or disturb title to any land conveyed to any person or firm as a result of the Termination Act and the partition and liquidation of Tribal land. The jurisdiction and governmental powers of the Tribe shall be exclusively those that are specifically enumerated in this Agreement. Except for claims extinguished under this Agreement, the enactment of the implementing legislation shall not affect any property right or obligation or any contractual right or obligation in existence before its effective date or any obligation for taxes levied before such date.

4.2 Entitlement of Tribe and Members. The Catawba Indian Tribe of South Carolina will be entered on the list of federally recognized bands and tribes maintained by the Department of the Interior; and its members will be entitled to special services, educational benefits, medical care, and welfare assistance provided by the United States to Indians because of their status as Indians, and the Tribe will be entitled to the special services performed by the United States for tribes because of their status as Indian tribes. In addition to any other provision of health care that might be authorized or provided to the Tribe or its members now or in the future by state or federal authority, the Indian Health Service shall be authorized and directed to issue "health cards" for use by any member of the Tribe in a health care facility of their choosing approved by Indian Health Service as to quality of care. Such "health card" shall entitle the tribal member to the same level of care as is available at any Indian health care facility or available through contract health care.

4.3 Extent of Jurisdiction. Federal recognition shall not be construed to empower the Catawbas with special jurisdiction, or to derogate from the jurisdiction of the State of South Carolina or its political subdivisions other than municipalities over the Catawba Indian Tribe and its members, except as expressly provided in this Agreement. The Catawba Tribe, its members, and the lands and natural resources owned by the Tribe and its members (including land and natural resources held by the United States in trust for the Tribe) shall be subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State, except as otherwise expressly provided in this Agreement.

4.4 Impact Aid. Any school district in York County or Lancaster County affected by the loss of property tax revenues caused by the establishment of the Catawba Indian Reservation shall be eligible for "Impact Aid," at the time the legislation is adopted, as provided by 20 U.S.C. 236, et seq.

5. Monetary Contributions Toward Settlement.

5.1 Federal Contribution. Upon formal ratification of this Agreement by the tribe and final enactment of all local, state and federal legislation consummating this settlement, the Federal Government shall contribute Thirty-two million and no/100 ($32,000,000) Dollars to the trust funds established in accordance with the provisions of Section 13 less any funds to be paid pursuant to Section 6.4 of this Agreement, in annual installments as specified on the schedule set forth in Exhibit A-1, and shall begin providing the services and benefits accorded recognized tribes and their members, as provided in this Agreement.

5.2 State, Local, and Private Contributions. Upon formal ratification of this Agreement by the Tribe and final enactment of all local, state, and federal legislation consummating this settlement, the State, local governments and private sources shall contribute Eighteen million and no/100 ($18,000,000) Dollars, to the Department of the Interior, and the Secretary shall deposit such contributions, less any funds to be paid pursuant to Section 6.4 of this Agreement, in the trust funds established pursuant to Section 13, in annual installments as specified in the schedule set forth in Exhibit A-2. Any private payments made under this Agreement shall be treated as either a payment in settlement of litigation or a charitable contribution for federal and state income tax purposes.

6. Extinguishment of Claims, Dismissal of Suits, Ratification of Prior Transfers.

6.1 In consideration of the payments set forth in Section 5 and other benefits accruing to the Tribe and its members under this Agreement, the federal legislation implementing this settlement shall extinguish all claims and all right, title, and interest that the Tribe, its members, or any one or more of its members, or any person or group of persons purporting to be Catawba Indians, may have to aboriginal title, recognized title, or title by grant, patent, or treaty, to the lands located anywhere in the United States; except, however, that this quitclaim and release shall not apply to the 630-acre reservation described in Exhibit A, now held in trust by the State of South Carolina; nor shall it divest or disturb any member of the Tribe of any fee simple, leasehold, or remainder estate, or any equitable or beneficial interest, he or she may own and hold individually, and not as members of the Tribe, in any parcels of land anywhere in the United States.

6.2 In further consideration of the payments set forth in Section 5 and other benefits accruing to the Tribe and its members under this Agreement, the federal legislation implementing this settlement shall also extinguish any hunting, fishing, or water rights or rights to any other natural resources claimed by the Tribe based on aboriginal or treaty recognized title, and all trespass damages and other damages associated with use, occupancy or possession, or entry upon such lands, including

without limitation all profits and rents derived from such lands, and any timber, soil, minerals, crops, or other natural resources taken from such lands; provided, however, that extinguishment of the claim shall in no way diminish or derogate from the fee simple estate in the existing reservation now held by the State as trustee for the benefit of the Catawbas.

6.3 The Tribe shall accept the payments set forth in Section 5 and the benefits provided under this Agreement as just and full compensation for, and the federal implementing legislation shall ratify and approve, all prior transfers of lands by the Tribe, its members or any one or more of its members within the United States, including the cession of title purportedly effected by the Treaty of Nation Ford in 1840, and to the extent that such cession may have included aboriginal title, such legislation shall extinguish aboriginal title as of the effective date of transfer; provided, however that nothing in this section shall be construed to affect, diminish, or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability that protects non-Indians as well as Indians. By virtue of such approval and ratification, together with the extinguishment of aboriginal title, all claims based on aboriginal, recognized title, or title by grant, patent or treaty against the United States, or against any state or subdivision of any state, or any person or entity, by the Catawba Indian Tribe, or by any member or members of the Tribe, or by any person or group of persons purporting to be Catawba Indians, including but not limited to possessory claims and claims for ejectment, claims for trespass damages, and claims for use, occupancy, hunting, fishing, or extraction and removal of natural resources, and any accounting therefor, arising from the beginning of time to the date of such legislation shall be canceled, released, and forever extinguished. Adoption of the federal and state legislation implementing this Agreement shall constitute a general discharge of all obligations of the United States, the State and all of their political subdivisions, agencies and departments, including claims asserted in the Suits defined in Section 2.10 arising out of any treaty or agreement, including the Treaty of Nation Ford, the Treaty of Augusta and the Treaty of Pine Tree Hill, with the Tribe, its members or any one or more of its members.

6.4 Upon final enactment of all implementing legislation, the Tribe shall duly consent to the dismissal with prejudice of the suits, and shall execute and deliver to the State and the United States full and final releases of all their claims against the State and the United States and all other defendants and landowners in the Claim Area, including defendants not yet named or sued. The parties to the suits shall bear their own costs and attorney fees and the federal implementing legislation shall authorize and direct the Secretary of the Interior to approve and pay to the Tribes' attorneys reasonable attorney fees and expenses not to exceed ten and no/100 (10%) percent of the funds paid pursuant to Section 5 of this

Agreement.

6.5 The federal legislation implementing this settlement shall bar the United States from asserting by or on behalf of the Tribe, any one or more of its members, or anyone purporting to be a Tribal member, any claim arising before the date of such legislation from the transfer of any land or natural resources of the Tribe by deed or other grant, or by treaty, compact, or act of law, on the grounds that such transfer was not made in accordance with the laws of the State or the United States. The federal legislation implementing this settlement shall also provide that any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Tribe, or any of its members, or anyone purporting to be a Tribal member, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (Chapter 33, Section 4, 1 Statutes 137, 138), and all amendments thereto and subsequent reenactments and versions thereof; and Congress will ratify and approve any such transfer as of its effective date; provided, however, that nothing in this section shall be construed to affect, diminish, or eliminate the personal claim of any individual Indian (except for any federal common law fraud claim or other action to recover for a Claim as defined in Section 2.11 which is pursued under any law of general applicability that protects non-Indians as well as Indians.

6.6 The provisions of this section shall take effect immediately upon adoption of federal and state legislation implementing the provisions of this settlement. The federal legislation shall provide that in the event the state contribution, or any part of it, is not appropriated as scheduled, the United States shall advance the Tribe the amount which the state has failed to appropriate as scheduled. The United States shall have a cause of action to recover from the state by an action in the United States District Court for the District of South Carolina any amount so advanced to the Tribe.

7. Tribal Membership.

7.1 Membership Criteria. For purposes of approving or ratifying this Agreement or any other agreement for settlement of the Tribe's claims, a person shall be considered a member of the Tribe and his or her name shall be carried on the membership roll if the person is living at the time of the enactment of federal legislation pursuant to this Agreement and:

7.1.1 His or her name was listed on the membership roll published by the Secretary of Interior in the Federal Register on February 25, 1961, (26 Federal Register 1680-1688, "Notice of Final Membership Roll") and he or she is not excluded under the provisions of Section 7.2; or

7.1.2 The Executive Committee determines, based on the criteria used to compile the above-referenced roll, that his or her name should have been included on the membership roll

at that time, but was not; or

7.1.3 He or she is a lineal descendant of a member of the Tribe whose name appeared or should have appeared on the membership roll published on February 25, 1961.

7.2 Revision of Membership Roll. The Tribe will revise and update its membership roll, including lineal descendants and others omitted from the roll published in the Federal Register on February 25, 1961, and excluding any persons found to have been erroneously listed. As soon as practicable after enactment of federal legislation implementing this settlement, the Secretary will publish in the Federal Register a notice that the rolls of the Catawba Indian Tribe of South Carolina are open, the requirements for membership, the final membership roll as of September 29, 1959, and the updated membership role as prepared by the Executive Committee and approved by the General Council; that the updated roll will be open for a period of ninety (90) days, and the name and address of the tribal or federal official to whom inquiries should be made.

7.3 Finalizing Membership Roll. Within one hundred twenty (120) days after publication of such notice, the Secretary, after consultation with the Tribe, will prepare and publish in the Federal Register a proposed final roll of the Tribe's membership. Within sixty (60) days from the date of publication of the proposed final roll, an appeal may be filed with the Executive Committee under rules made by the Executive Committee in consultation with the Secretary. Such an appeal may be filed by a member of the Tribe with respect to the inclusion of any name on the proposed membership roll and by any person with respect to the exclusion of his or her name from the membership roll. The Executive Committee will review such appeals and render a decision, subject to the Secretary's approval. If the Executive Committee and the Secretary disagree, the Secretary's decision will be final. All such appeals will be resolved within ninety (90) days following publication of the proposed roll. The final membership roll of the Tribe will then be published in the Federal Register and will be final for purposes of this settlement.

7.4 Future Membership in the Tribe. The Tribe shall have the right to determine future membership in the Tribe; however, in no event may an individual be added to the final membership roll which is compiled in accordance with Section 7.3 unless an individual is a lineal descendant of a person on such final membership roll.

8. Transitional and Provisional Government.

8.1 Executive Committee. If the Tribe completes revision and adoption of a new constitution prior to consummation of this Agreement, the Executive Committee instituted under the new constitution will represent the Tribe and its members in the implementation of this Agreement.

8.2 Executive Committee as Transitional Body. Until the Tribe has completed the revision and adoption of a new

constitution, the existing Executive Committee of the Catawba Indian Tribe of South Carolina will be recognized as the provisional and transitional governing body of the Tribe. The Executive Committee shall represent the Tribe and its members in the implementation of this Agreement. The Executive Committee shall have full authority to enter into contracts, grant agreements and other arrangements with any federal department or agency, and shall have full authority to administer or operate any program under such contracts or agreements. Until the initial election of tribal officers under a new constitution and by-laws, the Executive Committee will determine tribal membership in accordance with the provisions of Section 7; and the Executive Committee will oversee and implement the revision and proposal to the Tribe of a new constitution, and conduct such tribal meetings and elections as may be required.

9. Tribal Constitution and Governance.

9.1 Indian Reorganization Act. If the Tribe so elects, it may organize under the Indian Reorganization Act, 25 U.S.C. Sections 461-479, (IRA) and may adopt and apply to the Tribe any of the following provisions to the extent they are consistent with this Agreement: Sections 461, 466, 469, 470, 470a, 471, 472, 472a, 473, 475a, 476, 477, 478, 478a, and 478b.

9.2 Revision of Tribe's Constitution. The Executive Committee will oversee the drafting of a proposed constitution and by-laws for the Tribe, and upon completion, provide for distribution of copies to members of the Tribe. The Executive Committee will set a date, time, manner for ratification by secret ballot after distribution of the proposed constitution and by-laws, and include a notice of the election with the distribution of the documents to be approved. Unless otherwise provided in the Tribe's constitution, two-thirds of those actually voting shall be necessary to ratify and adopt the tribal constitution and by-laws.

9.3 Elections. Within one hundred twenty (120) days after the Tribe ratifies and adopts a constitution and by-laws, the Executive Committee shall conduct an election by secret ballot for the officers and governing body of the Tribe as specified in the constitution and by-laws. Subsequent elections will be held in accordance with the Tribe's constitution and by-laws.

9.4 Extension of Time. Any time periods prescribed in Section 9.3 may be altered by written agreement between the Executive Committee and the Secretary.

10. Jurisdiction and Governance of the Reservation.

10.1 Governance. Except as otherwise provided in this Agreement, the Tribe shall exercise full authority over internal tribal matters.

10.2 Powers of Tribe. The sections of the IRA cited in Paragraph 9.1 shall apply to the Tribe if the Tribe so elects. Regardless of whether the Tribe elects to organize under the IRA,

in any constitution adopted by the Tribe, the Tribe may be authorized to the extent which is consistent with this Agreement (i) to regulate the use and disposition of tribal property; (ii) to define laws, petty crimes and rules of conduct applicable to members of the Tribe while on the reservation, supplementing but not supplanting criminal laws of the State of South Carolina; (iii) to regulate the conduct of businesses located on the reservation and individuals residing on the reservation; (iv) to levy taxes on members of the Tribe and levy other taxes as provided in Section 18; and (v) to grant exemptions, abatements or waivers from any tribal laws, tribal regulations, or tribal taxes, except the Tribal Sales and Use Taxes, otherwise applicable on the reservation, including waivers of the jurisdiction of any tribal court; (vi) to adopt its own form of government; (vii) to determine membership as provided in Section 7; (viii) to exclude non-members from its membership rolls and from the reservation, except for (a) any public roads traversing the reservation; (b) passage on and use of the Catawba River; (c) public or private easements encumbering the reservation properly used by those with authority to use such easements; (d) federal, state, and local governmental officials and employees duly performing official governmental functions on the reservation; and (e) any other access to the reservation allowed by federal law; and (ix) to charter tribally-owned economic development corporations and enterprises provided the corporations or enterprises register with the Secretary of State for South Carolina as a domestic or foreign corporation when doing business off the reservation.

10.3 Indian Civil Rights Act. The Tribe shall be subject to the Indian Civil Rights Act, 25 U.S.C. Sections 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, and any amendments thereto, which shall apply to the reservation and any tribal court and to anyone subject to its jurisdiction.

11. Criminal Jurisdiction.

11.1 Felonies. Except as provided in Section 11.2 below, the State of South Carolina shall exercise exclusive jurisdiction over all crimes under the statutory or common law of the State of South Carolina.

11.2 Jurisdiction of Tribal Court. Any constitution adopted by the Tribe may provide for a tribal court with criminal jurisdiction. The territorial jurisdiction of the court shall be limited to the reservation; the jurisdiction of the court over persons shall be limited to members of the Tribe; and the subject matter jurisdiction of the court shall be limited to crimes within the jurisdiction of the state's magistrate's courts and to misdemeanors and petty offenses specified in the ordinances or laws adopted by the Tribe, provided that the fines and penalties for such offenses shall not exceed the maximum fines and penalties that a state magistrate's court may impose. In all cases in which the tribal court has jurisdiction over state law, its jurisdiction shall be concurrent with the jurisdiction of the

magistrates courts of the state; and defendants shall have the right to remove such cases to the magistrate's court or appeal their convictions in tribal court cases to the General Sessions Court, in the same manner that magistrates' court decisions may be appealed, or in accordance with such procedures as the state legislature may provide.

11.3 For purpose of enforcing the Tribe's powers under Sections 10.2, 11, and 17 of this Agreement, the Tribe may employ peace officers. If the Tribe elects to employ peace officers, all tribal peace officers shall undergo and pass the same course of training required of sheriff's deputies by the State of South Carolina and the Counties of York and Lancaster and shall be cross-deputized by the sheriffs of York and Lancaster Counties. The State, the Counties of York and Lancaster, and the Tribe shall enter into a cross-deputization agreement whereby tribal law enforcement officers are authorized to enforce state law within the reservation against members and non-members of the Tribe and state and county law enforcement officers are authorized to enforce state, county and tribal law within the reservation against members and non-members of the Tribe.

12. Civil Jurisdiction: Jurisdiction of Tribal Court.

12.1 The Tribe may provide in its constitution for a Tribal Court having civil jurisdiction which may extend up to, but not exceed, the extent provided in this Agreement. The Tribe may have a court of original jurisdiction, as well as an appellate court.

12.1.1. With respect to actions on contracts, the Tribal Court may be vested with jurisdiction over:

12.1.1.1 An action on a contract to which the Tribe or a member of the Tribe is a party, which expressly provides in writing that the Tribal Court has concurrent or exclusive jurisdiction.

12.1.1.2 An action on a contract between the Tribe or a member of the Tribe and other parties or agents thereof who are physically present on the reservation when the contract is made, which is to be performed in part on the reservation, provided that such contract does not expressly exclude jurisdiction of the Tribal Court. For purposes of this section, the mere delivery of goods or the solicitation of business on the reservation shall not constitute part performance sufficient to confer jurisdiction.

12.1.1.3 An action on a contract to which the Tribe or a member of the Tribe is a party where more than fifty percent of the services to be rendered are performed on the reservation, which does not expressly exclude jurisdiction of the Tribal court.

12.1.2 With respect to actions in tort, the Tribal Court may be vested with jurisdiction over:

12.1.2.1 An action arising out of an intentional tort, as defined by South Carolina law, committed on the reservation in which recovery is sought for bodily injuries

and/or damages to tangible property located on the reservation.

12.1.2.2 An action arising out of negligent tortious conduct occurring on the reservation or conduct occurring on the reservation for which strict liability may be imposed, excluding, however, accidents occurring within the right-of-way limits of any highway, road, or other public easement owned or maintained by the State or any of its subdivisions, or by the United States, which abuts or crosses the reservation; provided, however, that any such action in tort involving a non-member of the Tribe as defendant may be removed to a state or federal court of appropriate jurisdiction if the amount in controversy exceeds the jurisdictional limits then applicable to Magistrate's Courts in the State of South Carolina.

12.1.3 The Tribal Court may be vested with exclusive jurisdiction over internal matters of the Tribe.

12.1.4 The Tribal Court may also be vested with jurisdiction over domestic relations where both spouses to the marriage are members of the Tribe and both reside on the reservation, or last resided together on the reservation before the separation leading to their divorce.

12.1.5 The Tribal Court may also be vested with jurisdiction to enforce against any business located on the reservation, and any members or non-members residing on the reservation, any tribal civil regulation regulating conduct on the reservation enacted pursuant to Section 10.2 or 17 of this Agreement. Such persons or entities are charged with notice of the Tribe's regulations governing conduct on the reservation and are subject to the enforcement of such regulations in the tribal court unless the tribe has specifically exempted the entity or person from any or all regulation and enforcement in tribal court.

12.1.6 The original jurisdiction of the Tribal Court over the matters set forth in Sections 12.1.1.2, 12.1.1.3 and 12.1.2 and 12.1.4 shall be concurrent with the jurisdiction of the Court of Common Pleas of South Carolina, the Family Court and the U. S. District Court for South Carolina. The original jurisdiction of the Tribal Court over the matters set forth in Section 12.1.1.1 shall be concurrent or exclusive depending upon the agreement of the parties. The original jurisdiction of the Tribal Court over matters set forth in Section 12.1.3 shall be exclusive. The original jurisdiction of the Tribal Court over matters set forth in Section 12.1.5 shall be exclusive unless the Tribe has waived such exclusive jurisdiction as to any person or entity. As to all sections referred to herein jurisdiction over appeals, if any, is governed by Section 12.1.8.

12.1.7 The Tribe may waive Tribal Court jurisdiction or the application of tribal laws with respect to any person or firm residing, doing business, or otherwise entering upon the reservation or contracting with the Tribe. Any member of the Tribe may also waive Tribal Court jurisdiction or specify in the contract the law of any appropriate jurisdiction to govern any commercial transaction or the interpretation of a

contract to which the member is a party.

12.1.8 All final judgments entered in actions tried in Tribal Court shall be subject to an appeal to the Family Court, the Court of Common Pleas, or the United States District Court, (depending upon whether that court would have had jurisdiction over the appealed matter had it been commenced in that court) if: (i) a party to the suit is not a member of the Tribe; (ii) the amount in controversy or the cost of complying with any equitable order or decree exceeds the jurisdictional limits then applicable in the Magistrate's Courts of South Carolina; and (iii) provided that the subject matter of the suit does not fall within the provisions of Sections 12.1.1.1 if jurisdiction is exclusive, or 12.1.3 or 12.1.5. The Tribe may enlarge the right of appeal to include other subject matters and members of the Tribe, subject to such rules and procedures as the applicable court and relevant state and federal laws may provide.

12.1.9 In any such appeal, the court may, as appropriate (i) enter judgment affirming the Tribal Court, (ii) dismiss the case for lack of jurisdiction of the Tribal Court, but only in those cases where the Tribal Court has first addressed the issue of its jurisdiction; (iii) reverse or remand the case for retrial or reconsideration in Tribal Court or (iv) grant a trial de novo in its court.

12.1.10. In any appeal, trial, or trial de novo, the reviewing court shall apply any regulation enacted pursuant to Tribal authority.

12.1.11 In cases subject to the provisions of 12.1.2, 12.1.8 and 12.1.9, all final judgments of the Tribal Court shall be given full faith and credit in the state or federal court with appropriate jurisdiction, and the Tribal Court shall reciprocate.

12.1.12 If a member of the Tribe seeks to enforce against a non-member in state or federal court a final judgement of the Tribal Court in a case which is not subject to the provisions of 12.1.2, 12.1.8 and 12.1.9, the judgment shall be reviewed by the state court in the manner provided in the Uniform Arbitration Act, S.C. Code 15-48-10 et. seq. and by the federal court in the manner provided in the United States Arbitration Act, 9 U.S.C. 1 et. seq.

12.2 Sovereign Immunity.

12.2.1 The Tribe may sue, or be sued, in any court of competent jurisdiction; except, however, that the Tribe shall enjoy sovereign immunity, including damage limits and except as provided in 12.2.7, immunity from seizure, execution, or encumbrance of properties, to the same extent as the political subdivisions of the State as provided in the South Carolina Tort Claims Act, Section 15-78-10, et seq., S.C. Code Annotated, 1976 as amended, and amendments of general applicability thereto adopted hereafter. With respect to liability based on contract, however, the Tribe may, in a written contract, provide that it is immune from suit on that contract as if there had been no waiver of sovereign immunity. Notwithstanding the provisions of this

section, the Tribe will be subject to suit as provided in Section 17.2.

12.2.2 The Tribe shall procure and maintain liability insurance with the same coverage and limits as required of political subdivisions of the State by Section 15-78-140(b), and amendments thereto hereafter adopted.

12.2.3 Any action alleging tortious conduct by an employee of the Tribe acting within the scope of his duties which seeks money damages against the Tribe shall name only the Tribe as a party defendant.

12.2.4 A settlement or judgment in an action or a settlement of a claim filed with the Tribe shall constitute a complete bar to any further action by the claimant against the Tribe by reason of the same occurrence.

12.2.5 A claimant may file a verified claim for damages with the Tribe prior to filing suit, but shall not be required to file such a claim as a prerequisite to filing suit. Such claim shall set forth the circumstances which brought about the loss, the extent of the loss, the time and the place the loss occurred, the names of all persons if known, and the amount of the loss sustained. The Tribe shall designate an employee or office to accept the filing of claims. Filing may be accomplished by receipt by the Tribe's designee of certified mailing of the claims or by compliance with the provisions of law relating to service of process. If filed, the claim must be received within one year after the loss was or should have been discovered. The Tribe shall have 180 days from the date of the filing of the claim in which to determine whether the claim should be allowed or disallowed. Failure to notify the claimant of action upon the claim within 180 days after the filing of the claim is considered a disallowance of the claim. While the filing of such a claim shall not be required as a prerequisite to suit, if a claimant files a claim, he may not institute an action until after the occurrence of the earliest of one of the following three events: (1) the passage of 180 days from the filing of the claim with the Tribe, (2) the Tribe's disallowance of the claim, or (3) the Tribe's rejection of a settlement offer.

12.2.6 The provisions of the following sections of the South Carolina Tort Claims Act shall apply to the Tribe to the same extent as they apply to the State and its political subdivisions: Sec. 15-78-100(c) (joint tortfeasors); 15-78-110 (statute of limitations); 15-78-170 (survival actions); 15-78-190 (applicability of uninsured or underinsured defendant insurance).

12.2.7 In the event that the Tribe's insurance coverage is inadequate or unavailable to satisfy a judgment within the limits of the Tort Claims Act, neither the judgment nor any other process may be levied upon the corpus or principal of the Tribal Trust Funds or upon any property held in trust for the Tribe by the United States; however, the Tribe or the Secretary of Interior shall honor valid orders of a federal or state court which enters money judgments for causes of action

against the Tribe arising after the consummation of this settlement, by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment or payments of income from the Tribal Trust Funds.

12.3 Indian Child Welfare Act. The Indian Child Welfare Act, 25 U.S.C. 1901, et. seq., (ICWA) shall apply to Catawba Indian Children except as provided in this section. Before the Tribe may assume jurisdiction over Indian child custody proceedings under the ICWA, the Tribe shall present to the Secretary for approval a petition to assume such jurisdiction, and the Secretary shall approve the petition in the manner prescribed in ICWA. Any petition to assume jurisdiction over Indian child custody proceedings by the Tribe shall be considered and determined by the Secretary in accordance with the relevant provisions of ICWA. Assumption of jurisdiction under ICWA shall not affect any action or proceeding over which a court has already assumed jurisdiction. Until the Tribe has assumed jurisdiction over Indian child custody proceedings, the State shall retain exclusive jurisdiction over Indian custody proceedings; however, the State Court shall apply the Indian Child Welfare Act. ICWA shall not apply to private adoptions of Indian children under the jurisdiction of the Catawba Tribe under the ICWA where both parents consent to the adoption or in the case of an unwed mother, the mother consents to the adoption when the father's consent is not necessary for the adoption under South Carolina Law Section 20-7-1690 and any amendments thereto, and the parents or mother help choose adoptive parents, regardless of whether or not the adoptive parents are outside the preferences of the ICWA. However, the court may consider any benefits, material and cultural, the child may lose in determining whether the proposed adoption is in the best interests of the child; provided, however, that failure of the courts to make this consideration shall not be subsequently held to invalidate the adoption. In all cases of adoption, regardless of whether the ICWA applies, Section 25 U.S.C. 1917 shall apply.

12.4 Jurisdiction of State Courts. If no Tribal Court is established by the Tribe, the State shall exercise jurisdiction over all civil and criminal causes arising out of acts and transactions occurring on the reservation or involving members of the Tribe. If the Tribe does establish a tribal court, then the provisions of Section 12.1.6 shall govern the question of whether such jurisdiction is exclusive or concurrent.

13. Tribal Trust Funds: Purposes. All funds paid pursuant to Section 5 of this Agreement shall be deposited with the Secretary in trust for the benefit of the Tribe. Separate trust funds ("Trust Funds") shall be established for the following purposes: Economic Development, Land Acquisition, Education, Social Services and Elderly Assistance, and Per-Capita Payments. Except as provided in this section, the Tribe, in consultation with the Secretary, shall determine the share of settlement payments to be deposited in each Trust Fund, and define,

consistently with the provisions of this section, the purposes of each Trust Fund and provisions for administering each, specifically including provisions for periodic distribution of current and accumulated income, and for invasion and restoration of principal.

13.1 Tribal Trust Funds: Outside Management Option. The Tribe, in consultation with the Secretary, shall be authorized to place any of the Trust Funds under professional management, outside the Department of the Interior. If the Tribe elects to place any of the Trust Fund under professional management outside and the Department of the Interior, it may engage a consulting or advisory firm to assist in the selection of an independent professional investment management firm , and it shall engage, with the approval of the Secretary, an independent investment management firm of proven competence and experience established in the business of counseling large endowments, trusts, or pension funds. The Secretary shall have forty-five (45) days to approve or reject the independent investment management firm selected by the Tribe. If the Secretary fails to approve or reject the firm selected by the Tribe within forty-five (45) days, the investment management firm selected by the Tribe shall be deemed to have been approved by the Secretary. Secretarial approval of an investment management firm shall not be unreasonably withheld and any Secretarial disapproval of an investment management firm shall be accompanied by a detailed explanation setting forth the Secretary's reasons for such disapproval. For funds placed under professional management, the Tribe, in consultation with the Secretary and its investment manager, shall develop (i) current operating and long-term capital budgets, and (ii) a plan for managing, investing, and distributing income and principal from the Trust Funds to match the requirements of the Tribe's operating and capital budgets. For each Trust Fund which the Tribe elects to place under outside professional management, the investment plan will provide for investment of Trust Fund assets so as to serve the purposes described in this section and in the Trust Fund provisions which the Tribe shall establish in consultation with the Secretary and the independent investment management firm. Distributions from each Trust Fund shall not exceed the limits on the use of principal and income imposed by the applicable provisions of this Agreement for that particular Trust Fund. The Tribe's investment management plan shall not become effective until approved by the Secretary. Upon submission of the plan by the Tribe to the Secretary for approval, the Secretary shall have 45 days to approve or reject the plan. If the Secretary fails to approve or disapprove the plan within 45 days, the plan shall be deemed to have been approved by the Secretary and shall become effective immediately. Secretarial approval of the plan shall not be unreasonably withheld and any secretarial rejection of the plan shall be accompanied by a detailed explanation setting forth the Secretary's reasons for rejecting the plan.

Until the selection of an established investment management firm of proven competence and experience, the Tribe will rely on the management, investment, and administration of the Trust Funds by the Secretary pursuant to the provisions of this section.

13.2 Transfer of Trust Funds; Exculpation of Secretary. Upon the Secretary's approval of the Tribe's investment management firm and an investment management plan, all funds previously deposited in trust funds held by the Secretary and all funds subsequently paid pursuant to Section 5 and deposited with the Secretary in trust, which are chosen for outside management, shall be transferred to the accounts established by an investment management firm in accordance with the approved investment management plan. Prior to any such transfer of funds, the Secretary shall be exculpated by the Tribe from liability for any loss of principal or interest resulting from investment decisions made by the investment advisory firm. Any Trust Fund transferred to an investment management firm shall be returned to the Secretary upon written request of the Tribe and the Secretary shall manage such funds for the benefit of the Tribe.

13.3 Land Acquisition Trust. The Secretary shall establish and maintain a "Catawba Land Acquisition Trust Fund," and until the Tribe engages an outside firm for investment management of this trust fund, the Secretary shall manage, invest, and administer this trust fund. The original principal amount of the Land Acquisition Trust Fund shall be determined by the Tribe in consultation with the Secretary. The principal and income of this trust may be used for the purchase of reservation and non-reservation land in York and Lancaster Counties pursuant to this Agreement, costs related to land acquisition, and costs of construction of infrastructure and development of the reservation. Upon acquisition of the maximum amount of land allowed for expansion of the reservation, or upon request of the Tribal Council and approval of the Secretary pursuant to the Secretarial approval provisions set forth in Section 13.1 of this section, all or part of the balance of this trust fund may be merged into one or more of the Economic Development Trust Fund, the Education Trust Fund, or the Elderly Assistance Trust Fund. Alternatively, at the Tribe's election, the Fund may remain in existence after all the reservation land is purchased in order to pay for the purchase of non-reservation land.

The Tribe may pledge or hypothecate the income and principal of the Land Acquisition Trust to secure loans for the purchase of reservation and non-reservation lands. Following enactment of the implementing legislation and before the final annual payment is made as provided in Section 5, the Tribe may pledge or hypothecate up to 50% of the unpaid annual installments required by Section 5, to secure loans to finance the acquisition of reservation or non-reservation land or infrastructure improvements on such lands.

13.4 Economic Development Trust. The Secretary shall establish and maintain a "Catawba Economic Development Trust Fund", and until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer this Trust Fund. The original principal amount of the Economic Development Trust Fund shall be determined by the Tribe in consultation with the Secretary. The principal and income of this Trust Fund may be used to support tribal economic development activities, including but not limited to infrastructure improvements and tribal business ventures and commercial investments benefitting the Tribe. The Tribe, in consultation with the Secretary, may pledge or hypothecate future income and up to fifty percent (50%) of the principal of this Trust Fund to secure loans for economic development. However, in defining the provisions for administration of this Trust Fund, and before pledging or hypothecating future income or principal, the Tribe and the Secretary shall agree upon rules and standards for the invasion of principal and for repayment or restoration of principal, which shall encourage preservation of principal, and provide that, if feasible, a portion of all profits derived from activities funded by principal be applied to repayment of the Trust Fund. Following enactment of the implementing legislation and before the final annual payment is made as provided in Section 5, the Tribe may pledge or hypothecate up to fifty percent (50%) of the unpaid annual installments required by Section 5 to secure loans to finance economic development activities of the Tribe, including, but not limited to, infrastructure improvements on reservation and non-reservation lands. If the Tribe develops sound lending guidelines approved by the Secretary, a portion of the income from this Trust Fund may also be used to fund a revolving credit account for loans to support tribal businesses or business enterprises of tribal members. Availability of funds from this trust shall not be considered in determining the eligibility of the Tribe or its members for funds available from State or federal sources; and distributions from these trust funds may be used as matching funds, where appropriate for other State or federal grants or loans.

13.5 Education Trust. The Secretary shall establish and maintain a Catawba Education Trust Fund, and until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer this Trust Fund. The original principal amount of this Trust Fund will be determined by the Tribe in consultation with the Secretary; provided, however, that at least one-third of all state, local, and private contributions to this settlement shall be paid into the Education Trust Fund. Income from this Trust Fund shall be distributed to the Executive Committee periodically to fund vocational, adult, special and higher educational assistance programs administered by the Executive Committee for members of the Tribe. The principal of this Trust Fund shall not be invaded or transferred to any other Trust Fund, nor shall it

be pledged or encumbered as security. Availability of funds from this Trust Fund shall not be considered in determining the eligibility of members of the Tribe to any other funds available from State or federal sources.

13.6 Social Services and Elderly Assistance Trust. The Secretary shall establish and maintain a Catawba Social Services and Elderly Assistance Trust Fund, and until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer the Social Services and Elderly Assistance Trust Fund. The original principal amount of this Trust Fund shall be determined by the Tribe in consultation with the Secretary. The income of this Trust Fund shall be periodically distributed to the Tribe to support social services programs, including without limitation housing, care of elderly and physically and mentally disabled members of the Tribe, child care, supplemental health care, education, cultural preservation, burial and cemetery maintenance, and operation of tribal government, all in accordance with entitlement criteria and procedures which shall be established by the Tribe.

13.7 Per Capita Payment Trust Fund. The Secretary shall establish and maintain a Catawba Per Capita Payment Trust Fund in an amount equal to 15% of the settlement funds paid pursuant to Section 5 of this Agreement. Until the Tribe engages an outside firm for investment management of this Trust Fund, the Secretary shall manage, invest, and administer the Per Capita Payment Trust Fund. The principal and income of this Trust Fund shall be used (i) to fund a one-time per capita settlement payment to members of the Tribe over the age of 21 in an amount to be determined by calculating the pro rata share of each member of the Tribe following completion of the tribal roll pursuant to Section 7 of this Agreement, and (ii) to purchase a group annuity or make an annuity investment, so as to pay the same sum to members of the Tribe under the age of 21, upon attainment of such age. Each person whose name appears on the final roll of the Tribe published in the Federal Register pursuant to Section 7.3 of this Agreement will receive a one-time, non-recurring payment from this Trust Fund. Each enrolled member who has reached the age of 21 years at the time the final roll is published will receive the payment as soon as practicable after that date. Payments due to each member who is on the final roll of the Tribe but who dies prior to distribution shall be paid to the beneficiaries designated under his will or to the heirs of his personal estate under the law of his domicile if he leaves no will. Members who are 21 years of age or older as of the distribution date will receive the per capita payment on the date of distribution. Any member whose name appears on the final roll who has not attained the age of 21 on the distribution date will receive the per capita payment as soon as practicable after he or she has reached the age of 21. An annuity policy or investment shall be maintained for twenty-one years after the date of ratification. After payments have been made to all members of

the tribe entitled to receive payments, this Trust Fund will terminate, and any balance remaining in this Fund will be merged into the Economic Development Trust Fund, the Education Trust Fund, or the Elderly Assistance Trust Fund, as the Tribe may determine.

13.8 Duration of Trust Funds. Subject to the provisions of Section 13.7 below, and with the exception of the Per Capita Payment Trust Fund, the Trust Funds established in accordance with this section shall continue in existence so long as the Tribe exists and is recognized by the Federal Government. The principal of these Trust Funds shall not be invaded or distributed except as expressly authorized in this Agreement.

13.9 Transfer of Money Among Trust Funds. The Tribe, in consultation with the Secretary, shall have the authority to transfer principal and accumulated income between the Economic Development and Land Acquisition Trust and the Social Services and Elderly Assistance Trust, and from either such Trust Fund into the Education Trust Fund; however, the mandatory share of state, local, and private sector funds invested in the original corpus of the Education Trust Fund shall not be transferred to any other Trust Fund. Any Trust Fund, except for the Education Trust Fund, may be dissolved by a vote of two-thirds (2/3) of those members of the Tribe eligible to vote, and the assets in such Trust Fund shall be transferred to the remaining Trust Funds; except, however, that no assets shall be transferred from any of the Trust Funds into the Per Capita Payment Trust Fund; and no funds from the corpus of the Education Trust Fund may be transferred or used for any non-educational purposes. The dissolution of any trust fund shall require the approval of the Secretary pursuant to the Secretarial approval provisions set forth in Section 13.1 of this section.

13.10 Trust Fund Accounting by Secretary. The Secretary shall account to the Tribe periodically, and at least annually, for all Catawba Trust Funds being managed and administered by the Secretary. The accounting shall identify the assets in which the Trust Funds have been invested during the relevant period; report income earned during the period, distinguishing current income and capital gains; indicate dates and amounts of distributions to the Tribe, separately distinguishing current income, accumulated income, and distributions of principal. The accounting shall identify any invasions or repayments of principal during the relevant period and record provisions the Tribe has made for repayment or restoration of principal.

13.11 Trust Fund Accounting by Investment Management Firm. Any outside investment management firm engaged by the Tribe shall account to the Tribe and separately to the Secretary at periodic intervals, and at least quarterly. Its accounting shall identify the assets in which the Trust Funds have been invested during the relevant period; report income earned during the period, separating current income and capital gains; indicate dates and amounts of distributions to the Tribe, distinguishing

current income, accumulated income, and distributions of principal. Prior to distributing principal from any Trust Fund, the investment management firm shall notify the Secretary of the proposed distribution and the Tribe's proposed use of such funds, following procedures to be agreed upon by the investment management firm, the Secretary, and the Tribe. The Secretary shall have fifteen (15) days within which to object in writing to any such invasion of principal; and failure to object will be deemed approval of the distribution. The investment management firm's accounting shall identify any invasions or repayments of principal during the relevant period and record provisions the Tribe has made for repayment or restoration of principal. All Trust Funds held and managed by any investment management firm shall be audited annually by a certified public accounting firm approved by the Secretary; and a copy of the annual audit shall be submitted to the Tribe and to the Secretary within four (4) months following the close of the Trust Fund's fiscal year.

13.12 Replacement of Investment Management Firm and Modification of Investment Management Plan. The Tribe shall not replace the investment management firm approved by the Secretary without prior written notification to the Secretary and approval by the Secretary of any investment management firm chosen by the Tribe as a replacement. Such Secretarial approval shall be given or denied in accordance with the Secretarial approval provisions contained in Section 13.1 of this Agreement. The Tribe and its investment management firm shall also notify the Secretary in writing of any revisions in the investment management plan which materially increase investment risk or significantly change the investment agreement made in consultation with the Secretary.

14. Establishment of Expanded Reservation.

14.1 Existing Reservation. The State currently holds in trust approximately 630 acres of land which is referred to in this Agreement as the "existing reservation." Upon final enactment of all implementing legislation, the State shall convey the existing reservation to the United States of America as trustee for the Tribe, and the obligation of the State as trustee for the Tribe with respect to this land shall cease.

14.2 Expanded Reservation.

14.2.1 Upon final enactment of all implementing legislation, the Secretary, after consulting with the Tribe, will engage a registered land surveyor to ascertain the boundaries and area of the existing reservation. In addition, the Secretary, after consulting with the Tribe, will engage a professional land planning firm ("planning firm") to assist the Tribe in developing land-acquisition and land-use plans for an expanded reservation. The Secretary will bear the cost of all services rendered by the surveyor and the planning firm pursuant to this Agreement, and neither the Tribe nor state or local government will be assessed for any part of such costs.

14.2.2 With the assistance of the Secretary or the planning firm, the Tribe may canvass land owners in the Primary

Expansion Zone to identify additional tracts that the Tribe may be able to acquire. The Tribe, with the assistance of the Secretary or the planning firm, will determine the scope of its canvass, based on those tracts it wants to acquire and those landowners it considers likely to sell.

14.2.3 Upon final enactment of all implementing legislation, the Secretary, in consultation with the Tribe, may purchase and place in reservation status tracts of lands that are bounded by the existing reservation, or bounded by a tract that has been acquired as part of the expanded reservation and placed in reservation status. Prior to final approval of its Non-Contiguous Development Plan application as described below, the Secretary may obtain options upon and purchase non-contiguous (or "outlying") tracts of lands not bounded by the existing or expanded reservation, but no such non-contiguous tract shall be placed in reservation status until the Tribe's application for a Non-Contiguous Development Plan has been approved. In assembling tracts, contiguity will not be deemed broken by state or federal roads or by public rights of way; and lands on the eastern bank of the Catawba River opposite the reservation shall be considered contiguous to the reservation if the western boundary of any such tract joins the eastern boundary of the reservation when the boundaries of both are extended to the middle of the river. Tracts acquired for the expanded reservation shall not deny access to lands owned by non-members of the Tribe.

14.2.4 When the Secretary has identified a parcel that can be purchased and has negotiated the price, he will present a description of the property and its price, together with other pertinent information and the terms of purchase, to the Tribe. If the Tribe approves the purchase, the Secretary will proceed with closing after completion of a title examination, a preliminary subsurface soil investigation, and a level one environmental audit. The Secretary will bear the cost of all such examinations and will report the results to the Tribe. Payment of any option fee and the purchase price will be drawn from the Tribe's Land Acquisition Trust Fund.

14.2.5 The total area of the expanded reservation will be limited to 3,000 acres, including the existing reservation, but the Tribe may exclude from this limit up to 600 acres of additional land if such land is (i) within rights-of-way for public roads or public utilities rendered unusable for development by the easement or right-of-way; (ii) within the 100-year flood plain of the Catawba River as defined by the Federal Emergency Management Agency, or its successor; (iii) non-developable wetland defined or restricted by law or regulation such that buildings, structures, and other improvements are prohibited; and (iv) park and recreational land accessible to the public and dedicated permanently to public use. After completion of a comprehensive development plan, the Tribe may seek to have the permissible area of the expanded reservation enlarged to a maximum of 3,600 acres, plus up to 600 acres of land as described in (i) through (iv) above. Any such expansion shall be first

approved, however, by the Secretary, and then by ordinance of the county council governing any area where the additional lands are to be acquired, and by a law or joint resolution enacted by the General Assembly and signed by the Governor of South Carolina. All additional lands acquired by the Secretary for the expanded reservation will be held in trust together with the existing reservation which the State is to convey to the United States.

14.2.6 The Secretary, acting on behalf of the Tribe, will make every reasonable effort to expand the existing reservation by assembling a composite tract of contiguous parcels that border and surround the existing reservation. Before placing any non-contiguous tract in reservation status, the Tribe, in consultation with the Secretary, shall submit to the county council in any county where it proposes to purchase non-contiguous tracts for reservation status a Non-Contiguous Development Plan Application ("Application"), which shall include the following:

(a) A statement of the Tribe's needs, objectives, and priorities for its reservation, including planning goals for (1) single and multi-family residential units; (2) recreational amenities; (3) historical sites to be preserved; (3) business and industrial parks; (4) common areas, parks, and open space; (5) roads, streets, utilities, and tribal government and community facilities.

(b) An acquisition and land-use plan, based on the Tribe's planning goals and objectives, showing tracts, both contiguous to the reservation and not contiguous, which the Tribe has acquired or optioned, and identifying where reasonably possible those areas that the Tribe seeks to acquire tracts to place in reservation status, in either the Primary or Secondary Expansion Zones. The acquisition and land-use plan need not be location-specific as to all uses, but should show the expanded reservation as then configured and should designate existing uses, roads, and topographical features including flood plain. Prior to submitting the acquisition and land-use plan to the county council in the county where the Tribe seeks to acquire non-contiguous tracts for reservation status, the Tribe will review the plan with county planning authorities. To avoid speculation in land prices, examination of the Tribe's future land use plans may be restricted by the Tribe to appropriate state and local officials, and these officials as well as the Secretary will be bound to protect confidential aspects of the plans. The acquisition and land-use plan should endeavor to meet the following guidelines: (i) the plan should attempt to cluster the non-contiguous parcels within the Primary Expansion Zone so that each is located as close as possible to the expanded reservation; (ii) the plan should endeavor to locate all non-contiguous parcels within the Primary Expansion Zone, and confine the number of outlying parcels in all Expansion Zones to three with no more than two in any one Zone; (iii) the plan should seek to assemble only non-contiguous parcels of significant size, using 250 acres as the criterion for a minimum desirable area;

(iv) the plan should undertake to show that the outlying parcels will be used for purposes which are compatible with desired existing uses of the surrounding property; (v) the plan should follow generally accepted standards of good land-use planning, providing for the mitigation of environmental impacts and incompatible land uses, and providing traffic and utility planning, building setbacks and density; (vi) the plan for acquiring non-contiguous tracts should avoid the selection of sites or configurations that could leave fragments of unusable land or create hardship for owners of adjoining parcels.

(c) A report of the Secretary's efforts, acting in behalf of the Tribe, to acquire contiguous tracts at fair market value, showing why it is not possible, practical, or advisable to assemble contiguous parcels into a composite tract, as provided in Section 14.2.4, and including the Secretary's certificate to this effect. The Secretary's report will include relevant data on tracts that the Tribe has sought but failed to purchase because of price, terms, or the seller's refusal.

(d) Criteria controlling the Secretary's selection of outlying tracts that the Tribe will seek to purchase, provided its Application is finally approved. Such criteria shall include (i) the minimum area of tracts to be acquired, (ii) the location of outlying tracts in relation to the expanded reservation and the maximum distance between outlying tracts and the nearest boundary of the expanded reservation, (iii) the number of outlying tracts the Tribe intends to acquire in each Zone, (iv) an identification of outlying tracts already owned or under option or targeted for acquisition if the Application is finally approved, (v) provisions for assuring that proposed uses of tracts to be acquired are compatible with existing uses of surrounding property and will not interfere with essential public services, and (vi) a means of assuring that non-contiguous tracts can be marked and readily identified as reservation property.

14.2.7 The Tribe shall present its Application to the county council of each county in which the Secretary proposes to purchase non-contiguous tracts to be placed in reservation status. The county council shall make findings on the extent to which the Application has met the criteria set forth in Section 14.2.6, and recommend to the Governor whether or not the Application should be approved. After receiving the county council's recommendation, the Tribe either may modify its Application and re-submit it to the county council, or present it to the Governor for approval. The Governor shall review the Application and decide whether to approve or disapprove it on the basis of the criteria set forth above. Neither the county council's approval nor the Governor's approval shall unreasonably be withheld, and the Governor's final action shall be subject to review under the Administrative Procedure Act.

14.2.8 Upon approval by the Governor of the Tribe's Non-Contiguous Development Plan Application, the Secretary, in consultation with the Tribe, may proceed to place

non-contiguous tracts in reservation status, in accordance with the Plan and the provisions of this Agreement.

14.3 Primary Expansion Zone. The Secretary and the Tribe shall endeavor at the outset to acquire contiguous tracts for the expanded reservation in the area referred to in this Agreement as the "Primary Expansion Zone." The Primary Expansion Zone shall lie within the area bounded by S.C. Highway No. 5 on the south running northwesterly to its intersection with Springdale Road on the west and thence northeasterly to the Catawba River along Sturgis Road; thence east along the Catawba River to its confluence with Sugar Creek; north along Sugar Creek to its intersection with S. C. Highway No. S-29-41 (Doby Bridge Road); thence with S. C. Highway S-29-41 to its intersection with U. S. Highway No. 521; thence with U.S. Highway No. 521 in a southerly direction to its intersection with S. C. Highway No. S-29-55 (Van Wyck Road) on the east; and thence with S. C. Highway No. S-29-55 to its intersection with Twelve Mile Creek on the south; and thence with Twelve Mile Creek to S. C. Highway No. 5 on the south. This entire area will be known as the "Catawba Reservation Primary Expansion Zone."

14.4 Secondary Expansion Zone. The Secretary, in consultation with the Tribe, may elect to purchase contiguous tracts in an alternative area described in this Agreement as the Secondary Expansion Zone, under the conditions provided in Paragraph 14.2.6 above. The Secondary Expansion Zone shall consist of the area bounded by Sugar Creek on the west; the Catawba River on the south extending to the Norfolk Southern Railway trestle on the west; thence northerly with the railroad right-of-way to its intersection with S. C. S-46-329 (Brickyard Road); thence east to S. C. S-46-41 (Doby Bridge Road); thence easterly along S. C. S-46-41 to its intersection with Sugar Creek. This area shall be known as the "Catawba Reservation Secondary Expansion Zone."

14.5 Other Expansion Zone. The Primary and Secondary Expansion Zones are the preferred and only approved zones for expansion of the reservation. However, after completing a comprehensive plan of development, the Tribe may propose different or additional expansion zones; but any such zone first must be approved by the Secretary, and then by ordinance of the county council where the zone is located, and by law or joint resolution enacted by the General Assembly of South Carolina and signed by the Governor. The combined area of all land acquisitions, including land in any specially approved zones, shall not exceed the limits imposed by Paragraph 14.2.5.

14.6 Future Highways. Prior to the Tribes' planning process, the South Carolina Department of Highways and Public Transportation will consult with the Tribe about planned and proposed major highways within the Primary and Secondary Expansion Zones, including the proposed extension of Dave Lyle Boulevard (South Carolina Highway No. 122) from the City of Rock Hill across the Catawba River into Lancaster County. In accordance with the letter to the Tribe from the City of Rock

Hill, dated August 28, 1992, the City of Rock Hill and the South Carolina Department of Highways and Public Transportation will consult the Tribe about access to Dave Lyle Boulevard Extension, and in cooperation with the Tribe, will plan and provide for an interchange assuring access to Dave Lyle Boulevard Extension over a public road in reasonable proximity to the expanded reservation.

14.7 Future Sewage Treatment Facilities. Prior to the Tribe's planning process, the South Carolina Department of Health and Environmental Control (DHEC) will consult with the Tribe about the location of future sewage treatment facilities that may serve the Primary and Secondary Expansion Zones. Such treatment facilities include, but are not limited to, the treatment plant proposed by the Charlotte-Mecklenburg Utilities Department near the confluence of the Catawba River and Twelve Mile Creek in Lancaster County and all pump stations and transmission lines, gravity and pressure. If this or a similar regional treatment plant is constructed here or in the vicinity of this site, DHEC will endeavor to ensure that the commitments of the City of Rock Hill, set forth in its letter to the Tribe dated August 28, 1992, are carried out (i) by locating the City's sewage transmission line to the regional treatment plant in reasonable proximity to the reservation and (ii) by allowing the Tribe the right of access to such transmission line for a tap fee and on other terms similar to those for municipalities using this treatment facility. The Tribe will be responsible for the design, construction, operation, and maintenance of its own sewage collection system and for the cost of constructing any extension line and tap to the transmission line. The Tribe will also be subject to fees for use of the treatment system and transmission line, and subject to all regulations imposed on users of the system, but DHEC will endeavor to ensure that such fees, charges, and rules are the same as applied to municipal users of the system. If the Tribe is required to construct an extension line to connect with a transmission line the Tribe may charge non-reservation users along such extension line reasonable tap and user fees.

14.8 Voluntary Land Purchases. The power of eminent domain shall not be used by the Secretary or any governmental authority in acquiring parcels of land for the benefit of the Tribe, whether or not the parcels are to be part of the reservation. However, all such purchases shall be made only from willing sellers by voluntary conveyances. Conveyances by private land owners to the Secretary for the expanded reservation will be deemed, however, to be involuntary conversions within the meaning of Section 1033 of the Internal Revenue Code of 1986, as amended. Filing and recording fees and all documentary tax stamps and any other fees incident to the conveyance of real estate will be payable in connection with such purchases regardless of whether the property is purchased by the Tribe or by the United States in trust for the Tribe. Real property taxes levied for the year of closing will be pro-rated and paid at closing, or if the amount

of property taxes to be due cannot then be calculated, property taxes will be estimated and escrowed at closing. Notwithstanding the provisions of Section 257 and 258a of Title 40, the Secretary may acquire reservation land for the benefit of the Tribe from the ostensible owner of the land if the Secretary and the ostensible owner have agreed upon the identity of the land to be sold and upon the purchase price and other terms of sale. If the ostensible owner agrees to the sale, the Secretary may use condemnation proceedings to perfect or clear title and to acquire any interests of putative co-tenants whose address is unknown or the interests of unknown or unborn heirs or persons subject to mental disability.

14.9 Rollback Taxes. The purchase of any land specially assessed as farmland or timberland by York or Lancaster County will not result in a rollback of property taxes provided the property is placed by the Tribe in reservation status within one year of the date of purchase. If any specially assessed land is acquired and not made part of the reservation within one year, deferred or rollback taxes will be due and payable without interest to the county treasurer.

14.10 Terms and Conditions of Acquisition. All properties acquired by the Secretary for the Tribe shall be acquired in fee simple. The Secretary, in consultation with the Tribe, will be authorized to ascertain the market value of lands to be purchased; to enter into options and contracts for reservation and non-reservation lands upon such conditions as he deems appropriate; to acquire, when necessary, the reversionary fee in leases and the remainder fee in life estates; to acquire lands subject to leases and timber interests and subject to easements, covenants, and restrictions that will not impair usefulness of the lands for the Tribe's purposes. The Secretary, acting in behalf of the Tribe and with its consent, is also authorized to execute and deliver purchase-money notes, mortgages, and other debt and security instruments, to acquire both reservation and non-reservation lands. When property is acquired for the Tribe through purchase-money financing, and encumbered by a purchase-money mortgage, the mortgagee shall have the right to foreclose under South Carolina law in the event of default as defined in the note and mortgage.

14.11 Easements Over Reservation. The acquisition of lands for the expanded reservation shall not extinguish any easements or rights-of-way then encumbering such lands unless the Secretary or the Tribe enters into a written agreement with the owners terminating such easements or rights-of-way. The Secretary, with the approval of the Tribe, shall have the power to grant or convey easements and rights-of-way for public roads, public utilities, and other public purposes over the reservation. Unless the Tribe and the State agree upon a valuation formula for pricing easements over the reservation, the Secretary shall be subject to proceedings for condemnation and eminent domain to acquire easements and rights of way for public purposes through the reservation under the laws of the State of South Carolina in

circumstances where no other reasonable access is available. With the approval of the Tribe, the Secretary may also grant easements or rights-of-way over the reservation for private purposes; and implied easements of necessity shall apply to all lands acquired by the Tribe, unless expressly excluded by the parties.

14.12 Jurisdictional Status. Only land made part of the reservation shall be governed by the special jurisdictional provisions set forth in this Agreement.

14.13 Sale and Transfer of Reservation Lands. At the request of the Tribe, and with approval of the Secretary, the Secretary may sell, exchange, or lease lands within the reservation, or sell timber or other natural resources on the reservation. The proceeds from these transactions may be used to re-invest in other land contiguous to the reservation or in improvements for the common use of the Tribe on the reservation; or if the Tribe deems it appropriate, the proceeds may be placed in the Education Trust Fund, the Elderly Assistance Trust Fund, the Land Acquisition Trust Fund, or the Economic Development Trust Fund. At the request of the Tribe and with the approval of the Secretary, the Secretary may exchange like-kind parcels of land on the reservation for contiguous parcels of land not currently part of the reservation. Notwithstanding the provisions of this paragraph, the area of the reservation shall not exceed the limits imposed by Section 14.2.5.

14.14 Time Limit on Acquisitions. All acquisitions of contiguous land to expand the reservation or of non-contiguous lands to be placed in reservation status shall be completed or under contract of purchase within ten years from the date the last payment is made into the Land Acquisition Trust; except, however, that the Tribe may continue to acquire parcels which are contiguous to either of two designated reservation areas for a period of twenty years after the date the last payment is made into the Land Acquisition Trust.

14.15 Leases of Reservation Lands. The provisions of 25 U.S.C. §415 shall not apply to the Tribe and its reservation. The Tribe shall be authorized to lease its reservation lands for terms up to but not exceeding ninety-nine (99) years.

14.16 Non-Applicability of BIA Land Acquisition Regulations. The general land acquisition regulations of the Bureau of Indian Affairs, currently contained in 25 C.F.R. Part 151, shall not apply to the acquisition of lands authorized by Section 14 of this Agreement.

15. Non-Reservation Properties.

15.1 Acquisition of Non-Reservation Properties. The Tribe may draw upon the corpus or accumulated income of the Land Acquisition Trust or the Economic Development Trust to acquire parcels of real estate outside the reservation, including properties ancestral or historic to the Tribe and properties to be held by the Tribe for investment or development. Such properties may be held in fee simple by the Tribe as a corporate

entity or held in trust by the United States as trustee for the Tribe, but in either case, these parcels will not be part of the reservation, or governed by the special jurisdictional provisions set forth in this Agreement, or subject to any other special attributes on account of their ownership by the Tribe as a corporate entity or by the Secretary as trustee for the Tribe, except as provided in paragraph 15.2. If the ownership of any such properties by the Secretary or the Tribe, or any sub-entity of the Tribe, removes the property from ad valorem taxation, then payments shall be made in lieu of taxation that are equivalent to the taxes that would otherwise be paid if the property were subject to levy. Notwithstanding any other provisions of law, the Tribe may lease, sell, mortgage, restrict, encumber, or otherwise dispose of such non-reservation lands in the same manner as other persons and entities under State law; and the Tribe as land owner shall be subject to the same obligations and responsibilities as other persons and entities under State, federal, and local law, including local zoning and land use laws and regulations. Ownership and transfer of non-reservation parcels shall not be subject to federal law restricting on alienation, including, but not limited to, the restrictions imposed by Federal common law and the provisions of the Trade and Intercourse Act of 1790, Act of July 22, 1790, and all amendments thereto.

15.2 Jurisdiction on Non-Reservation Properties. All non-reservation properties, and all activities conducted on such properties, shall be subject to the laws, ordinances, taxes, and regulations of the State and its political subdivisions, except as provided in Section 16: and this general jurisdictional principle shall extend both to non-reservation properties held by the Tribe as a corporate entity and to any properties held in trust by the United States designated as non-reservation property when acquired. The laws, ordinances, taxes, and regulations of the State and its subdivisions shall apply to such non-reservation properties in the same manner as such laws, ordinances, taxes, and regulations would apply to any other properties held by non-Indians located in the same jurisdiction. However, non-reservation land may be eligible for federal grants and other federal services for the benefit of Indians.

16. Games of Chance.

16.1 Inapplicability of Indian Gaming Regulatory Act. The Indian Gaming Regulatory Act, 25 U.S.C. Section 2701, et. seq., shall not apply to the Tribe. This Agreement, and the implementing legislation passed pursuant to this Agreement, and all laws, ordinances, and regulations of the State of South Carolina, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the reservation, except as specifically provided in this section.

16.2 Conduct of Bingo Games by Tribe. The State shall govern the conduct of bingo under Title 12, Chapter 21, Article 23 (the "Bingo Act"), South Carolina Code of Laws, 1976, as

amended, and any amendments thereto hereafter adopted, including any regulations or rulings issued in relation to Title 12, Chapter 21, Article 23, except as provided by the special bingo license to which the Tribe shall be entitled in accordance with this section if it elects to sponsor bingo games under the special license. For purposes of conducting the game of bingo, the Tribe shall be deemed a non-profit organization under the Bingo Act. The Tribe may be licensed by the South Carolina Tax Commission to conduct games of bingo either under a regular license allowed non-profit organizations or under the special license provided in this section, but not both, and either on the reservation or off the reservation, but not both.

16.3 Special Bingo License. The Tribe may apply to the South Carolina Tax Commission for a special bingo license in lieu of any of the licenses authorized by Title 12, Chapter 21, Article 23 of the South Carolina Code of Laws, 1976, as amended. The special license will be granted if the Tribe complies with licensing requirements and procedures. The special license shall be identical in all respects to the class of license permitting the highest level of prizes allowed by law, and shall carry the same privileges and duties as the class of license permitting the highest level of prizes provided by law, and that:

16.3.1 The frequency of sessions shall be determined by the Executive Committee, but shall be no more frequent than six sessions per week, with sessions on Sundays prohibited unless State law otherwise expressly allows Sunday sessions.

16.3.2 The amount of prizes offered per session shall be determined by the Tribe, but shall not be greater than $100,000.00 for any game.

16.3.3 The Catawba Indian Tribe shall pay, in lieu of any admission or head tax, any license tax, or any other bingo tax, a special bingo tax equal to 10% of the gross proceeds received during each session. All revenues derived from the special bingo tax shall be collected by the South Carolina Tax Commission and deposited with the State Treasurer for the benefit of the General Fund of South Carolina.

16.3.4 State law shall govern the percentage of the gross proceeds taken in by the Tribe during a calendar quarter that must be returned to the players in the form of prizes. For purposes of this section, "gross proceeds" does not include the 10% special bingo tax.

16.3.5 The Tribe shall be entitled to one bingo license, and that license may be used to operate at one location only, and shall not be assignable to any other entity or individual.

16.3.6 The net proceeds derived by the Tribe from the conduct of bingo may be used for any purpose authorized by the Tribe.

16.4 Special License Sites. The Tribe may operate under the special bingo license either off the reservation or on the reservation at its election, but not both. If the Tribe

chooses to operate under the special bingo license off the reservation, it shall locate in an area which is within the 144,000 acre Catawba claim area and zoned compatibly for such commercial activities. The Tribe shall consult with the city or county where the facility is to be located before the site is selected.

16.5 Sponsor, Promoter and Oversight. The sponsor and promoter of the bingo games shall be the Catawba Indian Tribe; and all profits gained from the enterprise shall accrue to the Tribe. The South Carolina Tax Commission, or any successor regulatory body or agency, shall have the power to administer, oversee, and regulate all bingo games sponsored and conducted by the Tribe, and to audit and enforce the operation of such games and assess and collect taxes, interest, and penalties in accordance with the laws and regulations of the State as they apply to the Tribe. The South Carolina Tax Commission or its regulatory successor shall have the right to suspend or revoke the Tribe's Bingo license or Special Bingo license if the Tribe violates the law with regard to conducting the game; however, the Tax Commission or its regulatory successor shall first be required to notify the Tribe of any violations and provide the Tribe with an opportunity to correct any violations before its license may be revoked. Failure to pay bingo taxes, interest or penalties may be grounds for license revocation.

16.6. Any license of the Tribe to conduct Bingo shall be revoked if the game of Bingo is no longer licensed by the State. If the State resumes licensing the game of Bingo, the Tribe's license or special license shall be reinstated provided the Tribe complies with all licensing requirements and procedures.

16.7. Should the Tribe obtain a license as provided herein and operate a facility, the Tribe may install for play in the same building video poker or similar electronic play devices as allowed under the law of the State.

17. Governance and Regulation of Reservation.

17.1 Building Code. The Tribe shall incorporate by reference and adopt the York County Building Code, and any amendments thereto hereafter adopted, and may contract with York County, South Carolina for the services necessary to enforce, inspect, and regulate compliance with its Building Code. Such services shall be provided at no charge by York County as an in-kind contribution toward settlement. In addition, those local jurisdictions which exact any fee, permit, or inspection services shall waive the fees otherwise charged for building permit or inspection services on the reservation. The Tribe shall be empowered, but not required, to adopt building code provisions to be applied on the reservation in addition to, but not in derogation of, the York County Building Code, as amended from time to time.

17.2 Environmental Laws. All federal, state, and local environmental laws and regulations shall apply to the Tribe and to the reservation, and shall be fully enforceable by all relevant federal, state, and local agencies and authorities. Similarly, all requirements that a license, permit, or certificate be obtained from any federal, state, or local agency shall also apply to the Tribe and to the reservation. This provision shall include all such laws and regulations now in effect and all amendments adopted hereafter, including without limitation those laws listed in Exhibit C. This provision shall extend without limitation to all environmental laws and regulations adopted in the future. The Tribe, the Executive Committee, and all members of the Tribe shall have the same status under all such laws as other citizens or groups of citizens to contest, object to, or intervene in any proceeding or action in which environmental regulations are being made, adjudicated, or enforced, or in which licenses, permits, or certificates of convenience and necessity are being issued by any agency of federal, state, or local government. Notwithstanding any other provisions of law now or hereafter adopted, the Tribe shall not have special or preferential status in any such action or proceeding, or rights, privileges, or standing any greater than the rights, privileges, and standing allowed other citizens or citizen organizations. The Tribe shall have the authority to impose regulations applying higher environmental standards to the reservation than those imposed by federal or state law or by local governing bodies; but such tribal regulations shall apply only to the reservation, and not to property surrounding the reservation or non-reservation property, or to the use of the Catawba River. Such tribal regulations shall also not apply to activities or uses off the reservation, even if those activities affect air quality on the reservation. The Tribe shall not be authorized to invoke sovereign immunity against any suit, proceeding, or environmental enforcement action involving any federal, state, or local environmental laws or regulations, and shall be subject to all enforcement orders, restraining orders, fees, fines, injunctions, judgments and other corrective or remedial measures imposed by such laws. Provided, however, it is not the intent of the parties that the Tribe, or the Secretary when acting on behalf of the Tribe, be required to comply with duplicative federal laws and regulations that would not apply to Tribal or Secretarial actions if these actions were taken instead by a private corporation; and, recognizing that this provision may be insufficient to insure fulfillment of this intention, it is also the intent of the parties to seek, if necessary, in the implementing legislation a provision sufficient to fulfill the parties' intention in this regard.

17.3 Planning and Zoning. With respect to any land use regulation within the reservation, the Tribe shall have the power to adopt and enforce a land use plan after consultation with York County and Lancaster County, for those parts of the reservation located in those respective jurisdictions. The Tribe

and the affected governing bodies shall follow the consultative procedures created for settlement of the claim of the Puyallup Tribe in the State of Washington, as set out in House Report 101-57, pages 161-64. In determining whether to permit the construction of any buildings or improvements on the reservation, the Tribe shall consider (1) the protection of established or planned residential areas from any use or development that would adversely affect residential living off the reservation; (2) protection of the health, safety, and welfare of the surrounding community; and (3) preservation of open spaces, rivers, and streams, and provision of public facilities to support development.

17.4 Health Codes. All public health codes of the State of South Carolina and any county in which the reservation is located shall be applicable on the reservation.

17.5 Hunting and Fishing. Hunting and fishing, on or off the reservation, shall be conducted in compliance with the laws and regulations of the State of South Carolina. Members of the Tribe shall be subject to all state and local regulations governing hunting and fishing both on and off the reservation, except, however, during the period established by Section 3.2 of this Agreement members of the Tribe shall be entitled to personal state hunting and fishing licenses without payment of fees. However, the Tribe and its members shall be subject to the same fees and requirements as all other citizens of the State in applying for and obtaining commercial hunting and fishing licenses. The Tribe shall have the authority to impose hunting, fishing, and wildlife rules and regulations on the reservation that are stricter than those adopted by the State.

17.6 Riparian Rights. The littoral and riparian rights of the Catawba Indian Tribe in the Catawba River, or in any other streams or waters crossing their lands, shall not differ in any respect from the rights of other owners whose land abuts non-tidal bodies of water or non-tidal water courses in South Carolina. The rights and obligations covered by this provision shall include but not be limited to: (i) the title to the river bed; (ii) the right to flood, pond, dam, and divert waters of the river or its tributaries; (iii) the right to build docks and piers in the river; (iv) the right to fish in the river or its tributaries; and (v) the right to discharge waste or withdraw water from the river or its tributaries. The reservation is located on the Catawba River between two hydroelectric reservoirs licensed by the Federal Energy Regulatory Commission ("FERC"). The Tribe shall have the same rights and standing as all other riparian owners and users of the Catawba River to intervene in any proceeding or otherwise to contest or object to proposed actions or determinations of FERC or of any other governmental agency, commission, or court, whether federal, state, or local, with respect to the use of the Catawba River and its basin, including without limitation, withdrawal of water from the river; navigability on the river; and water power and hydroelectric usage of the river.

Notwithstanding any other provisions of law effective now or hereafter adopted, the Tribe will have no special right or preferential standing greater than other riparian owners and users of the Catawba River to intervene in or contest any such agency action, determination, or proceeding, including specifically any actions or determinations by FERC regarding the licensing, use, or operation of the waters impounded by the existing reservoirs above and below the reservation. These qualifications shall apply to the existing reservation, to lands acquired for the expanded reservation, to any other lands acquired by or for the benefit of the Tribe, and to non-reservation lands.

17.7 Alcoholic Beverages. Alcohol shall be prohibited on the reservation unless the Tribe adopts laws permitting the sale, possession, or consumption of alcohol on the reservation. In such case, the Tribe shall adopt laws or ordinances that incorporate all state standards and regulations regarding hours, sales to minors, employment, consumption, possession, and standards for licensing; except, however, that the Tribe may impose stricter standards and regulations than those prescribed by state law. If beer, wine, and liquor are sold on the reservation, licenses must be issued by the State in accordance with South Carolina law; and all beer, wine, and liquor taxes will be paid to the State in accordance with South Carolina law.

18. Taxation.

18.1 Indian Tribal Government Tax Status Act. The Indian Tribal Government Tax Status Act, 26 U.S.C Section 7871, shall apply to the Tribe and its reservation. In no event, however, may the Tribe pledge or hypothecate the income or principal of the Education or Social Services and Elderly Trust Funds or otherwise use them as security or a source of payment for bonds the Tribe may issue.

18.2 General Tax Liability. The Tribe, its members, the Tribal Trust Funds, and any other persons or entities affiliated with or owned by the Tribe, members of the Tribe, or the Tribal Trust Funds, whether resident, located, or doing business on the reservation or off the reservation, shall be subject to all federal, state, and local income taxes, sales taxes, real and personal property taxes, excise taxes, estate taxes, and all other taxes, licenses, levies, and fees, except as expressly provided in this Agreement. Any other person or business entity which locates, operates, or does business on the reservation shall be subject without exception to all federal, state, and local taxes, licenses, and fees, unless otherwise expressly provided in this Agreement. To the extent that the Tribe may be subject to any taxes under this section, the Tribe shall be taxed as if it were a business corporation incorporated under the laws of South Carolina unless otherwise expressly provided.

18.3 Bingo Taxes. If the Tribe elects to sponsor and conduct games of bingo under the provisions of Section 16 of this

Agreement, the gross revenues generated by such bingo games will be subject to the 10% tax levy specified in Section 16 exclusively, and no other federal, state or local taxes shall apply to revenues generated by the bingo games which are received by the Tribe. If the Tribe elects to sponsor and conduct games of bingo under a regular license allowed non-profit organizations under the Bingo Act, the Tribe will be taxed as a non-profit corporation under the Bingo Act with respect to all revenues generated from the bingo games.

18.4 Income Taxes.

18.4.1 The Tribe and Tribal Trust Funds. Income of the Tribe, subdivisions and agencies of the Tribe, including entities owned by the Tribe or the Federal Government and the Tribal Trust Funds, and tax revenues collected by the Tribe by levy or assessment, shall be non-taxable for federal income tax purposes to the extent provided by federal law for recognized or restored Indian Tribes. Any tribal income and tax revenues which are non-taxable for federal income tax purposes because of the Tribe's status as a recognized or restored Indian Tribe shall also be non-taxable for purposes of any state and local taxes on income.

18.4.2 Members of Tribe. Members of the Tribe shall be liable for payment of federal, state and local income taxes to the same extent as any other person in the state, except that income earned by members of the Tribe for work performing governmental functions solely on the reservation shall be exempt from state taxes during the period established by Section 3.2 of this Agreement, and income earned by members of the Tribe from the sale of Catawba Indian pottery and artifacts, whether on or off the reservation, which are made by members of the Tribe, shall be exempt from state, federal, and local income taxes. For purposes of federal income taxes, the income of members earned on the reservation shall be taxable to the extent provided by federal law for members of recognized or restored Indian tribes. No funds distributed per capita pursuant to Section 13.5 shall be subject at the time of distribution to federal, state or local income taxes; however, income subsequently earned on shares distributed to members of the Tribe shall be subject to the same federal, state, and local income taxes as other persons in the state would pay. Compensation paid to Executive Committee members shall be subject to federal payroll taxes to the extent provided by Federal law for members of tribal councils of recognized or restored Indian tribes.

18.4.3 Taxation of Others on the Reservation. Any person or other entity which is not exempt from income taxes under Sections 18.4.1 or 18.4.2 shall be liable for all federal, state, and local income taxes otherwise due regardless of whether or not they are doing business on the Reservation.

18.5 Real Property Taxes.

18.5.1 Exemption of Tribal Real Property. All lands held in trust by the United States for the Tribe as part of the reservation shall be exempt from all property taxes levied by

the State or by any county and school district or special purpose district. All buildings, fixtures, and real property improvements owned by the Tribe or held in trust by the United States for the Tribe on the reservation shall be exempt from all property taxes levied by the State or by any county and school district or special purpose district during the period established in Section 3.2 of this Agreement. If the Tribe owns a partial interest in property or a business, the property tax exemption provided in this section is applicable to the extent of the Tribe's interest during the period established in Section 3.2.

18.5.2 Exemption of Members' Real Property. Single and multi-family residences, including mobile homes, that are situated on the reservation shall be exempt from all property taxes levied by the State or by any county or special purpose district, provided that (i) they are owned by the Tribe, members of the Tribe or Tribal Trust Funds during the period established by Section 3.2 of this Agreement, and (ii) occupied by members of the Tribe or the surviving spouse of a deceased member of the Tribe. For purposes of this section, residential property shall be deemed owned by a member of the Tribe if the member or the surviving spouse of a member owns at least a one-half undivided interest in the property; and property shall be deemed occupied by members of the Tribe if at least one member or the surviving spouse of a member is living in the single-family residence or in each unit of any multi-family residence.

18.5.3 Taxation of Other Real Property. All buildings, fixtures, and real property improvements located on the reservation which are not exempt from real property taxes under sections 18.5.1 or 18.5.2 shall be subject to all property taxes levied by the State, county, and any school district or special purpose to the same extent that similar buildings, fixtures, or improvements are assessed and taxed elsewhere in the same jurisdiction. However, the underlying land or leasehold in the land will not be subject to real property taxes. All buildings, fixtures, and improvements subject to real property taxes shall be eligible for any tax abatement or temporary exemption allowed new business investments to the same extent as similar properties qualify for exemption or abatement in the same county.

18.5.4 Tribal Property Taxes. The Tribe shall be authorized to levy taxes on buildings, fixtures, improvements, and personal property located on the reservation, even though such properties may be exempt from property taxation by the state or its subdivisions, and may use such tax revenues for appropriate tribal purposes. The Tribe may also exempt or abate any such taxes. York and Lancaster Counties and the South Carolina Tax Commission will provide the necessary assistance to the Tribe if the Tribe chooses to assess tribal real property taxes as if they were property taxes imposed by a political subdivision.

18.5.5 Taxation of Non-Reservation Properties. Real property and improvements owned by the Tribe or by members

of the Tribe or by both and not located on the reservation shall be subject to all property taxes levied by the State and the county and by the school district and any special purpose districts or other political subdivisions where such property is located.

18.5.6 Fee in Lieu of Taxes on Non-reservation Property Held in Trust. All non-reservation real property held in trust by the Secretary shall be subject to the payment of a fee or fees in an amount equivalent to the real property tax that would have been paid to the applicable taxing authority had the property not been held in trust.

18.6 Personal Property Taxes.

18.6.1 Personal Property Owned by Tribe. All personal property owned by the Tribe during the period established by Section 3.2 of this Agreement and used solely on the reservation shall be exempt from personal property taxes. Except, however, motor vehicles owned by the Tribe during the period shall be exempt from personal property taxes even if used off the reservation.

18.6.2 Personal Property Owned by Tribal Members All personal property owned by members of the Tribe shall be subject to personal property taxes levied by the State and by the county, school district, special purpose district, and other subdivision of the State, where the property is deemed to be located.

18.6.3 Taxation of Other Personal Property. All personal property located on the reservation which is not exempt from personal property taxes under Section 18.6.1 shall be subject to personal property taxes levied by the State, county and any school or special purpose district encompassing the reservation to the same extent that similar personal property is assessed and taxed elsewhere in the jurisdiction.

18.6.4 For purposes of Sections 18.5.1 through 18.6.3, the person or entity who is liable under South Carolina property tax law for payment of property taxes is considered the owner of the property.

18.7 Levy against property for failure to pay Property Taxes. If any taxpayer subject to property taxes under paragraph 18.5.1 through 18.6.3 fails to pay the taxes, the county shall have the power to levy against any personal property subject to personal property taxes owned by the taxpayer within the county whether on or off the reservation in order to satisfy the taxes due. If this levy against the personal property is not sufficient to satisfy the tax lien, the county may contact the State and the State will levy against other taxable property of the taxpayer in the State and remit any proceeds to the county which is owed the tax. If the county cannot satisfy its lien, the county may require the Tribe to cease allowing the taxpayer to do business on the Reservation. However, if the taxpayer is in bankruptcy, the bankruptcy statutes shall apply to this provision. In no event may the county seize real property located on the reservation.

18.8 Vehicle License Fees. The Tribe and its members shall be subject to all license and registration fees and requirements, all periodic inspection fees and requirements, and all fuel taxes imposed by federal, state, and local governments on motor vehicles, boats, and airplanes, and other means of conveyance.

18.9 Sales and Use Taxes. The Tribe, its members, and the Tribal Trust Funds shall be liable for the payment of all state and local sales and use taxes to the same extent as any other person or entity in the state, except as specifically provided below.

18.9.1 Tribal Purchases Exemption. Purchases made by the Tribe for tribal government functions during the period established by Section 3.2 of this Agreement shall be exempt from state and local sales and use taxes.

18.9.2 Catawba Pottery Exemption. Catawba pottery and artifacts made by members of the Tribe and sold on or off the reservation by the Tribe or members of the Tribe shall be exempt from state and local sales and use tax.

18.9.3 Tribal Sales Tax. During the period established by Section 3.2 of this Agreement, the sale on the reservation of all other items, whether made on or off the reservation, shall be exempt from state and local sales and use taxes, but shall be subject to a special tribal sales tax levied by the Tribal Council equal to the state and any local sales tax that would be levied in the jurisdiction encompassing the reservation but for this exemption. The South Carolina sales and use tax laws, regulations, and rulings shall apply to the special tribal sales tax, and the special tribal sales tax will be administered and collected by the South Carolina Tax Commission. The South Carolina Tax Commission will separately account for the special tribal sale tax, and the State Treasurer will remit the special tribal sales tax revenues periodically to the Tribe at no cost to the Tribe. The tribal sales tax shall not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are $100 or less. In such case, the State sale tax shall apply. The Tribe may impose a tribal Use tax on the storage, use or other consumption on the reservation of tangible personal property purchased at retail outside the State when the vendor does not collect the tax. However, any use taxes which are collected by a vendor which is not located in the state will be subject to state use taxes and the use tax will be remitted to the state and not the Tribe. Any use taxes not collected by the vendor and remitted to the state will be subject to the Tribal use tax and must be collected directly by the Tribe.

18.10 Payments in Lieu of Taxes. The Tribe, during the period established for State benefits in Section 3.2, shall pay a fee in lieu of school taxes. That fee shall be determined by the county in the same manner and shall be the same amount that is paid by students from outside the county entering schools in the county. The fee payable by the Tribe shall be reduced by

any funds received by the government for Impact Aid under Sections 20 U.S.C. 236 et. seq. or any other federal funds designed to compensate school districts for loss of revenue due to the non-taxability of Indian property. Any fee paid on behalf of a child under this section will be excluded from federal and state income of the child or his family for federal and state income tax purposes.

18.11 Estate Taxes. Members of the Tribe shall be liable for payment for all estate and inheritance taxes, except, however, that the undistributed share of any member in the trust fund established pursuant to Section 13.7 shall be exempt from federal and state estate and inheritance taxes.

18.12 Eligibility for Consideration to Become an Enterprise Zone or General Purpose Foreign Trade Zones. The Tribe shall be eligible for consideration to become an enterprise zone or Foreign Trade Zone within the meaning of the Foreign Trade Zones Act of 1934 to the same extent as other federally recognized Indian tribes.

19. General Provisions.

19.1 General Applicability of State Law. Except as expressly otherwise provided in the implementing legislation, the Tribe and its members, any lands or natural resources owned by the Tribe, and any land or natural resources held in trust by the United States or by any other person or entity for the Tribe, shall be subject to the laws of the State and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land in the State.

19.2 Nonadmissibility. This Agreement represents the compromise settlement of the Tribe's claim, and no term, condition, part, or provision of this Agreement shall be deemed an admission of liability on the part of any of the parties to this Agreement or the holder of property in the claim area in any pending or future suit in connection with the Tribe's claim.

19.3 Impact of Subsequently Enacted Laws. The provisions of any Federal law enacted after the date of enactment of the Federal law implementing this Agreement shall not apply in the State if such provision would materially affect or preempt the application of the laws of the State, including application of the laws of State to lands owned by or held in trust for Indians, or Indian Nations, tribes or bands of Indians. However, such federal law shall apply within the State if the State grants its approval by a law or joint resolution enacted by the General Assembly of South Carolina and signed by the Governor.

19.4 Severability. The implementing legislation shall provide that if the provisions of Sections 4 or 6 of this Agreement, once incorporated into the implementing legislation, are held invalid, then all of the implementing legislation is invalid. Should any other section of this Agreement be held invalid once incorporated into the implementing legislation, the remaining sections of the implementing legislation shall remain in full force and effect.

Mr. SPRATT. Secretary Babbitt now has copies of the latest legislation that was passed by the State, a copy of the Federal legislation and a copy of the agreement in principle, and the Department of the Interior under Secretary Babbitt is reviewing the settlement at the present time.

The State General Assembly passed the implementing legislation at the end of May. Governor Campbell signed it into law on June 14, 1993. Once we got the State implementing legislation settled, the Federal implementing legislation could be put in final form and introduced, which is what Butler Derrick did for us on June 10, 1993.

Mr. Chairman, I might note this is not the first time this committee has examined the Catawbas' claim. On June 12, 1979, this committee, under the chairmanship of Morris Udall, held a hearing on the Catawba claim, and the hearing report, which is very extensive, serial No. 96–17, provides an extensive background on the dispute.

Over the years that I have been involved with the land claim of the Catawbas, I have compiled my own history of the tribe and their land claim. While I am not going to try your patience by reading all of it, it is part of my testimony. I have included it in my written testimony and I would like to offer it for the record.

Basically let me say this claim stems from treaty recognition of an area set aside for the Catawbas after the French-Canadian war in 1760 and in 1763; 144,000 acres, 15 miles square, 15 miles on each side, was set aside for the Catawba Indians in the north-central corridor of South Carolina and confirmed in the Treaty of Augusta made in 1763.

A survey of this area was made by one Samuel Wyly, and the survey is still available. The tract was completed on February 22, 1764. The purpose of this set-aside was to separate the Indians from white settlers and to give them an area of land where they could live and continue to live in their aboriginal lands unmolested by white settlers. That was the theory.

In truth, there were white settlers settled in that country even then, in 1763. My own forebears moved to Catawba Indian country before 1763, sometime around 1758. And after the Revolutionary War, during which the Catawba Indian land had been used by the militia in South Carolina as an area where they mustered, many members of Sumter's forces who had mustered in that area and had gotten to know the Catawbas as a result because they had settled there and fought with Sumter's forces as well, many of them came back penniless and landless, and made a deal with the Catawbas where they leased tracts of land.

The Catawbas in time protested this white encroachment on their property. By the first decade in the 1800s, very little land was left unoccupied by white settlers and most of the Catawba land had been displaced and leased out to white settlers.

Consequently, a movement developed among the white settlers to convert their leasehold interest to fee-simple title. This movement was aggravated, you might say, motivated by the fact that there were a number of people, entrepreneurs, who kept dealing with the State trying to cut a deal whereby they might get the reversionary

title in this land so that when these leases were up, they, instead of the Catawbas, would own the land.

Spurred by a fear that this might happen, particularly in the low country of South Carolina, people in the Catawba Indian claim area pushed the State legislature to enter into a deal with the counties whereby the Catawbas would cede title, convey title to the State of South Carolina in return for a settlement of a certain sum of money and a certain amount of land so that the Catawbas could be resettled near the Cherokee and Haywood Counties, North Carolina.

For reasons I won't get into here, that deal was never fully consummated. The State of South Carolina did make payments to the Catawbas but they were never able to acquire a tract of land in Haywood County, North Carolina. Instead, the Catawbas were settled on a tract of 630 acres in York County, South Carolina, and the tribe dwindled down to a very small number of Catawba Indians.

From almost the first, a treaty was made with the Indians in 1840, and after the treaty was not completely fulfilled as the terms of it provided, the Catawbas began pressing for a resolution of their claim. And I will come back to this in just a little while.

But from that date forward, from the mid-1840s until literally the present, the Catawbas have sought assistance and the rectification of their claim under the treaty of 1840, and they have gotten precious little assistance until the Native American Rights Fund took up their case in the mid-1970s.

As a result of their inability to obtain any relief from the Department of the Interior, even to obtain the Federal Government's assistance to bring a suit on this claim on their behalf, after the Passamaquoddy and Penobscot and other New England claims indicated that we might indeed protect their claim to recovery of title in 1840, the Catawba Indians turned to the Native American Rights Fund, and in 1980 NARF brought suit on their behalf.

This suit is still pending today. It is a phenomenal lawsuit. It has been from the district court to the full circuit court of appeals. The district court dismissed, the full circuit court of appeals reinstated, the Supreme Court reversed the full circuit in part and sustained it in part. The case went back to the full circuit. The full circuit then sent the case to the State of South Carolina for an advisory opinion from the State Supreme Court.

The Supreme Court declined to render an advisory opinion. The full circuit rendered an advisory opinion on the effect of State law on the Catawba claim. The case then went back to the district court. Individual landowners like myself moved for summary judgment. The summary judgments were appealed to the full circuit court of appeals and then a petition for certiorari was taken to the Supreme Court. Now the case is back in the district court. The case has been pending for 13 years and no answer yet has been filed by the defendants.

I mentioned earlier that the Committee here held a hearing on this matter in June of 1979. And I think that hearing is important because it sort of set the tone and the outlines for what this settlement would be. And I think what we have done is we have con-

formed to the outlines that we brought away from that particular hearing.

This case has now been settled after four years of negotiation. The settlement involves a request of $50 million from the State of South Carolina, the Federal Government, private sources, title insurance companies, multiple sources, $32 million of which would come from the Federal Government.

And that is bound to be a major question. Why should the Federal Government participate in the settlement monetarily, and why should the Federal Government contribute this particular sum of money?

Let me recall the Committee's attention to the testimony that was offered by Kenneth Woodington, who is here today, an Assistant Attorney General, spent a good part of his career since the mid-1970s, following this suit, advising the state on it. He testified as follows.

He said, "Mr. Chairman, as far as a cash contribution or any other sort of contribution by the State of South Carolina, we would defer to the representatives of the South Carolina General Assembly. But we would ask the Committee take into consideration, as is done in Maine, past contributions of the State to this tribe. For instance, in the 1940s the State contributed enough funds to purchase 3,200 acres of land. At that time it was only $75,000."

Congressman Udall, Chairman of the Committee, said of him, "You do not reject outright, depending on the actions of the legislature then, some contribution beyond the land? I certainly agree with what has been said earlier about the pattern of settlements in the East, which has been for some a modest contribution at the least from the State. And that is the way I would lean at this point."

In other words, Chairman Udall then, having heard all the evidence in this case, recognized that the State's contribution should be provided, but it was not—it should not be an inordinate contribution.

I might point out that the State has, since the treaty of 1840, maintained over the years, from 1840 through the 1940s a series of annual payments appropriated to the Catawba Indian Tribe for their welfare, upkeep, education, medical attention, based on some theory that the State had a continuing financial obligation under the treaty of 1840.

Dr. Thomas Blumer, a scholar, historian associated with the Library of Congress and very closely associated with the Catawba Indian Tribe, has searched the legislative records of South Carolina for this whole 100-year period of time. I have a copy of a letter that he provided us, which is dated April 29, 1992, which outlines all of the payments that the State of South Carolina appropriated.

Now, you can't verify whether or not they were actually disbursed, but there was legislation appropriating this money. And I would assume it was spent, because I don't think the payments would have continued if the money was not being drawn down. The sum of this money in just actual nominal dollars over that 100-year period of time comes to a total of over $385,000. If we raise to a present value this sum of money at a 4 percent rate of interest, over that 100-year period of time, it comes to a total of $14,328,586.

I would like to offer for the Committee's record, first of all, the letter dated April 29, 1992, from Dr. Thomas Blumer, and secondly this computer calculation which shows the present value of this money at a modest discount rate of 4 percent, because if you add that, the $14 million there to the $18 million which we are providing from State, local, and private sector sources, this is about a 50/50 settlement.

[The document follows:]

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April 29, 1992

Mr. John Spratt
U.S. House of Representatives
1533 Longworth House Office Building
Washington, D.C. 20515

Attention: Tom Kahn

Dear Mr. Spratt:

Pursuant to a telephone conversation of April 27 with Mr. Kahn of your office and subsequent telephone conversations with Assistant Chief Fred Sanders and Don Miller, NARF attorney, I have searched my files for South Carolina's Catawba Nation appropriations from 1840 to the present. I cannot say that my working file is complete, but it is nearly so. Problems abound for the War Between the States and the record situation is worse for Reconstruction.

During the first nine years, South Carolina was obligated to pay the Nation $2,500 per year, but the actual appropriated amounts range from a high of $2,000 in 1843 to a low of $1,840 in 1841. The record is further complicated by that fact that the legislature qualified the amount to be paid as "*if necessary.*" The only way to ascertain the actual amount South Carolina considered **necessary** is to study each agent's report for the year in question. I have some of these reports in my files but not all of them.

Also, there is often a big difference between the amount appropriated and the amount actually distributed to the Nation. Between 1861 and 1866, the Indians were often given produce rather than money. Again each year would have to be studied to get a more accurate picture. Then from 1867 to 1877 confusion was the order of the day. For instance, the Catawbas registered several complaints that their agent did not distribute any money at all even though money had been appropriated by the legislature. In 1873 the agent reportedly kept the money, and I cannot say if he was forced to surrender the appropriation back to the legislature or finally distributed the money. Then in 1874, only $40 of a $500 appropriation was supposedly distributed.

In 1854 the S.C. legislature appropriated an additional $5,000 to be distributed **if the Nation removed to Indian Territory**. This was to make up for the lost $5,000 that the U.S. Congress appropriated in 1848 when it first seemed the Catawba would remove to Indian Territory. Neither amount was ever distributed. The closest the Catawbas ever came to removal was in 1860 when Chief Allen Harris and Councilman John Harris inspected land among the Choctaw in Indian

Territory. This removal plan was set aside by the War Between the States.

In 1879 the legislative appropriation and distribution problems between the agent and the Nation were finally solved. An appropriation of $800 per year was distributed. Even here, however, one cannot assume that the tribe actually saw $800. The custom was to deduct odd expenses from the Catawba appropriation. For instance, the Catawbas had to build their own school out of this sum, trips to visit the legislature, and the agent's percentage from 3% to 8% was also deducted. Beginning in 1898 it was normal for $200 to be taken off the top to pay the Catawba school teacher. In 1909, for instance, a sum was set aside for the school, the agent's percentage and a trip to Columbia made by the tribal council or chief. The agent's report would reveal additional odd deductions.

In 1917 an additional financial problem enters the picture. Although the appropriation had reached $7,000 per year, local merchants began to bring claims against individual tribal members. The agent, at least it seems that the agent performed this duty, then decided which merchants had valid claims. These claims were taken off the top of the appropriation and the remaining money, minus school costs, agent's percentage, etc., was distributed equally among the tribal members. It seems that those who ran up bills at the grocery store got a larger share of the appropriation, and there is no way of knowing if all the claims against the appropriation were actually true and accurate. From all appearances, it seems that each merchant's word was taken as gospel with little or no investigation or legal recourse.

Then in 1921, the South Carolina legislature began to deduct Catawba Indian Commission salaries from the Catawba appropriation. These men were local delegates and businessmen who were employed by the State to study the Catawba problem. In 1920 the appropriation was $8,500 but the deductions for that year amounted to: $375 for the agent, $2,000 for debts, $500 for the school, and $1,000 for the Catawba Legislative Study Commission. In 1921, a total of $647.30 was deducted from the $7,700 appropriation for these officials. That same year other deductions amounted to $375 for the agent, $700 for the school, and $1000 for local debts.

The appropriation continued on a regular basis at least until the Catawbas became wards of the Federal Government. In 1941 South Carolina did appropriate $75,000 to purchase additional reservation lands for the Nation, but I have no way of knowing if all the $75,000 was actually spent. The Catawba Appropriation Act No. 393 was repealed in 1951, but Catawba School appropriations were approved until the school was closed in 1966.

I have been through the Bureau of Indian Affairs Catawba files at least 6 times over the last 15 years and have never located what seemed to be a BIA Catawba budget. The Federal Government matched some South Carolina funds, and an agricultural project was conducted. The amounts spent are conjectural. The Catawba were administered through Cherokee, and the answers to these questions are probably to be found in the records of the Cherokee Agency.

Please keep in mind that the list was prepared in haste. There should be an agent's report for each year, and it would provide an itemized account of what was spent. If I say there is ---no record--, this means that I do not have a record for that year. A record may exist, but I merely could not find it.

The amounts listed below should give you a fairly good idea of the South Carolina appropriation from 1840 to 1951. If you need additional information, I will do my best to oblige you.

Sincerely,

Thomas J. Blumer, Ph.D.

Enclosure

cc: E. Fred Sanders, Assistant Chief
Catawba Nation
Don Miller, Attorney, NARF

SOUTH CAROLINA LEGISLATIVE APPROPRIATION

AMOUNTS TAKEN FROM THE FILES OF THOMAS J. BLUMER IN APRIL 1992

DATE	AMOUNT	
1841	$1,840, if necessary	
1842	$1,000, if necessary	
1843	$2,000, if necessary	
1844	$1,841, if necessary	
1845	$1,841, if necessary	
1846	$1,841, if necessary	
1847	$1,841, if necessary	
1848	$1,841, if necessary.	$5,000 appropriated by U.S. Congress was never used for removal.
1849	$1,842.50, if necessary	
1850	$2,500, if necessary	
1851	---no record---	
1852	$1,500, if necessary	
1853	$2,000, if necessary	
1854	$1,200, if necessary.	SC approved $5,000 if removal occurred; funds never used.
1855	$1,500, if necessary	
1856	$1,500, if necessary	
1857	---no record---	
1858	$1,200, if necessary	
1859	$1,182.18 distributed to Indians	

1860	No record. It is possible that the legislature though the Catawbas would remove and take the $5,000 approved in 1854. Neither happened. The War broke out and the Catawbas served the Confederacy.
1861	No record, possibly in produce
1862	No record, possibly in produce
1863	No record, possibly in produce
1864	No record, possibly in produce
1865	No record, possibly in produce
1866	No record, possibly in produce
1867	$1,200
1868	$600 note from the Governor of SC
1869	$850.40
1870	---no record---
1871	---no record---
1872	$777.91
1873	Agent reportedly kept the money. Amount unknown.
1874	$500 appropriated but only $40 distributed.
1875	$675 appropriated. A legislative investigation said that a total of $2,145 had been appropriated from 1870 - 1875 but the amount distributed is unknown.
1876	---no record---
1877	Appropriation made but amount unknown.
1878	Appropriation made but amount unknown.
1879	$800
1880	$800
1881	$800

1882	$800
1883	$800
1884	$800
1885	$800
1886	$800
1887	$800
1888	$800
1889	$800
1890	$800
1891	$800
1892	$800
1893	$800
1894	$800
1895	$800, but only $630 distributed. This is probably the case for each year, but my files do not always contain this information.
1896	$933
1897	$800
1898	$1,000 with $200 for the school, etc.
1899	$1,000 with $200 for the school, etc.
1900	$1,000 with $200 for the school, etc.
1901	$1,000 with 8% for the agent, etc.
1902	$1,000 with deductions for the agent, teacher, doctor, etc.
1903	$1,000
1904	$1,500 with 6% for the agent, etc.

1905	$1,500
1906	$1,500 with $200 for the school, etc.
1907	$3,000 with 3% for the agent, etc.
1908	$3,000 with $200 for the school, etc.
1909	$3,000 expenses to Columbia deducted, etc.
1910	$3,500
1911	$5,000
1912	$4,513.60 distributed
1913	$7,150
1914	$7,600 with $250 for the school, etc.
1915	$7,000 with $500 for the school, etc.
1916	$7,000 minus claims, etc.
1917	$7,000 minus claims, etc.
1918	$8,000 minus claims, etc.
1919	$7,000 minus claims, etc.
1920	$8,500 minus claims, etc.
1921	$7,700 minus claims, etc.
1922	$7,700 minus claims, etc.
1923	$6,625
1924	$10,375 minus $1,500 for the school, etc.
1925	$9,375 minus $1,500 for the school, etc.
1926	$9,375 minus $1,500 for the school, etc.
1927	$9,450
1928	$9,450

1929	$9,450
1930	$9,450 minus agent and school
1931	$9,450
1932	$8,905
1933	$11,222.50
1934	$9,450 minus agent and school
1935	$7,500
1936	$9,450
1937	$9,450
1938	$9,450
1939	$8,250
1940	$9,825
1941	$9,385; S.C. appropriated $75,000 for land purchase.
1942	$9,385
1943	$9,385
1944	$12,000
1945	No record. I suspect that the appropriation ended here.
1946	---no record---
1947	---no record---
1948	$12,500 for school matched by US Government
1949	$13,000 for the school
1950	---no record---
1951	Catawba Appropriation Act repealed: Act No. 393

9

1952 to 1966 the Catawba Indian School continued to operate as a York County school. It was closed in 1966.

Mr. SPRATT. Secondly, when we were before the Committee or when the State Attorney General and others from the State of South Carolina were last before this Committee in June of 1979, we discussed the issue of settlement. And we discussed in particular the issue of sovereignty and jurisdiction of the tribe if it was to be recognized, again, as a Federal Indian tribe.

Assistant Attorney General Ken Woodington who is here in the room today laid out to the Committee the jurisdiction and sovereignty that the State wanted the Catawbas to have if the tribe was to be recognized and if a new reservation was to be established for them. A useful comparison in his system, the most recent eastern settlement, Rhode Island settlement agreement, which Congress had then just enacted, which reserved virtually all civil and criminal jurisdiction to the State, he made it clear that the State of South Carolina did not want jurisdiction over the Catawba Tribe governed by Public Law 20, and as he said, leaned heavily toward jurisdiction on a sovereignty pattern like those in the Eastern Indian settlements today.

To this concept of limited jurisdiction which Mr. Woodington laid out, Chairman Udall responded as follows:

> I would be inclined to agree with you on the jurisdictional question. I think it is one thing to have a Navajo reservation in my State which is as big as West Virginia with a long history of problems; it is quite another thing to say in an Eastern State where you do not have an established reservation, to then go out and combine an established new reservation and give a tribe without an existing tribal structure civil and criminal jurisdiction. I think you are on sound ground there.

We negotiated the sovereignty and jurisdiction of the Catawba Tribe accordingly, tailoring their tribal authority, sovereignty and jurisdiction, to the circumstances in which this tribe finds itself: located in a metropolitan area in a fast-growing region of the Carolinas and following the Eastern settlements as precedents but in the end granting the Catawbas more jurisdiction than most of the Eastern settlements on record today.

I won't go over here, although I do in my testimony, the jurisdiction and sovereignty issues. I have outlined it in my testimony. It is available to the Committee to review and we are available at any time to review it with the Committee if you have questions about it.

Let me turn instead as my final point to what is the major issue here: contribution to settlement.

Mr. Chairman, from the very outset it has been assumed by almost everyone that the Federal Government had to contribute and contribute significantly if this claim was ever going to be settled. Attorney General Griffin Bell assumed as much when he reviewed all the Eastern Indian land claims for the Carter administration in the late 1970s, and all the parties before this Committee at the last hearing in March of 1979 and June of 1979 agreed and assumed that there would be a substantial Federal contribution.

Indeed, if you look in the front of your hearing report on that date you will find printed, Ken Holland's bill, a bill that he and the South Carolina delegation introduced, printed on page 2 of serial No. 96–17. That bill called for payment in full of this settlement out of the United States Treasury. That was the bill before the

Committee the last time we met. Full payment for the settlement from the Federal Government.

Still, it is fair to ask and will be asked, why should the Federal Government contribute $32 million to this settlement? Mr. Chairman, the short answer is that the Catawbas lost their land and have now lost most of their claim for recovery of that land because of the failure of the Federal Government to protect their rights and interests not once but continually over a period of 200 years.

Consider this long list of occasions on which the Federal Government turned a deaf ear to the Catawbas, ignored their plight and their pleas, did nothing to protect the interests, even when it had clearly occupied a trust relationship and knew the tribe held a serious claim.

As early as 1782, Catawbas traveled all the way to Philadelphia and presented to the Continental Congress their petition for protection of their lands from the white settlers. In 1791, Washington reported this in his own journal: Catawbas stopped Washington on the road near their reservation and protested to him white incursions into their property. He was traveling from Camden to Charlotte on a trip to the Southeast he had taken. He made note of it.

In 1825 the War Department, then headed by John C. Calhoun of South Carolina, reported to the Senate the Indian tribes that were among those holding lands in the United States and noted the Catawbas owned 144,000 acres in South Carolina.

In 1848, after the treaty of 1840—this is significant to me—1848, eight years after the treaty of 1840, the Catawbas got together and wrote President James Knox Polk protesting the treaty of 1840 as an injustice, the fact that it had not been fulfilled.

Why is that significant? James Knox Polk was born three or four miles from Catawba Indian country. He had direct relatives living in Catawba Indian country. He would have known if he saw that letter exactly what they were talking about.

They protested and sought the help of the Federal Government. Nothing came. Instead, in the same year, in an act of 1848 and then again in 1854, Congress passed legislation providing for the removal of this tribe west of the Mississippi, evidencing the fact that Congress knew of the treaty of 1840 and knew they had been dispossessed of their lands but did nothing to address grievances or protect them.

In 1877 a long series of efforts to get some relief from the Department of the Interior began. James Kegg, son of a man who was a chief when the treaty of 1840 was made, sent a letter to L.L.C. Lamar, Secretary of the Interior, asking for Federal assistance in reaching a settlement.

In 1895, the Catawbas submitted a petition. In 1905, they got really serious. They retained a Washington lawyer, Chester Howe, and he submitted a very professionally prepared brief requesting the Bureau of Indian Affairs to take action to protect the claim of the Catawba Tribe. The BIA, the Bureau of Indian Affairs, and the Office of Indian Affairs declined that request on legal grounds that have now been found to be completely erroneous.

In 1908, the Catawba Tribe commissioned the Commissioner of Indian Affairs again and was denied again. In 1910, the Indian service initiated another investigation into their claim and then re-

ferred them to the State of South Carolina. The State of South Carolina declined to take responsibility for the claim or the tribe.

And then between 1926 and 1943, due to the fact that Congressman James P. Richards, my predecessor in my district and a man who became the Chairman of the Foreign Affairs Committee while he served here in the House, James P. Richards took a deep and abiding interest in this tribe and he made repeated requests to try to get the Bureau of Indian Affairs interested in the welfare of this tribe, not so much in the claim but just on the welfare of the tribe and their claim against the Federal Government. But in the course of this, the existence of their claim, the unresolution of the claim, was brought to the attention of the Bureau of Indian Affairs and the Department of the Interior repeatedly.

In 1943, finally, all of this effort on the part of Congressman Richards and others bore fruit. The Department of the Interior entered into a memorandum of understanding assuming responsibility for this tribe and they began to provide Federal services. The State of South Carolina provided $75,000 to buy 3,434 acres of land on which the Catawbas could be settled, on which they could learn to farm and on which they could have a tribal existence.

This arrangement did not work well, not for Catawbas, not for the Federal Government. The Second World War intervened, and then the period of assimilation intervened.

As a consequence, both the Federal Government and the Catawba Tribe wanted out of the agreement. I should say that in making that agreement, Mr. Chairman, the State of South Carolina was prepared to put up $100,000, ended up putting up $75,000, but sought in return a release of this claim.

The Department of the Interior took the draft of the memorandum of understanding prepared first by the State of South Carolina and including a release of the Catawbas' claim and said, "We cannot advise the Catawbas to sign or enter into this agreement with this release in it because this claim may well be valid."

They knew the claim, they claimed it might be valid, but they did nothing to enforce the claim, to protect the claim, to prosecute the claim, even though this tribe was under their supervision and tutelage at that particular point in time.

As I said, the memorandum did not work well for either party, so the Catawbas sought relief from it. It was dissolved by an act of Congress along with the other assets of the Catawba Indian Tribe.

At that particular point in time the memory of the claim was still in the mind of Catawba leaders, and they insisted that a proviso be added to the resolution by which they approved the termination of the MOU, clearly reserving the status of their claim.

However, at that particular point in time the Bureau of Indian Affairs and the Department of the Interior made two grievous errors in terms of protecting the rights and interests of this claim. First of all, clearly they were acting as a trustee in liquidation for the tribe. That was the purpose of the dissolution. The act was called an act for the dissolution of assets and distribution of assets of the Catawba Tribe.

The Department of the Interior did not liquidate the single greatest asset of the Catawba Indian Tribe. They knew about it. It was

called repeatedly to their attention. The historian who had written the one definitive biography to that date of the Catawba Tribe, Douglas Summer Brown of Rock Hill, documented the existence of the claim, and he warned the BIA, "Any agreement of settlement made now cannot be filed. But the question about this claim will be brought up again and again in the future."

Despite that and all sorts of similar warnings, Interior and BIA did nothing about settling the claim as part of the dissolution and distribution of the assets of the tribe. Instead, they did something else that worked to the tremendous disadvantage of this tribe.

The Termination Act included in Section 5 language which was boiler plate language, more or less, which provided that upon the effective date of termination all Federal laws that protected and applied to this tribe as Indians would cease to have effect, and State laws would then apply to them as any other citizens of the State of South Carolina.

As a consequence, the Catawbas learned in 1986, by decision of the United States Supreme Court, that this Section 5 applied State statutes of limitation, adverse possession statutes to their land claim. The Fourth Circuit was later to find that this meant anybody who held his title, held his property for 10 years, between 1962 when the tribe was terminated, and 1980 when this suit was brought, 10 years consecutively during that 18-year period of time, could validate his title by adverse possession against the claim of title to the Catawba Indian Tribe.

Why? Because of the express boiler plate language put into this agreement by the Department of the Interior and the Bureau of Indian Affairs. Not only did they put it into the agreement, they failed to warn the Catawbas of the consequences, failed to tell them they had a 10-year time frame within which to bring this suit.

Then in 1962 and later in the 1970s, even after litigation, court decisions indicated that it might have this impact, they did nothing to protect their claim.

So when we come to you and ask for Federal participation, when the Catawbas come to you and ask for Federal participation, it is after this long trail of tears, this abject failure on the part of the Federal Government to do what it should have done, had a right, obligation and duty to do as trustee to protect these Indians.

Let me ask just in closing what will happen if the Federal Government does not assume its share of the settlement. The negotiations will resume. We won't let them break down. But it will be hard to bring back together. And so will the lawsuit.

The State of South Carolina for its part will probably have little choice but to seek dismissal from the suit under the recent ruling of the Supreme Court in *Blatchford* v. *Native Village of Noatak,* holding that an Indian tribe can not sue a State in Federal Court. So we may lose the State as a participant in this suit.

The Catawbas for their part will probably have no choice but to sue some 62,000 landowners, probably filing a lis pendens with each suit. And in a highly populated, well developed area covering 140,000 square miles in South Carolina, real estate sales and real estate lending will come to a crunching hold.

Pending the outcome of this suit, real estate will plummet in value, landowners will have to bear legal fees and substantial expenses that will run undoubtedly into millions of dollars.

And in the end, in the end, after all this turmoil, the vast majority of these landowners will prevail. They will have an adverse possession defense that will clear their title after time and over time.

And the Catawbas? The Catawbas will probably be left with a lot less than they have won by the way of this settlement.

In short, if the Federal Government can't and won't contribute the share we are seeking, this settlement, hard fought over four years of negotiation, will collapse and everybody will lose, including the Federal Government. And I include the Federal Government because if it collapses, the Federal Government will not be able to bring another Indian land claim to conclusion. It won't see another terminated tribe restored to Federal status, which is also Federal policy. And the injustice done the Catawbas by years of Federal neglect won't be rectified. It will be compounded.

Furthermore, an injustice will be visited upon 62,000 landowners. They will be the victims of the Federal law, the law which no one has understood clearly, and cause undue anguish as well as loss of money. And everybody knows, everybody knows that if this were the outcome, Congress wouldn't stand for a minute for them to be dispossessed of their family-owned farms and businesses.

Just in conclusion, Griffin Bell took a long, hard look. He got a lawyer from Atlanta, a retired judge to assist him, and he took a complete review of all the Eastern Indian land claims which were asserted in the 1970s, and he came to several conclusions which he set out in a letter to Cecil Andrus dated June 30, 1978. We will offer it for the record.

One was that landowners today are wholly innocent and they should not be held under threat of loss of their homes or farms or charged with the cost of this settlement. In fact, Griffin Bell refused to bring in suit on behalf of Catawbas because, "The fact that the landowners are completely innocent of any wrongdoing lays heavily against suing them."

Attorney General Bell concluded that "of necessity it is the government's responsibility to settle these claims." He recommended that it is, and I am quoting, "completely within the power of Congress to remedy the tribal claims by the process of ratifying the ancient tribal agreements with the States. Such ratification could be accompanied by payment to the tribe in appropriate manners. In the alternative, the tribes could be given a cause of action against the United States in the court of claims." He was speaking of Federal contribution, because he recognized the Federal Government would have to step in substantially.

So we come today to ask the Federal Government to stand up to its responsibility and help settle this claim, as Griffin Bell recommended 15 years ago.

Mr. Chairman, I have taken a lot of time but I appreciate your allowing me this latitude so I could present this matter to you fully.

[Prepared statement of Mr. Spratt and additional documents submitted for the record follow:]

TESTIMONY

CONGRESSMAN JOHN M. SPRATT, JR.

COMMITTEE ON NATURAL RESOURCES

SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

U. S. HOUSE OF REPRESENTATIVES

July 2, 1993

Mr. Chairman, I want to thank you not only on my behalf but on behalf of thousands of my constituents for holding today's hearing on H.R. 2399, the Catawba Indian settlement bill. To avoid lawsuits against 61,676 innocent landowners this October, H.R. 2399 needs to become law before Congress ends this session. I am grateful for your willingness to act so promptly.

At the outset, I should state that I am a landowner in the claim area and one of the 77 defendants named in the law suit, Catawba Indian Tribe of South Carolina v. State of South Carolina, et alia, docketed as Civil Action No. 80-2050 in the U. S. District Court for South Carolina. Along with the other named defendants, I moved for summary judgment. The District Court granted my motion and issued an order releasing all of my land in the claim area from the suit. The Fourth Circuit Court of Appeals sustained the District Court as to all but approximately 90 acres that I own. Because of my interest, I have sought the guidance of the House Committee on Standards of Official Conduct, and the Committee has advised me that I should not introduce the settlement legislation, but that I may testify and speak in favor of it so long as I disclose my interest.

This bill will settle a land claim outstanding for more than 150 years and a law suit brought by the Catawbas, which has been pending for more than 13 years. The bill will grant the Catawbas federal recognition as an Indian tribe, and restore a relationship with the tribe terminated by Congress in 1962.

This settlement has not come easily. For the past four years, we have been engaged in long, hard, and sometimes contentious negotiations. H.R. 2399 is the fruit of our efforts. The bill is supported by the tribe, the State of South Carolina, York and Lancaster County, Senator Hollings and Senator Thurmond, the Native American Rights Fund, and the National Congress of American Indians. The agreement in principle was basically settled last August, and the settlement was reviewed by Secretary of the Interior Manuel Lujan, who approved it and issued a press release expressing his support for it. Secretary Babbitt is reviewing the settlement now.

The South Carolina General Assembly passed the state

implementing legislation at the end of May, and Governor Campbell signed it into law on June 14, 1993. With passage of the state implementing legislation, the federal implementing legislation could be put in final form and introduced, and Congressman Butler C. Derrick, Jr. filed the bill before us on June 10, 1993.

This is not the first time this Committee has examined the Catawba's claim. On June 12, 1979, this Committee, under the Chairmanship of Morris Udall, held a hearing on the Catawba claim. The hearing report (Serial No. 96-17) provides extensive background on the dispute. I have compiled from various sources a history of the tribe and this land claim, and while I will not read it as part of my testimony, I would like to offer it for the record.

The Catawba Indians

Native Americans in the Catawba-Wateree basin of South Carolina were first called 'Esaws,' a corruption of 'river,' in their Siouan language. From the Esaws on the Catawba to the Mannahoacs on the Rappahannock, all descended from Siouan-speaking natives who migrated over the mountains centuries before Columbus. As they scattered along the rivers of the upcountry, they lost their sameness. A cluster of settlements in time became a separate people. In 1700, John Lawson, an English traveler, gave a common name to the natives settled on the upper banks of the Catawba River; he called them simply "Catawbas." By 1715, "Catawbas" had become the name for Indian communities once known as Esaw, Sugaree, and Shuteree, as well as Catawba. [The Indians' New World: Catawbas and Their Neighbors from European Contact through the Era of Removal, by James H. Merrell (University of North Carolina Press, 1989), Chapters 1-3.]

By the mid-1700s, the Catawbas had appended "Nation" to their name and had a population of some 1,500. Up until the 1750s, the estimate of warriors in the tribe ranged from 300 to 500. "Not very impressive when set alongside the 3,000 Cherokee or the 1,500 Creek," says Merrell, their most recent biographer, "but enough to sustain a native society in the piedmont and earn the Catawba Nation a place as one of the four 'most considerable' Indian peoples in the Southeast." [Merrell, page 17.] In 1756, their chief, King Hagler, said proudly, "We are a small Nation, but our Name is high." He did not exaggerate. [Merrell, p. 119.] Governor Glen called them "the bravest Fellows on the Continent of America." Edmmond Atkin, Superintendent of Indian Affairs, said, "In War, they are inferior to no Indians whatever." [Merrell, p. 119.]

In February of 1756, the Governor of Virginia dispatched a delegation to the Catawbas seeking warriors for his fight against the French. The following November, Colonel George Washington

reported that eleven Catawbas had arrived at Winchester, Virginia. Eventually, 124 Catawbas would come. They served mostly as scouts, and battle casualties were light, but smallpox had spread among the British forces, and the Catawba warriors brought it home with them. Epidemics of smallpox had afflicted the tribe in 1700 and again in 1748; now a pestilence of smallpox swept the tribe. Governor Dobbs estimated the death toll at 60%. In the years after 1759, the warrior count for the Catawbas never exceeded 50 to 150. The tribe's population as a whole declined from 1,500 to perhaps 500, according to Merrell. [Merrell, p. 195.] The Catawbas abandoned six towns along Sugar Creek and on the east bank of the Catawba below Nation's Ford and settled into one town at Twelve Mile Creek, where the state erected a fort for their protection.

The Treaty of Fort Augusta

For additional protection, the Catawbas asked as early as 1757 that "their lands be Measurd out for them." [Merrell, p. 198.] In July 1760, the Superintendent of Indian Affairs, Edmond Atkin met with a delegation of Catawbas led by King Hagler. Lt. Governor Bull reported the results of the meeting to the Commons House on October 14, 1760, saying that Atkin "had held a Conference with the Catawbas on his return from Kewohee last July, at Pine Tree Hill, concerning the Lands which they claim'd; and that they had agreed to surrender their claims to a large Tract of sixty Miles diameter, in consideration of being quietly settled in a Tract of only fifteen miles square, part of the above-mention'd Land, to be ascertained by survey, to prevent Intruders, and the Catawbas having a Fort built there at Public Expence." J.C.H.A. XXXIII, Pt. II, pp. 14-16; [The Catawba Indians: The People of the River, by Douglas Summers Brown, (University of South Carolina Press, 1961), pp. 240-241.]

The Royal Governors of Georgia, North Carolina, Virginia, and South Carolina met at Fort Augusta on the Savannah River in November 1763, following the King's Proclamation of 1763, which decreed that Indians south of Canada, west of the mountains, and east of the Mississippi were not to be molested in their hunting grounds if their lands had not been ceded or purchased. The purpose of the conference was to settle disputes arising from the Indian wars of the previous decade and to define boundaries of the Indian Nations. Creeks, Chickasaws, Choctaws, and Cherokees attended the congress, along with Catawbas. King Hagler had been slain by Shawnees the previous August, and Colonel Ayres represented the tribe. He asked for "15 miles on each side of his Town free from any encroachments of white people." He was asked in return if he still agreed with the terms of the Treaty of Pine Tree Hill, and was told, "If you stand to your former Agreement, your Lands will be immediately surveyed and marked out for your use, but if you do not, your claim must be undecided

till our Great King's Pleasure is known on the other side of the Waters." Ayres said the Catawbas were satisfied with the terms of the treaty, and he was informed that a new survey would be made, and "when the Line was run, the People settled within should be removed and no new Warrants granted them or any others to settle within those Limits." [Brown, pp. 250-251. An account of the proceedings at the conference is recorded in North Carolina States Records, Volume XI, pp. 179-203.]

Article Four of the Treaty of Augusta reads as follows:

> "And We the Catawba Head Men and Warriors 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 already been begun, and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be compleated 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."

The Catawbas' interpreter at Fort Augusta was a Quaker from Pine Tree Hill by the name of Samuel Wyly. Wyly had already begun a survey of the area the Catawbas sought and was engaged by the Royal Governors to finish it. His plat was completed on February 22, 1764, and submitted to the Royal Governor of South Carolina. At the otuset of the Revolution, Mouzon's "Map of North and South Carolina with their Indian Frontiers," dated May 30, 1775, delineates Wyly's boundaries as "Catawbaw Nation, 144,000 acres."

White Settlement of Catawba Lands

The Catawbas wanted an area of their own for security against white settlers as well as other tribes. Whites had put down stakes in Catawba country before 1760, some as squatters, some by land grant from the State of North Carolina. A trader named Matthew Toole was one of the first, and he became the tribe's interpreter and intermediary. When Catawba warriors arrived in Virginia, George Washington reported that they were accompanied by "one Matthew Tool who makes his boast of stopping them until he shall be handsomely rewarded for bringing them." Sometime after 1757, Thomas Spratt moved from Charlotte and settled in what is now Fort Mill. He apparently encouraged others to come; and by the start of the Revolution, Garrisons, Kimbrells, Erwins, and Elliots had followed him.

In May 1780, after the fall of Charleston, the New Acquisition Militia mustered in Catawba country and resolved to carry on the revolution in the upcountry under Thomas Sumter's

command. Catawba warriors joined their ranks. In an account written in 1843, David Hutchison recalled that "a large number of young men, chiefly from Mecklenburg County .... returned home [from the war] poor and penniless. A number of them had served their last years in Sumter's State troops ... In camp they had become acquainted with a number of Indians and were favorites with them. These men when married, being without means sufficient to purchase improved land, were encouraged by the Indians and the whites already settled to come and live on their land; which most of them did, purchasing from the first settlers."

The Catawbas must not have encouraged all who came; because in November 1782, a delegation of Catawbas appeared in Philadelphia before a committee of Congress, asking that their land be secured to them so that it could not "intruded into by force, nor alienated even with their own consent." Congress passed a resolution acknowledging the British treaty with the Catawbas. However, Congress was then operating under the Articles of Confederation, and under Article IX, Congress had only "the sole and exclusive right and power over Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." Congress referred their complaints to the state legislature to "take such measures for the satisfaction and security of the said tribe as the said legislature, shall, in their wisdom, think fit."

The framers of the Constitution abandoned Article IX of the Articles of Confederation, and in Article I, Section 8, Clause 3 of the Constitution, conferred on Congress plenary authority over Indians. In 1790, at the urging of President Washington and the Secretary of War, Congress exercised its authority under the new Constitution, and passed the first Indian Trade and Intercourse Act , which prohibited the conveyance of Indian land except where such conveyances were made pursuant to the treaty powers of the United States. (Referred to as "Nonintercourse Act," first codified at Chapter 33, 1 Statutes 137; now codified at 25 U.S.C. Section 177.) The law was amended in 1793 to provide more specifically that "no purchase or grant of lands ... from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution...[and] in the presence, and with the approbation of the commissioners of the United States." The Nonintercourse Act was passed as a temporary law and amended six times before it was made permanent in 1834.

The Treaty of 1840 at Nation Ford

The state legislature did little to deal with the Catawbas' land problem until 1808, when William Pettus, an Indian Land lessee, was elected to the General Assembly and refused his seat

because he was not a "freeholder." The dispute over Pettus led to the first law addressing Catawba land and those who occupied it. The General Assembly passed a law allowing the Catawbas to lease their lands, provided that each lease was approved by three of five commissioners appointed by the Governor, and signed by four Indian "headmen," and provided that no lease exceeded 3 lives in being or 99 years. (S. C. Statutes at Large, Volume V, pp. 576-577.0

The law helped regulate leasing, but by resolving the legal status of the leases as well as the lessees, it also encouraged new settlement. In 1826, Robert Mills visited the Catabwas and observed in his "Statistics of South Carolina:" "These lands are almost all leased out to white settlers, for 99 years, renewable, at the rate of from $15 to $20 per annum for each plantation of about 300 acres. The annual income is estimated to amount to about $5,000." [Brown, pp. 297-298.]

In 1828, a rumor spread through Indian Land that investors in the low country were seeking to buy out the Catawbas' reversionary interest, so that when the leases expired, they would own the land. The governor assured leaseholders that the state would not countenance such a deal. But rumors fueled leaseholders' concerns, and in 1830, petitions began arriving at each session of the General Assembly seeking a settlement of titles in Indian Land. By then, many Catawbas had moved to Haywood County, North Carolina, near the Cherokees; and those who remained were not disposed to sell. The leaseholders persisted; and after a decade of entreaties, the Catawbas finally indicated some willingness to sell, provided good land was purchased for them in Haywood County, North Carolina. On December 31, 1939, the legislature authorized the governor to enter into negotiations for purchase of the Catawbas' land. [Brown, Chapters XIII-XIV.]

The governor appointed five commissioners: John Springs, David Hutchison, Edward Avery, B. S. Massey, and Allen Morrow. The Catawbas were represented by their chief, General James Kegg, and and his "headmen, " Colonel David Harris, Major John Joe, Captain William George, Lieutenant Philip Kegg, Colonel Samuel Scott, and Lieutenant Allen Harris. The parties met at the Cross Roads above Nations Ford on the western side of the Catawba River, and after two sessions, signed a treaty on March 13, 1840.

David Hutchison wrote a contemporary account of how the treaty was negotiated. "With respect to the Indians," he wrote, "we tried to fix a sum of money, the yearly interest of which would be equal to the yearly rent secured in the Leases. This we fixed at $21,000." In their Report, the commissioners noted, "It is not easy to ascertain with accuracy the amount of annual rents their lands have heretofore yielded. If the original

survey is correct, their boundary contains 225 sections, which at ten dollars each, would produce $2,250.00."

The commissioners also reported their "opinion that Five thousand dollars would purchase a tract of land sufficient for their accommodation in any place they may wish...From a once populous tribe, they have dwindled down to twelve men, thirty-six women, and forty youths; in all eighty-eight."

The State engaged "to furnish the Catawba Indians with a tract of land of the value of $5,000,000, 300 acres of which is to be good arable lands fit for cultivation, to be purchased in Haywood County, North Carolina, or in some other mountainous or thinly populated region, where the said Indians may desire; and if no such tract can be procured to their satisfaction, they shall be entitled to receive the foregoing amount in cash from the State."

The Catawbas were promised $2,500 from the State upon their removal to Haywood County and $1,500 a year for nine years thereafter. In all, the payments total $21,000, which works out to approximately $.15 per acre. Nevertheless, the commissioners reported that if they had agreed to pay everything in cash on the signing of the Treaty, "they might have effected a Treaty for one-third or even one-fourth of the amount."

In exchange for these payments, "the Chief and Headmen of the Catawba Indians, for themselves and the entire Nation [agreed] to cede, sell, transfer, and convey to the State of South Carolina, all their right, title, and interest to their boundary of land lying on both sides of the Catawba River, situated in the Districts of York and Lancaster, and which are represented on a plat of survey of 15 miles square, made by Samuel Wiley and dated the twenty-second day of February, one thousand seven hundred and sixty-four, and now on file in the Office of the Secretary of State."

David Hutchison wrote his account of the treaty at the instance of Senator Isaac D. Witherspoon of York, apparently because the treaty encountered strong opposition in the state legislature. According to Douglas Summers Brown, "members of both Houses [proclaimed] that 'the settlers on the Indian land had cheated the Indians, and swindled them out of their possessions.'" Senator Witherspoon asked Hutchison for an authoritative account to defend the treaty, and he used it to "sway those of adverse opinions." The state legislature confirmed the treaty. [Brown, p. 316.]

The Treaty of 1840 was barely confirmed when it was thwarted by events. The Governor of North Carolina refused to allow the sale of land in Haywood County to the Catawba Indians. In Reminiscences of York District, Maurice Moore told of Catawbas

straggling back through Yorkville. "North Carolina refused them a home, and they came back to the haunts of their forefathers, a living monument to the cupidity of the whites, which must excite the sympathy of every generous heart."

The State commissioned Joseph F. White to search for an alternate tract of land, but did not offer to amend or renegotiate the treaty. Instead, the State proceeded with parceling out among the leaseholdersthe land acquired under the treaty. Lessees applied to the State for a survey of their leasehold; and when the survey was completed, they obtained a warrant for a deed and then a deed of conveyance from the Secretary of State. The deeds do not recite any consideration. Act No. 2807, Statutes at Large, Section III, confirmed the Treaty of 1840, and provided: "Each lessee shall pay to the Tax Collector, annually, one cent and a half per acre, or such additional rate of taxation as may hereafter be imposed, in order to refund the State the advances it may have made in the execution of said agreement...at seven per centum per annum; to be paid at the same time that other taxes are paid..." Apparently, the landowners completed their payments in 1854, because a law passed that year, Act 4180, Statutes at Large, Section II, provides "...That the proprietors of the said Catawba Indian lands be, and they are hereby, released from the payment of any further sum or sums of money on account of advances made by the State to the said Catawba Indians..."

Aftermath of the Treaty of 1840

In 1842, the State acquired the 630-acre tract on the west bank of the Catawba River which remains the reservation today. According to Douglas Summers Brown, "small groups of Catawbas wandered back" from Haywood County, because "tribal jealousies broke out [with the Cherokees]...With the 630-acre Reservation set aside, some feeble semblance of the old tribal unity reappeared...As the exiles gathered about, Allen Harris, who signed the Treaty of 1840 as lieutenant, became, for all practical purposes, 'Chief Man'..."Harris operated a ferry on the river, and deserves remembrance, writes Brown, "because, as their leader, his scattered people rallied around him and took a new hold on tribal life." Brown, pp. 319-321.

The State withheld payment of "$2,500 upon removal to Haywood County," as provided in the treaty, because the Catawbas never removed themselves to Haywood County. The State apparently delayed other payments as well, possibly because they were funded by sales to leaseholders. In 1849, Governor Seabrook personally visited the Catawbas to determine their status, and reported finding "that the number of Catawba Indians is 110 --- 20 men, 43 women, and 20 male and 27 female children under 10 years of age. Of the tribe, 56 are in North Carolina and 54 in this state." Seabrook acknowledged that the State's debt still due the

Catawbas was "about $18,000." He noted that the Comptroller General had "made up a statement of the amount due the Catawba Indians under the treaty of 1840, allowing interest at 7% upon the amounts agreed to be paid, from the date at which they were to have been paid." He further noted that "for the amount thus adjusted, the state shall debit herself as debtor to the Catawba Inidans, and shall allow an interest of 6% payable annually; and said interest shall be divided in annuities per capita among the Catawba Indians." The State then began making payments to the Catawbas that continued throughout the rest of the 1800s, except during the Civil War, and into the 1940s. During this period of a hundred years, the State's appropriations for the Catawbas totaled $385,922.09, according to Dr. Thomas Blumer of the Library of Congress.

At various times, the Catawbas sought to be removed to the west to live with the Chickasaws or the Choctaws. In an 1848 letter to President Polk, the Catawbas in North Carolina asked for aid and confirmed the appointment of Samuel P. Sherrill as "our Agent in the recovery of our claims against the state of South Carolina and to remove us west, having been badly treated, cheated, and defrauded by persons who acted as agent for us before Mr. Sherrill's appointment." [Brown, p. 324.] In 1848 (9 Stat. 264) and again in 1854 (10 Stat. 316), Congress authorized $5,000 "to assist the [Catawbas] to emigrate and to sustain and settle them...among some of the tribes West of the Mississippi River." p 329. However, the appropriation was never spent because the Chickasaws and the Choctaws never consented to receiving the Catawbas.

The correspondence with President Polk and Congress brought the Treaty of 1840 squarely to the attention of the federal government. Yet no one in the Executive Branch or the Congress seems to have raised any question compliance with the Indian Non-Intercourse Act or congressional ratification of the treaty.

Assertion of Land Claim

The letter to President Polk shows that soon after the Treaty of 1840, the Catawbas began to believe that they had a claim against the State. Though they did not press their claim, the legend of it passed from generation to generation. In 1904, Chief D. A. Harris retained an attorney, Chester Howe of Washington, D.C., to seek redress of its land claim. Howe petitioned the Department of Interior to bring suit on behalf of the Catawbas for recovery of their lands on the grounds that the Treaty of 1840 was void under the Non-Intercourse Act, and in any event, had never been fulfilled. The Department of Interior declined to bring suit because the Catawbas were "state" Indians who had never been recognized by the federal government. The Interior Department advised Howe to press the claims against the State of South Carolina. The Catawbas presented their claim to

the state legislature, which asked the Attorney General for a legal opinion. In 1907, the Attorney General concluded that the Treaty of 1840 was valid because the Catawbas were state Indians with no standing under the Non-Intercourse Act and with no more than Indian title, or the right of occupancy, which the state as owner of the underlying fee could extinguish. In 1908, the Catawbas petitioned the Department of Interior once again; and once again, they were denied on the grounds that no relationship existed between the Federal government and the Catawba Indian tribe.

Chester Howe died before he could bring suit for the Catawbas, the same fate that met A. R. McPhail of Charlotte and two other attorneys retained by the Catawbas.

Told that they had no claim in court, in 1924 the Catawbas submitted to the Governor of South Carolina and the General Assembly a "bill of conditions as the final settlement of all debts owed by the State of South Carolina," stating that if passed, the law would make the State "free of any claim or claims of said Indian Nation," and its tribal members would no longer be "wards of the State of South Carolina." The petition appeared in the Journal of the Senate for February 21, 1924. The Catawbas sought the following:

(1) An area of good farm land, consisting of 25 acres be given per head to all members of said tribe, with deeds and titles giving full ownership.

(2) Houses of good quality and of sufficient size (not to exceed 8 rooms and not less than 4 rooms) to accommodate the family placed on said farm.

(3) Cattle, stock, barns, and other outbuildings necessary on such a farm, along with all necessary implements and utensils needed to cultivate said farm.

(4) $100.00 to be paid each person per year for five years, as expenses while getting settled.

(5) A town or city residence of equivalent value for any family selecting it in place of a farm settlement.

Following the petition was a letter to the General Assembly from Governor McLeod, in which he wrote:

> "A proper and satisfactory settlement of our relationship with the Catawba Indians has long been a problem in South Carolina. These Indians have been faithful and loyal to the State from the days of the Revolution, and the unfortunate condition of this small remnant of a great nation is peculiarly appealing.

"There has been submitted to you a proposed Bill for a final settlement for the relief of these Indians...which originated with the Business Men's Evangelistic Club of Rock Hill. I wish to express my approval of this measure."

Despite the Governor's approval, the bill did not pass, but the Catawbas did not give up. On January 9, 1929, Chief Samuel T. Blue wrote the following letter to the Commissioner of Indian Affairs:

"I am chief of the Catawba Indians, now located in York Co., South Carolina, looking forward for final settlement from South Carolina on land lease, which has been standing for over 130 yrs. We are still wards of this State, and have been receiving an annuity at about $40 per head.

"I am kindly asking your office to inform me, as to how you are settling with the Indians on different reservations. Do you give them certain amount of land with houses per head or to a family? Do you include stock and farm implements or give them so much money?

"If you will give me an out line of this question will be greatly appreciated. So should the State make settlement with my tribe I will have an idea what to look for."

The General Assembly did not authorize settlement funds until 1936, when $100,000 to fund settlement of the claim and a rehabilitation program for the tribe was approved, provided arrangements could be made with the federal government to undertake the program. The appropriation lapsed because nothing was worked out with either the tribe or the federal government. However, Dr. Frank G. Speck, an anthropologist from the University of Pennsylvania, visited the Catawba reservation during 1936, and learned of settlement offers. At the request of Chief Blue, he wrote the Commissioner of Indian Affairs the following letter on January 26, 1937:

"Being at work for a while among the Catawba of South Carolina, I have had occasion on the side to become acquainted with one of the difficulties now confronting the tribe, and which I have been requested by my friend Chief Sam Blue to mention to you in the hope that you may be able to offer him some advice.

"As I am informed, the State is offering the tribe a settlement of outstanding unpaid obligations concerning land transactions of the past. The Chief feels that the amount offered is not commensurate with the value of the liability. The State wants the tribe to settle for $250,000, which would be a pittance for 144,000 acres, and to divide the amount among the 217

members of the tribe; $460 per capita upon settlement for the firast two years; $230 per capita for the third year. Under the present annuity payment system, they receive $27.80 per capita...

"In short, I am asked to request of you the favor of a reply giving a word of advice in regard to pros and cons of the general idea."

Professor Speck's letter prompted a visit to Rock Hill by D'Arcy McNickle, the Administrative Assistant to the Commissioner. McNickle found Professor Speck misinformed about the settlement offer; the State had appropriated $100,000, not $250,000; and it wanted these funds to be used for rehabilitation of the tribe, as well as settlement. McNickle's visit lasted a week and resulted in a lengthy report on the Catawbas, which finally laid the basis for an agreement.

Memorandum of Understanding with Federal Government

An agreement with the federal government was still a long time coming, because officials at Interior felt that "we don't need to adopt any more Indians." Congressman James P. Richards described his frustrations in trying to win federal assistance for the Catawbas in a floor statement made in the House on May 2, 1944, after the agreement was finally concluded:

"These Indians compose the only Indian group in South Carolina still retaining their tribal identity. They reside on a State reservation. When I came to Congress, I introduced bills which would make the Catawbas wards of the Federal Government. At first, I ran up against a stone wall of opposition. The Office of Indian Affairs and the Indian Affairs Committee of the House refused to report the bill favorably on the ground that the members of this tribe, like a few other small tribes in the United States, had never been wards of the Federal Government, and that there was no basis for Federal responsibility. I then decided to pursue another course. I had numerous conferences with Mr. Collier and his assistant, Mr. Zimmerman, of the Office of Indian Affairs, with a view to getting Federal aid for the tribe. I also went over the history of the Catawbas with Secretary of Interior Ickes. He showed great sympathy and interest and instructed Mr. Collier to go the limit under existing law in order to remedy the conditions of the Catawbas. A plan was then worked out whereby it was proposed that the State of South Carolina and the Federal Government enter into an agreement to rehabilitate these Indians."

The agreement referred to by Congressman Richards was a Memorandum of Understanding (MOU) made on December 13, 1943, by

the State, the Office of Indian Affairs, the Farm Security Administration, and the Business Committee of the Catawba Indians. Under the MOU, it was agreed that the Catawbas would become citizens of South Carolina. The State agreed to spend $75,000 purchasing land to add to the 630-acre reservation and to appropriate at least $9,500 annually in 1944, 1945, and 1946, to be spent by the Farm Security Administration in helping the Catawbas establish farms. The Office of Indian Affairs agreed to provide $7,500 under the Johnson-O'Malley Act for support of the Catawba Indian Association, and the Farm Security Administration agreed to make rehabilitation loans. In keeping with this MOU, the state purchased 3,434 acres of land, and conveyed title to the United States for the benefit of the Catawbas.

The State wanted the agreement to extinguish finally all tribal claims. But the Commissioner of Indian Affairs advised the State Auditor: "In the absence of court determination, we are in no position to pass upon the justice of these claims, and I think we could not become a party to any action seeking to quiet these claims." [Letter from William Zimmerman, Acting Commissioner of Indian Affairs, to J. M. Smith, State Auditor, August 28, 1941.] The first draft of the MOU, nevertheless, contained a paragraph calling for the Catawbas to execute a "release and quitclaim of all claims and actions, of whatsoever nature, against the State of South Carolina." On advice of the Solictor of Interior, Fowler Harper, the release was deleted in the final draft of the MOU.

After dealing with the release, the Commissioner also tried to make clear that the Federal Government sought merely to help the Catawbas through the Farm Security Administration, and not to make them "wards of the government." He recalled that "Congress refused to approve legislation designed to bring the Catawba Indians under the jurisdiction of the Federal Government. We should not want any action on the part of this Office to create the impression that we are attempting to accomplish indirectly what the Congress refused to permit us to do directly." In a Litigation Report prepared in 1978, the Solicitor's office noted that "The agreement was designed only to effect a limited rehabilitation program and the Department claimed not to recognize or undertake any general trust relationship with the Tribe by virtue of the agreement."

The Office of Indian Affairs was enthusiastic about the MOU. Assistant Commissioner Ward Shepard hoped that the "tribe can become not merely self-supporting, but can become a credit to the State." In time, however, the Catawbas became dissatisfied with the services and negligible benefits flowing to them from the federal government. They shared an agent who lived with the Cherokee Tribe and who visited their reservation only a few times a year. Although the Farm Security Administration helped them establish farms, they were unable to own any part of the 3,343

acres of farm land individually.

Termination of MOU

As the Catawbas were growing dissatisfied with the federal government, the government was growing doubtful of its Indian policies. In 1953, the federal government's policy toward Indian tribes shifted in a new direction. House Concurrent Resolution 108 was passed, and Congress declared that henceforth the government's policy was to make Indians within the United States subject to the same laws as other persons and to terminate any special status they might have had under federal law. In September 1954, a special House Subcommittee on Indian Affairs reported that the Catawbas were among the Indian tribes able to manage their own affairs and ready for termination. The tribe concurred in the report because they "could not productively utilize their reservation without either federal assistance or the ability to secure credit." [Testimony of Chief Gilbert Blue before the House Interior Committee, on H.R. 3274, June 12, 1979.]

On January 3, 1959, Congressman Robert W. Hemphill brought the following resolution to a Catawba tribal meeting for passage:

> Now, Therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, its General Council assembled in regular meeting hereby formally request the Honorable Robert W. Hemphill, our Congressman from the Fifth District, to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land, in York County, South Carolina, so that it can be patented, and to provide for an equitable distribution of all the Catawba Tribe, and to provide for the protection of minors and incompetents, and do all those things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians, or claim against their assets, and <u>that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe</u>." [Emphasis added.]

Congressman Hemphill advised the Bureau of Indian Affairs of the resolution and asked the Bureau to draft legislation. Hemphill subsequently introduced H. R. 6128, "The Catawba Indian Tribe Division of Assets Act." Because of doubts of a quorom and the tribe's understanding of the bill, Congressman Hemphill met again with the tribe on March 28, 1959. Following his

explanation of the bill, the Catawbas present voted in favor of its passage.

"The Catawba Indian Tribe Division of Assets Act" ("Termination Act" or "Act") was signed into law by President Eisenhower on September 21, 1959, and codified at 25 U.S.C. Section 931-938. The Act called for a plebiscite among all adult Catawbas; and on July 1, 1960, the Secretary of Interior published a notice in the Federal Register that a majority of the adult Catawbas had indicated their agreement to the provisions of the law, making the law effective as of that date.

Section 5 of the Act called for revocation of the tribal constitution, after which the tribe would no longer exist as a federally recognized Indian tribe. Section 5 further provided that after the tribal constitution was revoked, "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several states shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." On July 1, 1962, the tribe's constitution was revoked, and the termination process was completed. Pursuant to the Division of Assets Act, the 3,343 acres of land held in trust by the Secretary of Interior were partitioned partly in kind and partly by liquidation, followed by pro-rata distribution of the proceeds among members of the tribe.

Section 6 of the Termination Act "allowed those interested in organizing under State law to carry on any of the nongovernmental activities of the group." In 1975, the Catawbas formed a non-stock, non-profit corporation under state law by the name of the Catawba Indian Tribe, Inc. in order to participate in federal categorical assistance programs which were becoming available to the tribe through various federal agencies, such as the Comprehensive Employment and Training Act. A five-member Executive Committee was elected as governing body, and Gilbert Blue was elected Chief.

In the same year, the First Circuit Court of Appeals decided Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and extended the reach of the Nonintercourse Act. When the Passamoquoddy petitioned the Interior Department to sue the State of Maine, Interior took the same position it had taken in 1907 in when the Catawbas sought for Interior to sue South Carolina. Interior held that the Nonintercourse Act applied only to federally recognized tribes; that the Passamoquoddy had never entered into a treaty with the federal government or received benefits from the Bureau of Indian Affairs; and that consequently, the Nonintercourse Act did not apply to their tribe. The Passamoquoddy brought suit themselves; and in 1975, the district court rejected the distinction bewteen "federally-recognized" tribes and "state tribes." It held that the

Passamoquoddy were a tribe within the meaning of the Nonintercourse Act; and that the Act created a trust relationship between the federal government and the tribe. The Nonintercourse Act first become law in 1790; but it was not until 1975 that a court interpreted its restrictions to apply to all tribally held land within the United States, regardless of whether the tribe was federally recognized or its land was in "Indian country."

In 1970, the Oneida Nation of New York brought suit against the County of Oneida, New York, alleging that their ancestors had conveyed 100,000 acres of aboriginal land to the State of New York in 1795, and that the conveyance was void because it was never approved by Congress as required by the Nonintercourse Act. In 1974, the Supreme Court overruled the lower courts, which had dismissed the suit, and held that the "the possessory right claimed by [the Oneidas] is a federal right to the lands at issue." 414 U.S. 661, at 671 (1975). The State of New York contended that the Oneidas' claim was time-barred; but the Supreme Court held that state time-bars, such as laches and adverse possession, do not "apply of their own force to Indian land claims," due to the Supremacy Clause of the Constitution. 470 U.S. 226 (1985); footnote 13, citing Ewert v. Bluejacket, 259 U.S. 129 (1922). Furthermore, the Supreme Court found "no federal statute of limitations governing federal common-law actions by Indians to enforce property rights."

Other eastern Indian tribes --- the Narragansett in Rhode Island, the Mashpee in Massachusetts, the Cayuga and St. Regis Mohawk in New York --- began asserting old land claims and bringing suit in federal court. The Executive Committee authorized Chief Blue to contact the Native American Rights Fund (NARF) in regard to its claims under the Treaty of Nations Ford, which he did on June 9, 1975. NARF reviewed the case and advised the Tribal Executive Committee on May 12, 1976, that it "had a legal claim to the lands of its 1763 reservation, and while the case is not a 'sure thing,' it stands a good enough chance of success that it should be pursued by the tribe in federal court." On May 26, 1976, the Tribal Executive Committee adopted a resolution retaining NARF as its attorney. On July 17, 1976, the tribe, at a tribal meeting, authorized the Executive Committee "to undertake such actions as may be necessary to resolve and finally settle the status of lands which were taken from the Catawba Indians under the Treaty of Nations Ford in the year 1949 [sic], including bringing the matter before the South Carolina Congressional Delegation, the governor of the State of South Carolina, the United States Department of Interior, and the Federal Courts, if necessary."

On August 9, 1976, the Governor and the Congressional Delegation were put on notice of the Catawbas' claim by letter from NARF. In response, Attorney General McLeod met with the Catawbas' attorneys and became convinced that their claim was not

frivolous. Early negotiations with the Catawbas' attorneys were conducted by the Attorney General; but in April 1978, at the request of the Legislative Delegation, the General Assembly established a "Catawba Claim Study Commission," which was chaired by Rep. Robert L. McFadden, chairman of the House Judicviary Committee.

Following meetings with the Catawbas, the elements of any settlement acceptable to the state were laid out in a letter from Attorney General McLeod to Congressman Kenneth L. Holland, dated October 17, 1977, as follows:

(1) The acquisition of any lands by the Tribe should be by voluntary conveyance, and the power of condemnation should not be vested in any authority for this purpose.

(2) The size of the Catawba reservation, which should be acquired only by voluntary conveyance, should not exceed 4,000 acres.

(3) The tribal development fund, if established, should be derived principally or wholly from federal funds and should be held in trust.

(4) Any settlement lands should be subject to the criminal laws and jurisdiction of the State of South Carolina; this jurisdiction and regulatory authority of the State should include regulation of water rights and hunting and fishing rights.

(5) For purposes of the settlement act, tribal membership should be limited to persons appearing in the 1961 tribal role and their direct descendants with a specific blood quotient to be set forth in the act.

NARF recommended that the Catawbas also approach the Department of Interior in an effort to win their help in settling the claim. In November 1976, the Catawbas sent a formal litigation request to the Department of Interior. According to Interior's Solicitor, Leo M. Krulitz, the Department determined that the Termination Act "did not abrogate the Secretary's responsibility to aid the Tribe in the assertion of its claim. Hence on August 30, 1977, the Department of Interior wrote the Department of Justice requesting consideration of litigation on behalf of the Catawba Tribe, but recommending that "our initial role should be to seek a settlement of the claim." The Solicitor said in his letter to Justice that "the Tribe can establish a prima facie case under the Non-Intercourse Act that the Treaty of 1840 was void, and that the Tribe is therefore entitled to recovery of its reservation."

Before Interior and Justice could meet with the Catawbas and "seek a settlement of the claim," a split developed within the tribe between Catawbas who wanted a settlement for the tribe as an entity and those who wanted per capita cash payments. Those

favoring a cash settlement sued in state court and obtained a temporary order restraining settlement negotiations. The dispute was resolved by the appointment of a joint negotiating committee.

On June 30, 1978, Attorney General Griffin B. Bell advised Secretary of Interior Cecil D. Andrus about five Indian claims, including the Catawba claim. He referred to a meeting with Andrus on November 29, 1977, at which they agreed that "the Admninistration should make an omnibus proposal to Congress to settle these claims." Bell advised Andrus that he decided "not to bring suit against landowners in New York, South Carolina, and Louisiana." He said that he had "a number of questions about the legal and factual issues in these suits, and question whether they can be won. Furthermore, the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them. Finally, the Administration's policy decision to relieve small landowners in Maine from suit through a legislative settlement recommends the same relief to others similarly situated."

In October 1978, Solicitor Krulitz met with the Catawbas' joint negotiating committee and their attorneys. In the words of Solicitor Krulitz, "At that meeting, the Tribe proposed to settle their claim for a dollar figure far beyond what we were willing to consider. That proposal was rejected on the spot, and the Tribe was encouraged to develop a less costly proposal." Two days later, the Department of Interior withdrew its litigation request to the Department of Justice "in an effort to emphasize that we have no intention of pursuing litigation until and unless all reasonable avenues of settlement have been exhausted."

Negotiations between the Catawba Claim Study Commission and the Catawbas culminated in a draft settlement agreement titled "Work Group 8," dated April 1980. On October 27, 1980, the Catawba Claim Study Commission met and came to an impasse over the size of the reservation. A subcommittee of the Commission had recommended that the Catawbas be allowed to buy up to 4,200 acres from willing sellers, which would be added to the reservation of 630 acres. The Commission voted 4-3 against expansion of the reservation. Commission Chairman McFadden, Senator Don S. Rushing, and Godfrey K. Nims voted for allowing expansion; Senator Coleman Poag, Representative Tom Mangum, George W. Dunlap, and Oliver Nisbet voted against expansion.

Litigation of Catawba Land Claim

The next day, October 28, 1980, the Catawba Indian Tribe of South Carolina, also known as the Catawba Nation of South Carolina, brought suit on its claim, naming the State of South Carolina and 75 individual landowners, corporations, and local government entities as defendants. The named defendants were sued "both individually and as representatives" of a class of

landowners exceeding 27,000 people. In the Complaint, the plaintiff also indentified itself as Catawba Indian Tribe, Inc., successor to the Catawba Indian Tribe. The Complaint alleges that "from time immemorial...the Catawba Tribe owned and occupied a tract of land roughly 15 miles square...surveyed and set aside for exclusive use and occupancy pursuant to two treaties with the British Crown in 1760 and 1763...and surveyed by Samuel Wyly," as shown on his plat dated February 22, 1764, attached to the Complaint as Exhibit A. The Complaint alleges that these two treaties provided for the Catawbas to be "permanently and quietly settled on a tract of land fifteen miles square; and that by virtue of King George III's Proclamation of 1763, no deeds were to be issued in "lands which had been reserved to Indians." The Complaint recites that on July 22, 1790, Congress enacted the Indian Trade and Intercourse Act, now codified at 25 U.S.C. Section 177, providing "then as it does now that no interest of any kind may be acquired in the lands of any Indian tribe other than by treaty...to which the United States is party. Any interest acquired in violation of 25 U.S.C. Section 177 is void in law and equity." The Complaint alleges that on March 3, 1840, the State of South Carolina, "without the consent and participation of the United States, concluded the Treaty of Nation Ford with the Catawba Indian Tribe, "purportedly extinguishing the Indian title of the Catawba tribe to the entire 15 mile square tract..." The Complaint asserts that "The Congress of the United States has never ratified or otherwise consented to the alienation of the Catawba Indian Reservation as required by 25 U.S.C. Section 177," and implies that Congress could not now consent without "just compensation" because the "Tribe's right and title to these lands is now and has since 1789 been protected by the Fifth Amendment to the United States Constitution." In the prayer for relief, Plaintiff asked that the action be maintained as a class action. It asked the court to declare its right to possession of the 144,000-acre tract and restore it to possession. It also asked for trespass damages, rent, and profits "for the entire period of plaintiff's dispossession."

Following the first staus hearing, the District Court, on agreement of the parties, postponed filing of Answers to the Complaint until after resolution of the tribe's motion to certify the defendant class. The District Court then delayed consideration of plaintiff's motion to certify the defendant class in favor of hearing defendants' motion for summary judgment based on the effects of the Catawba Division of Assets Act.

For purposes of the summary judgment motion, the court had to assume what was alleged in the Complaint: that the Catawbas held a constitutionally protected property right in its 144,000-acre tract. The question presented was whether the Catawba Division of Assets Act had the effect of terminating the federally protected status of the 144,000-acre tract either by

application of state law or by implicitly ratifying the Treaty of Nation Ford. The District Court held that the Act had done both. Specifically, the District Court held that the 1959 Act extinguished the tribe's existence; ratified the Treaty of 1840; terminated any trust relationship between the tribe and the federal government; and made state law applicable to the tribe's claim. (718 F.2d 1291, 1295.)

The Catawbas appealed the District Court's order for judgment to the Fourth Circuit Court of Appeals. A three-judge panel of the Court of Appeals handed down the Court's initial decision on October 11, 1983, reversing the District Court by a vote of 2-1. The Court began its opinion by outlining the requirements of a prima facie case for violation of the Nonintercourse Act. The Court said the tribe must show:

(1) That it is or represents an Indian tribe within the meaning of the Nonintercourse Act.
(2) That the land in issue is covered by the Nonintercourse Act as tribal land.
(3) That the United States has never approved or consented to the alienation of the tribal land.
(4) That the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned.

As the Court of Appeals put it, the "principal issue" in this case was whether the Catawba Division of Assets Act "precludes the tribe from relying on the Nonintercourse Act and subjects its claim to the South Carolina statute of limitations." 718 F.2d 1291, 1295.

The Court reviewed the legislative history and the Catawba Division of Assets itself and found nothing to "suggest any congressional intent to affect any claim the Tribe might have against South Carolina." The only purpose of the Act was to "end federal supervision and assistance arising out of the 1943 Memorandum of Understanding."

"Clearly," said the Court of Appeals, "Congress did not intend the Division of Assets Act...to end the Tribe's existence." 718 F.2d 1291, 198. Nor did the Act end the trust relationship between the Tribe and the federal government. The Court cited the Passamaguoddy decision (528 F.2d 370, 379), which held that the Nonintercourse Act itself creates a trust relationship, "even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the Tribe." The Court acknowledged that Congress may terminate the relationship, "but its intent to do so must be plain and unambiguous to be effective."

The Court rendered Section 5 of the Termination Act ("...all

statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them...) to mean individual Indians and not the tribe. Basically, the Court felt that it could not "attribute to Congress an intention to bar by the 1959 Act the Catawba's claim to tribal lands...As we have pointed out, the Catawbas had been assured by a representative of the Bureau of Indian Affairs that their resolve to protect their claims against South Carolina would not be affected by the Act."

Having found that the Nonintercourse Act still applied, the Court held that "the Nonintercourse Act and the supremacy clause preempt state law defenses, such as adverse possession or statutes of limitation, which might otherwise preclude the tribe's suit." Mohegan Tribe v. Connecticut, 638 F.2d 612, 614-615.

The Court of Appeals reversed the District Court and remanded. Defendants petitioned for an en banc hearing, but by a 4-3 per curiam decision, the full Court upheld the panel and Judge Butzner's decision.

Defendants appealed the Fourth Circuit Court's decision to the Supreme Court, and the Supreme Court handed down its decision on June 2, 1986. 106 S.Ct 2039. The Supreme Court framed the "specific question presented" simply as follows: "whether the State's statute of limitations applies to the Tribe's claim." The Court said that the "answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets." By 5-3 decision, the Court held that the State's statute applied, but it did not "reach the question whether it bars the claim."

The Court of Appeals had read Section 5 of the Termination Act to subject individual Indians to State law but not the tribe. The Supreme Court read the same section and found it plainly to mean that the tribe as well as its members would be subject to all state laws. The Court of Appeals stressed the assurances given the tribe that its claim against the State would be unaffected by the Act. The Supreme Court found that "the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any citizen..." 106 S.Ct 2039, at 2046. In the Oneida II decision (105 S.Ct. 1245), the Supreme Court held that the application of State statutes of limitation to Indian land claims would violate federal policy, but the Court said this rule applied "only in the absence of a specific congressional enactment to the contrary." 106 S.Ct. 2039, 2044. The Court said, "We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." 106 S.Ct 2039, 2045.

The Supreme Court concluded by stating: "The District Court held that respondent's claim is barred by the South Carolina statute of limitation. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to remove the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are, we remand the case to that court for consideration of this issue."

On remand, the defendants asked the 4th Circuit Court of Appeals to certify these questions of South Carolina real property law to the South Carolina Supreme Court since these were uniquely questions of state law. The Court of Appeals granted their motion and certified the questions to the South Carolina Supreme Court for resolution. The South Carolina Supreme Court declined the request, leaving the Fourth Circuit to decide the questions itself.

Defendants relied on the Supreme Court's dictate that the plaintiff "had an obligation to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction," after July 1, 1962. Defendants said that under South Carolina law, "timely" meant within ten years after the tribe's termination, and offered the Court of Appeals two South Carolina laws that seemed to bar the Catawbas' claim altogether. Each implied that the Catawbas' suit should have been filed within ten years after July 1, 1962, when state laws became fully applicable to the tribe:

- Section 15-3-370, South Carolina Code of Laws, 1976, applies to claimants under a disability and stays the time allowed them for suing, but requires that suit be brought within ten years after the disability has ceased. Defendants argued that the Catawbas were wards of the United States prior to the Catawba Termination Act, and thus were under a legal "disability" and could not sue or be sued. Defendants contended that this statute too required the Catawbas' suit to be commenced within ten years after they ceased being wards of the federal government, or before July 1, 1972.
- Section 15-3-340, South Carolina Code of Laws, 1976, requires an owner seeking to recover possession of land to have been "seized and possessed" of the land within ten years prior to commencing suit. Since the Catawbas acknowledge that they were not in possession of any of the land they claim within ten years before October 28, 1980, defendants argued that Section 15-3-340 barred the Catawbas from suing.

The Court of Appeals disposed of Section 15-3-370 by ruling that it applied only to infants, the insane, and the imprisoned. The Court of Appeals agreed that Section 13-3-340 required the Catawbas to be "possessed" of the property they claimed within ten years of bringing suit, and acknowledged that the Catawbas

could not possibly show possession within this time. "Standing alone," said the Court, "Section 15-3-340 would bar the claim." But the Court found that this statute did not stand alone; it had to be read in conjunction with Section 15-67-210, South Carolina Code of Laws, 1976; and Section 15-67-210 essentially means that "possession follows title." According to the Court of Appeals, the Catawbas had made out a case of Indian title "dervied from aboriginal possession...dignified by royal grant." To defendants' argument that this was not "legal title," as Section 15-3-340 required, the Court replied that in several respects, "Indian title has aspects superior to fee simple title." Indian title cannot be sold or conveyed without consent of the federal government; and in suits for trespass or ejectment, state time-bars did not apply unless Congress expressly applied them.

Combining Section 15-3-340 and Section 15-67-210, the Court held that South Carolina law barred "the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 28, 1980, without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitation do not bar the tribe's claim against other persons." (865 F.2d 1444, 1456.)

On remand, 46 defendants filed affidavits supporting summary judgment in their favor. After an exchange of briefs and two hearings, the District Court entered summary judgment in four orders for judgment. In all, more than a thousand parcels of land and 29 defendants were released from the suit. The Catawbas appealed each order for judgment to the Court of Appeals.

The Catawbas renewed their motion for class certification. On February 19, 1991, Judge Willson filed an Order Denying Certification Pursuant to 28 U.S.C. Section 1292(b). Judge Willson based the order on the following grounds:

(1) There is no risk that adjudication of this case with 76 defendants will impair the defenses available to the absent defendants.

(2) The certification of a class of some 27,000 landowners would include "a large number of persons...[against whom] by reason of defenses...the plaintiff possesses no colorable claim."

(3) The defendant class was not so "numerous that joinder is impracticable," because plaintiff's claim as to all persons other than the named defendants who were properly served ...are barred by the South Carolina presumption of grant doctrine. The South Carolina presumption of grant doctrine provides that the passage of twenty years of possession of land under a claim of ownership bars the assertion of claims against the possessor the land. D. W. Alderman & Sons Co. v. McKnight, 95 S.C. 245, 78 S.E. 982, 986 (1913); Powers v. Smith, 80 S.C. 110, 61 S.E. 222, 223 (1908). Unlike the ten-year statutory limitation period under S.C. Code Section 15-3-340 and 15-67-210, the possession of

successive holders of the land may be tacked to make up the twenty-year period for the presumption of grant...Counting from the date when, according to the United States Supreme Court, South Carolina limitations doctrines became applicable to the plaintiff's claim, the absent class members' twenty-year period of possession was fulfilled on July 1, 1962. The filing of the plaintiff's complaint in the present case did not toll the running of this limitation period as to persons other than the properly served defendants because as to absent members of the proposed defendant class the pre-requisites for tolling, that the complaint notify the defendants of the substantive claims against them, have not been satisfied. Davis v. Bethlehem Steel Corp., 760 F.2d 210 (4th Cir.)."

Because the Order Denying Class Certification was not a final order, it was not immediately appealable. The Catawbas, therefore, petitioned the Fourth Circuit Court of Appeals for a writ of mandamus directing the District Court to certify the defendant class. On August 14, 1992, the Court of Appeals denied the appeal, holding that the Catawbas had "failed to establish that the district court's refusal to certify a defendant class constitutes such an abuse of discretion...as to justify the extraordinary remedy of mandamus." The Court noted that this was not necessarily the decision it would have reached "were it the trial court," but it reviewed the trial court's reasons and found them adequate. In a final footnote, the Court mentioned the District Court's alternative sustaining ground, namely, that the Catawbas had not tolled the statute of limitations against unnamed defendants by filing their complaint and motion for class certification in October 1980, and as a consequence, more than twenty years had run since July 1962, making the twenty-year presumption of a grant a defense available to these defendants. The Court refused to rule on the issue, stating: "In view of our disposition of this case, and the limited nature of our inquiry on the petition for mandamus, we express no opinion on that issue."

Settlement Negotiations

Settlement negotiations ended with commencement of the Catawbas' suit. It was difficult for the parties to take up negotiations because of their polarized positions on the claim. The Catawbas' attorneys initially insisted that there were no defenses; that Passamoquoddy made the Nonintercourse Act applicable; that the Treaty of 1840 was void under the Nonintercourse Act because it was never ratified; that Oneida made state time-bars to the claim inapplicable; and thus the Catawbas had a right to recover both possession and damages. The defendants, on the other hand, proved that there were defenses, winning complete dismissal of the suit on their first responsive pleading, a motion to dismiss. This did not make the defendants amenable to settlement; and the Fourth Circuit's reversal of the

District Court did not make the Catawbas amenable. Until the law of the case was settled, and each side could evaluate the merits of the claim and the available defenses, settlement negotiations hung in abeyance.

In January 1989, after the Court of Appeals handed down its decision on South Carolina law, defense counsel met with Congressman John Spratt in Washington, and asked him to use his "good offices" to restart negotiations for settlement. Spratt made contact with Don B. Miller of the Native American Rights Fund; with the House Interior Committee staff; and with Secretary Lujan, and his executive assistant, Timothy Glidden. He also contacted Senator John C. Hayes and the York and Lancaster County Legislative Delegation. Governor Campbell had indicated his support for settlement, and Spratt sent Governor Campbell a background memorandum on the claim and a proposal for negotiations. In September 1989, Congressman Spratt, Senator Hayes, and Governor Campbell met in Columbia, along with Crawford Clarkson, State Tax Commissioner, Warren Tompkins, Executive Assistant to the Governor, Tom Kahn, Legislative Counsel to Congressman Spratt, and Robert Hopkins, District Administrator. Following this meeting, the Governor set up a Catawba Claim Advisory Committee and made Crawford Clarkson its chairman. In January 1990, Secretary Lujan agreed for the Interior Department to take part in negotiations; and a series of negotiating sessions with the Catawbas took place over the next two years.

In June 1991, an offer of settlement was submitted to the Catawbas, which included $37.5 million in payments, partly distributable per capita; the right for an expanded reservation up to a maximum area of 2,500 acres; application of state statutory and regulatory law to the reservation, with provision for tribal civil and criminal courts; tax exemption of reservation lands; tribal sales taxes equal to local sales taxes; and gambling limited to bingo under a special license from the state. The Catawbas rejected the offer and counter-offered approximately twice the dollar amount proposed.

In October 1991, the parties met at the Catawba Community Center on the Reservation, and negotiators for the state informed members of the Executive Committee that their counter-offer could not be met. Unless a lower offer was forthcoming and there was agreement by January, the Executive Committee was warned that the legislative window for 1992 would be missed. The Catawbas were clearly reluctant to bring their counter-offer down until the Fourth Circuit had ruled on their two pending appeals. On February 4, 1992, the Fourth Circuit heard oral argument of the two appeals; and the argument did not seem to augur well for the Catawbas. By the end of February, the Catawbas lowered their counter-offer, but continued to seek substantially more than the $37.5 million proposed in June 1991, and substantial autonomy on the reservation, including gaming and gambling rights comparable

to the Indian Gaming Regulatory Act.

Before the counter-offer could be answered, the Catawbas' attorneys announced that they would have no choice but to bring 62,500 lawsuits against the unnamed defendants before October 19, 1992. By their calculation, the limitation period of the claim was tolled or stopped when the Complaint and Motion for Certification of Defendant Class was filed on October 28, 1980; and it did not start running again until February 19, 1991, when the District Court denied their motion. Thus, by their count, twenty years would have run by October 19, 1992; and at that point, South Carolina's twenty-year presumption of a grant would be available to any defendant landowner who was sued. To buy time both for negotiating and implementing a settlement, the Catawbas' attorneys proposed that a statute be enacted by Congress suspending the running of time until October 1, 1993, as to any claim on which time had not already run. The law was enacted, and the Attorney General rendered his opinion that it was valid and constitutional, but the Catawbas' attorneys decided that they must have a settlement offer in hand by August 22, 1992, giving them reasonable grounds to believe that settlement could be consummated before October 1, 1993.

After a week of intense negotiation, an agreement in principle was reached in the early morning hours of August 29, 1992. The afternoon of the same day, the full tribe met, and approved the agreement in principle as outlined to them. The parties agreed to use their "good offices and best efforts" to carry out the agreement, but recognized that it could only be effected through the enactment of state and federal implementing laws. Following the negotiating session of August 1992, discussions to refine the terms of settlement continued. Attorneys on both sides identified provisions requiring revision. State gaming laws were reviewed by the Supreme Court of South Carolina and amendments to state gaming laws came under active consideration in the General Assembly.

A final negotiating session was convened in January 1993. At the end of five days, the negotiations culminated in a revised "Agreement in Principle," which the tribe approved at a meeting held on February 29, 1993. The revised draft of the "Agreement in Principle" is the document submitted today for the record, and referred to in H. R. 2399 as the "Agreement in Principle." The same document is referred to as the "Agreement in Principle" in South Carolina Statutes 27-16-100, et seq. (the "State Implementing Legislation"), and is on deposit as a permanent record in the Office of the Secretary of State of South Carolina.

The negotiations were intense, spirited, and sometimes contentious, as I have said, but the they were conducted in the utmost good faith on all sides. Every element of the Agreement in Principle was negotiated in depth and detail. The Catawbas were

represented throughout the negotiations by Don B. Miller and other attorneys of the Native American Rights Fund (NARF); Jay Bender of Baker, Barwick, Ravenel and Bender of Columbia, South Carolina, and by Robert M. Jones of Rock Hill and Richard Steele of Union, South Carolina, as local counsel. In addition, Ross Swimmer was of counsel to NARF and made major contributions to the settlement negotiations.

After the "Agreement in Principle" was approved by the members of the tribe on February 29, 1993, we began work to convert the "Agreement in Principle" into state and federal implementing legislation. More negotations and accommodations on both sides were necessary. As a result, the state implementing legislation and H. R. 2399 differ in some respects from the "Agreement in Principle." The most notable changes treat games of chance. These provisions were modified in favor the tribe because of possible changes in state gaming law.

The parties entered into a "Memorandum of Cooperation" stipulating that the language in the state implementing legislation and in H. R. 2399 was consented to and accurately reflects their final agreement. A copy of the "Memorandum of Cooperation," signed on June 12, 1993, is also submitted for the record.

According to the Memorandum of Cooperation, "In all cases where there are differences, the enacted legislation shall control and supersede the Agreement in Principle. The Agreement in Principle is otherwise a comprehensive statement of the parties' terms of settlement." In signing the Memorandum, each party pledged "to work faithfully and diligently to secure passage of H. R. 2399 in the form it has been introduced."

The following is a summary of the "Agreement in Principle" and the state and federal implementing legislation:

Monetary Provisions of Settlement

At this Committee's first hearing on the Catawba claim on June 12, 1979, Kenneth Woodington, Assistant Attorney General for the State of South Carolina, told the Committee in his testimony (p. 26, Serial No. 96-17):

> "As far as a cash contribution, and any other sort of contribution by the State, we defer to the representatives of the South Carolina General Assembly...but we would ask that the committee take into consideration, as is being done in Maine, past contributions of the State to the tribe. For instance, in the 1940s, the State contributed enough funds to pruchase 3,200 acres of land. At that time,

> it was only $75,000, but it did purchase 3,200 acres of land..."

Congressman Udall, then Chairman of the Interior Committee, asked of Mr. Woodward (p. 26, Serial No. 96-17):

> "You do not reject outright, depending on the actions of the South Carolina Legislature, some contribution beyond the land...I certainly agree with what has been said earlier about the pattern in the East, which has been for some sort of modest contribution, at the least, from the State, and that is the way I would lean at this point..."

Since the Treaty of 1840, the State of South Carolina has appropriated in the aggregate over $375,000 for the Catawba Indian tribe, according to Dr. Thomas Blumer of the Library of Congress, a scholar of the tribe. Dr. Blumer conditions this summary by saying that he cannot verify how much was actually disbursed, but he has identified from legislation enacted these sums of money which were appropriated by the State of South Carolina over more than a hundred years. A copy of Dr. Blumer's letter is submitted for the record. In addition, a chart is submitted showing how much this sum would amount to if raised to a present value at various
rates of return.

In addition to past payments, and 630 acres of land that it holds in trust for the tribe, the State of South Carolina has agreed to contribute $12.5 million over five years, and local government and private sector sources are to contribute another $5.5 million. State, local, and private sector sources will pay, therefore, $18 million toward settlement, much more than the "modest contribution" Chairman Udall mentioned fourteen years ago.

Here is an outline of the monetary payments called for by the "Agreement in Principle" and by state and federal implementing legislation:

1. Total Payments to Catawbas over 5 Years: Payments to the Catawbas from all sources will total $50 million over five years.

2. Sources of Payment:

(A) The settlement plan assumes that $32 million will come from the federal government.

(B) The settlement plan assumes that $18 million will come from state, local, and private sector sources.

(C) The state is to provide $2.5 million per year for five years. The Governor has stipulated that this be accompanied by local government contributions.

(D) Private sector sources include:

-$500,000, escrowed by Crescent Resources, Inc. for the release of land.

-$500,000, held out by Duke Power Company as a challenge offer.

-$500,000 from private sources matching Duke's challenge offer.

-$1,400,000 from title insurance companies.

(E) York and Lancaster County contributions:

-York = $470,000 p/a for five years.

-Lancaster = $50,000 p/a for five years.

-Total = $2.6 million over five years.

3. Final Resolution of All Catawba Claims: When the implementing legislation has been enacted, the land and landowners in the claim area will be freed of the Catawbas' claims. The existing suit will be dismissed with prejudice, and the Catawbas' claims will be ended and extinguished by an Act of Congress.

4. Trust Funds:

(A) Settlement payments will be placed in five trust funds held by the Secretary of the Interior for the benefit of the Catawba Indian Tribe. The Trust Funds are designated:

Land Acquisition Trust Fund
Economic Development Trust Fund
Education Trust Fund
Elderly Assistance Trust Fund
Per Capita Distribution Fund

(B) The settlement plan permits the Catawbas to place any of their trust funds under outside management by an investment firm, provided the firm is approved by the Secretary and has a record of competence in managing pension funds and endowments. The

Secretary would be exculpated from liability for losses by the trusts but would retain oversight responsibilities.

(C) The following are the specific allocations of funds:

-15% for the Per Capita Trust

-33% of State, County, Private Contributions for Education Trust

-10% maximum for attorneys' fees and expenses

Tribal Sovereignty and Jurisdiction

At the hearing held before this Committee on June 12, 1979, Assistant Attorney General Ken Woodington also laid out the jurisdiction and sovereignty the state wanted the Catawbas to have if the tribe were recognized and a reservation established. Assistant Attorney General Woodington used for comparison the Rhode Island Settlement Agreement, which Congress had recently enacted, which reserved virtually all civil and criminal jurisdiction in the state. He made it clear that the State of South Carolina did not want jurisdiction of the Catawba tribe governed by Public Law 280.

To the concept of limited jurisdiction that he laid out, Chairman Udall responded as follows (p. 12, Serial No. 96-17):

> "I would be inclined to agree with you on the jurisdictional question. I think it is one thing to have the Navajo Reservation in my State, which is as big as West Virginia, with a long history of self-government and special problems. It is one thing to see criminal and civil jurisdiction in the Navajos. It is quite another thing to say in an Eastern State where you do not have an established reservation, to then go out and buy and establish a new reservation, and then give a tribe without an existing tribal structure civil and criminal jurisdiction. I think you are on sound ground there..."

We negotiated the sovereignty and jurisdiction of the Catawba tribe accordingly, following the other Eastern Indian settlements as precedents, but in the end granting this tribe more civil and criminal jurisdiction than most of the Eastern Indian settlements to date. Here is a summary of the jurisdictional provisions of the implementing legislation:

1. Federal Restoration of the Catawba Indian Tribe: The trust

relationship between the Catawba Tribe and the United States will be will be restored. The tribe and its members will qualify for federal Indian programs, such as health and education benefits, housing loans, and grants and loans for reservation development.

2. Reservation:

(A) The state will convey the existing 630-acre reservation to the Secretary of the Interior.

(B) The Secretary, acting for the Catawbas, may acquire in specified acquisition zones up to 3,000 acres of developable land, including the existing reservation, plus up to 600 additional acres of non-developable flood plain and wetland or park and recreation land dedicated permanently to public use. All acquisitions must be from willing sellers, and not by condemnation.

(C) After a comprehensive land study is completed, the Tribe may seek approval of the county council and state legislature to acquire up to 600 additional acres.

(D) The Secretary and Tribe must use "every reasonable effort" to enlarge the existing reservation "by assembling a composite tract of contiguous parcels that border and surround the existing reservation."

(E) Before the Secretary and Tribe can purchase non-contiguous lands to be placed in reservation status, they must submit an acquisition and land-use plan to county planning authorities and to county council. County council will review the plan according to criteria in the settlement agreement and make recommendations to the Governor. The Governor will review the application and county council's recommendation and decide whether to allow acquisition. Governor's approval cannot be unreasonably withheld and will be reviewable under S.C. Administrative Procedure Act.

(F) If the Tribe is unable to acquire all of the additional land in the vicinity of the existing reservation, a second expansion zone is designated north of the Catawba River lying between the Norfolk Southern trestle and Sugar Creek. Non-contiguous tracts are limited to three, with no more than two in any one expansion zone.

3. Tribal Self-Government:

(A) The Tribe will have authority to regulate the conduct of its members on the reservation and certain other on-reservation activities. If it chooses, the tribe may establish a tribal court. All laws and regulations of the state will apply on the reservation, except as otherwise provided. In certain areas, the tribe may supplement these laws with tribal laws. The tribe

will have jurisdiction over: internal tribal matters, including membership criteria; laws that regulate the use of tribal property; petty crimes and rules of conduct applicable to tribal members and others doing business on the reservation; the exclusion of non-members from the reservation, except for public roads and easements.

(B) The criminal jurisdiction of the tribal court will be restricted to members and limited to the jurisdiction of state magistrate's courts. State law will generally apply to activities of non-members on the reservation. The Tribe may also allow its tribal court to exercise jurisdiction over contract disputes where the parties provide for tribal court jurisdiction or where the performance of the contract occurs substantially on the reservation. In addition, the tribal court may exercise jurisdiction over domestic matters where both spouses are members of the Tribe and reside on the reservation; over child custody matters arising under the Indian Child Welfare Act; over intentional torts committed on the reservation which cause bodily harm or damage to tangible property; and over negligence actions arising on the reservation, except that non-members can remove an action in negligence if the amount exceeds the jurisdictional limits of the magistrate's court.

4. Taxation:

(A) Reservation land will be exempt from real property taxation, as are all Indian reservations. In addition, buildings, fixtures, and improvements owned by the Tribe on the reservation will be exempt. Homes of tribal members residing on the reservation will not be subject to real property taxes, but residents on the reservation will pay personal property taxes and income taxes; and for each reservation child attending public school, the Tribe will made a payment in lieu of school district taxes. Certain of the state tax exemptions will expire after 99 years.

(B) Sales on the reservation will not be subject to state sales tax, but the Tribe will levy its own sales tax in the same amount and be subject to audit by the State Tax Commission.

5. Gambling and Bingo:

(A) The tribe and the state have agreed that the federal Indian Gaming Regulatory Act will not apply to the Catawba Tribe.

(B) Instead, the Tribe will have the option of sponsoring bingo games under a special license issued by the State Tax Commission. The Tribe's license will allow more frequent sessions (up to six days a week) and higher stakes (up to $100,000) than allowed other bingo operators licensed by the state. Bingo

operations will be supervised and audited by the State Tax Commission, and the Tax Commission will levy a 10% tax on gross receipts, payable to the State.

(C) The Tribe may operate bingo games at two sites in the state. If the Tribe chooses to operate within the claim area but off the reservation, the area must be zoned compatibly, and the Tribe must consult with city or county authorities before the site is selected. If the tribe chooses to operate outside the claim area anywhere else in the state, the approval of the county government and municipal government, if any, are required.

6. Tribal Membership: All persons named on the 1962 tribal roll and all their lineal descendants are eligible for membership in the Tribe.

7. Application of General Laws: All environmental and public health laws, federal and state, will apply on the reservation. The Tribe's water rights in the Catawba River will be no more nor less than the rights of any landowner on the banks of the river; and the Tribe will not be able to restrict passage on the river. The Tribe will adopt the York County Building Code, and may contract with York County for enforcement. The Tribe will have the authority to zone the reservation, but is obliged to consult with York and Lancaster County before implementing its land-use plan or zoning law. The counties and the tribe are required to consult with each other regarding major developments that might impact the reservation and the surrounding area.

Federal Contribution to Settlement

From the outset, it has been assumed by everyone that the federal government had to contribute significantly if this claim was ever to be settled. Attorney General Griffin Bell assumed as much when he reviewed the Eastern Indian land claims for the Carter Administration, and all the parties at the first hearing before this Committee assumed a significant federal contribution. Indeed, H.R. 3274, filed on March 27, 1979, and printed on page 2 of Serial No. 96-17, called for payment of the full settlement out of the United States Treasury.

Still, it is fair to ask, "Why should the federal government contribute $32 million to this settlement?"

The short answer is that the Catawbas lost their land and have now lost most of their claim for recovery of the land because of the failure of the federal government to protect their rights and interests, not once but continually over a period of two hundred years. Consider this long list of occasions on which the federal government turned a deaf ear to the Catawbas, ignored their plight, and did nothing to protect their interests, even when it clearly

occupied a trust relationship and knew the tribe had a serious claim:

(1) As early as 1782, Catawba Indians traveled to Philadelphia to petition the Congress for protection of their reservation lands from white settlers.

(2) In 1791, the chiefs of the Catawba Tribe met President George Washington as he traveled from Camden to Charlotte and asked for protection of their lands from encroachment by white settlers.

(3) In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those tribes which still held lands within the United States. A War Department chart indicated that the Catawbas possessed 144,000 acres.

(4) In 1848, the Catawbas wrote President James K. Polk, protesting the Treaty of 1840. Polk was born and lived until he was 12 years of age less than five miles from Catawba country, and had relatives who remained there.

(5) In the Act of July 29, 1848, and again in the Act of July 31, 1854, Congress revealed its awareness of the Treaty of 1840 by appropriating money for removal of the Catawbas west of the Mississippi, but did nothing to redress their grievances or protect their interests.

(6) In 1887, Catawba Chief Thomas Morrison visited the Interior Department and petitioned the United States for assistance in resolving the Catawbas' claim to 144,000 acres. In the same year, James Kegg, a Catawba, son of the chief who signed the Treaty of 1840, wrote L. L. C. Lamar, Secretary of the Interior, requesting federal assistance in reaching a settlement concerning Catawba lands in South Carolina.

(7) In 1895, a group of Catawbas submitted their "Petition and Memorial in the Matter of Claims and Demands of the Catawba Indian Association, to the United States."

(8) In 1905, the Catawba Tribe submitted to the Bureau of Indian Affairs a formal request for assistance based on the requirements of the Nonintercourse Act, accompanied by legal briefs and a lengthy history of the claim. The Commissioner of Indian Affairs denied the request on the ground that the Catawbas and their lands were not protected by federal law, a ground now found to be erroneous.

(9) In 1908, the Catawba Tribe petitioned the Commissioner of Indian Affairs again, and was denied again.

(10) In 1910, the United States Indian Service initiated an

investigation of the Catawbas' claim against the State of South Carolina. Special Indian Agent Davis submitted a report advising the tribe to submit its claim to the state legislature. The tribe submitted the claim to the state legislature, which declined to take responsibility for the claim or the tribe.

(11) Between 1926 and 1943, repeated inquiries were made by the tribe, its attorneys, and Congressman James P. Richards. A hearing was held by the Senate Committee on Indian Affairs in Rock Hill, South Carolina, at which the Treaty of 1840 was discussed at length. In 1940, BIA official Ward Shepard reported that the Catawba Tribe had a claim against the State of South Carolina arising out of the Treaty of 1840. In 1941-1943, the Department of Interior refused to allow the tribe to release its claim against in return for money contributed by the state for purchase of 3,434 acres of land for the tribe. The land was purchased by the state and conveyed to the United States as trustee under a Memorandum of Understanding with the Catawbas.

(12) From 1943-1962, the Bureau of Indian Affairs assumed responsibility for the tribe under a Memorandum of Understanding. In 1958, the BIA began efforts to terminate federal supervision and services to the tribe. The tribe consented to termination and division of tribal assets, but pressed BIA officials about the status of the land claim. When the tribe adopted a resolution approving termination in January 1959, it included a proviso reserving its claim.

(13) On February 5, 1959, Douglas Summer Brown, author of Catawba Indians: People of the River, wrote the agent at BIA supervising the Catawba termination, documenting the existence of the claim and concluding that "any agreement or settlement made now cannot be final, but the question will be brought up again and again in the future."

(14) Despite its knowledge of the Catawbas' land claim, and despite its responsibility to liquidate and distribute the assets of the tribe, the BIA did nothing to help the tribe assert, enforce, or liquidate its claim.

(15) In addition, the BIA failed to protect the Catawbas' claim in the termination act and used boilerplate language in the act which had the effect of applying South Carolina laws of limitation to apply to the Catawbas' claim, without warning the tribe of the timeframe within which they must sue or lose their claim.

(16) In 1977, the Solicitor of the Department of the Interior concluded, in response to a formal litigation request, that the Treaty of 1840 was probably invalid under the Nonintercourse Act; that the United States had a duty to protect the Catawbas' interests under the Nonintercourse Act; that the United States had

denied assistance in the past under erroneous legal theories; and that the United States shoudl bring suit on behalf of the tribe. The Solicitor's litigation report concluded: "Thus, the case is a particularly inviting one for a negligence claim against the United States, should this Department fail to advocate relief of the Catawba." Despite the request, the Department of Justice declined to bring suit, because Attorney General Griffin Bell did not want to sue innocent landowners. He recommended instead governmental settlement of the claim.

Represented by NARF, the Catawbas filed suit on their own in October 1980. In 1986, the United States Supreme Court held that the Termination Act resulted in the application of state statutes of limitation to the Catawba land claim. In 1989, the Fourth Circuit Court of Appeals ruled that South Carolina laws barred the tribe's claim to any lands adversely possessed for ten years between July 1, 1962 (the effective date of termination) and October 28, 1980 (the date suit on the claim was filed). On remand of the suit to the District Court, the court released more than 75% of the land on motions for summary judgment.

Had the federal government on any of the foregoing occasions upheld its trust responsibilities, the Catawbas would not have been denied redress for 150 years or lost the better part of their claim to adverse possession. Their land claim would have been settled long ago by the persons responsible for it and not by innocent landowners.

When the Catawba Indian Tribe discovered the effect of the Termination Act on their land claim, they brought suit against the United States of America in the Court of Federal Claims for breach of an "implied-in-fact contract to protect the Tribe's claim to possession of 144,000 acres of land that were reserved to the Tribe in treaties with the Crown." The Court held that federal statutes of limitation had run on any claim the Catawbas could assert against the federal government. Catawba Indian Tribe of South Carolina v. U.S., 24 Cl.Ct. 24 (1991). While the statute may have run on the United States' legal liability to the Catawbas, no statute runs on the government's moral responsibility; and the government should be wary of hiding behind a statute of limitations when it has not upheld responsibilities it holds as trustee.

We ask for the United States to contribute to this settlement because it has a strong moral responsibility. We have pressed state and local governments for as much they can provide. Other witnesses can tell you more in specific about the state's fiscal situation. I can tell you the state's budget is exceedingly tight, and we feel fortunate, indeed, to have a commitment of $12,500,000 from the State of South Carolina.

What will happen if the federal government does not assume this share of the settlement? Negotiations will resume, and so

will the law suit. The State of South Carolina, for its part, will probably have little choice but to seek dismissal from the suit under the recent ruling of Blatchford v. Native Village of Noatak, 111 S.Ct. 2578 (1991), which held that an Indian tribe cannot sue a state in federal court. The Catawbas, for their part, will probably have no choice but to sue some 62,000 landowners, probably filing a lis pendens with each suit. In a highly populated and developed area covering 225 square miles in South Carolina, real estate sales and lending will come to a halt. Pending the outcome of these suits, real estate will plummet in value. Landowners will have to bear legal fees and expenses running into millions of dollars. In the end, after all the turmoil, the vast majority of the landowners will prevail, and the Catawbas will probably be left with a lot less than what they have won by way of this settlement.

In short, if the federal government cannot contribute the share we are seeking, the settlement will collapse, and everyone will lose, including the federal government. I include the federal government because if this settlement collapses, the federal government will not bring another Eastern Indian land claim a successful conclusion, which is an important objective. It will not see another terminated tribe restored to federal status, which is also a federal policy. And the injustice done the Catawbas by years of federal neglect will not be rectified; it will be compounded. An injustice will also be visited upon 62,000 innocent landowners. They will be the victims of a federal law, the Indian Nonintercourse Act, which no one has ever understood clearly. They will be sued for recovery of title and possession to their homes, farms, and businesses, and caused undue anguish, when everyone knows that if this were the outcome, Congress would not stand for them to be dispossessed.

When Griffin Bell completed his review of all of the Eastern Indian land claims in the 1970s, he came to several conclusions, set out in a letter to Secretary of the Interior Cecil D. Andrus, dated June 30, 1978. One was that landowners today are wholly innocent and should not be held under threat of the loss of their land or charged with the cost of settlement. He refused to bring suit on this claim because "the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them." Griffin Bell concluded that of necessity, it is the government's responsibility to settle these claims. He suggested that "it is completely within the power of Congress to remedy the tribal claims by the process of ratifying the ancient tribal agreements with the states. Such ratification could be accompanied by payment to the tribes in appropriate amounts. In the alternative, the tribes could be given a cause of action against the United States in the Court of Claims." We come today to ask the federal government to stand up to its responsibility and help settle this claim, as the Attorney General recommended fifteen years ago.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

June 30, 1978

Honorable Cecil D. Andrus
Secretary of the Interior
Department of the Interior
Washington, DC 20240

Re: Ancient Eastern Indian Claims

Dear Mr. Secretary:

From time to time your Solicitor, Mr. Leo Krulitz, has forwarded litigation reports on various ancient Eastern Indian claims to my Assistant Attorney General for Land and Natural Resources, Mr. James Moorman. I refer specifically to three claims in New York (Cayuga, Oneida and St. Regis-Mohawk), one in South Carolina (Catawba), and one in Louisiana (Chittimacha). These reports have not been accompanied by requests to sue immediately, but rather with requests that they be held for later suit pending preliminary settlement negotiations. I believe it is incumbent upon me to inform you of my views on whether suit should ever be filed so that you can better carry out your duties with regard thereto.

At our luncheon meeting on November 29, 1977, you and I generally approved of a settlement approach whereby the Administration would make an omnibus proposal to Congress to settle these claims. My only reservation then and now was that I would not support a settlement bill which forced anyone (other than a State) to give up land.

It appears to me that the settlement process is going slower than we anticipated and that it may not be able to get all the interested parties to agree. At our meeting on November 29th you will recall that Leo Krulitz suggested he would have a bill in April or May of this year. I am under the impression that should settlement discussions fail you may expect that the Department of Justice would actually sue landowners in the claim areas. In addition, the Administration's proposed Maine Claim bill will raise a question in the public's mind as to whether or not we intend to treat the small landowners the same in New York, South Carolina and Louisiana. As you know, the Administration proposes to submit a bill to Congress on the Maine claims which would extinguish Indian title to all land holdings up to 50,000 acres per owner and provide $25,000,000 in payment to the tribes.

After careful thought, I have decided that I will not bring suit against the landowners in the New York, South Carolina, or Louisiana claim areas. I have a number of questions about the legal and factual issues in these suits and question whether they can be won. Furthermore, the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them. Finally, the Administration's policy decision to relieve small landowners in Maine from suit through a legislative settlement recommends the same relief to others similarly situated.

This is not to say that the tribes involved do not have some equitable complaint, using that term in the broadest sense. Other tribes have been compensated over the years for the ancient takings which occurred as a result of the western movement and settlement of the nation. However, it is completely within the power of Congress to remedy the tribal claims by the process of ratifying the ancient tribal agreements with the states. Such ratification could be accompanied by payments to the tribes in appropriate amounts. In the alternative, the tribes could be given a cause of action against the United States in the Court of Claims.

My decision applies only to private landowners. I am undecided as yet with regard to suits against the states of New York, South Carolina or Louisiana. There are several considerations. For example, on the one hand it is true that those states bear some responsibility for the title problems. On the other hand, suits against the states are in effect suits against public lands which involve such things as highways and parks.

As a matter of principle, I believe the landowners should know of my decision not to sue them as soon as possible. The decision should be announced at a time upon which you and I agree. My inclination is to announce it at the same time that the Administration sends up the Maine bill. I would also recommend that the Administration commit to introduce a bill to solve the private landowners' title problems in the claim areas in New York, South Carolina and Louisiana.

Sincerely yours,

/s/ Griffin B. Bell

Griffin B. Bell
Attorney General

bcc: James Moorman

Native American Rights Fund
[illegible] Boulder, Colorado 80302-5296 • (303) 447-8760 • Fax (303) 443-7776

June 11, 1993

The Honorable John Spratt
United States House of Representatives
1533 Longworth HOB
Washington, DC 20515

Re: Catawba Settlement Bill

Dear Congressman Spratt:

The purpose of this letter is to express the support of the Catawba Tribe for the bill introduced by The Honorable Butler Derrick that provides for the settlement of the Tribe's land claim and restoration of the Federal trust relationship. We have participated fully in the drafting of the bill and hereby certify that the bill as introduced accurately reflects the terms of our Agreement in Principle and will effectively implement the parties' settlement agreement.

This complex legislation is the product of an arduous negotiation process spanning three years. Each provision is the product of detailed and intense give and take among the parties. The settlement agreement embodied in the State and Federal implementing legislation is painstakingly crafted and represents a delicate balance of the diverse and sometimes competing interests of the numerous parties involved in and impacted by the settlement. It is our firm belief that any amendment which would significantly alter the terms of our agreement would result in a collapse of the settlement and condemn the parties to many additional years of disruptive and expensive litigation.

Therefore, it is critical for all parties to the agreement to resist modification of the terms of the settlement agreement now that the bill has entered the Federal legislative process. The Tribe will work diligently to secure enactment of the settlement bill as introduced and respectfully requests that you and representatives of the State of South Carolina make a similar commitment.

Because many of the provisions of the settlement agreement, particularly in the area of jurisdiction, do not follow the general rules of Federal Indian law, the bill as introduced will undoubtedly raise questions among Indian leaders around the country whether the Catawba land claim settlement act represents a shifting of Federal Indian policy away

from tribal self-government and toward greater state involvement in the governmental affairs of Indian tribes. It will therefore be important for all parties to the Catawba settlement to emphasize that this is not the case.

The Catawba Tribe and the State have negotiated a broad jurisdictional compact that in many ways is unique, covering in detail civil and criminal cause of action jurisdiction as well as a wide range of civil regulatory matters. The manner in which the parties' agreement divides and allocates the respective jurisdictional powers of the Tribe and State and Federal governments reflects the particular circumstances of the Catawba Tribe and its non-Indian neighbors. These allocations are a function of many complex factors, including the risk of continued litigation, the expensive and disruptive nature of the protracted legal proceedings, the Tribe's unique history, its proximity to major urban areas, and, most importantly, the wishes of Catawba Tribe as expressed by an overwhelming vote of support for the settlement agreement.

Therefore, beyond furtherance of the general Federal policies of encouraging consensual settlements, fostering Indian self-determination, and restoring terminated Indian tribes, the Catawba Land Claim Settlement Act should not be viewed as a precedent that either sets forth or impacts Federal Indian policy . Rather, it is legislation that seeks to implement the agreement of particularly situated parties engaged in unique and troublesome litigation.

The Catawba Tribe endorses the provisions of the bill as introduced. We pledge our good faith efforts to secure its enactment in its current form, as it will implement the agreement as negotiated by the parties. In return, we respectfully request that you and representatives of the State pledge to support the bill as introduced and make clear to Congress and the national Indian community that this bill in no way represents a modification or departure from current Federal Indian policy.

Sincerely,

Don B. Miller

cc: The Honorable Carroll Campbell
Executive Committee
Co-Counsel

DEPARTMENT of the INTERIOR
news release

OFFICE OF THE SECRETARY

Bob Walker (O) 202/208-3171
(H) 703/938-6842

For Release: September 29, 1992

INTERIOR SECRETARY LUJAN RECEIVES BRIEFING ON TERMS OF CATAWBA SETTLEMENT WITH STATE OF SOUTH CAROLINA

Secretary of the Interior Manuel Lujan met today with South Carolina Governor Carroll Campbell, Senator Strom Thurmond and representatives from the offices of Senator Ernest Hollings and Congressman John Spratt to discuss the terms of the Catawba Indian land settlement.

"This appears to be an excellent settlement proposal, and I will do whatever I can to gain the support of the Administration for it," Lujan said. "All parties to this historic agreement are to be congratulated for their hard work."

Lujan noted that the settlement would provide for the restoration of the Catawbas as a federally recognized tribe.

"This Administration has supported restoration of terminated tribes, and I am pleased the Catawbas will be among those restored," Lujan said.

"The settlement will provide new economic and education opportunities for the tribe, and it will end 12 years of litigation that has clouded the commercial and real estate markets in the area. The monetary pledges demonstrate a vital commitment by the state and local governments as well as private sources."

Under the proposed settlement:

-- The Catawba Indian Tribe, terminated by the Federal Government in 1962, will be restored as a federally recognized tribe, and will thus qualify for federal Indian programs;

-- The tribe will receive a total of $50 million over five years with 60 ~~to 65~~ percent from the Federal Government, 25 percent from the state and local governments, and the balance from private sources. The funds will be held in trust by the Secretary of the Interior;

-- The tribe may have a reservation of up to 3,600 acres, which could be expanded up to 4,200 acres with the approval of state and local governments;

-- The tribe will have limited authority to regulate matters on the reservation through a tribal council and tribal courts.

In exchange, the tribe will relinquish claims against federal, state and local governments as well as against private landowners.

These claims were filed in 1980 when the tribe brought suit in federal court. The tribe alleged that an 1840 treaty signed by the state and Catawbas transferring 144,000 acres of tribal lands was void because it was never ratified by the Congress as required by federal law.

Legislation will be required to implement the settlement.

-DOI-

SYNOPSIS OF CATAWBA BILL

Section 1. - Title of Bill.

Section 2. - Policy and findings. Recounts history of land claim, recites policy of settling land claims, and describes intent to settle this claim.

Section 3. - Definitions.

Section 4. - Restoration of Trust Relationship. Restores the trust relationship between the United States and Catawbas, repeals the 1959 Termination Act, and makes Catawbas eligible for health cards. Preserves all contract and property rights of individuals accruing prior to this act, preserves State's jurisdiction unless explicitly displaced, and makes area school districts eligible for impact aid.

Section 5. - Settlement Funds. Requires the United States to contribute (in five equal installments) $32,000,000. Private and state funds are to total $18,000,000, and to be deposited in trust funds after payment of up to 10% to attorneys.

Section 6. - Ratification of Prior Transfers. Ratifies prior transfers, extinguishes aboriginal title and claims, bars future claims by the United States, and authorizes payment of up to 10% as attorneys' fees.

Section 7. - Tribal Membership. Establishes membership criteria for new members. Requires descendancy from member of 1961 roll (or person who should have been member). Authorizes Tribe to determine future membership.

Section 8. - Transitional and Provisional Government. Requires Tribe to prepare new constitution, permits Executive Committee to act in interim.

Section 9. - Tribal Constitution and Governance. Makes IRA apply to Tribe. Details method of adoption of new constitution, and election of tribal officers.

Section 10. - Jurisdiction and Governance of the Reservation. Permits the Tribe to regulate the conduct of its members, use and disposition of its property, to regulate conduct of non-member businesses or persons living or conducting business on the Reservation, and to exclude non-members from the Reservation.

Section 11. - Criminal Jurisdiction. South Carolina retains all criminal jurisdiction except that Tribe may have Court with jurisdiction limited to members, Reservation, and crimes within the

jurisdiction of South Carolina's Magistrates' Courts. Tribal court jurisdiction is concurrent with Magistrates' Courts and defendants can remove their case to Magistrates' Court or appeal to General Sessions Courts. Requires cross-deputization of peace officers.

Section 12. - Civil Jurisdiction. Tribal civil court may have original and appellate jurisdiction over:

1. actions on contracts to which Tribe a party, member a party and made on Reservation, or contract where more than 50% of services to be rendered on Reservation which do not expressly exclude Tribal court jurisdiction;

2. actions in tort for intentional torts under South Carolina law is cause bodily injury or damage to property, or negligence or strict liability except for autombile accidents on reservation;

3. internal tribal matters;

4. domestic relations involving members residing on Reservation; and,

5. enforcement of business regulations applicable to businesses on Reservation.

Most jurisdiction is concurrent with state courts. Appeals lie to court in which could have been brought originally if matter exceeds amount of Magistrates Courts' jurisdiction.

Full faith and credit only to judgments subject to appeal. Tribe has sovereign immunity similar to state for torts subject to requirement that they procure similar insurance.

Indian Child Welfare Act applies when Secretary approves.

Section 13. - Tribal Trust Funds. Establishes trust funds with an option to have them managed by outside manager. Funds are Land Acquisition Trust, Economic Development Trust Fund, Education Trust Fund, Social Service and Elderly Assistance Trust Fund, and Per Capita Trust Fund. Per Capita Trust Fund will distribute $7,500,000 in one time payments to members.

Payments from trust funds (other than original per capita payments) not counted for eligibility for federal benefits.

Section 14. - Establishment of Expanded Reservation. Permits acquisition of up to 3600 acres (not counting 600 undevelopable acres) in defined area of York and Lancaster Counties. Purchases must be from willing sellers, but sellers can treat as involuntary conversions.

Section 15. - Non-Reservation Properties. Catawbas free to acquire non-reservation properties, but obligated to make payments in lieu of taxes if acquisition removes property from tax rolls.

Section 16. - Games of Chance. IGRA not apply. Tribe has ability to establish two high stakes bingo games under terms of state bill. One must be within claim area, other requires approval of county and any municipality in which located. Taxed at 10% of gross revenues.

Section 17. - Governance of Reservation. All environmental laws apply to reservation, and Tribe has no special status. Building code is same as York County, but can be more stringent. Planning and zoning require consultative procedures described in Puyallup bill. Tribe and members subject to state hunting and fishing regulations. Alcohol prohibited unless Tribe permits.

Section 18. - Taxation. Indian Tribal Government Tax Status Act applies. Generally subject to tax unless exempted by Act. Only taxes on games of chance is 10% state tax. Tribe's income non-taxable to extent non-taxable for recognized tribes. Members liable for taxes to same extent as other citizens of the state, with exceptions for members working on Reservation, or engaged in sale of pottery. Real property on reservation exempt from taxes to extent owned by Tribe. Residences exempt to extent occupied by members. Tribe required to make payment to school districts for students attending. Liable for personal property taxes.

Eligible for special status as Enterprise or Foreign Trade zone.

Section 19. - General Provisions. State law generally applicable. Subsequent laws preempting state jurisdiction not applicable, becomes effective upon transfer of existing reservation. Bill invalid if extinguishment or restoration invalidated.

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

Honorable James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This letter constitutes a request for your Department to institute legal action on behalf of the Catawba Indian Tribe to recover its reservation in South Carolina. The issue in this litigation is whether South Carolina's attempt to acquire title to the Catawba reservation by virtue of an 1840 Treaty was valid under the Non-Intercourse Act, 25 U.S.C. § 177. We conclude that the Tribe can establish a prima facie case under the Non-Intercourse Act, that the 1840 Treaty was void, and that the Tribe is therefore entitled to recovery of its reservation.

The Catawba claim is for approximately 140,000 acres (or 15 miles square) to which they have had a vested property right since 1763. Prior to that date, the Tribe occupied and controlled a much larger area by aboriginal title. However, in 1763, the Tribe relinquished their claim to the larger area in return for Great Britain's assurance that they would have unmolested possession of the 15 mile square reservation. When the United States succeeded to Great Britain's sovereignty in 1783, our new government did not abrogate the 1763 Catawba Treaty. Therefore, according to settled rules of international law, which are acknowledged by the U.S. Supreme Court, the Catawba retained a vested right in their reservation, as sacred as the fee simple of a non-Indian, which the United States Government was bound to respect. See Mitchel v. United States, 9 Pet. (34 U.S.) 711, 733 (1835).

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

The successive Non-Intercourse Acts, enacted to protect Indian property by requiring federal consent to the attempted conveyance of any Indian lands, were as applicable to the Catawba reservation as to any other kind of tribally held land. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (C.A. 1 1975). By 1840, the Catawba's treaty reservation was overrun by non-Indians who continually ignored the Tribe's protests; non-Indians also occupied the reservation lands under a state instituted leasing system whereby the lessees owed rent to the Catawba but often did not pay it. In 1840, the Tribe finally purported to convey their remaining title and interest in the 140,000 acres to the State of South Carolina by treaty. The federal government was in no way involved in the negotiations and never subsequently gave its consent. The 1840 conveyance was therefore void under the Non-Intercourse Act. Shortly after the 1840 Treaty, the Tribe sought return of the reservation stating the Treaty was procured by duress, that the terms were unfair and that the State wasn't meeting its obligations under the Treaty. Under the Non-Intercourse Act, the United States, as protector of Indian held lands, had the duty to protect the Catawba reservation, to set aside the 1840 Treaty if it didn't consent to it, and to assist the Catawba in recovering their lands. Passamaquoddy, supra.

The United States has never taken any action to fulfill its duty to help the Catawba recover the land. In fact, the Department of the Interior has twice refused, in 1906 and 1908, to take action when the Tribe's lawyers pointed out the Tribe's claims under the Non-Intercourse Act. But mere lapse of time and failure of the federal government to act cannot eradicate either the Catawba's rights to their land or the federal government's continuing duty to help them get it back. The Act of September 21, 1959, which terminated federal services to the Catawba and the applicability of federal Indian statutes similarly did not extinguish the 1840 Treaty claim or the government's duty of protection. The termination language in that 1959 statute is prospective and does not affect pre-existing legal rights. Moreover, the Supreme Court in Menominee Tribe v. U.S., 391 U.S. 404 (1968), and in many other Indian land cases, required clear evidence of Congressional intent before finding an abrogation of Indian rights. The legislative history of the 1959 Act shows that Congress, as well as the administering

agency, believed the Act was passed for one reason--to liquidate a 3400 acre reservation and to terminate limited federal benefits both of which were created by a 1943 agreement between the Tribe, the State of South Carolina, and the Department of the Interior. In short, the 1959 Act was a means of dissolving the legal relationship set up by that 1943 agreement. In fact, Congress was unaware of the status of the 1763 treaty reservation, of the Non-Intercourse claim pertaining to it, and finally of its own duty under the Non-Intercourse Act to protect the reservation. The Tribe itself certainly did not contemplate the 1959 Act as a means of cutting off their legal claims to the 1763 reservation because they stipulated, in the petition which gave rise to the 1959 legislation, that those claims should not be affected.

The action we hereby recommend is that the United States finally act upon its long neglected duty under the Non-Intercourse Act to nullify the 1840 Treaty with South Carolina and restore possession of the 1763 Treaty reservation to the Catawba Tribe.

An alternative source of the United States' duty to bring this suit to quiet title to the 1763 reservation arises from the 1959 Act itself. Since 25 U.S.C. § 935 did not abrogate the Catawba's Non-Intercourse Act claim, the 1763 reservation might be a tribal asset subject to the distribution provisions of 25 U.S.C. § 933, as was the known 3400 acre reservation. It would therefore be incumbent upon the Secretary, under § 933, to bring legal action to settle ownership of the 15 mile square reservation so that he could later determine whether that reservation should be conveyed to tribal members under § 933(d) or sold pursuant to § 933(f).

We recommend that the appropriate cause 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 attached materials include legal research by our staff attorneys and historical materials that should aid in your preparation of the case.

We recommend that you meet with us as soon as possible, and with the Tribe's representatives, to discuss the handling of the claim. The Tribe has already held several meetings with the South Carolina Governor and Attorney General to discuss settlement of the claim. We understand that discussions have reflected a mutual intent to resolve the matter in a way that would satisfy the parties without endangering the State's economy or interfering with the orderly development of residential and industrial real estate. Since we agree with that approach, we should inform all concerned parties that we concur in the validity of the Catawba claim, that we would prefer an amicable, orderly settlement to lengthy, disruptive litigation, and that we will lend immediate assistance in negotiations for a just and model settlement.

Sincerely,

Solicitor

Attachments

CATAWBA SETTLEMENT

MONETARY CONTRIBUTIONS

Cash Settlement:	**$50.0m**
Federal Contribution 5 years @ $6.4m/year	$32.0m
State Contribution 5 years @ $2.5m/year	$12.5m
Title Insurance Contribution	$ 1.4m
Crescent Escrow	$ 0.5m
Duke Challenge Offer	$ 0.5m
Matching Private Contributions	$ 0.5m
York County Contribution 5 years @ $470,000/year	$ 2.35m
Lancaster County Contribution 5 years @ $50,000/year	$ 0.25m
TOTAL	$50.00m

	CATAWBA PAYMENTS			
Year	Payment	Rate	PV	Periods
1841	$1,840.00	4.0%	$714,307.81	-152
1842	$1,000.00	4.0%	$373,279.58	-151
1843	$2,000.00	4.0%	$717,845.35	-150
1844	$1,841.00	4.0%	$635,362.16	-149
1845	$1,841.00	4.0%	$610,925.15	-148
1846	$1,841.00	4.0%	$587,428.03	-147
1847	$1,841.00	4.0%	$564,834.64	-146
1848	$1,841.00	4.0%	$543,110.23	-145
1849	$1,842.50	4.0%	$522,646.87	-144
1850	$2,500.00	4.0%	$681,879.33	-143
1851		4.0%	$0.00	-142
1852	$1,500.00	4.0%	$378,261.46	-141
1853	$2,000.00	4.0%	$484,950.60	-140
1854	$1,200.00	4.0%	$279,779.19	-139
1855	$1,500.00	4.0%	$336,273.06	-138
1856	$1,500.00	4.0%	$323,339.49	-137
1857		4.0%	$0.00	-136
1858	$1,200.00	4.0%	$239,156.42	-135
1859	$1,182.18	4.0%	$226,543.22	-134
1860		4.0%	$0.00	-133
1861		4.0%	$0.00	-132
1862		4.0%	$0.00	-131
1863		4.0%	$0.00	-130
1864		4.0%	$0.00	-129
1865		4.0%	$0.00	-128
1866		4.0%	$0.00	-127
1867	$1,200.00	4.0%	$168,028.13	-126
1868	$600.00	4.0%	$80,782.76	-125
1869	$850.40	4.0%	$110,092.40	-124
1870		4.0%	$0.00	-123
1871		4.0%	$0.00	-122
1872	$777.91	4.0%	$89,528.93	-121
1873		4.0%	$0.00	-120
1874	$40.00	4.0%	$4,256.25	-119
1875		4.0%	$0.00	-118
1876		4.0%	$0.00	-117
1877		4.0%	$0.00	-116
1878		4.0%	$0.00	-115
1879	$800.00	4.0%	$69,966.58	-114
1880	$800.00	4.0%	$67,275.56	-113
1881	$800.00	4.0%	$64,688.04	-112
1882	$800.00	4.0%	$62,200.04	-111
1883	$800.00	4.0%	$59,807.73	-110
1884	$800.00	4.0%	$57,507.43	-109
1885	$800.00	4.0%	$55,295.61	-108
1886	$800.00	4.0%	$53,168.85	-107
1887	$800.00	4.0%	$51,123.90	-106
1888	$800.00	4.0%	$49,157.59	-105
1889	$800.00	4.0%	$47,266.92	-104
1890	$800.00	4.0%	$45,448.96	-103
1891	$800.00	4.0%	$43,700.92	-102

	CATAWBA PAYMENTS			
1892	$800.00	4.0%	$42,020.12	-101
1893	$800.00	4.0%	$40,403.96	-100
1894	$800.00	4.0%	$38,849.96	-99
1895	$630.00	4.0%	$29,417.64	-98
1896	$933.00	4.0%	$41,890.50	-97
1897	$800.00	4.0%	$34,537.47	-96
1898	$1,000.00	4.0%	$41,511.39	-95
1899	$1,000.00	4.0%	$39,914.79	-94
1900	$1,000.00	4.0%	$38,379.61	-93
1901	$1,000.00	4.0%	$36,903.47	-92
1902	$1,000.00	4.0%	$35,484.11	-91
1903	$1,000.00	4.0%	$34,119.33	-90
1904	$1,000.00	4.0%	$32,807.05	-89
1905	$1,500.00	4.0%	$47,317.86	-88
1906	$1,500.00	4.0%	$45,497.94	-87
1907	$3,000.00	4.0%	$87,496.05	-86
1908	$3,000.00	4.0%	$84,130.81	-85
1909	$3,000.00	4.0%	$80,895.01	-84
1910	$3,500.00	4.0%	$90,747.61	-83
1911	$5,000.00	4.0%	$124,653.31	-82
1912	$4,513.60	4.0%	$108,199.08	-81
1913	$7,150.00	4.0%	$164,806.06	-80
1914	$7,600.00	4.0%	$168,440.84	-79
1915	$7,000.00	4.0%	$149,175.84	-78
1916	$7,000.00	4.0%	$143,438.31	-77
1917	$7,000.00	4.0%	$137,921.45	-76
1918	$8,000.00	4.0%	$151,562.04	-75
1919	$7,000.00	4.0%	$127,516.14	-74
1920	$8,500.00	4.0%	$148,885.60	-73
1921	$7,700.00	4.0%	$129,685.42	-72
1922	$7,700.00	4.0%	$124,697.52	-71
1923	$6,625.00	4.0%	$103,161.97	-70
1924	$10,375.00	4.0%	$155,341.87	-69
1925	$9,375.00	4.0%	$134,970.34	-68
1926	$9,375.00	4.0%	$129,779.18	-67
1927	$9,450.00	4.0%	$125,785.97	-66
1928	$9,450.00	4.0%	$120,948.05	-65
1929	$9,450.00	4.0%	$116,296.20	-64
1930	$9,450.00	4.0%	$111,823.27	-63
1931	$9,450.00	4.0%	$107,522.37	-62
1932	$8,905.00	4.0%	$97,424.37	-61
1933	$11,222.50	4.0%	$118,056.52	-60
1934	$9,450.00	4.0%	$95,587.00	-59
1935	$7,500.00	4.0%	$72,944.90	-58
1936	$9,450.00	4.0%	$88,375.55	-57
1937	$9,450.00	4.0%	$84,976.49	-56
1938	$9,450.00	4.0%	$81,708.17	-55
1939	$8,250.00	4.0%	$68,588.97	-54
1940	$9,825.00	4.0%	$78,541.56	-53
1941	$9,385.00	4.0%	$72,138.64	-52
1942	$9,385.00	4.0%	$69,364.07	-51
1943	$9,385.00	4.0%	$66,696.22	-50
1944	$12,000.00	4.0%	$82,000.19	-49

	CATAWBA PAYMENTS			
1945		4.0%	$0.00	-48
1946		4.0%	$0.00	-47
1947		4.0%	$0.00	-46
1948	$12,500.00	4.0%	$73,014.70	-45
1949	$13,000.00	4.0%	$73,014.70	-44
1950		4.0%	$0.00	-43
1951		4.0%	$0.00	-42
1952		4.0%	$0.00	-41
1953		4.0%	$0.00	-40
1954		4.0%	$0.00	-39
1955		4.0%	$0.00	-38
1956		4.0%	$0.00	-37
1957		4.0%	$0.00	-36
1958		4.0%	$0.00	-35
1959		4.0%	$0.00	-34
1960		4.0%	$0.00	-33
1961		4.0%	$0.00	-32
1962		4.0%	$0.00	-31
1963		4.0%	$0.00	-30
1964		4.0%	$0.00	-29
1965		4.0%	$0.00	-28
1966		4.0%	$0.00	-27
1967		4.0%	$0.00	-26
1968		4.0%	$0.00	-25
1969		4.0%	$0.00	-24
1970		4.0%	$0.00	-23
1971		4.0%	$0.00	-22
1972		4.0%	$0.00	-21
1973		4.0%	$0.00	-20
1974		4.0%	$0.00	-19
1975		4.0%	$0.00	-18
1976		4.0%	$0.00	-17
1977		4.0%	$0.00	-16
1978		4.0%	$0.00	-15
1979		4.0%	$0.00	-14
1980		4.0%	$0.00	-13
1981		4.0%	$0.00	-12
1982		4.0%	$0.00	-11
1983		4.0%	$0.00	-10
1984		4.0%	$0.00	-9
1985		4.0%	$0.00	-8
1986		4.0%	$0.00	-7
1987		4.0%	$0.00	-6
1988		4.0%	$0.00	-5
1989		4.0%	$0.00	-4
1990		4.0%	$0.00	-3
1991		4.0%	$0.00	-2
1992		4.0%	$0.00	-1
	$385,922.09		$14,328,586.79	
RATE=	4.0%			

Mr. RICHARDSON. Let me say I admire my colleague's prodigious knowledge of this issue. I would like to ask my colleague how he wishes to proceed. I know he is accompanied by some very distinguished witnesses. Does my colleague wish to introduce them?

Mr. SPRATT. That is an omission or oversight I made at the outset. I should introduce first of all those at the witness table, the counsel table with me. My good friend Senator Wes Hayes, a Senator from the district that covers this particular claim area.

This is Chief Gilbert Blue, the Chief of the Catawba Indian Tribe. Seated behind him is his lawyer of the last 17 years, so far without compensation but nevertheless with total diligence and fervor, Don B. Miller of the Native American Rights Fund.

In the room we have Mark Elam representing Governor Campbell who cannot be here because this hearing was scheduled on short notice. He is known to many of you because he worked on the Hill before when Governor Campbell was here as a Member of Congress.

And Ken Woodington, who represents the Attorney General of South Carolina. Jim Quarles of Hale and Dorr, Jay Bender of South Carolina, Robert Jones of Rock Hill, South Carolina, who represents a particular group of the Indians but who also has been involved in this claim for some period of time, as well as Richard Steele of Union, South Carolina, who represents the same Indian constituency.

In addition, we have present John Christie, who represents Bell, Boyd and Lloyd, who represents the title insurance companies in this lawsuit and has been involved from the inception of the claim.

Mr. RICHARDSON. Would my good friend and colleague wish to join us at the dais, or does he prefer to sit with the witnesses?

Mr. SPRATT. That would be nice. I could give up my chair and come up and join you, if that is okay.

Mr. RICHARDSON. If my colleague wishes, Mr. Elam or anybody else that my colleague wishes could join the witness table.

Mr. SPRATT. Just to complete what I have just presented, to complement it, I think it would be well to hear from the Catawbas next and then from Senator Hayes and Mr. Elam, to round out——

Mr. RICHARDSON. If my colleague could wait, our good friend from Hawaii, Neil Abercrombie has come in. I believe my colleague wishes to ask you a question.

Mr. ABERCROMBIE. Mr. Spratt, thank you very much for that description and detailed exposition. I must say there are tremendous parallels for the situation that happened to Native Hawaiians as well. I just want to clarify a couple of things for myself.

The Nonintercourse Act, page 20 of your testimony, I believe it is, am I correct that the ultimate judicial system—excuse me, the ultimate judicial rendering was that the four points that I raise on page 20, they are in effect in this settlement proposal; is that correct? It embodies and includes, represents an Indian tribe within the meaning of the Nonintercourse Act, et cetera? Is that all still in effect? Do I understand correctly from your testimony?

Mr. SPRATT. The court held these things must be shown.

Mr. ABERCROMBIE. And they were shown, were they not, in the court's estimation?

Mr. SPRATT. Some of these issues are still in litigation, and haven't been finally resolved. As I said, we do not even have a responsive pleading in the form of an answer yet in this case. We haven't taken testimony on the this issue.

One of the issues would be whether or not this Indian tribe would maintain a continuity of existence necessary to show it was the same tribe in 1840 as the tribe today pursuing this claim.

Mr. ABERCROMBIE. Certainly the intent, though, of the Nonintercourse Act at the time it was passed was to have as its end result preservation of tribes, non-alienation of their land, et cetera; isn't that correct?

Mr. SPRATT. The main purpose as I understand it was to require that land transactions between Indian tribes and white settlers be supervised and ratified by the Federal Government before they were consummated.

Mr. ABERCROMBIE. And you make a statement on page 36, then—I want to just read it, it is only a sentence or so—"Had the Federal Government on any of the foregoing occasions upheld his trust responsibilities, the Catawbas would not have been denied redress for 150 years or lost the better part of their claim to adverse possession. Their land claim would have been settled long ago by the persons responsible for it and not by innocent landowners."

Would you say those two sentences are a fair summary of the entire thrust of both the legal and the rhetorical observations?

Mr. SPRATT. I would say so. Now, one reason that the Nonintercourse Act was not invoked apparently was it was not clear exactly what the scope and application of the act was during all these years up until the 1970s when the Penobscot and Passamaquoddy finally were able to obtain a ruling from the First Circuit Court of Appeals that the Nonintercourse Act applied to Eastern Indian land claims.

Mr. ABERCROMBIE. Well, the chief might have a contemporary version of what—how you would define the non-Intercourse Act today, given this history. But I want to comment then, Mr. Chairman, and Mr. Spratt, that as far as I am concerned, with respect to the $32 million, which I think is the bottom-line dollar question to be settled, not only in this hearing, but by this Congress; that is correct?

Mr. SPRATT. That is one of the bottom-line issues, no question about it.

Mr. ABERCROMBIE. Relying on your—the background that I have been given here is that, as far back as 1756 when George Washington was a colonel, not General Washington, the Catawbas provided, if you take the most conservative estimate of the warriors available in that tribe, fully one-half of the warriors, the adult males—I presume there were no female warriors, I don't know the history at that point—but fully one-half of the adult males made themselves available to Colonel Washington.

Mr. SPRATT. He sent for them. He sent someone to the tribe and asked for them because he needed scouts to go to Fort Duquesne. They sent a party that numbered somewhere between 125 and 150 according to records because, again, George Washington recorded in his journal the arrival of Catawbas in his camp with one

Mannahoc who announced that he will not allow them to enter into service of the crown until he is handsomely compensated.

Mr. ABERCROMBIE. Yes, I remember that part also in the testimony there. But my point really here is, is that what we have, is really a 300-year history, better than a 300-year history, and that as part of that history, people from the tribe were—at the time, of course, we weren't a Nation, but nonetheless, in the service of the of Virginia at that time under Colonel Washington, fully half the adult members of the tribe made themselves available, right?

Mr. SPRATT. In every war but one, the Catawbas fought on the side of the American Colonials. Every war but one.

Mr. ABERCROMBIE. The result of that, the unfortunate result of that was no doubt due to resistance factors, genetic factors having been associated with the tribe's isolation from western disease, that they acquired smallpox and the smallpox devastated the tribe; is that not correct?

Mr. SPRATT. Literally decimated the tribe. Inflicted by smallpox, according to history, several times from the first contact with white settlers in the early 1700s. This was the most devastating episode of it.

Mr. ABERCROMBIE. So if we look at this figure that you are talking about over a 300-year period of $52 million—I am talking now the whole factored amount, not——

Mr. SPRATT. $50 million, not $52 million. $50 million even.

Mr. ABERCROMBIE. I see. I was under the impression——

Mr. SPRATT. $32 million plus $18 million.

Mr. ABERCROMBIE. I had——

Mr. SPRATT. $50 million.

Mr. ABERCROMBIE. I had $52 million. You are lousing up my figures here. It makes it better actually, but the way I look at it, that is only $173,000 a year, and as you take 1,500—in other words, if you have a total tribe of about 1,500 people, if you take about 300 warriors and you add in spouses and children and perhaps older people who weren't eligible, say about 1,500 people, we are talking about $115 a year per person. That is all that comes to is $115.

So I don't even look at it as $50 million. I look at it as compensation, recompense due over 300 years that doesn't—that amounts to scarcely $100 a year.

So it seems to me that a very strong case can be made not only from the social-historical side for settlement here and the participation of the Federal Government, but that this amount of money is almost shameful, from my point of view, in terms of how—as far as it is with respect to the history of this tribe and its contributions with respect to this Nation's history.

So I can assure you, as far as I am concerned, no offense to the rest of the people testifying, that this is an extraordinarily modest settlement. And if it is satisfactory to all parties involved, I think we should count ourselves fortunate, indeed, from the financial point of view, and from my position as well, to say that the generosity and forbearance of the Catawbas is remarkable and is to be commended.

Mr. SPRATT. Thank you, Mr. Abercrombie. We will have two witnesses on behalf of the State. Senator Hayes and Mr. Elam, and

both will tell you how tight the fiscal straits are for South Carolina right now. We have got a tight situation there.

South Carolina has a balanced budget Constitution. I don't think State employees have had a raise for three years, so we have scraped the bottom of the barrel. This is all the money we can get from State, local and private sources, and we have to have at least this Federal contribution if we are to make this settlement work.

Mr. ABERCROMBIE. I assure you of my support.

Mr. SPRATT. Thank you, sir.

Mr. RICHARDSON. We would like our colleague, Congressman Spratt, to come up to the dais and join the Subcommittee on Native American Affairs.

Mr. RICHARDSON. I will now recognize the Honorable Gilbert Blue, the Chief of the Catawba Indian tribe, to proceed.

PANEL CONSISTING OF HON. GILBERT B. BLUE, CHIEF, CATAWBA INDIAN TRIBE, ROCK HILL, SC, ACCOMPANIED BY DON MILLER, ESQ., NATIVE AMERICAN RIGHTS FUND; HON. ROBERT W. HAYES, JR., STATE SENATOR, SOUTH CAROLINA; MARK ELAM, SENIOR COUNSEL TO HON. CARROLL A. CAMPBELL, GOVERNOR, STATE OF SOUTH CAROLINA, ACCOMPANIED BY KENNETH WOODINGTON, SENIOR ASSISTANT ATTORNEY GENERAL, SOUTH CAROLINA, AND JAMES I. QUARLES III, ESQ., HALE AND DORR

STATEMENT OF HON. GILBERT B. BLUE

Mr. BLUE. Thank you, Mr. Chairman, and members of the Committee. Congressman Spratt, has very eloquently presented our case today, and I will not be repetitious in the historical events that have led to this day. What I would like to emphasize is the fact of the negotiating process that we went through to arrive at legislation.

We spent many long hours together in Rock Hill for weeks at a time well into the night negotiating the things that we could give, the things that we would like to have as far as this legislative package is concerned. With all the hard work of the people involved, we felt we have come to a conclusion that will be suitable to everyone involved.

The Catawba Indian people, we have made an effort as leaders on several weekends to hold meetings in the mornings and in the afternoon and in the evening as well to help keep the people informed as to what this legislative package consisted of, giving them the opportunity to ask questions that they might have concerning this legislative package.

Also, we have many times gone out into the community and asked the people individually how they felt about the things that we have negotiated. So we feel, at least I do as a leader—and my people have voted at a tribal meeting and the majority overwhelmingly approved this package—we feel that we have—I know a question was raised earlier, a reference was made to the jurisdiction of civil rights and so forth in the package, and has already been alluded to.

Not being a tribe that has had a certain amount of setup of government, these things would be more detrimental to our people and

more of a burden probably than they would have been an asset. But we feel in this package that we have the powers that we need to govern ourselves on the reservation, that we have the control over the people who will come on the reservation; any business ventures that we would become involved in, that we would have the opportunity and that we would have the power to govern those businesses and the people there to the best of our interests.

I am thankful for all those, especially Congressman Spratt and those from the Governor's office and all those who involved themselves in the negotiating process that have finally brought us to the point that we are today.

In conclusion, I would like to just comment to you, because I think it is important that you understand that as we present ourselves before you today, we do it as a group with the cohesiveness among us that this is the best way to go. In Rock Hill and York County, the realtors, the Chamber of Commerce, the Governor—excuse me—the Mayor and all the people involved in the economic process in York County have actually written me letters or called me on the phone asking me as the leader of the Catawba Nation, what are my thoughts on how roads are going to be extended, water rights, and things concerning the corridor of the Catawba River.

I think this means to me that the people are concerned about the Catawba Nation in real life, that we are going to be an economic input to the area in which the Catawba Indians live.

We will have the opportunity to involve ourselves in business ventures in and of ourselves. We will also have the opportunity to, with other people in the private sector of our community, to be involved with them in some adventures as far as economic businesses are concerned.

This is the main thing that I wanted to convey to you today. I know that Congressman Spratt has given you the historical events that led up to where we are and he has done it admirably, so I am not going to try to be repetitious about going over those.

I would like to say in conclusion that we are all together as one and we come here today asking that you support us and the Committee, and I endeavor to settle this longstanding claim that we feel has been long overdue. I feel good about the support that we have gotten and I have just returned from three days in Green Bay, Wisconsin with the National Congress of American Indians. We presented a resolution on the floor with representatives of all Native Americans throughout the United States. They approved the resolution to support this package.

The Board of Directors of the National Congress of American Indians supported this by a resolution and that has been entered into my record as well as my written testimony.

I thank you for your time and for your interest in our people.

Mr. RICHARDSON. Well, Chief, thank you very much.

[Prepared statement of Mr. Blue and attachment follow:]

PREPARED TESTIMONY OF GILBERT B. BLUE, CHIEF, CATAWBA INDIAN TRIBE OF SOUTH CAROLINA ON H.R.2399, A BILL TO SETTLE THE LAND CLAIMS OF THE TRIBE AND RESTORE THE FEDERAL TRUST RELATIONSHIP, BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS OF THE NATURAL RESOURCES COMMITTEE, UNITED STATES HOUSE OF REPRESENTATIVES

JULY 2, 1993

Mr. Chairman and members of the Committee:

Thank you for the opportunity to appear and present testimony on H.R. 2399, a bill to settle our Tribe's claim to possession of its ancestral treaty lands and restore the trust relationship between the Catawba Tribe and the United States of America. This bill, if enacted, will extinguish the Tribe's possessory land claims to 140,000 acres in return for payments to the Tribe of $50,000,000 over 5 years ($32,000,000 from the Federal Government and $18,000,000 from State and local sources). In addition, the trust relationship between the Tribe and the United States will be restored. At least 90% of the funds will be placed in trust funds for acquisition of Federal reservation lands (maximum of 4,200 acres), economic development, education, social services and elderly assistance, and per capita payments to tribal members (15% or $7,500,000). H.R. 2399, together with the State implementing legislation signed earlier this month by Governor Carroll Campbell, will implement a comprehensive jurisdictional compact between the State and Tribe covering civil, criminal and regulatory jurisdiction.

On June 12, 1979, I appeared at a hearing before the House Interior Committee to offer testimony on a Catawba land claim settlement bill introduced by Congressman Spratt's predecessor, Congressman Ken Holland. I and my fellow Executive Committee members had been actively attempting to resolve this claim for four years without resorting to disruptive litigation. While we had made limited progress, at the time of the 1979 hearing the Tribe, the State, the non-Indian occupants of the land, and the Federal Task Force that had been working on the settlement each maintained very different views regarding the form any settlement should take. Those differing views were presented to the Committee and, predictably, the settlement bill was not reported out of Committee. A second, renewed effort at settlement was made in 1980 under the capable guidance of then-Governor Richard Riley, but it too collapsed under the weight of widely divergent views among the parties.

Today, following almost 13 years of expensive and complicated Federal court litigation, we are again before the same Congressional committee advocating settlement of the Catawba land claim. However, unlike our previous journeys to our nation's capital, we come before you today united with our non-Indian neighbors in the desire to bring this long and sometimes bitter dispute to a just and honorable conclusion.

It is not my purpose today to present a detailed history of our Tribe and our struggle to first retain and then regain possession of our ancestral treaty reservation. The story is a

long one and my testimony will recount it only briefly. The historical record speaks clearly for itself, and I shall seek only to refer the Committee to those few sources among the countless letters, official reports, news articles, and scholarly publications which I regard as central to an understanding of this 200-year-old controversy. While an understanding of the events of the past must always inform the actions of the present, I firmly believe that we as a Tribe must focus our energies and our efforts on the future. And that, I believe, is exactly what the Catawba Indian Tribe did last February 20 when we voted 289 to 42 to accept the settlement agreement that is embodied in H.R. 2399.

In addition, it is equally clear that our non-Indian neighbors have likewise decided to look to the future rather than to the past. And the overriding significance of the fact that we appear before you today united with the State and local governments, as well as private interests, is that for the first time in over 200 years we, as a Tribe, will have the opportunity to share in that vision of the future as equal participants. This settlement will not make us rich Indians, but it will provide us the economic and governmental tools with which we can fashion a proud and self-reliant future in partnership with our non-Indian neighbors.

Beyond fulfilling the spirit of the promises contained in our 1760 and 1763 treaties with the British Crown, H.R. 2399 furthers the important modern Federal policies of encouraging consensual settlements, fostering Indian self-determination, and restoring the Federal trust relationship with those tribes terminated pursuant to the misguided Federal Indian policies of the 1950's. But it furthers these policies in a way that is tailored to meet the particular needs of the Catawba Tribe. Because H.R. 2399 and the settlement agreement it embodies result, to some degree, from the Catawba Tribe's unique circumstances, it is important to note at the outset that we realize that the terms our settlement are perhaps not ones that other differently-situated Indian tribes would necessarily find satisfactory if applied to them.

Because many of the provisions of the settlement agreement, particularly in the area of jurisdiction, do not follow the "general rules" of Federal Indian law, the bill as introduced may raise questions among Indian leaders around the country whether the Catawba land claim settlement act represents a shifting of Federal Indian policy away from tribal self-government and toward greater state involvement in the governmental affairs of Indian tribes. I wish, therefore, to emphasize that this is not the case.

This complex legislation is the product of an arduous negotiation process spanning three years. Each provision is the product of detailed and intense give and take among the parties. The settlement agreement embodied in the State and Federal implementing legislation is painstakingly crafted and represents a delicate balance of the diverse and sometimes competing interests of the numerous parties involved in and impacted by the settlement. I stress this to the Committee for two reasons. First, I hope that other Tribes will understand that this legislation, like other acts implementing consensual, negotiated settlements, is fact and tribe-specific. Second, I hope that Congress will, to the greatest extent possible, give deference to the parties' accord with the understanding that amendments

which would significantly alter the terms of our agreement might well result in a collapse of the settlement and condemn the parties to many additional years of disruptive and expensive litigation.

The Catawba Tribe and the State have negotiated a broad jurisdictional compact that in many ways is unique, covering in detail civil and criminal cause of action jurisdiction as well as a wide range of civil regulatory matters. The manner in which the parties' agreement divides and allocates the respective jurisdictional powers of the Tribe and State and Federal governments reflects the particular circumstances of the Catawba Tribe and its non-Indian neighbors. These allocations are a function of many complex factors, including the risk of continued litigation, the expensive and disruptive nature of the protracted legal proceedings, the Tribe's unique history, its proximity to major urban areas, our desire to emphasize and promote economic development and, most importantly, the wishes of Catawba Tribe as expressed by an overwhelming vote of support for the settlement agreement.

Therefore, beyond furtherance of the general Federal policies of encouraging consensual settlements, fostering Indian self-determination, and restoring terminated Indian tribes, the Catawba Land Claim Settlement Act should not be viewed as a precedent that either sets forth or impacts Federal Indian policy. Rather, it is legislation that seeks to implement the agreement of particularly situated parties engaged in unique and troublesome litigation. We are grateful that The National Congress of American Indians recognized the importance of this settlement bill and enacted a resolution of support earlier this week at its mid-year meeting in Green Bay. [Exhibit A].

The Catawba Tribe strongly endorses the provisions of the bill as introduced. We have pledged our good faith efforts to secure its enactment in its current form, as it will implement the agreement as negotiated by the parties. We respectfully request that Congress make clear to the national Indian community that this bill in no way represents a modification or departure from current Federal Indian policy.

The history of our centuries-long struggle to protect our lands tells the story of a once-powerful and self-sufficient Indian tribe reduced to a state of poverty and dependence by the neglect and mismanagement of state and Federal officials. It is important to briefly review that history here, not because we desire to view ourselves, or desire others to regard us, as victims of the oppression of the dominant culture. Indeed, in many respects, we have adopted the ways and become a part of mainstream American society. But in many other fundamental ways, we continue to survive as a tribal people. And that fact, together with the history of opportunity denied and justice postponed, form the basis and justification for favorable Congressional action on H.R. 2399.

Before outlining the historical justification for Federal participation in this settlement, I would like to refer the Committee to two recent publications that document in scholarly detail the history of our Tribe and its reservation. These works are required reading for anyone seeking to gain a full appreciation of our Tribe's history. First, our long-

time friend, Dr. Thomas J. Blumer, authored a comprehensive collection of historical citations in *Bibliography of the Catawba*, Scarecrow Press, Metuchen, N.J. (1987). Two years later, Vassar history professor Dr. James H. Merrell's widely acclaimed history of our Tribe was published. *The Indians' New World -- Catawbas and Their Neighbors from European Contact through the Era of Removal*, University of North Carolina Press, Chapel Hill (1989).

THE HISTORICAL/LEGAL BASIS FOR FEDERAL PARTICIPATION IN THIS SETTLEMENT[1]

In 1760 and 1763, the Catawba Tribe entered into treaties with the British Crown whereby the Tribe was secured in possession of a 144,000 acre, 225 square mile reservation and its title thereto recognized by the Crown. In return, the Tribe ceded its remaining aboriginal territory in North and South Carolina. In the treaties, the Crown undertook fiduciary obligations to protect the Tribe in possession of its reservation, and in fact later took affirmative action to thwart efforts by third parties (the Colony of South Carolina and others) to deprive the Tribe of possession. (For a more detailed history of this period, *see Hearings on H.R. 3274, Before the Committee on Interior and Insular Affairs, House of Representatives, "To Settle the Nonintercourse Claims of the Catawba Indian Tribe of South Carolina,"* 96th Cong., 1st Sess. at 135-182 (1979) [Exhibit B].

The property rights of the Tribe recognized under British law, as well as the Treaty obligations of the Crown, became binding upon the United States upon its independence from Great Britain. Since before the adoption of the Constitution, the United States has been aware that the Catawba Tribe possessed recognized title and that our lands were being encroached upon by non-Indian settlers. Indeed, in 1782, our Tribe petitioned the Continental Congress to protect our treaty reservation from encroachment by whites. In 1791, our chiefs met with President George Washington in Lancaster County, South Carolina and requested that he take action to protect our reservation.

And the protection we sought was no greater than that provided by existing Federal law. In 1790, the First Congress enacted the first Nonintercourse Act to ensure that Indian rights of occupancy could only be interfered with or determined by the United States. The Act, presently codified at 25 U.S.C. §177, provided that any conveyance in violation of its terms would be void. This Act, as well as federal common law, adopted and carried forth the policies of the Crown respecting Indian land tenure and rights and established in the United States a fiduciary duty to protect all Indian Tribes, including the Catawbas, in possession of their lands.

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[1] In preparing this history, I have freely relied on the legal research in this case prepared by our attorneys from the Native American Rights Fund.

In 1840, following decades of illegal State-sanctioned and regulated leasing of Catawba reservation lands to which the Federal Government turned a blind eye, the State of South Carolina dispossessed the Tribe of its Treaty reservation in violation of federal law. In the Treaty of Nation Ford, which the United States neither participated in nor approved, the State attempted to extinguish the Tribe's recognized Treaty title in return for its promise to acquire for the Tribe new lands elsewhere and to pay $16,000 to the Tribe over a 10-year period. The State failed to honor its bargain and the Tribe wandered homeless for over 2 1/2 years until the State bought back a 630 acre farm located within the original 144,000 acre Treaty reservation as a "new" reservation for the Tribe. The Tribe continues today to reside on this 630 acre tract, which is held in trust for the Tribe's benefit by the State of South Carolina. *See Hearings on H.R. 3274* at 177-186.

The 1840 dispossession of the Tribe is the basis of the Tribe's lawsuit in Federal District Court against the State and private landholders who currently possess the 1763 Treaty reservation. The Tribe asserts a Federal right to current possession because the 1840 State treaty was void under the Nonintercourse Act and Federal Common Law.[2]

In the century following the 1840 state "treaty," the Tribe made numerous efforts to secure the assistance of the United States in resolving its land claim.[3] For example, in 1848 and 1854, Congress enacted statutes authorizing the removal of the Catawbas west of the Mississippi. In 1906 and 1908, the Tribe formally requested Interior's assistance in obtaining either compensation or return of the land based on the requirements of Federal law. Interior twice refused assistance based on the erroneous legal position that the Catawbas were "state Indians" and therefore not entitled to the protection of Federal law. On several occasions, Interior sent agents to South Carolina to investigate the claim and their reports documented in detail the Tribe's dispossession and the State's failure to abide by the terms of the 1840 Treaty.[4]

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[2] *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[3] For a more detailed examination of the United State's mis-handling of this land claim, please refer to the Tribe's legal briefs before the United States Supreme Court in our claim against the United States [Exhibit C] and our claim to regain possession of the land [Exhibit D]. A more complete summary of Government involvement is contained in the *Index of Catawba Historical Documents*, Native American Rights Fund (February, 1990). [Exhibit E].

[4] Please refer to BIA documents relating to the Tribe's 1905 and 1908 requests [Exhibit F], the 1911 report of Special Indian Agent Charles Davis [Exhibit G], and the Memorandum to the Commissioner of Indian Affairs from D'Arcy McNickle [Exhibit H].

In 1940, following a BIA official's report that the Catawba Tribe probably had a claim against the State of South Carolina arising out of the 1840 treaty, the Interior Department took affirmative, if timid, steps to protect the claim. During negotiations between the State and Federal governments aimed at securing federal and state participation in a rehabilitation program for the Tribe, the State initially sought to condition its participation on a release and quit-claim by the Tribe of its treaty land claim. But the Interior Department refused to agree to the claim's extinguishment and so advised the State. That position was later upheld by the Interior Department Solicitor who doubted the legality of using the agreement "to deprive the Indian Tribe of claims which it might be able to enforce in the courts." Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, etc." *reprinted in I Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs*, 1917-1974, 1080, 1081-82 (Gov't Printing Office, n.d.); *see South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 516-517 (1986) (Justice Blackmun dissenting).

These negotiations resulted in a 1943 Memorandum of Understanding between Interior, the State and the Tribe pursuant to which an additional 3,434 acres, all within the boundaries of the 1763 Treaty reservation, were acquired by the State and transferred to the Secretary of the Interior in trust for the Tribe. The United States agreed to provide Federal Indian services and, following a Solicitor's opinion concluding that the Catawba Tribe had been recognized by the United States since at least 1848 and that its continuous existence as a Tribe could not seriously be questioned, the Tribe adopted a constitution under the Indian Reorganization Act. *See Questions of the Catawbas' Identity and Organization As A Tribe And Right to Adopt An IRA Constitution*, Mem.Sol.Int., April 11, 1944, *reprinted in II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs*, 1917-1974, 1261 (Gov't Printing Office, n.d.) [Exhibit I]. Thus, at the beginning of the Tribe's short-lived "Federal period," Interior had compiled a voluminous record documenting the existence and nature of the Tribe's third-party possessory claim.

In 1953, Congress drastically altered the course and direction of federal Indian policy with the passage of House Concurrent Resolution No. 108, declaring it to be the policy of the Federal government to terminate the United States' trust relationship to Indian tribes. Pursuant to that policy, the BIA in 1954 identified the Catawba Tribe as a likely candidate for termination. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 503. In 1958, Congress and the Eisenhower Administration, in recognition of the disastrous effects termination was having on Indian people, revised the termination policy, rejecting coercive termination of Indian tribes in favor of a policy that permitted termination based only on informed tribal consent. *See* F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.).

Nonetheless, BIA pressed forward with its termination agenda and, shortly after the 1958 policy revision, dispatched Special Agent Raymond Bitney to the Catawba Tribe for the purpose of securing tribal consent to termination of Federal supervision. Because the Federal Government had failed to provide services under the 1943 Memorandum of Understanding and the Tribe was therefore unable to provide housing or productively

utilize its restricted Federal lands (the 3,434 acres acquired in 1943), tribal dissatisfaction with our new Federal status was running high.

Federal officials played on this dissatisfaction to garner tribal support for the termination proposal, telling the Tribe that while they were powerless to provide additional services, they could facilitate a removal of federal restrictions to the 3,434 acres. This would result in the Indians acquiring unrestricted fee title which they could then mortgage and thereby secure the funds to improve their housing and finance farming operations. The BIA would thus be relieved of the duty to provide services it had undertaken in the 1943 agreement with the Tribe and the State.

BIA files show that Agent Bitney pressed Interior's case for termination to the Indians in a door-to-door, family-by-family campaign during the last quarter of 1958. His reports, which contain a detailed narrative of the issues discussed at each visit, show that during these meetings several tribal officials expressed concern about the Tribe's land claim against the State with one official stating that Interior's plan could not go forward until the land claim was resolved. Agent Bitney assured our leaders, most of whom, including my uncle Chief Samuel Blue, could neither read nor write, that our land claim would in no way be jeopardized by Interior's proposal to withdraw Federal supervision.

The meetings at which the BIA's termination proposal was considered by the Tribe were attended by Bitney and other Federal officials. The Tribe had no lawyer. Agent Bitney worked closely with tribal officials to ensure tribal consent and drafted the Tribe's resolution of approval. The Tribe's January 3,1959 resolution, as drafted by Bitney, expressly conditioned the Tribe's support for the legislation on there being nothing in the legislation affecting the status of the Tribe's land claim. After the Tribe adopted the resolution, the BIA sent it to Congressman Hemphill who sent it right back to BIA requesting BIA's assistance in drafting a bill "to accomplish the desire [of the Tribe] set forth in the resolution." The BIA then drafted a bill that made state law generally applicable but made no mention of protecting the land claim.

The Congressman and Interior officials then presented the bill to the Tribe at a March 28, 1959 tribal meeting and assured us that it had been drafted to carry out the intent of the resolution. The Tribe's official minutes of the meetings reveal that we believed the draft legislation to have been a "contract that was drawn up by the Bureau of Indian Affairs." Based on those assurances, and without legal guidance, the Tribe approved introduction of the legislation at the March 28, 1959 meeting.

Congressman Hemphill's introductory remarks emphasized to Congress that the Tribe's consent was contained in the January 3, 1959 resolution. 105 *Cong. Rec.* 5462 (1959). At the subcommittee hearings on the bill, the Congressman and Interior officials emphasized that the bill had been drafted to conform to the desires of the Tribe as expressed in the January 3, 1959 resolution, which was introduced into the hearing record. Congress relied on the January 3 and March 28 endorsements of the bill by the Tribe as the

expressions of the informed tribal consent required by Federal policy, but, like the BIA and the Congressman, either overlooked or conveniently ignored the part about our consent being conditioned on protection of the land claim. H.R. Rep. No. 910, 86th Cong., 1st Sess., *reprinted in 1959 U.S. Code Cong. & Ad. News* 2671, 2672.

On September 21, 1959, Congress enacted the bill in substantially the same form that it had been presented to the Tribe. Congress did amend the bill to provide that it would not become effective until a majority of the adult members of the Tribe agreed to accept the division of assets in accordance with the Act's provisions. BIA agents were once again dispatched to the reservation and by June 30, 1960, BIA officials had collected enough signatures to permit Interior to announce that the Tribe had accepted termination. Pursuant to the Act, Interior liquidated the 3,434 acres acquired in 1943 and, on July 1, 1962, formally decreed that termination of the Catawba Tribe was final.

Until the 1959 Act became effective in 1962, Interior continued to be our Tribe's trustee subject to all fiduciary duties to protect and preserve tribal assets. During this period of more than two and one-half years, the Government's files show that our land claim was brought to Interior officials' attention several times. Interior officials led us to believe that the claim was protected or simply "made no comments." We had no lawyer and were wholly dependent upon the BIA for guidance and assistance. At no time did Interior officials advise us that the Government might not have fulfilled its contract to preserve the claim nor did they advise us to seek legal counsel.

In 1976, after obtaining the assistance of the lawyers at the Native American Rights Fund, the Tribe again submitted a litigation request to the Interior Solicitor. In 1977, the Solicitor formally requested that the Department of Justice initiate litigation on the Tribe's behalf, noting that "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." Solicitor Krulitz further concluded that: 1) the Catawba Tribe had been dispossessed of its treaty reservation in violation of Federal law; 2) the 1840 state treaty was void; 3) the Tribe could establish a *prima facie* case for repossession of its reservation under the Nonintercourse Act; 4) "the United States has had a duty under the Non-intercourse Act, since the Treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation;" and 5) "this duty was not affected by the 1959 Act." [Exhibit J]. The Solicitor's litigation report concluded: "Thus, the case is a particularly inviting one for a negligence claim against the United States should this Department fail to advocate relief for the Catawba." [Exhibit K at 31]. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible. *See Hearings on H.R.3274*, at 16, 67; *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 518 (1986) (Justice Blackmun, dissenting).[5]

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[5] On March 31, 1983, the Secretary of the Interior included the damages portion of the Catawba Tribe's land claim on the list of potentially meritorious Indian claims to be

Thereafter, efforts to legislatively settle the claim failed. [Exhibit L, NARF Legal Review at 8-10].

In 1980, the Tribe filed an ejectment action in Federal District Court seeking to recover possession of its treaty reservation based on its unextinguished, recognized Indian title. In 1983, the district court dismissed the claim based on the 1959 Act, concluding, among other things, that the Act resulted in the application of state statutes of limitations to the Tribe's claim and that they operated to bar the claim in its entirety. The Court of Appeals for the Fourth Circuit reversed, holding that the 1959 Act did not extinguish the claim nor had state law become applicable to the claim as a result of the Act. Because it held state law inapplicable to the claim, the Court of Appeals did not decide what effect South Carolina statutes of limitations would have on the claim. *Catawba Indian Tribe v. State of S.C.*, 718 F.2d 1291 (4th Cir. 1983), *aff'd en banc* 740 F.2d 305 (4th Cir. 1984) (*Catawba I*).

On the State's petition to the Supreme Court for a Writ of Certiorari, the Department of Justice, overruling Interior's views, urged the Court to grant *certiorari* and reverse the Court of Appeals on the grounds that the 1959 termination act had, contrary to the Government's 1959 bargain, destroyed the Tribe's claim through the application of state statutes of limitations. This was the first notification received by the Tribe that the Government would not fulfill its bargain and take action to protect the claim or that it believed that the claim had been unprotected since 1962.

The Supreme Court granted *certiorari* and ruled against the Tribe in 1986. Reviewing the single issue of whether the 1959 Act applied state statutes of limitations to the Tribe's Federal cause of action, the Court ruled 6-3 that the statute's plain language (drafted by the BIA) compelled the application of state law limitations periods to the claim. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986). The case was remanded to the Court of Appeals to determine the effect of state law limitations on the Tribe's claim.

In 1989, the Court of Appeals ruled that an undetermined portion of our claim survived because South Carolina's 10-year statute of limitations would operate to bar the Tribe's claim only to those lands where the non-Indian occupant could prove adverse possession for a continuous 10-year period between 1962, when the termination act became effective, and 1980, when the Tribe filed suit. Because adding together ("tacking") successive periods of adverse possession to meet the 10-year statutory period is not permitted by South Carolina law, the Tribe's claim would not be barred as to lands not continuously

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investigated by the Department of the Interior pursuant to 28 U.S.C. §2415 (1982). 48 *Fed.Reg.* 13920 (1983). Interior's inclusion of the claim on the §2415 list meant that §2415's Federal statute of limitations would not begin to run on the claim until the Department formally notified the Tribe that it would not pursue the claim on the Tribe's behalf. The Catawba land claim remains on the §2415 list.

possessed adversely for 10 years. *Catawba Indian Tribe v. State of S.C.*, 865 F.2d 1444 (4th Cir. 1989), *cert. denied*, 491 U.S. 906 (1989) (*Catawba II*).

On remand, the district court, on July 19, 1990, found numerous defendants' evidentiary showings to be sufficient to prove adverse possession for 10 years. It then dismissed 75% of the land occupied by the named defendants (parcels totaling 10 to 20% of the 1763 Treaty Reservation). On the Tribe's appeal, the Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and vacated and remanded in part. *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334 (4th Cir. 1992) (*en banc*), *cert. denied*, 113 S.Ct. 1415 (1993) (*Catawba III*).

In 1990, the Tribe filed suit against the United States for that portion of the claim that has been or will be lost--estimated to be 75% based upon *Catawba III* -- as a result of the Government's breaches of contract and trust in failing to protect the land claim from the effects of the 1959 Termination Act. Although that suit was dismissed on statute of limitations grounds, *Catawba Indian Tribe v. United States*, 982 F.2d 1564 (Fed.Cir. 1993), *cert. denied*, June 21, 1993, it remains clear that the Federal Government's negligence directly caused the Tribe to lose at least 3/4 of the claim. For, as the Supreme Court ruled, without the 1959 Act's application of state statutes of limitations, our claim, like that of the Oneida Tribe in New York, would be intact and entirely free from the application of any time-related defenses. *See* footnote 2 above.

The historical record of Federal neglect and mismanagement contained in the Interior Department's own files, *see* Exhibits C, D & E, together with the failure both of Congress in 1959 and the Justice Department in 1985 to take action to protect the claim, form the basis for at least a 75% Federal share of the settlement contribution. The fact that the United States can now bar the court-house door and prevent the merits of our claim from being heard in its courts does not absolve this nation of its moral duty to set its account straight with the Catawba Tribe. As Justice Blackmun observed in his dissent from the Court's 1986 ruling:

> Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From my perspective, there is little to be proud of here.
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> Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," . . . I do not join the judgment of the Court.

476 U.S. at 529 (citation omitted). The enactment of H.R. 2399 will belatedly permit this great nation to keep its word to the Catawba Tribe.

THE PUBLIC POLICY/EQUITABLE JUSTIFICATION FOR FEDERAL PARTICIPATION IN A LEGISLATIVE RESOLUTION

In addition to the moral and legal/historical justification outlined above, there exists a second compelling need for Congress to act expeditiously to settle this claim. Following the Federal District Court's refusal to certify a defendant class action in 1991, and with the settlement talks that had begun in 1990 apparently stalled, the Tribe began preparations to sue each of the 61,767 occupants of the claim area for possession of the lands they occupied. The Court's denial of class action status had re-started the running of a statute of limitations period in which only 20 months remained when we filed our lawsuit in 1980. With the Tribe's preparations to file the massive lawsuit on September 2, 1992 nearing completion,[6] Congress, in August, 1992, enacted legislation that again suspended the running of the statute of limitations to give the parties additional time to negotiate a settlement. [Exhibit M, the Act of August, 11, 1992, 106 Stat. 869].

After 10 days of virtually non-stop negotiations, by the early morning hours of August 29, 1992, we had made substantial progress toward agreement. Later that day, the Tribe assembled and concluded that settlement was likely. Consequently, we agreed to postpone filing the suit that all parties had come to regard as a "doomsday bomb" for the entire region. *See* Exhibit N, (a sampling of press clippings). Negotiations continued, and in January, 1993 we finalized an Agreement in Principal [Exhibit O] that would form the basis of the State and Federal implementing legislation. On February 20, 1993, the Tribe overwhelmingly endorsed the Agreement. *See* Exhibit L, NARF Legal Review at 11-12.

On June 14, 1993, in a signing ceremony in the rotunda of the State Capital, South Carolina Governor Carroll Campbell signed the State implementing legislation into law. [Exhibit P]. It is now up to Congress to take the final step in bringing this 200-year-old struggle to a close. The 102nd Congress envisioned such action last August when it extended the statute of limitations until October 1, 1993. Quick enactment of H.R. 2399 will

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[6] As Exhibit Q, I have furnished the Committee samples of the printed individual summonses and complaints, together with the notice of claim (*Lis Pendens*) and necessary forms for service by mail. These samples are stamped "VOID" and "CONFIDENTIAL," as they contain the official seal and signature of Clerk of the United States District Court for the District of South Carolina. The suit against the 61,767 individuals, captioned *Catawba Indian Tribe of South Carolina v. City of Rock Hill*, Case No. 92-2450, has not been filed. The official signatures, seal, filing stamp and case number were obtained through pre-filing orders issued by the Federal district court to facilitiate printing, service by mail and the court's orderly administration of the case. The original summons, complaint and *Lis Pendens* that will be filed with the court is a document 16 inches thick, and is not included as an exhibit to my testimony, although one copy is available for the Committee's viewing. The original documents for filing, together with the 1.4 million pages of documents for service by mail, are in storage. It is our hope that we can soon recycle them.

remove the title cloud on the homes and businesses of 62,000 individuals and the resultant economic uncertainty that has confronted our region for nearly 20 years. In addition, it will enable the Catawba Tribe to build a secure future and thereby fulfill, at least to some small measure, the promise of cultural and political survival and economic self-sufficiency that our ancestors first bargained for in treaties with the King of England. In contrast, yet another Federal failure to act will condemn the Tribe and our non-Indian neighbors to a litigation purgatory, an uncertain future created by the spectre of the massive economic and social disruption that inevitably would attend such expensive and divisive litigation.

Please give H.R. 2399 quick and favorable consideration. Thank you.

Gilbert Blue, Chief
Catawba Indian Tribe of South Carolina

FACT SHEET

H.R. 2399: CATAWBA LAND CLAIM SETTLEMENT & RESTORATION

HISTORY. 1763 Treaty Reservation (144,000 acres) taken by State in 1840 in violation of Federal law, giving rise to tribal claim to possession of land now occupied by 62,000 defendants. Tribe terminated by Congress in 1959.

SETTLEMENT PROVISIONS. Tribe releases claims in exchange for $80 to $90 million in value -- $50 million in cash ($32m federal & $18m state & local) paid over 5 years. Includes **restoration** of Federal trust relationship; trust funds for **land acquisition** (up to 4,200 acres), **economic development, social services and elderly assistance, education,** and **per capita payments** (15% or $7.5m); and comprehensive **jurisdictional compact** between state and Tribe (covering civil, criminal, and regulatory jurisdiction).

TRIBAL SUPPORT. On February 20, 1993, Catawba Tribe voted 87% in favor (289 to 42) of settlement package negotiated by its Executive Committee & attorneys over a 3-year period of intense negotiations.

JUSTIFICATION FOR FEDERAL PARTICIPATION. Since 1840, the United States has been aware that the Tribe lost its lands illegally, yet, despite repeated tribal requests, took no action to fulfill its duty to protect the Tribe in possession of its Treaty Reservation. In 1959, the Interior Department promised the Tribe that, in return for the Tribe's agreement to release the BIA from a contractual duty to provide services, the BIA would protect the Tribe's land claim. BIA then told the Tribe, which had no lawyer and whose leaders could neither read nor write, that its claim was being protected, while at the same time pushing a bill through Congress that did not protect the claim. Later, BIA led the Tribe to believe that it would take action to preserve the claims, but did not. In 1991, the Federal courts ruled that as much as 75% of the Tribe's land claim had been lost as a result of the BIA's broken promise.

NEED FOR QUICK FEDERAL ACTION. In August, 1992, Congress extended statute of limitations applicable to Tribe's claim until October 1, 1993 to avoid individual lawsuits against 62,000 occupants & give parties more time to reach settlement. State legislation implementing settlement signed into law on June 14, 1993. If settlement is not final (signed by President) by September, Tribe must file lawsuits against 62,000 individuals -- resulting in collapse of settlement.

STATUS OF FEDERAL SETTLEMENT BILLS. H.R. 2399 introduced on June 10, 1993 & hearings before Subcommittee on Native American Affairs scheduled for July 2, 1993 at 1:30. S. 1156 introduced on June 24, 1993.

Mr. RICHARDSON. The Chair recognizes Senator Hayes. Senator, welcome.

STATEMENT OF HON. ROBERT W. HAYES, JR.

Mr. HAYES. Thank you. Let me begin by thanking the Committee for allowing me to testify. I will point out, as Congressman Spratt did, that I too am a land owner in the claim area. It is ours, as are most of the 60,000 landowners in the claim area, and my Senate—I wanted to point it out so there is no question that I have that personal interest.

The South Carolina General Assembly has recently passed, and the Governor signed, a State version of the Catawbas Indian settlement which calls for the State to pay $2.5 million a year for five years for a total of $12.5 million towards settling this claim. The total settlement is $50 million.

This $12.5 million represents a substantial State commitment toward resolving the issue. The remainder of the settlement agreement also represents a strong commitment toward resolving this issue. The remainder of the settlement agreement also represents a strong State commitment toward resolving this matter in that the Catawba Indian Tribe was given certain autonomy over civil and criminal matters, as well as certain tax exemptions.

This commitment on the part of the State goes beyond any potential liability that the State may have under the claim which speaks to the desirability of having the claim resolved from an economic development standpoint for the State of South Carolina, particularly in the northern region of the State which is affected by this claim.

The claim has been in litigation for over 12 years and could very well go on for another 12 years before being finally resolved. A great deal of development has been lost from this part of South Carolina because of the cloud on title.

Also, the claim is at the point where if it is not resolved, approximately 60,000 landowners will be sued in Federal Court with resulting legal fees and inability to sell their property or borrow money on it. Obviously, this would have a further crippling effect on this area of South Carolina.

To understand the commitment the State has made to this claim, it must be borne in mind that there have been virtually no increases in State revenue for the past two to three fiscal years—actually, that is three fiscal years, virtually no increase in State revenues. This resulted in no general pay increases for State employees over the last two fiscal years, other than minor bonuses.

Additionally, the State is facing the financial burden from the closing of the Naval base in Charleston, as well as the State having to refund income taxes to Federal retirees due to a recent Federal Court decision. It could be $130 to $200 million in commitment there. Thus, the commitment of $12.5 million is a major expenditure at the State level.

I am here today to urge the Committee to support funding for the Federal portion of this settlement. The reason for your support, once again, goes beyond any potential liability of the Federal Government in this suit, although there may be some liability on the

part of the Federal Government as has been outlined by Congressman Spratt.

The primary reason for Federal support is the good that it will do for the Catawba Indian tribe and for the State of South Carolina. I believe that the proposed settlement is a win-win situation that will allow the Catawba Indian tribe to have a great potential for meeting the needs of its people, but at the same time allowing the State of South Carolina, particularly the north central portion, to grow and develop economically.

Congressman Spratt, the Congressman from this area, has spearheaded the effort toward reaching this settlement and I commend him for his efforts and I strongly support his testimony before the Committee today. I too have been involved in the settlement process, particularly in getting the State legislation through the General Assembly.

I would be glad to answer any questions from any member of the Committee at the appropriate time.

Mr. RICHARDSON. Senator, just for the record, this area is in your Senatorial district?

Mr. HAYES. Most of the claim area and the current reservation, 630 acres, is all in my Senate. Most of the claim area is in my Senate district.

Mr. RICHARDSON. Thank you, Senator.

[Prepared statement of Mr. Hayes follows:]

STATEMENT
OF
SENATOR ROBERT W. HAYES, JR.
South Carolina State Senator from York County

Let me begin by thanking the Committee for allowing me to testify today concerning the Catawba Indian Settlement. The South Carolina General Assembly has recently passed and our Governor has recently signed the state version of the Catawba Indian Settlement which calls for the state to pay $2,500,000.00 a year for five years for a total of $12,500,000.00 toward settling this claim. The total settlement is $50,000,000.00. This $12,500,000.00 represents a substantial state commitment toward resolving this issue. The remainder of the settlement agreement also represents a strong state commitment toward resolving this matter in that the Catawba Indian Tribe was given certain autonomy over civil and criminal matters, as well as certain tax exemptions. This commitment on the part of the state goes beyond any potential liability that the state may have under the claim, but speaks to the desirability of having this claim resolved from an economic development standpoint for the state of South Carolina, particularly in the northern region of the state which is affected by this claim. The claim has been in litigation for over twelve years and could very well go on for another twelve before being finally resolved. A great deal of development has been lost from this part of South Carolina because of the cloud on title. Also, the claim is at the point where if it is not settled, approximately 60,000 landowners will be sued in federal court, with the resulting

legal fees and inability to sell their property or borrow money on it. Obviously, this would have a further crippling affect on this area of South Carolina.

To understand the commitment that the state has made toward this claim, it must be born in mind that there have been virtually no increases in state revenue for the past two fiscal years. This has resulted in no general pay increases for employees other than some minor bonuses. Additionally, the state is facing a financial burden from the closing of the naval base in Charleston, South Carolina as well as the state having to refund income taxes to federal retirees due to a recent federal court decision. Thus the commitment of $12,500,000.00 over five years is a major expenditure at the state level.

I am here today to urge the committee to support funding of the federal portion of the settlement. The reason for your support once again should go beyond the potential liability of the federal government in this suit, although I will point out that the federal government is a named party in the suit and does have potential liability if the claim is not settled. The primary reason for federal support is the good that it will do for the Catawba Indian Tribe and for the state of South Carolina. I believe that the proposed settlement is a "win-win" situation that will allow the Catawba Indian Tribe to have a great potential for meeting the needs of its people, while at the same time allowing the state of South Carolina, particularly the northern portion, to grow and develop economically.

Congressman John Spratt, Congressman from our area of South

Carolina, has spearheaded the effort toward reaching this settlement, and I commend him for his efforts and strongly support his testimony before this committee today. I, too, have been involved in the settlement process, particularly in getting the legislation passed at the state level. I would be glad to answer questions of any member of this Committee.

Mr. RICHARDSON. The Chair recognizes Mr. Elam.

STATEMENT OF MARK ELAM

Mr. ELAM. Congressman, I appreciate the opportunity to be here. Governor Campbell wanted me to express his sincere thanks for you expeditiously handling this matter. Unfortunately, he was not able to be here because he is overseas on an economic development mission which he hopes to come back with good news in the near future, but nonetheless, he has prepared a statement which we would like to submit for the record and also briefly comment that this ongoing litigation has been before us since the early 1980s.

Governor Riley was the first Governor when this matter came before him. He worked long and hard on trying to reach a settlement, along with former Attorney General, Dan Cloud. A settlement was not reached. This fell into Governor Campbell's lap when he was elected Governor. Congressman Spratt has talked to him extensively about the nature of the claim and the State of South Carolina has gotten involved in the litigation and involved in the discussions and negotiations.

I can't tell you the length of negotiations that were carried on in the past four years. I can tell you that at one point, after many extensive long weeks in a local motel in York County, South Carolina, someone quipped that maybe we ought to call this a treaty of Holiday Inn.

But nonetheless, we have spent an awful lot of time on this and we believe that one of the State's two objectives in these negotiations is, one, to expeditiously as possible resolve this conflict so that the next Governor, next Attorney General, or the citizens of South Carolina and the Catawbas do not have to live with this for another 150 years, but also to provide a settlement agreement that would not provide simply for the parties merely to co-exist, but to provide a framework for a longstanding relationship between the Catawbas and the neighboring citizens of South Carolina so we don't have some of the conflicts and problems that have developed in other parts of the country.

That is to say, Governor Campbell, in his membership at NGA, has talked extensively with other governors in other parts of the country, talked about the kind of problems that they have had over the past several years, and we hope that we have got an agreement that will not have some of these ongoing problems that occupy the time and the efforts of the Catawbas and the citizens of South Carolina.

We think this is an agreement in which all parties had to compromise. There were many points that the parties don't agree to, but overall, we think this is the kind of agreement that the State, the Catawbas, and the United States can live with for a long time to come.

I appreciate you all allowing us to be here today, and if there are any questions, we would be happy to answer them.

[Prepared statement of Hon. Carroll A. Campbell follows:]

TESTIMONY OF THE
HONORABLE CARROLL CAMPBELL
GOVERNOR OF THE STATE OF SOUTH CAROLINA

BEFORE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

Mr. Chairman, members of the Committee, as the Governor of South Carolina I am pleased to submit these remarks to you. I very much appreciate the willingness of the Committee to schedule these hearings so promptly and to expeditiously consider this legislation which means so much to the people of South Carolina. Unfortunately, because the hearings were scheduled so promptly I was unable to rearrange my schedule to permit me to attend these hearings. Instead, I must be out of the country on an economic development mission for the State of South Carolina.

I have asked Mark Elam, Esq., my senior legal advisor to represent me at these hearings, and to convey my support for H.R. 2399. Accompanying Mr. Elam are Kenneth Woodington, Senior Assistant Attorney General, and James L. Quarles III of the law firm of Hale and Dorr. These gentlemen have represented the State in the litigation and negotiations with the Catawbas.

I strongly support H.R. 2399 and ask that you report favorably upon the bill and recommend it to the House for passage. I believe that this bill is a fair resolution to an issue that has inflicted and threatens to inflict further hurt and economic damage on the Catawbas and the citizens of South Carolina. This

bill promises to settle not only litigation which has gone on for more than a decade (and threatens to go on for decades longer) but to finally resolve a dispute that has been around for more than 150 years.

A. Background of the Litigation.

I shall leave for others the ancient events that lie at the base of this matter. For me, it is important for the Committee to realize the disruptive effect that this ancient claim--pursued under a federal statute known as the Non-Intercourse Act, 25 USC Section 177--has had on the State of South Carolina, the local communities and the landowners effected by this lawsuit. Although the history of the litigation from a lawyer's perspective is contained in the committee report of a bill passed in the last Congress, Pub. L. 102-339 (August 11, 1992), 106 Stat. 869, the history of this litigation from my perspective and the perspective of other elected officials in South Carolina was an important ingredient in the State's decision to reach a settlement.

As long ago as 1978, when I was a Member of Congress representing the 4th District of South Carolina, I learned that the Catawba Indians were asserting that they had a right to 144 square miles encompassing parts of York and Lancaster Counties and the City of Rock Hill. Like many non-lawyers, I was amazed that a claim involving events alleged to have occurred in 1840 could threaten the titles to land that had been passed down in families for generations, and which had been bought and sold on the

strength of attorneys' opinions of titles for more than a century and a half.

For more than three years people of good faith sought to work out a negotiated settlement accommodating the Catawbas' desire for an increased reservation and a measure of sovereignty over their members. In 1980 a group came close to negotiating a settlement which would have resolved this issue once and for all.

That effort failed, despite the efforts of my predecessor, Governor Richard Riley and former Attorney General McLeod. As a result, the Catawbas commenced their action against 76 defendants who were alleged to represent all of the landholders who owned land in the 144 square mile area. That litigation took on a life of its own.

The defendants argued that legislation passed during the Termination Era, the Catawba Division of Assets Act, 25 USC § 931, et. seq. had, among other things, made state law statutes of limitation apply to the Catawbas' claim, and that the passage of time had caused those statutes of limitation to expire so that the Catawbas' claims were barred.

The district court judge appointed by then Chief Justice Burger to hear the case (all of the South Carolina district court judges had recused themselves) agreed with the defendants and dismissed the complaint. The Catawbas appealed to the United States Court of Appeals for the Fourth Circuit. A panel of that court voted two to one that the district court had erred in holding that state law statutes of limitations applied. The defendants asked

the entire Fourth Circuit to reconsider that ruling and it agreed to do so.

By a single vote the seven judges who considered that issue held that the state statutes of limitation did not apply. One judge, Judge Francis Murnaghan, wondered whether the litigation was not headed for the most unjust result of all--one in which the small landowner ended up, in his words, "holding the Queen of spades" in a mythical game of hearts because the State had relied on its Eleventh Amendment immunity from suit, and the federal government had abandoned any accountability for its conduct.

In 1986 the United States Supreme Court agreed to hear the case and to review the decision of the en banc court of appeals. The Supreme Court held, by a six to three vote, that the statute of limitations did apply, and remanded the matter to the court of appeals to consider whether the entire claim was barred, or only a part. More than three years elapsed before that issue was resolved by a holding that any person who could demonstrate that he or she had possessed the land for ten consecutive years in the period between 1959, when the Catawba Act was passed, and 1980, when the Catawbas filed suit, was free of the claim. Anyone who could not make that demonstration was still subject to the claim.

In 1990 the district court began the task of sorting out who among the original defendants was free of the claim and who was still subject to it. That task was a massive one and produced briefing more than 10 feet high. When the dust cleared much of the acreage owned by the 76 original defendants was released from

the claim. However, the rulings made it extremely likely that Judge Murnaghan's prophecy would come true. The persons most likely to end up holding the Queen of Spades are the tens of thousands of small landowners--not the farm, factory, church or school that had owned its land for years--but the families that bought land in a subdivision that had changed ownership several times in the relevant period.

Another ruling of the district court--that the Catawbas must sue every landowner within the claim area if they wanted to extend their claim beyond the landowners who had been sued in the original claim--threatened to work even greater hardship on the area. More than 61,000 landowners would be faced with the prospect of retaining a lawyer and defending their homes and businesses.

Although I was willing to continue to litigate the federal case unless an acceptable settlement could be reached, I directed Mr. Elam and Crawford Clarkson, the Chairman of the State Tax Commission, to seek to negotiate a resolution of this litigation. Working with Representative Spratt and State Senator Hayes they were ultimately successful in reaching a settlement that all parties could support. That settlement was reduced to a bill which was enacted by the General Assembly of the State of South Carolina and signed into law by me on June 14, 1993.

B. The Settlement Reached is a Fair One.

The settlement reached between the Catawbas, the State, the local communities and the private landowners is a fair one. Everyone involved negotiated in good faith. Everyone involved would like to change some portion of the settlement, but everyone involved recognizes that the settlement was the product of necessary compromise.

The salient features of the settlement reflect an attempt by all of the parties to provide a workable framework for the Catawbas, the State and the local citizenry to not only coexist, but to forge a new alliance. The settlement provides to the Catawbas sufficient funds to permit them to acquire and develop a land base, to undertake economic development activities and to provide support and assistance to their members. It provides to the Catawbas state tax benefits which will permit them to build housing for their members, and provide to their governmental entity not only attractive tax treatment, but also allow it to impose taxes to support its governmental functions. The settlement provides to the Catawbas a measure of sovereignty and control over members that they have not had for decades.

On the other hand, the settlement removes the cloud which hangs over the title of the landowners. It also insures that the Reservation will be developed and used in a manner compatible with the surrounding community. It provides to the Catawbas the ability to conduct high stakes bingo in a way no other group in South Carolina can conduct such high stakes gaming, while at the

same time avoiding the possibility of casino gaming that is so inconsistent with the public policy of our State.

In short, this settlement is the best resolution creative minds, negotiating in good faith, could produce. The form and substance of virtually every word and phrase in it has been discussed and reviewed many times over. The settlement is so delicate that, at the time the state implementing legislation was signed, the Catawbas and I signed a Memorandum of Cooperation pledging that neither we nor anyone else who participated in the negotiations would seek to improve our position by lobbying to change any portion of the federal legislation. This legislation represents a settlement which cannot be reopened, and should not be altered because of the views of people who did not participate in the negotiations, and do not know the give and take necessary to produce this settlement.

I would like to respond briefly to questions I anticipate may be asked about the settlement.

1. The Settlement Equitably Adjusts the Competing Needs of the Catawbas and the State and Local Governments.

Some may question this settlement because the Catawbas do not receive all of the "sovereignty" normally attaching to the reservations of federally recognized Indian tribes. Those who level that criticism ignore the unique circumstances under which this settlement was reached.

First, this settlement provides to the Catawbas something a prior Congress removed from them--recognition as an Indian tribe

having a government to government relationship with the United States. This bill does not diminish the Catawbas' sovereignty. Until this bill is passed, and the Catawba Termination Act repealed, the declared federal policy is that the Catawbas are citizens of the State of South Carolina and subject to the laws of the State of South Carolina. This bill grants to the Catawbas a degree of sovereignty greater than they have exercised for more than a century and a half.

Second, it is not possible to turn back the hands of time. Since the early 1800's the Catawbas have lived among the people who settled South Carolina. Since 1840, at least, the land they sought to recover in their lawsuit has been treated as a part of South Carolina. It has been subject to the laws of the State, has been patrolled by local, county and state police, and has been indistinguishable from any other private land in the State.

That land is now located in an area that is part of a rapidly growing area of South Carolina located less than a 30-minute drive from the international airport at Charlotte. The City of Rock Hill, and the counties of York, Lancaster and Chester are areas which grow more urbanized with every passing year. Homes and subdivisions are replacing farms. What once was open space may soon be the home of a National Football League stadium.

Carving from that area a reservation having the jurisdictional attributes of, for example, the Navajo Reservation, is not feasible. The land is now so valuable that creating a massive reservation would require an expenditure so great that it would

greatly exceed the amount called for in the present settlement bill. The land is now held by so many different people that it is extremely unlikely that the Catawbas could assemble any sizable contiguous parcel. A reservation of noncontiguous parcels would produce the anomalies associated with checkerboard reservations.

Whatever may have been the state of this land in 1760, 1763, or 1840 this land has been part of South Carolina for more than 150 years. Innocent landowners, businessmen and others have settled on the areas surrounding the area where the new reservation will be located in the expectation that they, and the land around them will be governed by the laws of the State of South Carolina. The Catawbas do not intend to, and can not, supplant many of the services now provided by the local communities. It would be unrealistic to expect them to duplicate the school systems of York and Lancaster Counties. It would be equally unrealistic to expect that those counties can continue to provide quality schooling without some revenue from the Catawbas who continue to use those schools.

Nor is this an unprecedented allocation of jurisdiction between Indians and a State. The Maine Settlement Act explicitly provides that the Indians shall have the jurisdiction afforded a municipal corporation. The Gay Head Settlement Act provides that the Gay Head Wampanoags shall be subject to all the laws, civil, criminal and regulatory, of the Commonwealth of Massachusetts.

Those settlements have been successful accommodations of the competing interests of tribes, States and local communities, and reflect the reality of life in congested areas on the East Coast of the United States. They provide a model to be followed, not a model to be discarded.

2. The Allocation of Payments is Equitable.

The bill provides for the State to pay $12,500,000, local governments and private parties to pay $5,500,000, and for the federal government to pay the remaining share. That allocation is equitable.

The State has agreed to pay $12,500,000 despite the existence of a technical defense that might have permitted it to escape liability. The Eleventh Amendment, as recently interpreted by the United States Supreme Court in the Blatchford case, prohibits suits against a state by citizens of that state in the courts of the United States. Instead of availing itself of that defense, and insuring that Judge Murnaghan's prophecy came true, the State of South Carolina has appropriated a substantial sum at a time when the closing of the Charleston Naval Base and the recent decision on the taxability of federal retirement pensions threaten our tax base.

The federal government has never assisted the Catawbas. At every turn they have rebuffed their advances.

As early as 1782, the Catawbas complained to the continental Congress of encroachments on the reservation they claimed under the 1763 Treaty of Augusta. They sought that their lands "be so

secured to their tribe as not to be intruded into by force, nor alienated even with their own consent . . . ." The Continental Congress denied this request, and instead "recommended to the legislature of the State of South Carolina" that the State "take such measures for the satisfaction and security of the said tribe as the said legislature shall in their wisdom think fit."

The very limited federal activity regarding the Catawbas in the nineteenth century was directed not toward securing the 1763 reservation, but toward assistance in removing the Catawbas to lands west of the Mississippi. 9 Stat. 252 (1848); 10 Stat. 315 (1854).

The federal government's nineteenth century failure to assist the Catawbas was based on an implicit view that the Catawbas were "State Indians" rather than a federal responsibility. In 1906, the Commissioner of Indian Affairs stated this position explicitly. Responding to an attorney's request in 1906 for assistance in pressing a claim to the land they sued for in 1980, The Commissioner stated:

> . . . . I do not agree with your conclusion that these people are not "State Indians" but wards of the Government . . . . Any treaty concluded by the State with these Indians was not void . . . . solely because it ceded lands without the consent of the United States, such consent not being necessary as to lands in which the General Government did not possess the ultimate fee.

A second request in 1909 met with a similar response.

The correspondence of other federal officials in the first few decades of the twentieth century contains many similar

disclaimers of federal responsibility for the Catawbas. Even when the government did finally act to provide some assistance in 1943, the assistance was almost entirely State-funded. In fact the State bought the 3,434 acre reservation which was the core of the limited federal activity from 1943 to 1959. But even this limited federal effort was short-lived, ending in 1959 with the passage of the Catawba termination act.

The mere assertion of the Catawba claim has caused tens of thousands of titles in South Carolina to be clouded. The assertion of that claim is the result of the application of the Non-Intercourse Act to eastern Indians, despite the fact that the policy behind that act was either explicitly repudiated or completely ignored for almost two centuries by the executive branch and was revived by the federal judiciary only in the 1970's. While South Carolina has never admitted that the United States was trustee for the Catawbas, the historical record shows that if such a trust relationship existed in theory, it was never put into practice by those charged with its enforcement. Had the United States in fact recognized and maintained a trust relationship with the Catawbas in the nineteenth century, the 1840 Treaty would either have been approved, in which case there would be no claim today, or disapproved, in which case there still would be no claim.

For these reasons, the cause of this claim which clouds the titles of tens of thousands of its landowners is either federal inaction in the face of a trust relationship, or federal action in

creating the possibility that such a trust relationship exists when in fact it does not. Either way, the question is one whose answer is far too costly to obtain, both for the innocent landowners and the Catawbas as well. The proposed settlement fairly allocates the financial responsibility for the historical oversight or error which has given rise to this claim.

Mr. Chairman, I urge you to report this bill favorably and recommend its passage. Congress must act promptly to avoid the disruption that 60,000 lawsuits would cause.

Mr. RICHARDSON. Mr. Elam, the gentleman to your far left, is that Mr. Woodington?

Mr. ELAM. No. That is Mr. Miller.

Mr. BLUE. That is Mr. Don Miller, our attorney.

Mr. RICHARDSON. So that basically concludes those that are making statements?

Mr. ELAM. Yes, sir.

Mr. RICHARDSON. Let me start out by asking some informational questions. First to you, Mr. Elam.

Did anyone from the United States Government agree to pay $32 million for the settlement?

Mr. ELAM. Yes, sir, Mr. Chairman. During the last year, the Governor and Congressman Spratt and several Members of the congressional and legislative delegations have had discussions. We have met on a couple of occasions with former Secretary Lujan.

Mr. RICHARDSON. Okay. Was the calculation based on a formula that was basically a consensus?

Mr. ELAM. Yes, sir.

Mr. RICHARDSON. But not based on any years, although I would like the analogy of my friend from Hawaii, but it was basically a consensus agreement?

Mr. ELAM. Yes, sir.

Mr. RICHARDSON. Under the bill, the Secretary of the Interior has to collect $18 million from South Carolina citizens. How would that work? I know the Department of the Interior isn't here, but was anything procedural set up about that?

Mr. ELAM. What we have done, we have adopted separate legislation that—beyond the agreement that for this year appropriates $2.5 million, which is held in an account by the Treasurer of the State of South Carolina until such time as the final agreement is reached or final legislation has been adopted and ratified, signed by the President, at which time the State of South Carolina will issue a check to the Secretary of the Interior and he will hold it for the purposes——

Mr. RICHARDSON. So it will be basically a simple transaction?

Mr. ELAM. Yes, sir.

Mr. RICHARDSON. You won't have the Department of the Interior being a collection agency?

Mr. ELAM. No, sir. We hope not.

Mr. RICHARDSON. Now, the Committee—and my good friend and colleague knows this, is still waiting to hear officially from the Interior Department, and in a way, I think I am pleased that they are not here because I believe they are now seriously studying their response at the urging of several of us that would like to resolve this matter. It is better to have support from the Department than a non-position.

Let me deal with an issue that I think will be coming up and that is, is there any flexibility on the part of the State or the tribe in the issue of jurisdiction over federally recognized tribes? In other words, under this bill, you as a State are going to have more jurisdiction over a federally recognized tribe than any other State in the Union and we in this Committee, have to deal with that. Is there any flexibility there on either side?

Mr. ELAM. Mr. Chairman, we feel that this agreement is very much similar in nature to other tribes, eastern Indian tribes. We feel our situation is much different than perhaps tribes in the western part of the United States. We feel this is a long, hard-fought agreement and one of the problems that we have with the State of South Carolina was selling this to the entire State.

South Carolina, like every part of the United States, has its regional influences, and to sell this legislation or the State legislation to people in Charleston, to people in Greenville, South Carolina, who had no financial interest, not the pressure that the people in York County had, we had to make certain agreements and commitments that we think we have to live up to.

So quite frankly, I do not think that we have any flexibility with respect to that issue.

Mr. RICHARDSON. Now, Chief, I am very pleased what you told me, that you have support from the National Congress of American Indians. They endorsed the resolution?

Mr. BLUE. Yes, sir.

Mr. RICHARDSON. I take it that the Catawba tribe supports this, too.

Mr. BLUE. Yes.

Mr. RICHARDSON. Through your election and referendum process?

Mr. BLUE. Several ways we know that to be true. At one meeting, we had a vote and somebody—correct me if I am wrong on the numbers, but I think it was 289 to 42 to accept this proposal as it was.

Mr. RICHARDSON. Do you think this is the best you could get out of the State?

Mr. BLUE. Yes, sir, I really do. We—as has already been alluded to many times, we worked hard and long hours into the night. There were many issues that we would like to have had differently, but if we had pursued those too vigorously, then we could have probably lost the whole thing.

So we feel like—and I have to say this, as Mr. Elam talked about the State of South Carolina and his constituents and them having to be satisfied, we are in a unique position in the Catawbas. We are not like the western tribes. We are right in the middle of this economic corridor in York County and our people have never had a government setup where we had to run our own courts, whether they be criminal or civil.

But we have enough, I think, in the package that if some time in the future we want to establish a civil court, it says that we can, when we get to the position that we are able to handle that.

As far as civil is concerned, that would be more of a detriment to my people right now, in my opinion. The people felt that way as well. Because it would have too much of a burden to try and institute that law on the reservation with the small government we have at the present time.

Mr. RICHARDSON. You would be appealing though, Chief, into the State court system.

Mr. BLUE. That is my understanding, yes, in part. Let me let Don Miller answer that for you.

Mr. RICHARDSON. Mr. Miller.

Mr. MILLER. Thank you, Congressman Richardson.

Some of the appeals would go into the State court system, but not all of them. The tribe has exclusive jurisdiction if it chooses to exercise it in certain areas related to internal tribal matters and the conduct of—well, the conduct of business activities on the reservation. They have initial or original jurisdiction. And then the appeals would go into the State courts.

But you earlier characterized the amount of jurisdiction that the tribe would have through this legislation as less than any other tribe in the country and that the State would have greater influence than any other State.

And while I agree that the jurisdiction of the Catawba tribe under this agreement would be down on the low end of the spectrum, if you will, it clearly possesses greater jurisdiction under this agreement than a number of other eastern Indian tribes have received under their settlements.

I think it is worthy of note that the Maine—the tribes in Maine, the Passamaquoddys and the Penobscots, when they settled their non-Intercourse Land Act claim in 1980, they had been federally recognized tribes for some four years, and they were receiving full Federal services, but the agreement that they made to settle their land claim provided for greater State jurisdiction by the State of Maine than we have gotten in this agreement.

And there is no question that it was a hard fought issue and we conceded quite a lot, but those concessions are concessions that are made with the particular circumstances of this tribe in mind, the parties' assessment of the strength of their litigation position, the weaknesses of their litigation position, the prospect of another 25 years of litigation as opposed to being able to bring it to a close now, what price do we pay for continuing a struggle such as this.

So I think the important thing to emphasize is that the tribe, for their circumstances, they are in a suburban area with not—fewer traditions of strong tribal institutions such as courts and police forces and so forth than most other tribes have. They find this satisfactory, and I think that it is most—well, the way to conceive of this agreement, I think, that makes the most sense is that this legislation embodies a jurisdictional compact between the tribe and the State which is broader than most jurisdictional compacts between tribes and states.

But it is not at all uncommon for tribes and states, particularly in the last five or seven years, to enter into agreements on taxation. I mean, many Indian tribes around the country are finding that it is not to their advantage——

Mr. RICHARDSON. I think it is particularly significant that you are here because your organization is renowned for advocating Indian rights across the country. So, what you are basically saying is this is a unique situation. This is a negotiation that dealt with the issues that I am raising, and in your view, you are very strongly supporting this legislation; is that correct, Mr. Miller?

Mr. MILLER. Absolutely. Well, I am—I don't have an independent position on this. This is my client's position. I am their lawyer and the Native American Rights Fund serves in their capacity as their lawyer. And, of course, we have had to examine the question of, do we—where do our responsibilities lie, to some broad Indian policy

generally or to a client who has a particular need and wants a particular result? And we are their attorneys.

Mr. RICHARDSON. Now, before I recognize my colleague from Hawaii, then my colleague from South Carolina, let me ask Counsel Elam a question.

What is the significance of the September deadline? Chairman Spratt has urged us to move expeditiously. Take us through the process.

Mr. ELAM. October.

Mr. BLUE. October 1, yes.

Mr. RICHARDSON. October 1? Mr. Elam.

Mr. ELAM. Yes, sir. I may not be the right person to answer this.

Mr. MILLER. Would you like some props?

Mr. ELAM. All right.

Mr. RICHARDSON. Maybe the Senator can answer this. It may be a political answer that I am basically looking for.

Mr. HAYES. No, sir. I think it is more of a legal statute of limitations question that the Congress, by a bill, I believe, Congressman Spratt can clarify, has extended the statute of limitations by one year to stop the filing of 60,000 lawsuits. That year runs out in October and that is kind of the deadline we are operating under. They may want to explain that in more detail.

Mr. RICHARDSON. Mr. Miller, are those papers there for a reason?

Mr. MILLER. If I might have permission to, if you would like to take a closer look at these, I would be glad to bring them up. This first document——

Mr. RICHARDSON. Are those the 60,000 complaints?

Mr. MILLER. Yes. This is the lis pendens with 61,767 defendants claimed by name. This is one copy of the complaint and this is one copy of the summons. These are the documents that would—well, they are in storage right now. These will be filed in the Federal District Court if we weren't successful in beating that statute of limitations. These—I brought some samples.

In addition to filing these originals in the court, each of the 61,767 occupants of the claim area would receive in the mail an individualized summons, complaint, lis pendens, and return envelope for service by mail. These, too, are in storage.

If the Committee were to examine these, they would find that they are complete with a filing stamp from the clerk of the court, the seal of the court, the Court's signature and the case number in the case, *Catawba Indian Tribe* v. *City of Rock Hill,* and this is what we are seeking to avoid. It is our desperate hope that we will be in a position to recycle all of this soon.

Mr. RICHARDSON. Let the record show that the Chair and members of the Subcommittee saw the 60,000 complaints. Let me now turn to my colleague from Hawaii.

Mr. ABERCROMBIE. I have no questions.

Mr. RICHARDSON. The gentleman from South Carolina.

Mr. SPRATT. Mr. Chairman, let me thank you on behalf of all of us, my constituents and the people here in the room today, for not just holding this hearing and holding it expeditiously, but for seriously looking into the issues that are before us and showing genuine concern for this problem.

I don't have any further statement to make.

Mr. ABERCROMBIE. Mr. Chairman, I do have a very brief comment then. I don't—didn't mean for any of you gentlemen to think that I was indifferent by saying I had no questions. All my questions have been answered. I will make a comment for the record.

Mr. Elam, Senator, you speaking on behalf of the Governor, Mr. Elam, Senator, and Chief, I think you have made a remarkable statement here today that I hope can be emulated in other contexts. I realize that the situations may not be analogous either in the west or other areas, but I think the context is parallel.

That is to say, we live in the world of today. We all come from someplace. We all have antecedents, we have roots, we have the hunger of memory, if you will, for what might have been, what should have been, what was and maybe shouldn't have been that way, but we all know that we are responsible for what happens today. And as a result of what we do today, that forms the basis for what will happen tomorrow and those for whom we are responsible.

And I believe that the honorable way in which this has been conducted, the obviously difficult, complicated and detailed situation that had to be resolved, does stand as a beacon to what people in good faith and goodwill can accomplish. And to the degree that this agreement will not in history necessarily be applicable to everyone else facing a similar crisis, while it may not be particularly applicable, nonetheless, it shows the way things can be done when people put their minds to it.

And I hope, sincerely hope, that this same attitude can prevail in the numerous other cases that present themselves to this Committee as a whole and to this Subcommittee in particular. I congratulate you and the State once again. For the record, you have my support.

Mr. RICHARDSON. Chief, let me ask you two more questions before we conclude the hearing.

Mr. BLUE. Yes, sir.

Mr. RICHARDSON. The concept of health cards under the bill, what is the reason for those? You get IHS benefits; is that correct?

Mr. BLUE. Under the Restoration Act we would, yes, sir.

Mr. RICHARDSON. What are these health cards?

Mr. BLUE. The reason for that mainly is that we have a lot of Catawba people who live in other states who have married. We have many out West, and they would not be able to get health care under this provision unless they went to—they could go to a local Indian Health Service and probably get it, but there may be circumstances where they couldn't. If we could get this card, it would be easier for our people to get the health care that they desire and need.

Mr. RICHARDSON. Did the Indian Health Service advise you on that provision?

Mr. BLUE. We went to them and had a nice meeting. They gave us all the different packages of care that we could implement on the reservation. They said as far as this card was concerned, they didn't know if we could get it or not, but if we did, they would do what they had to do to implement it. They said go for it. That was their feelings about.

It is the same thing in Nashville. We had some people going to Nashville to talk to the Indian Health Service people who will be handling our area and they told us the same, gave us a good rundown. Said if you can get the card, we will do what we can to implement it.

Mr. RICHARDSON. Mr. Miller, did you want to add something?

Mr. MILLER. Yes, if I might. The Catawba tribe is a small tribe and it is located in an urban, suburban area where there are quite good existing health care facilities. And our thought when we drafted this was that it might not be necessary for the Federal Government to come in and build a health care clinic and staff it with doctors when there were such good facilities available locally.

We have since talked to IHS and it might be the most economical and sensible way, in fact, to build a small clinic there, but we are looking at that. Our goal is to provide absolutely the best health care that we can for the members and we thought that the most efficient way would be to use it, use the existing facilities that are already in place in the area and simply find a way for them to be able to use those rather than start from scratch.

Mr. RICHARDSON. Now, Mr. Miller, let me ask you. Can the State tax the tribe and its members and does the Gaming Act apply to this agreement?

Mr. MILLER. The State can tax the members of the tribe but not the tribe itself. Tribal income is exempt from State and Federal taxes. Tribal members' income—if they don't perform a tribal governmental function, if they aren't performing a——

Mr. RICHARDSON. I meant under the agreement. In other words, assuming this legislation passes.

Mr. MILLER. That is what I am describing. If you have a tribal member working for the tribe and performing a governmental function, his income, her income will not be taxed for 99 years by the State. Other Indians and non-Indians on the reservation, their income would be taxed. The property or buildings and improvements on the reservation owned by the tribe and tribal members are exempt from State taxation.

Mr. RICHARDSON. What about gaming?

Mr. MILLER. Under the agreement, the Indian Gaming Regulatory Act would not apply. Again, this is a—what we view as a gaming—I mean, part of this is a gaming compact. We have agreed that State law generally would be applicable to any gaming activities with the exception that the tribe would be entitled to a special bingo license, which nobody else in the State had.

I mean, it was invented for this case, and the tribe could conduct high stakes bingo six days a week with a $100,000 a game limit.

Mr. RICHARDSON. And the State gets 10 percent, right?

Mr. MILLER. And the State would get 10 percent, but the income of the tribe otherwise off of gaming would be exempt from State and Federal taxes. And the State has made a concession that the tribe can decrease from 60 percent to 50 percent the amount, which is—of gross, which is required to be paid in prizes.

Mr. RICHARDSON. Senator Hayes, would you say that this agreement has the support of the South Carolina legislature?

Mr. HAYES. Yes, sir, it does.

Mr. RICHARDSON. The Governor, who we did learn had another commitment, couldn't be here but I know he feels very strongly about this. Mr. Elam, is that accurate?

Mr. ELAM. Yes, Mr. Congressman.

Mr. RICHARDSON. Let me conclude this hearing by stating that the Committee intends to move this bill. I think that the Chair, and obviously members of our Subcommittee, will support this legislation. It is my view that the tribe deserves restoration. In fact, that is among the last of the terminated tribes to be restored.

Now, what I would like to do is, I have directed the Native American Subcommittee staff to meet with the Interior Department next week to get a departmental position on the bill and to work out, perhaps, any differences that are needed. I would ask Chairman Spratt to make his staff available and, Chief, your attorneys and the State, also.

We want to move this bill, hopefully, to preserve your October 1st deadline and, as you know, we have a complex legislative schedule. We will also work with the other body to see how we can expedite this, and I would just ask for a little flexibility.

I think it makes eminent sense—I know that it has been hard fought negotiations, but I would prefer to move with the Department of the Interior's support rather than opposition, and I don't know what they will say.

So with that, I want to thank all the witnesses.

Chairman Spratt, do you want to say anything in conclusion?

Mr. SPRATT. Except to thank you very much. If you would like to look at this map on the way out, it shows where the tribe is located. I can show you that and it is in close proximity to the City of Rock Hill. That is why we call it a suburb of the city.

Thank you very much, Mr. Chairman.

Mr. RICHARDSON. The hearing is officially adjourned.

[Whereupon, at 3:10 p.m., the Subcommittee was adjourned.]

APPENDIX

JULY 2, 1993

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

STATEMENT OF GAIASHKIBOS, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS, UNITED STATES HOUSE OF REPRESENTATIVES, ON H.R. 2399, THE "CATAWBA INDIAN TRIBE OF SOUTH CAROLINA LAND CLAIMS SETTLEMENT ACT OF 1993"

July 2, 1993

For nearly 150 years, the Catawba Indian Tribe of South Carolina has been denied the possession and benefits of land that was legally theirs. The National Congress of American Indians (NCAI) fully supports correction of this long-standing issue by enactment of H.R.2399, the "Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993". The Committee has been provided with a copy of the NCAI resolution adopted by its Executive Committee during its Mid-Year Meeting in Green Bay, Wisconsin, June 27th through June 30th, of this year, which endorses the agreement in principle negotiated by the Tribe.

By treaty in 1763, the Catawba Tribe was promised protection for its lands, a promise that was broken by the State of South Carolina in 1840, as it sought to extinguish Catawba Tribe title to the lands remaining to it. However, Federal law since 1790 has provided that only the United States Congress may extinguish Indian title to land. This conflict initiated the many years of legal struggle that can now be resolved with enactment of H.R. 2399.

During the 1950s, the Bureau of Indian Affairs mounted a campaign to terminate the Catawba Tribe. The Tribe refused to consent to its termination unless the United States assured the Tribe that its land claim would be protected; in fact, the Tribe's resolution consenting to termination was conditioned upon this assurance. However, when Congress enacted the termination legislation, the Bureau of Indian Affairs failed to assure that language protecting the Tribe's land claim was incorporated into the legislation.

While the Federal government may argue against provisions of this legislation requiring it to assume its part of the settlement payment, stating that the State of South Carolina's portion of the payment is too small, it must be remembered that these provisions were the best possible resolution the Catawba Tribe, acting without Federal support, was able to obtain with the State. Since orchestrating the Tribe's termination, the Federal government has not worked to fulfill its obligation to assist the Catawba Tribe resolve that land claim, and in fact has conducted itself in ways that have actually undermined the Tribe's land claim. Therefore, NCAI believes that the provisions of the legislation which allocate the Federal and State/local contributions are very reasonable.

NCAI believes that Congress' ratification of the Catawba settlement, as negotiated by the Tribe, is consistent with the tenets of contemporary Indian policy in that the legislation will resolve the historic Catawba Tribe land claim and restore Federal recognition.

NCAI asks the Congress to recognize the urgency of enactment of H.R. 2399, not only to bring to a conclusion the century and a half of loss suffered by the Catawba people, but to protect the

tribe from an approaching statute of limitations on their land claim. Failure to enact H.R. 2399 will require the Catawba Tribe to sue tens of thousands of individual non-Indian persons who currently claim ownership of the disputed lands.

On behalf of the 119 tribes we represent, the National Congress of American Indians joins the Catawba Indian Tribe, the South Carolina Congressional delegation, the state governor and local governments in urging strong support for this historic legislation.

COMMENTS FOR THE RECORD REGARDING

H.R. 2399 and S. 1156,

A BILL TO SETTLE THE ANCIENT CATAWBA LAND CLAIM

AND TO

RESTORE THE FEDERAL TRUST RELATIONSHIP

Submitted on July 26, 1993,

by

Thomas J. Blumer, Ph.D.

Historian, Catawba Restoration of Justice Project

My friendship with the Catawba began in 1970, during my early days as a doctoral candidate at the University of South Carolina. My professional relationship with the Catawba dates from 1976 when I assisted a group of 21 Catawba potters in founding the Catawba Potters' Association. Since 1976, I have worked on a large number of Catawba projects, most of an historical nature. This work has been done for the Catawba Executive Committee, the Tribal Council, the Catawba Preservation of Culture Project, the Catawba Potters' Association, the Native American Rights Fund, individual tribal members and, most recently, I have served as historian for the Catawba Restoration of Justice Project. The results of my work include the *Bibliography of the Catawba* (1987), a book-length reference work. It will, in time, enable Catawba studies to make great advances and should serve the Catawba well in their efforts to reclaim their rightful place in history. My long-awaited *Survival of a Folk Tradition: Catawba Pottery* is in its second draft. It tells the story of Catawba pottery from the standpoint of the potters themselves. I have published numerous articles in a wide variety of regional and national sources. I have lectured on Catawba issues throughout the United States. My greatest area

of interest is the pottery tradition, and my historical period of concentration is from 1840 to the present.

I would like to qualify my support for the current settlement legislation. I support the economic package, but I find the jurisdictional part of the agreement totally lacking in equity as far as the Catawba are concerned. I realize that the Catawba are at yet another crossroads in their long and painful relationship with both South Carolina and the United States. Perhaps at no time since 1760 have the Catawba been in more need of the protection of a powerful central government: the Crown in 1760, and the United States Congress in 1993.

I am writing this paper with very mixed feelings about H.R. 2399/S. 1156. On the one hand, I am happy to see that this smoldering issue is being laid to rest. On the other hand, I worry about the nearly complete destruction of jurisdictional rights that belong to the Catawba. As I contemplate the settlement, I recall all the many Catawba Indians who worked without funds or legal counsel to see the resolution of this matter. There are so many who would have rejoiced to be part of the final settlement. But I write with the full knowledge that Lady Justice in South Carolina, particularly in regard to Indian affairs, is not blind. Lady Justice has 20/20 vision when it comes to the Catawba Indians.

For nearly two well-documented centuries, South Carolina has dreamed of the extinction of the Catawba. This legislation, **if the jurisdictional issues are not made more equitable for the Catawba**, may very well be the death knell for this small but historically important group of Indians.

I have monitored all the many episodes that constitute the history of the Catawba land suit which brings H.R. 2399/S. 1156 to its current status. All too often the negotiating table tilted away from Catawba interests and favored those large

landowners affected by the suit. With great continuity, the chief negotiators were men who were part of the establishment in South Carolina. Many of them had a clear conflict of interest, and this conflict shows in the jurisdictional parts of the South Carolina legislation which forms the basis for H.R. 2399/S. 1156.

If time would permit, but it does not, many examples of the impropriety of the negotiations could be brought to light. However, perhaps it will help to point out that at one point in 1979 the Catawba were very close to a settlement. This settlement promised to be far more advantageous to the United States, the party who is really paying the bills here. Reportedly, however, one solitary land owner in the claim area prevented a settlement. If this is true, and I think it is, this man singlehandedly caused years of needless additional negotiations which are being brought to a close today, over ten years after his negative influence bore fruit.

This factor and many others, including the exclusion of the BIA, Eastern Office, from the negotiating table were not brought out in either the House or the Senate hearings. Instead, during the hearings, the BIA took a bashing for its so-called negligence. However, no one mentioned the historical fact that the 1959 termination of the Catawba was engineered by a South Carolina legislator by the name of Robert Hemphill. Although the BIA clearly played a major role in the process, Hemphill was the genius behind a major effort to legislate the extinction of the Catawba. Hemphill made certain that the ancient Catawba land claim was omitted from the literature of the period.

It is also worthy of note that not one Catawba of the traditionalist faction was invited to testify on either July 2 or July 22. Perhaps their absence was caused by Governor Campbell's "Memorandum of Cooperation." He states in his testimony presented on July 2, 1993:

> The settlement is so delicate that, at the time the state implementing legislation was signed, the Catawba and I signed a Memorandum of Cooperation pledging that neither we nor anyone else who participated in the negotiations would seek to improve our position by lobbying to change any portion of the federal legislation.

This device bothers me. The result, on July 22 the hearing room empty of joyous Catawba. Instead, the hearing room, this was true for both hearings, was dominated by smiling lawyers and legislators. Will Lady Justice retain her 20/20 vision? At the same time, I wonder, what would South Carolina gain by suppressing the inalienable jurisdictional rights of a mere 1,400 Indians? How long would it take the Catawba to initiate all aspects of full jurisdiction? The Indians would obviously have to change their organizational structure and go through a training period. The Poarch Band Creek have been highly successful in this regard. Why not the Catawba? On several occasions those who were part of the negotiations have told me: "the Catawba can always go back to the U.S. Congress and obtain more jurisdiction." I don't think this is the way things work. I also wonder if the Catawba have been told this very same thing? Why make an agreement which is clearly going to be in need of changes before the ink is dry? How much would these changes cost the Catawba; are any changes possible once H.R. 2399/S. 1156 become law?

Other questions haunt me. Who has the most to lose here? Who is paying the bill? Who is writing what amounts to a "Treaty"? Who wrote the Treaty of Pine Tree Hill in 1760, the Crown or South Carolina? Who is calling the shots in 1993?

In spite of feelings grounded in knowledge of the historical situation the Catawba face in South Carolina, I can see the great benefits that will come to the Catawba as they implement the economic advantages that H.R. 2399/S. 1156 will give the Tribe. I feel certain the benefits of this economic package blinded many

Catawba to the importance of jurisdictional issues. Like the Catawba, I remain supportive of this legislation because of the economic package. But jurisdiction will play a role in the fulfillment of the economic package to the best advantage of a people who have been economically deprived for over 230 years.

Much was made of the damage the Catawba Claim has brought to that part of South Carolina which in reality is part of suburban Charlotte, North Carolina. Perhaps there was some economic stagnation; however, in visiting York County perhaps 5 or 6 times per year (1977-1993) on Catawba business, I have observed nothing but progress: new malls, new restaurants, new subdivisions. Few other parts of South Carolina can boast similar advances. Yet, where do the Catawba fit in all this progress? As a result of a long negotiation process, the Catawba remain at the end of the list of those American Indian tribes who were terminated in the 1950s and 1960s. No one has calculated what kind of economic damage was done to the Catawba from 1973 to 1993. It is easy to assume that during much of this period the Catawba could have enjoyed full federal recognition. I think it is quite clear who needs protection here. South Carolina has nothing to fear concerning 1,400 Indians, but the Catawba clearly need the United States' mantle. This protection has been withheld too long. This protection would be accorded the Catawba through those jurisdictional issues that were purposely omitted from H.R. 2399/S. 1156 by negotiators who came to the table from Columbia, South Carolina and the landowners in the claim area.

One could easily make an interesting case for the morality of the long delay caused by the establishment in South Carolina. Yet at the end of a long tortuous process, they cry economic stagnation. I was not proud to see a letter and its accompanying report I produced in April 1992 flaunted as an example of how generous South Carolina has been since 1840. This paper was researched to show just how much the Catawba had suffered under the South Carolina mantle

(*Appendix I*. If these two documents are read carefully, the picture presented is not complementary to the State.

I support this legislation only if the federal mantle covers the Catawba in the most beneficial way possible. It must be done with a full realization of the dangers which the Catawba face on a daily basis. Working in the face of a very real deadline, I will only touch upon 4 issues that illustrate the reality of Catawba life in South Carolina:

The Tribal Roll

The keeping of a tribal membership roll is a very difficult internal process which all Indian tribes handle on their own. As soon as South Carolina decided it was in her best interests to negotiate a settlement in good faith, the membership issue came to the surface. This happened in 1992 when the draft legislation now before the U.S. Congress as H.R. 2399/S.1156 was in its first negotiation stages. As part of the Catawba extinction syndrome, South Carolina insisted on a blood quotient which might soon end all State services to the Catawba. When the Catawba protested on the technical grounds of keeping a tribal roll accurate and up-do-date, the 99-year tax device was inserted into the settlement document. The first part of this episode strikes me as an attempt to meddle in Catawba affairs, an old issue in South Carolina. The second part strikes me as a device to begin, at the end of a century, a new push for the extinction of the Catawba. Should H.R. 2399/S. 1156 prepare for the extinction of the Catawba or protect their future as an Indian nation? Is Justice blind here or does Justice have 20/20 vision?

Come-See-Me

For many years now, the City of Rock Hill has celebrated a local spring festival in April. The event is a low-key celebration designed to show outsiders the bright side of Rock Hill and to bring the community together for some fun. I believe it was in April 1990 when a local group appeared in the Come-See-Me parade as Indians dressed in trash cans. The effect on those Catawba who witnessed this shameful display or read about it in *The Herald* was one of devastation. They knew the meaning of the word *trash*. They knew who the make-believe Indians in the trash cans portrayed. Protests were made. The organizer of the event shrugged the Catawba away as poor sports. No official apology was issued by anyone. Those in Columbia who monitor such grievous insults remained silent. At the time, I wondered what would have happened had the men and women dressed in trash cans appeared as black minstrels. Justice in South Carolina has 20/20 vision. Will H.R. 2399/S. 1156, with its weak approach to jurisdictional issues, provide for the protection of Catawba civil rights? I think Justice in South Carolina will retain her 20/20 vision if this legislation is not changed.

Indian Fellowship Program

Just a few months ago (April 1993), a young Catawba Indian who was graduating from high school applied for an Indian Fellowship. Only Indians who are members of federal or state tribes are eligible. The result was a cruel refusal which took the young man through a bureaucratic ping-pong game. According to the Governor of South Carolina, the Catawba are not "State Indians" (*Appendix II*). This response is highly questionable historically; however, the result for anyone caught in such political games is usually a frustrating failure. This was the lamentable result for this young man. Along a similar line, for many years South

Carolina has held up Title 4, Part A, Indian Education Program funds that by right belong to the Catawba. What kind of economic damage has been done to the Catawba through such calculated official responses? It is one thing to do battle with adults and quite another to hurt the young. Will H.R. 2399/S. 1156, with its weak approach to jurisdictional issues, allow such episodes to continue?

Catawba Clay Holes

Archaeologists claim that some of the oldest pottery excavated anywhere in the continental United States is found in Coastal Carolina. Estimates of antiquity go back as far as 4,500 years before the present. This dates the history of pottery making in South Carolina well before that of the Southwest. It has long been known that the Catawba pottery tradition has been practiced in an unbroken line of descent from the time of contact with Europeans to the present. The Catawba tradition is the only such cultural treasure to have survived in the eastern part of the United States. As such, the Catawba potters, about 50 of them, form a priceless cultural heritage for all America.

Also, archaeologists continue to study the relation between contemporary Catawba pottery and ancient pottery excavated in the Catawba Cultural Zone, much if not all of South Carolina and a large portion of central North Carolina. There is great continuity between contemporary Catawba vessels and those excavated from ancient sites. These parallels include the kind of paste used, construction techniques, shape, and incised markings. In the near future, archaeologists will be able to publish a complete line of descent from the earliest Coastal Carolina pottery, dated 2,500 B.C., through to contemporary Catawba pottery.

What a cultural treasure South Carolina has in the Catawba. The story of the survival of this tradition is touched by many miracles. Yet, the level of appreciation for Indian culture is somewhat lacking in official South Carolina circles.

In 1979 Catawba hearings were held in the U.S. Congress. In the published record entitled *Settlement of the Catawba Indian Land Claims, Hearing before the Committee on Interior and Insular Affairs* (Serial No. 96-17), I published a short piece entitled "Two Points Concerning a Just Settlement of the Catawba Indian Land Suit of 1977" (*Appendix III*). In it I expressed my well-founded fear that the Catawba would be denied access to their traditional clay resources located on contested land in Lancaster County. At the time, the Tri-County Landowners Association, partially funded by the State, was attempting to influence the settlement negotiations through the owner of this crucial Catawba resource. Only Catawbas of the Cash Only faction were being allowed to dig clay. I knew it was only a matter of time before all Catawbas would be cut off from this resource.

The axe fell in May of 1990. On May 12th, the Native American Rights Fund attempted to protect this resource legally through depositions taken from two potters (*Appendix IV*). In actuality the depositions tell only a fraction of the story. The Catawba have dug clay in Nisbet Bottoms for many centuries, probably long before the 1760 Treaty of Pine Tree Hill was negotiated.

I was informed of this cultural tragedy 7 days later and began immediately to contact those I thought might be able to bring some sense of justice and reason to the matter of great cultural importance. I spoke to key members of the Catawba Executive Committee, several of the senior Catawba potters and Don Miller of NARF. The list of those contacted grew to include members of the U.S. Congress, academics in both North and South Carolina, local historians and BIA officials who

I felt might be able to influence the landowner or perhaps arrange a political solution while negotiations on a settlement continued. In August, I wrote Governor Campbell of South Carolina (*Appendix V*).

The response from the Governor's Office was totally lacking in appreciation for an issue of great consequences to culture in South Carolina:

> It is indeed unfortunate that the citizens of South Carolina must continue to live with the issue, however, until the land claim dispute reaches a full conclusion it is likely that such situations will persist. I certainly can understand those landowners reluctance to grant certain privileges to the Catawbas (*Appendix VI*).

In reality, one short telephone call from the Governor could have ended this crisis which continues to have a profound effect on the Catawba potters. I might add that the majority of these talented Indians are not affluent and depend on pottery for many of life's necessities. Again, the State hurt those most in need of protection.

More recently, September 1992, I made a more direct attempt to put salve on the wounds caused by an event that I remain convinced could have been solved in a gentlemanly way in 1990. My letter to Mr. William Oliver Nisbet is included as *Appendix VII*. This correspondence went unanswered.

As a result of actions taken in 1990, Catawba pottery production suffered. Classes planned for the Catawba Cultural Preservation Project had to be cancelled. The young could not be taught this ancient skill, and senior potters were cut off from much needed cash. Tutorials sponsored by McKissick Museum at the University of South Carolina were jeopardized by a lack of clay. If Justice were blind in South Carolina, the Governor would have come to the rescue.

As the U.S. Congress contemplates the virtues of H.R. 2399/S. 1156, this lamentable situation continues. The Catawba, in their usual resourcefulness, have found **inferior alternate clay sources.** These are located on the reservation and on land owned by more civic minded and compassionate landowners. I am proud to report that numerous landowners dug clay on their land and brought samples to the potters in hopes that their clay might serve as a temporary resource. The Indians went through the long and arduous process of checking all these samples for useability. The best of these, **still inferior to Nisbet clay**, are in use today.

I might add that I have been assured since 1979 that the clay holes would be addressed in any Catawba settlement. They are not mentioned in H.R. 2399/S. 1156, and I am forced to believe that the potters will remain hostage to a local landowner who may or may not grant them their traditional access depending on the local climate or his attitude at the moment. This is no way to do business and hardly a plus even in the economic package.

Ending Statement

Through the episodes enumerated here, which by no means tell the entire story, I remain supportive of H.R. 2399/S. 1156 only in regards to the economic package. I have severe reservations concerning the bold jurisdictional rights that South Carolina is wrenching from the Catawba. I do not believe that the U.S. Congress should allow this travesty. I know that the Eastern Office of the Bureau of Indian Affairs has voiced its objections early on in the negotiations and this concern alone kept them from the negotiation table. And I know that the misgivings of the BIA could and should be more vocal than the statement submitted on July 22. The Catawba are at a critical crossroads in their history.

Not much has changed in South Carolina in the last two centuries, not when it comes to Indian affairs. South Carolina still looks to the extinction of this small but historically important tribe. I think that the U.S. Congress has one last chance to ensure that Lady Justice in South Carolina is made blind. At the same time, I do not think that the few jurisdictional issues that remain controversial, if they are changed in favor of the Catawba, will hurt South Carolina. I do know that if these jurisdictional issues are not properly addressed, the Catawba will be hurt. If this happens, damage will be done once again by the very people who are charged by the Constitution of the United States with protecting Native Americans. I think the Catawba of South Carolina are worthy of such attention.

APPENDIX I

642 A Street, N.E.
Washington, D.C. 20002

Home Telephone (202) 543-7031 Office Telephone (202) 707-4821

April 29, 1992

Mr. John Spratt
U.S. House of Representatives
1533 Longworth House Office Building
Washington, D.C. 20515

Attention: Tom Kahn

Dear Mr. Spratt:

Pursuant to a telephone conversation of April 27 with Mr. Kahn of your office and subsequent telephone conversations with Assistant Chief Fred Sanders and Don Miller, NARF attorney, I have searched my files for South Carolina's Catawba Nation appropriations from 1840 to the present. I cannot say that my working file is complete, but it is nearly so. Problems abound for the War Between the States and the record situation is worse for Reconstruction.

During the first nine years, South Carolina was obligated to pay the Nation $2,500 per year, but the actual appropriated amounts range from a high of $2,000 in 1843 to a low of $1,840 in 1841. The record is further complicated by that fact that the legislature qualified the amount to be paid as "*if necessary*." The only way to ascertain the actual amount South Carolina considered **necessary** is to study each agent's report for the year in question. I have some of these reports in my files but not all of them.

Also, there is often a big difference between the amount appropriated and the amount actually distributed to the Nation. Between 1861 and 1866, the Indians were often given produce rather than money. Again each year would have to be studied to get a more accurate picture. Then from 1867 to 1877 confusion was the order of the day. For instance, the Catawbas registered several complaints that their agent did not distribute any money at all even though money had been appropriated by the legislature. In 1873 the agent reportedly kept the money, and I cannot say if he was forced to surrender the appropriation back to the legislature or finally distributed the money. Then in 1874, only $40 of a $500 appropriation was supposedly distributed.

In 1854 the S.C. legislature appropriated an additional $5,000 to be distributed **if the Nation removed to Indian Territory**. This was to make up for the lost $5,000 that the U.S. Congress appropriated in 1848 when it first seemed the Catawba would remove to Indian Territory. Neither amount was ever distributed. The closest the Catawbas ever came to removal was in 1860 when Chief Allen Harris and Councilman John Harris inspected land among the Choctaw in Indian

Territory. This removal plan was set aside by the War Between the States.

In 1879 the legislative appropriation and distribution problems between the agent and the Nation were finally solved. An appropriation of $800 per year was distributed. Even here, however, one cannot assume that the tribe actually saw $800. The custom was to deduct odd expenses from the Catawba appropriation. For instance, the Catawbas had to build their own school out of this sum, trips to visit the legislature, and the agent's percentage from 3% to 8% was also deducted. Beginning in 1898 it was normal for $200 to be taken off the top to pay the Catawba school teacher. In 1909, for instance, a sum was set aside for the school, the agent's percentage and a trip to Columbia made by the tribal council or chief. The agent's report would reveal additional odd deductions.

In 1917 an additional financial problem enters the picture. Although the appropriation had reached $7,000 per year, local merchants began to bring claims against individual tribal members. The agent, at least it seems that the agent performed this duty, then decided which merchants had valid claims. These claims were taken off the top of the appropriation and the remaining money, minus school costs, agent's percentage, etc., was distributed equally among the tribal members. It seems that those who ran up bills at the grocery store got a larger share of the appropriation, and there is no way of knowing if all the claims against the appropriation were actually true and accurate. From all appearances, it seems that each merchant's word was taken as gospel with little or no investigation or legal recourse.

Then in 1921, the South Carolina legislature began to deduct Catawba Indian Commission salaries from the Catawba appropriation. These men were local delegates and businessmen who were employed by the State to study the Catawba problem. In 1920 the appropriation was $8,500 but the deductions for that year amounted to: $375 for the agent, $2,000 for debts, $500 for the school, and $1,000 for the Catawba Legislative Study Commission. In 1921, a total of $647.30 was deducted from the $7,700 appropriation for these officials. That same year other deductions amounted to $375 for the agent, $700 for the school, and $1000 for local debts.

The appropriation continued on a regular basis at least until the Catawbas became wards of the Federal Government. In 1941 South Carolina did appropriate $75,000 to purchase additional reservation lands for the Nation, but I have no way of knowing if all the $75,000 was actually spent. The Catawba Appropriation Act No. 393 was repealed in 1951, but Catawba School appropriations were approved until the school was closed in 1966.

I have been through the Bureau of Indian Affairs Catawba files at least 6 times over the last 15 years and have never located what seemed to be a BIA Catawba budget. The Federal Government matched some South Carolina funds, and an agricultural project was conducted. The amounts spent are conjectural. The Catawba were administered through Cherokee, and the answers to these questions are probably to be found in the records of the Cherokee Agency.

Please keep in mind that the list was prepared in haste. There should be an agent's report for each year, and it would provide an itemized account of what was spent. If I say there is ---no record--, this means that I do not have a record for that year. A record may exist, but I merely could not find it.

The amounts listed below should give you a fairly good idea of the South Carolina appropriation from 1840 to 1951. If you need additional information, I will do my best to oblige you.

Sincerely,

Thomas J. Blumer, Ph.D.

Enclosure

cc: E. Fred Sanders, Assistant Chief
Catawba Nation
Don Miller, Attorney, NARF

SOUTH CAROLINA LEGISLATIVE APPROPRIATION

AMOUNTS TAKEN FROM THE FILES OF THOMAS J. BLUMER IN APRIL 1992

DATE	AMOUNT	
1841	$1,840, if necessary	
1842	$1,000, if necessary	
1843	$2,000, if necessary	
1844	$1,841, if necessary	
1845	$1,841, if necessary	
1846	$1,841, if necessary	
1847	$1,841, if necessary	
1848	$1,841, if necessary.	$5,000 appropriated by U.S. Congress was never used for removal.
1849	$1,842.50, if necessary	
1850	$2,500, if necessary	
1851	---no record---	
1852	$1,500, if necessary	
1853	$2,000, if necessary	
1854	$1,200, if necessary.	SC approved $5,000 if removal occurred; funds never used.
1855	$1,500, if necessary	
1856	$1,500, if necessary	
1857	---no record---	
1858	$1,200, if necessary	
1859	$1,182.18 distributed to Indians	

1860	No record. It is possible that the legislature though the Catawbas would remove and take the $5,000 approved in 1854. Neither happened. The War broke out and the Catawbas served the Confederacy.
1861	No record, possibly in produce
1862	No record, possibly in produce
1863	No record, possibly in produce
1864	No record, possibly in produce
1865	No record, possibly in produce
1866	No record, possibly in produce
1867	$1,200
1868	$600 note from the Governor of SC
1869	$850.40
1870	---no record---
1871	---no record---
1872	$777.91
1873	Agent reportedly kept the money. Amount unknown.
1874	$500 appropriated but only $40 distributed.
1875	$675 appropriated. A legislative investigation said that a total of $2,145 had been appropriated from 1870 - 1875 but the amount distributed is unknown.
1876	---no record---
1877	Appropriation made but amount unknown.
1878	Appropriation made but amount unknown.
1879	$800
1880	$800
1881	$800

6

1882	$800
1883	$800
1884	$800
1885	$800
1886	$800
1887	$800
1888	$800
1889	$800
1890	$800
1891	$800
1892	$800
1893	$800
1894	$800
1895	$800, but only $630 distributed. This is probably the case for each year, but my files do not always contain this information.
1896	$933
1897	$800
1898	$1,000 with $200 for the school, etc.
1899	$1,000 with $200 for the school, etc.
1900	$1,000 with $200 for the school, etc.
1901	$1,000 with 8% for the agent, etc.
1902	$1,000 with deductions for the agent, teacher, doctor, etc.
1903	$1,000
1904	$1,500 with 6% for the agent, etc.

1905	$1,500
1906	$1,500 with $200 for the school, etc.
1907	$3,000 with 3% for the agent, etc.
1908	$3,000 with $200 for the school, etc.
1909	$3,000 expenses to Columbia deducted, etc.
1910	$3,500
1911	$5,000
1912	$4,513.60 distributed
1913	$7,150
1914	$7,600 with $250 for the school, etc.
1915	$7,000 with $500 for the school, etc.
1916	$7,000 minus claims, etc.
1917	$7,000 minus claims, etc.
1918	$8,000 minus claims, etc.
1919	$7,000 minus claims, etc.
1920	$8,500 minus claims, etc.
1921	$7,700 minus claims, etc.
1922	$7,700 minus claims, etc.
1923	$6,625
1924	$10,375 minus $1,500 for the school, etc.
1925	$9,375 minus $1,500 for the school, etc.
1926	$9,375 minus $1,500 for the school, etc.
1927	$9,450
1928	$9,450

1929	$9,450
1930	$9,450 minus agent and school
1931	$9,450
1932	$8,905
1933	$11,222.50
1934	$9,450 minus agent and school
1935	$7,500
1936	$9,450
1937	$9,450
1938	$9,450
1939	$8,250
1940	$9,825
1941	$9,385; S.C. appropriated $75,000 for land purchase.
1942	$9,385
1943	$9,385
1944	$12,000
1945	No record. I suspect that the appropriation ended here.
1946	---no record---
1947	---no record---
1948	$12,500 for school matched by US Government
1949	$13,000 for the school
1950	---no record---
1951	Catawba Appropriation Act repealed: Act No. 393

1952 to 1966 the Catawba Indian School continued to operate as a York County school. It was closed in 1966.

APPENDIX II

☎ 6033243213 PI14

2nd denial Rec'd

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202-

Dear Applicant: Christopher Canty

Thank you for submitting an application for the 1993-94 Indian Fellowship Program. Your application, however, cannot be considered for funding for the following reason(s):

( ) Proof of Indian identity inadequate (Section 263.3);

( ) Proof of Indian descent in 1st or 2nd degree not provided (Section 263.3);

(X) Failure to provide documentation of membership in a federally or state recognized Indian tribe, band, or other organized group (Section 263.3);

( ) Application for an ineligible field of study (Section 263.4);

( ) Only graduate students at the postbaccalaureate level are awarded fellowships in the fields of medicine, law, education, psychology, and clinical psychology (Section 263.4)

( ) Appropriate transcripts not provided (Section 263.8);

( ) You are not accepted for enrollment or currently enrolled as a full-time student at an accredited institution of higher education for the field and level of study listed in the application by the May 1, 1993 deadline (See p.E2-E3).

(X) Other Your tribe was not recognized by either the Bureau of Indian Affairs or by the state according to the official list presented to the Office of Indian Education.

The above explanation(s) is based on the eligibility requirements for the Indian Fellowship Program as outlined in the application package. Please refer to the section(s) in parentheses for a further explanation of these requirements.

Thank you for your interest in the Indian Fellowship Program.

Sincerely,

John F. Derby

John F. Derby, Chief
Indian Fellowship Program

State of South Carolina

Office of the Governor

[illegible] A. CAMPBELL JR.
[illegible]

[illegible]

April 8, 1993

Mr. John E. Derby, Chief
Fellowships & Contracts Branch
Office of Indian Education
U. S. Department of Education
Washington, DC 20202

Dear Mr. Derby:

I am in receipt of your letter to [illegible] concerning the recognition of the Catawba Tribe of South Carolina by the State of South Carolina. Currently, the Catawbas are not a recognized eligible Indian tribe by either the state or the federal government.

This is one point of contention in a federal lawsuit by the Catawbas against the state and others. It is anticipated that recognition will be granted by the federal government by year's end as a part of the settlement of the suit.

I hope this addresses your question.

Sincerely,

Mark Elam

Mark R. Elam
Senior Legal Counsel to the Governor

MRE/TDH/pfl

JOHN M. SPRATT, JR.
5th DISTRICT, SOUTH CAROLINA

1533 LONGWORTH BUILDING
WASHINGTON, D.C. 20515
(202) 225-5501

COMMITTEES:
ARMED SERVICES
BUDGET
GOVERNMENT OPERATIONS
(ON LEAVE)

Congress of the United States
House of Representatives
Washington, D.C. 20515

April 30, 1993

DISTRICT OFFICES

FEDERAL BUILDING
BOX 250
ROCK HILL, SOUTH CAROLINA 29731
(803) 327-1114

21 E. CALHOUN STREET
SUMTER, SOUTH CAROLINA 29150
(803) 773-3362

214 W. LAURENS STREET
BOX 984
LAURENS, SOUTH CAROLINA 29360
(864) 984-6320

Mr. Christopher Chad Canty
650 Rutledge Drive
Catawba, SC 29704

Dear Mr. Canty:

In response to my inquiry on your behalf, the Department of Education has provided me with the enclosed reply. I regret that our findings are not more favorable.

However, it is my suggestion that you consider applying next year for funding. If we can be of further assistance with this or other matters, please contact my Rock Hill office.

With kind regards, I am

Respectfully,

John M. Spratt Jr.

JOHN M. SPRATT, JR.
Member of Congress

JMSjr/ko
Enclosure

APPENDIX III

SETTLEMENT OF THE CATAWBA INDIAN LAND CLAIMS

HEARING

BEFORE THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 3274

TO SETTLE THE NONINTERCOURSE CLAIMS OF THE CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

HEARING HELD IN WASHINGTON, D.C.
JUNE 12, 1979

Serial No. 96–17

Printed for the use of the
Committee on Interior and Insular Affairs

Appendix III

463

TWO POINTS CONCERNING A JUST SETTLEMENT OF THE CATAWBA INDIAN LAND SUIT OF 1977

by

Thomas J. Blumer

I first met the Catawba Indians of South Carolina in 1970 when I began my doctoral studies at the University of South Carolina. What started as a casual friendship with several Catawba potters evolved into a major research project which currently occupies much of my time. Upon completion of my doctoral studies in 1976, I obtained a temporary appointment as a lecturer in the English Department at Winthrop College in Rock Hill. During the fall semester, I interested 20 Catawba potters in the idea of having a pottery exhibition/sale at Winthrop's Art Department. While researching the exhibition's pamphlet, I interviewed several Catawba potters about the old custom of selling pottery at Winthrop's gates. These Indians told of a long and interesting tradition, and my interest was immediately captured. From the vantage point of a scholar, my work with the Catawba Indians has been particularly rewarding, since the story of the Catawbas has never been fully told, in spite of the fact that the Catawbas are probably among the best documented Indian groups in the United States. Virtually every major event in over 350 years of their recorded history has been meticulously written down in a wide variety of documents.

Since my interviews in preparation for the Winthrop exhibition, I have been actively engaged in researching the story of Catawba pottery from pre-Columbian times, and the

study is now in the writing stage. I also plan to do a comprehensive history of the Catawba Nation. My association with the Catawba Indians has also led me to assist the Catawba Arts and Crafts Association with many tasks including forming the association, helping to set up exhibitions, and even assisting the fledgling group with minor legal difficulties. I have also published four articles on the Catawba pottery tradition and two additional articles will soon be ready for publication.

In this paper, I will discuss two aspects of Catawba history and culture which I feel the Committee on Interior and Insular Affairs of the United States House of Representatives should have access to in its attempt to find a fair solution to settling the Catawba suit of 1977. These are: (1) the events following the Catawba Tribal Termination of 1961, and (2) the problems the Catawbas face concerning the use of their ancient clay deposits.

TERMINATION OF 1961

Perhaps one of the most interesting events in recent Catawba history is the termination of United States wardship in 1961. After over 100 years of living in oftentimes great poverty and just a few souls from extinction, the Catawba Indians of South Carolina were finally rescued from the negligence of the state government and were made wards of the United States in 1943. Possessing an expanded reservation and suddenly being permitted to seek permanent employment in the local cotton mills--largely the result of the war efforts of the time--

the Catawbas prospered, and this new prosperity has continued to the present day. There were, however, many problems with the New Reservation which was administered from far-off Cherokee, North Carolina, and by the late 1950's the Catawbas felt it might be best to seek their independence under the then popular policy of termination. Rushed by forward thinking bureaucrats and the lure of a few dollars, the Catawbas refused to listen to the warnings of the more conservative element in the tribe, and concerned whites were silenced. Termination became a legal reality, and the tribal roll was closed in 1961.

In theory all should have gone well. The Catawbas had largely abandoned their old 600 acre state reservation and were living on the larger federal lands. Most were working in local industry, and their children were receiving the benefits of the county educational system. It was thought that termination would merely be the last step in an assimilation process which had begun with white contact in 1526. The Catawbas were thought to be ready to join the mainstream of the local population. Many thought Albert Sanders would be the last Chief of the Catawbas.

However, all did not go well. The federal termination program did not take the spiritual aspects of tribalism into account, and no thought was given to the effects of tribalism on the individual. Many Catawbas did not care to abandon their tribalism, and others were not ready to face alone the financial aspects of the 20th century. Often the children of those who wanted to break tribal ties wanted to maintain their identities as Catawbas when they were old enough to make the decision.

The most immediate and dramatic problems were financial and were no surprise to the Catawbas. Perhaps the hartinger of events to come appeared in a letter written to the agent in Cherokee by a Catawba mother. She was impatient for her share of the tribal assets so she could buy school clothing for her children. She declared that some of those who had chosen land over money had already sold their land and had their money in hand. She had voted to take her share of the tribal assets in cash and was still waiting. The failure of the money to arrive in time threatened to deprive her children of new clothing for school. Another individual complained that he needed his money immediately so that he could move his family from one military base to another. Little thought was given to the future of the Catawbas as a group. The woman's children would grow up landless in the middle of a region that their ancestors once ruled over supreme. The soldier would later return home and seek an allotment on the crowded Old Reservation.

The problems were magnified by speculators who were ready to exploit the Catawbas who suddenly possessed a bonus of several hundred dollars or held parcels of land with clear title. Although it must be emphasized that the Catawbas suffer far less from the ravages of drink than do their non-Indian neighbors--a fact that can be attributed to their adherence to the Mormon faith--it is rumored among the Catawbas that one individual traded his birthright for a supply of whiskey. Another man was approached by a speculator who lives in the shadow of the

Catawba Reservation. The Catawba traded his acreage for an automobile which hardly survived the season. Indians who had no idea of the value of land since they had never owned any except as a tribal society, quickly gave away when they had. Recently, I had occasion to talk with one of the Catawba potters who lives in poverty not far from the Old Reservation. I asked her what she did with her land. She explained that she thought she could do better with the land and chose it over a cash settlement. Her intent was to sell the land and make a profit. "It never dawned on me that I could have sold the trees and taken the money and built me a nice house on my land." She sold her land and spent the money quickly on life's necessities. The story of how the speculator fared need not be told.

In still another case, a mother received land allotments for herself and each of her children. Together the parcels made up a farm which should have given her children a secure future. Instead, the land was sold before the children reached maturity, and today they have nothing. Their well-meaning mother did not intend to cheat them out of their inheritance; she simply did not see the value of holding land since she had never owned any. Today some of her children and others like them have returned to the Old Reservation. Contrary to testimony given before the Committee on Interior and Insular Affairs on 12 June 1979, the Old Reservation is not in a desolate state of abandonement but instead is crowded with frame homes and trailers. Indeed, at this very moment,

several Catawba families are approaching the Catawba Executive Council to receive allotments of reservation land and plan to return there to live. As the economy continues to tighten, the trend will accelerate. The Catawba Tribe is in dire need of a larger reservation.

A cash settlement for the Catawba Nation is not a fair solution to the tribe's future needs. Tribalism is still a strong force among the Catawbas. Evidence of this fact is exhibited even by the tribal faction which is so vehemently opposed to the "land and program" settlement. These individuals use tribalism as a basis for their opposition to such a settlement. In the future, as individual Catawba Indians have difficulties and need a home, they will naturally gravitate toward their reservation and their tribal government. Others will never leave the Catawba Tribe but will spend their entire lives in the community of their birth. Through the settlement of the Treaty of 1840, the Catawbas should be left prepared to assist tribal members, even those who do not have the foresight to see that a new reservation and educational programs are in their best interest. Here is the only insurance policy the Catawbas can invest in for the future. One wonders what sort of a settlement the next generation of Catawba children will need. They should not be permitted to approach their parents and say, "What happened to our share?" They should be able to see the results in a new reservation and in educational advantages which will benefit their tribe. Why should the tribal assets be used once again to line the pockets of speculators? The tribal inheritance should not be squandered

but should be kept for the next generation. Since the Catawba tribe exists as a viable unit, it must be protected by a wise federal government and not left without resources.

OWNERSHIP OF THE CATAWBA CLAY HOLES

Early in the 19th century, the Catawba Nationa legally owned and collected the rents for the 144,000 acre reservation which is the focal point of the current land suit. Although many of the white farmers whose descendants still inhabit the Indian lands were fair in paying their rents, many of them cheated the Catawbas in the traditional manner. Gradually, every acre of the reservation was held by whites with the exception of King's Bottoms. This tract was reserved by the Catawbas because it contains the ancient Catawba cemetery, the ceremonial grounds, and the precious clay which the Catawbas use in producing their unique pottery. Eventually, even this last section of land was leased, between 1813 and 1828, to a fortunate landowner by the name of John Doby. In time Doby sold the land to the Johnston family, and they in turn sold it to the Nesbits who are the current owners.

Although the Catawbas lost legal rights to this important real estate in the 19th century, their attraction to King's Bottoms has never waned. After the Treaty of 1840, the State of South Carolina attempted to be rid of the Catawbas and shipped them off to North Carolina. It was not long, however, before Governor Morehead made it clear that his state had enough Indian problems of her own without taking the pitiful remnant of the Catawba Nation under her wing. During this

traumatic time, the family of Alan Harris refused to join the rest of the tribe in their North Carolina sojourn. Instead, Chief Harris became the leader in the return of the Catawbas to South Carolina. Naturally, Chief Harris's strongest asset was his call for the Catawbas to return home to their old village site, King's Bottoms, which they had occupied for hundreds if not thousands of years. When the tribe had successfully returned home, however, the Catawbas became squatters on their own land. South Carolina, suffering from embarrassment, tried to purchase a reservation for them. The land of greatest spiritual value to the Catawbas, King's Bottoms, was far too expensive for the state to purchase. An alternative was then forced on the homeless Catawbas, and the impoverished land which has come to be known as the Old Reservation was obtained. The Catawbas were not satisfied, but they were close to their ancient village site. They merely had to cross the Catawba River by boat and they were home. Once in the bottoms, they were free to dig the clays used by countless generations of Catawba potters. In turn, each of the three successive families who owned the bottoms recognized that the land had a special spiritual meaning to the Catawbas. The white owners have always respected the Catawba Indians' special rights to this land.

One could hardly say that it is customary for South Carolina farmers to permit people to dig up their fields in search of clay. The Nesbit family, however, has always been friendly toward the Catawbas; and, to my knowledge, the Catawba

Indians have never had difficulty obtaining their needed clay supplies. Unfortunately, recently, the Catawbas have been deeply troubled by rumors that their clay supply might be cut off in retaliation for the uncomfortable situation caused by the current land suit. It is impossible to say where these rumors have originated, but they point out a very real danger.

Many people wonder why the Catawba potters are so firm in their insistence that they use the clay found in the Nesbit River Bottoms for their pottery. The clay from the bottoms is particularly pure, almost miraculously plastic, and very necessary to the construction of the tradition Catawba vessels. Other clays are known to the clay-conscious Catawbas, but these clays are not used because of the high percentage of impurities, of the high incidence of breakage during the firing process, and because commercial clay is not the clay grandmother's grandmother used in making her pots. In the words of one elderly potter, "The clay from those bottoms is the best clay ever; I've never used any other clay, and my mother's mother dug her clay there."

Some may think that since the Catawbas have used the clays from the Nesbit Bottoms through an unwritten agreement for so long that they should be content to continue to rely on the generosity of the landowners. Our country, however, does not operate on the agreements made by gentlemen. The Catawbas need a legal right to their clay source. In the final analysis, the Catawbas do not own the river bottoms. What would happen should

the current owners decide to abandon the traditional right of the Catawbas to trespass or should the land change hands again? Nothing short of a long legal battle would compell the new owners to honor an ancient agreement even if it has been in force for over 180 years. If the Catawba Indians were barred from the river bottoms, they would have little legal recourse. In the past this very problem has occurred but with a less vital source of clay.

The Catawba potters do not use the Nesbit clay in its pure state except in the manufacture of small vessels or smoking pipes. To make larger pieces, they must mix a stronger tempering medium with the Nesbit clay. In the 1840's, after the Catawbas moved onto the Old Reservation, they found a suitable location from which to take this tempering agent. The clay hole was situated on a nearby farm, and the Catawbas freely used this clay hole for almost a century. Then the inevitable happened: the original owner sold the farm and the new owner simply did not want his land dug up. He told the Catawbas they were not welcome. The clay hole was abandoned and remains so to this day. This same situation could easily occur should the Nesbit family decide to sell the crucial river bottoms. While the Catawbas can find secondary sources for the tempering medium, the same is not true of the Nesbit Bottom clay. Without this clay, the Catawbas would have great difficulty maintaining their ancient pottery tradition.

Recently, there has been great fear among the Catawba potters that the local landowners might retaliate in the face

of the current land suit and deny the Indians access to their clay deposits. Shortly after the suit became a major issue, I received the following complaint from one of the Catawba potters:

> Our clay situation has gone from bad to worse, to use an old saying. Mr. Nesbit only will let the money group get clay. If we want land and programs, we dont get clay. Isn't that terrible? I made cy last clay up last week and that's it. (5-22-78)

These rumors turned out to be without grounds, but many of the potters did not get their summer's clay supply in until late in the season. Then more recently one declared:

> I only have about a peck of pure clay. After the Land owners did not get things to go their way in Washington, I'll bet the Nesbits wouldn't let us within sight of the clay holes. (6-79)

During this same period it was also rumored that the black farmer who owns the current source of the tempering medium was not pleased to have the Catawba Indians visit his land.

It is obvious that this precarious state of affairs should not be permitted to continue. The two parcels of land containing clay crucial to the manufacture of Catawba pottery should remain part of the new reservation that the Catawba Executive Council has requested as partial settlement of the Treaty of 1840. In actuality, the critical land necessary for the continuation of the Catawba pottery tradition makes up only a small portion of the Nesbit farm. In this case, however, the land is valuable river bottom acreage. In the case of the land which yeilds the tempering medium, we are not talking of a valuable parcel of land. This clay hole is located not on valuable farm land but in the middle of a tangle

of scrub oak and weeds.

If the clay holes are not made a part of the New Reservation, it will only be a matter of time before the Catawbas are denied access to their clay sources. One might say that such a loss would not be earth shattering, for only forty Catawba potters are active craftsmen. The Catawba tradition, however, is not just a Catawba treasure but a national one. The Catawba potters constitute the only group of Indian potters east of the Mississippi River which has maintained this aboriginal art form in a nearly pure state from pre-Columbian times to the present. This heritage must be protected.

( )

Appendix IV

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Catawba Indian Tribe of South Carolina, Inc.,	)	C/A No. 80-2050
Plaintiff,	)	
vs.	)	AFFIDAVIT OF NOLA CAMPBELL
State of South Carolina, et al.,	)	
Defendants.	)	

PERSONALLY appeared before me, Nola Campbell, who being duly sworn, deposes and says that:

1. I am a member of the Catawba Indian Tribe.

2. For as long as I can remember members of the Catawba Indian Tribe have gone upon the lands claimed the Nisbet family in Lancaster County to dig clay for use in pottery making.

3. I have gone on the property on average every six (6) to eight (8) months since I was thirteen (13) years old and I am now seventy-two (72) years old. The last time I went on the lands claimed by the Nisbet family in Lancaster County was several months ago.

4. Each time I go on the land claimed by the Nisbets I dig and take away a couple of bushels of clay. I have never been denied access when I went there to dig in the clay holes. I have know of no member of the Catawba Indian Tribe who has ever been denied access

to these lands when they sought to enter and dig clay.

Nola H. Campbell
Nola Campbell

SWORN to before me this
12th day of May, 1990
Robert Marshall Jones (L.S.)
Notary Public for South Carolina
My Commission Expires: 5-21-91

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Catawba Indian Tribe of South Carolina, Inc.,	)	C/A No. 80-2050
Plaintiff,	)	
vs.	)	AFFIDAVIT OF FRANCES WADE
State of South Carolina, et al.,	)	
Defendants.	)	

PERSONALLY appeared before me, Frances Wade, who being duly sworn, deposes and says that:

1. I am a member of the Catawba Indian Tribe.

2. For as long as I can remember members of the Catawba Indian Tribe have gone upon the lands claimed the Nisbet family in Lancaster County to dig clay for use in pottery making. My parents before me went on those lands and dug clay for pottery making.

3. For many years members of the Tribe crossed the river by boat and entered onto the lands claimed by the Nisbets. They never asked permission or notified the Nisbets of their entry on those occasions.

4. I have gone on the property on average several times per year over my lifetime and I am now sixty-six (66) years old.

5. Each time I go on the land claimed by the Nisbets I dig and take up to 150 pounds of clay.

I have never been denied access when I go there to dig in the clay holes. I have knownof no member of the Catawba Indian Tribe who has ever been denied access to these lands when they sought to enter and dig clay.

6. At this time at least nineteen (19) people continue to enter onto the lands claimed by the Nisbet family in Lancaster County on a regular basis and to dig and carry away clay therefrom.

Frances Wade
Frances Wade

SWORN to before me this
12th day of May, 1990
Robert Marshall Jones (L.S.)
Notary Public for South Carolina
My Commission Expires: 5-21-91

Appendix V

642 A Street, N.E.
Washington, D.C. 20002
August 14, 1990

The Honorable Carroll A. Campbell
Governor of South Carolina
P.O. Box 11369
Columbia, South Carolina 29211

Dear Governor Campbell:

I am writing a letter that I feared would be a necessity in 1977 when I first began to work with the Catawba Indian Tribe of South Carolina. On May 17, 1990, the owner of the Catawba pipe clay holes, Mr. William Oliver Nisbet, turned the Catawba potters away from their only pipe clay deposit. This action was taken in retaliation for the land suit. I am writing to implore you to use your influence to help the Indians regain their ancient right to visit King's Bottoms (Nisbet Bottoms) to dig clay.

Although the Catawba Indians lost control of Kings Bottoms (Nisbet Bottoms) in 1840, they have continued to use this crucial resource. Each owner during this 150 year period, including at least two generations of the Nisbet family, has honored the Catawba's right to this clay. This unwritten but long honored agreement has permitted the only Native American pottery tradition practiced east of the Mississippi to survive. Today, Mr. Nisbet has a strangle hold on one of South Carolina's greatest cultural treasures.

Since May, several potters who customarily produce museum-quality wares have been idle. In July a pottery class for 20 children was funded, I think by South Carolina and Federal agencies, and this class could not be conducted without clay. If the Catawba pottery tradition is to survive into the 21st century, the youth must be taught. Everyone recognizes this fact. McKissick Museum has responded by funding a very successful tutorial program. These classes cannot be continued without clay from Nisbet Bottoms.

Since May I have used every avenue known to me to reach Mr. Nisbet and have failed to do so. I feel that you are probably the only person in South Carolina who can intervene on behalf of this small community of American Indian potters and end a lamentable crisis.

Sincerely yours,

Thomas J. Blumer, Ph.D.

APPENDIX VI

State of South Carolina

CARROLL A. CAMPBELL, JR.
GOVERNOR

Office of the Governor

POST OFFICE BOX 11369
COLUMBIA 29211

August 22, 1990

Dr. Thomas J. Blumer
642 A Street, N.E.
Washington, D.C. 20002

Dear Dr. Blumer:

Thank you for your letter concerning the Catawba Indians and their dispute with Mr. Nisbet. The Governor has asked that I respond.

Although, I can understand your concern for the preservation of Native American culture, this matter is currently before the Federal Courts and certainly beyond the power of the Governor to intervene. Furthermore, Mr. Nisbet and his family have resided on this property for over one hundred years. His concern over the Catawba Indian suit certainly has affected his generosity toward those Catawbas who have gathered clay from his land for years. It is indeed unfortunate that the citizens of South Carolina must continue to have to live with the issue, however, until the land claim dispute reaches a final conclusion it is likely that such situations will persist. I certainly can understand those landowners reluctance to grant certain privileges to the Catawbas.

Again, thank you for your letter. If I may be of any assistance to you in the future, please do not hesitate to contact me.

Sincerely,

Mark R. Elam

Mark R. Elam
Senior Counsel to the Governor

MRE/jl-w

Appendix VII

642 A Street, N.E.
Washington, D.C. 20002

Home Telephone (202) 543-7031 Office Telephone (202) 707-9821

September 21, 1992

Mr. & Mrs. William Oliver Nesbit
Van Wyck, South Carolina 29744

Dear Mr. & Mrs. Nesbit,

I have wanted to write to you or talk with you for a very long time about the clay holes and your family's relationship with the Catawba. Since the Catawba filed suit, my greatest fear has been that access to the clay holes would become legally entangled. And it did -- two years ago. I spent hours on the long distance lines talking to Lindsay Pettus and others about a solution. Initially, I thought the happy ending would be a change of heart -- on your part. And I prayed that the Indians would find an alternate clay source that they might use until life in the claim area returned to normal.

My prayers for an alternate clay source were not answered. During the time the Catawba could not dig clay on your land, they made every effort to find clay elsewhere. Two sources were found on the reservation, but neither proved good enough to make pottery. It was so poor that the potters could not build vessels taller than one inch. What a travesty -- what a disappointment -- when compared to the size, the magnificence, of the pots made from the ancient clay holes on your land. Several landowners offered possible clay sources on their land. Samples were tested in Columbia. But all contained too much sand. Geologists at the University of South Carolina have been working with maps, but so far all the clay outcroppings are inferior. The happy result of this turmoil? The Catawba know a lot more about local clay resources. And we have a much better understanding about why the Catawba have been so wedded to Neshit Bottoms (Kings Bottoms/Johnston Bottoms) for so many centuries. The old Indians knew the value of the clay found in Nesbit Bottoms. That's why they've dug clay there for so long.

Last spring, Earl Robbins and Evelyn George told me that you were allowing the potters to dig clay on your property once again. Then came, I thought, the happy ending -- the change of heart. I felt the inextricable bond between the Nesbit family and the Catawba had been mended. But last month, while I conducted at Winthrop University a Teachers' In-Service regarding the Catawba pottery tradition, I heard from several potters that access to the clay holes had become a problem again. My immediate reaction was disbelief, because I had heard that a settlement offer was in the works and that the Catawba were close to accepting the offer. If what I heard about the recent clay hole dispute is true, I hope that by the time you receive this letter the access problem will be a thing of the past and that you will be allowing the Catawba potters access to their ancient clay holes once again.

There's another issue, perhaps even more personal to you. I understand your home has long been on the National Register of Historic Sites. There is every reason to expand the historic importance of your land. It contains the last Catawba village site occupied before the Treaty of 1840. It contains the cemetery they used from pre-Columbian times to the 1860s. And it contains the irreplaceable Catawba clay holes. Your family and the Catawba have had a long and friendly and historic relationship. There must be a way to get past the problem at hand, to recognize the full historic significance of your land, and to preserve the legacy. Perhaps I can help. I stand ready to do so. Perhaps the Catawba Cultural Preservation Project can help. I cannot speak for them. But I believe they stand ready to help as well.

Both points -- expanding the importance of your land on the National Register of Historic Sites and making the clay holes accessible to the Catawba once again -- are points I'd like to discuss with you.

I will be at Winthrop on September 30th for a symposium and exhibit of Catawba pottery. The show will open on October 1, and the symposium will begin at 9:00 a.m. on October 2. My talk is entitled "The Catawba Potters: Teaching in Crisis." I will discuss the complexity of the Catawba teaching process; the traditional pottery method; modern diversions which cause the young to turn away from their tradition; and Catawba innovations to carry the tradition into the 21st century.

I'd like to invite you and Mrs. Nesbit to come. I hope you'll accept my invitation. I'd like you to hear me talk. And if you're inclined, I'd like for us to talk about the points I've raised here. Your family has long played a role in the survival of the Catawba's unique pottery tradition. The Nesbit family still has a role to play in preserving Catawba pottery for both the State of South Carolina and the nation. Again, I hope to see you on October 2.

Sincerely,

Thomas J. Blumer, Ph.D.

CATAWBA NATION
1540 Tom Steven Road
Rock Hill, South Carolina 29730
(803) 324-7078 or (803) 324-0677

Treaty of Pine Tree Hill - 1760
Treaty of Augusta - 1763

30 June 1993

The Honorable George Miller, Chairman
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC

Dear Congressman Miller:

Enclosed you will find my statement on H.R.2399, a bill to settle the Catawba Indian Land Claim which was introduced on June 10th by South Carolina Congressman Butler Derrick. I am unable to be present during the hearing on July 2nd, so I am sending this testimony for the record.

As Assistant Chief of the Catawba Indian Nation, I am deeply concerned about this bill which is written heavily in favor of South Carolina and deprives Catawba of the basic rights of a sovereign Indian nation.

If H.R. 2399 is enacted without change, South Carolina will have succeeded in turning the Catawba Nation into a township under the thumb of local and state control. We will be "federally recognized" in name only. The United States is asked to provide most of the funds for this settlement and to give most of the power to South Carolina. South Carolina's financial contribution to the settlement of the Catawba land claim is minimal, even though state citizens have enjoyed usage of our aboriginal homelands since 1840. This state has an enormous appetite for control over the Catawba Indian Nation and no interest whatsoever in acknowledging any federal rights.

You will hear NARF and Chief Blue say that this settlement is "overwhelmingly supported by the Catawba people." They will not tell you that most of the Catawba people voted on a document they did not understand, or that those who criticized the settlement were not allowed to speak during the meeting where the vote was taken. It is therefore especially important that this bill be afforded a full and fair hearing by the United States Congress. I offer this testimony to help clarify the record and to seek the assistance of Congress in rectifying wrongs which will only become worse if this bill is made law without change.

Sincerely,

E. Fred Sanders

E. Fred Sanders, Assistant Chief

E. Fred Sanders
Assistant Chief

Gilbert B. Blue
Chief

Carson T. Blue
Secretary/Treasurer

STATEMENT OF E. FRED SANDERS, ASSISTANT CHIEF
CATAWBA INDIAN NATION

BEFORE THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
ON H.R. 2399

A BILL FOR THE SETTLEMENT OF LAND CLAIMS OF THE CATAWBA TRIBE OF INDIANS IN THE STATE OF SOUTH CAROLINA AND THE RESTORATION OF THE FEDERAL TRUST RELATIONSHIP WITH THE TRIBE, AND FOR OTHER PURPOSES
JULY 2, 1993

I. Introduction

Greed and political power have destroyed individuals and nations throughout the world since the beginning of time. These twin terminators have been no strangers to American Indian Nations. H.R. 2399, a so-called Catawba settlement, is more evidence of the continuing presence of greed and political power in Indian Country. This settlement will benefit South Carolina and its non-Indian citizens, but it contains very few advantages for the Catawba people. For a mere $12.5 million, South Carolina will achieve its goal of obtaining total control over an aboriginal Indian Nation. If the settlement package is approved as written, it will destroy Catawba's future as an Indian Nation, and its people will be condemned to face the extinction South Carolina has sought for so long.

If the United States government is going to commit $32 million toward this settlement, the Catawba Indian Nation should not be relegated to little more than a tourist attraction in South Carolina. The language of this settlement must be carefully reviewed and amended in order to protect the Catawba people, even though it may mean saving them from themselves.

Too often, history has shown that the United States Congress ironically used its power to harm rather than to protect American Indian nations. Catawba was one of the Tribes subjected to the devastating federal termination policy of the 1950s. Despite promises by federal officials that the Catawba land claim would not be touched by termination, we have learned in recent years that these promises meant nothing. Congress did not reveal this truth to the Catawba people, the federal courts did. It was not the Tribe's fault that language to protect the land claim was omitted from the termination act. The termination act was written by federal officials and advocated by a Congressional representative from South Carolina who claimed, but did not have the full support of the Tribe.

If Congress is going to destroy a treaty right of an American Indian Tribe, it must be told to them in plain language. Isn't this the position which is claimed by the United States, at least in theory? Sadly, termination is still very much alive and well. This settlement, as currently written, is evidence of this fact.

Worn down by the weight of broken promises which have fed the greed and political power of the State of South Carolina, the Catawba people have acquiesced to this settlement by exhaustion.

I was born on the Catawba Reservation on April 9, 1926, and have lived there most of my life. I am familiar with Catawba history, art, customs and tradition and often function as Tribal historian on the board of the Catawba Cultural Preservation Project. Since 1975, I have served as Assistant Chief, and I have been present throughout the process which has brought us to this time.

Although you may hear testimony from Catawba representatives in support of H.R. 2399, they bring you the results of what is called "an adhesion contract," an agreement that is totally one-sided. I submit that the Catawba people did not fully understand the Settlement Agreement they were asked to vote on, just as they did not fully understand the 1959 Termination Act. Now the decision is with the United States Congress. Will you allow South Carolina to railroad you into acquiescence, too?

II. H.R. 2399

H.R. 2399 is just another termination bill if Congress allows South Carolina to take control over Tribal jurisdiction, to subject the federal government to state law, to tax a federally recognized Tribe (after 99 years), to control the application of federal Indian law on the Catawba Reservation, and even to effectively veto this bill. **A complete understanding of the meaning of H.R. 2399 cannot be found in this document alone. It must be read side-by-side with South Carolina's implementing legislation and the Settlement Agreement.** The following is a point by point discussion to illustrate my concerns. It is not a comprehensive analysis.

A. South Carolina will control when and whether federal law becomes effective.

State implementing legislation does not take effect until the Governor of South Carolina has certified federal compliance with terms of the Settlement Agreement. You will not find this language in H.R. 2399. It is Section 2 of the state implementing legislation:

> This act takes effect when the Governor certifies that the Counties of York and Lancaster have taken all actions required of them by the Settlement Agreement. However, the Governor may not make the certification until the Congress of the United States has

> passed and the President of the United States has signed into law federal implementing legislation **which he also certifies as consistent with the Settlement Agreement.** (Emphasis added.)

If the Governor of South Carolina doesn't like any changes made in H.R. 2399, he has the power to make the final decision by refusing to certify that this federal legislation is "consistent with the Settlement Agreement." Governor Carroll Campbell has put himself in the position of ratifier of the settlement.

B. South Carolina will control the application of Federal Indian law on the Catawba Reservation.

Built into all three documents is language which allows South Carolina to decide whether any future federal laws concerning Indians and Indian nations will apply to Catawba. State law is given priority.

> The provisions of a federal law enacted after the date of this agreement shall not apply in the State if the provision materially affects or preempts the application of the laws of the State, including application of the laws of the State to lands owned by or held in trust for Indians, Indian Nations, Indian tribes, or bands of Indians. However, **the federal law shall apply within the State if the State grants its approval** by a law or joint resolution enacted by the General Assembly of South Carolina and signed by the Governor. (Section 19(b) of H.R. 2399; Section 27-16-140(A) of South Carolina legislation)

South Carolina refused to allow the application of some existing federal law on the Catawba Reservation. See Section 16 of H.R. 2399 which states, "The Indian Gaming Regulatory Act (25 USC 2701 et seq.) shall not apply to the Tribe." (See also Section 27-16-110 of the state legislation where **ten percent of gross receipts** must be paid to South Carolina if the Tribe elects to obtain a "special bingo license.")

Section 12(g)(4) states that the Indian Child Welfare Act of 1978 shall not apply to private adoptions of Indian children under the jurisdiction of the Tribe and that state courts are not required to apply standards under this Act in determining whether the proposed adoption is in the best interests of the child. Federal law requires state courts to apply Indian Child Welfare Act

standards in order to protect the rights of Indian children.

The Settlement Agreement and the state legislation both state that Catawba students who attend local schools will be treated as non-residents of the school district and will pay additional fees. This is in addition to Tribal members paying all the taxes other residents of the county pay. Federal Impact Aid will offset some of these fees, but not all.

C. South Carolina will control Catawba Tribal Court jurisdiction.

Throughout the jurisdictional provisions in all three documents you will find South Carolina control. State control means that Catawba cannot offer full tax benefits to businesses located on the reservation. It means that Catawba has no real authority over some of the issues most critical to Tribal sovereignty. I offer a <u>few</u> examples to illustrate my point:

1. This settlement allows Tribal members to appeal a criminal case from Tribal court to state court: "...defendants shall have the right to ... appeal their conviction in tribal court cases to the General Sessions Court..." (Section 11(b)(2)(B) of H.R. 2399). Under federal Indian law, major crimes are under federal jurisdiction (18 USC 1151-1152) and lesser offenses are handled by the Tribal Court (25 USC 1301(7); Indian defendants may not appeal a Tribal court decision to state court.

2. This settlement allows civil cases to be appealed from Tribal court to state court where a new trial may be granted. See Section 12()(3)(D) of H.R. 2399. This allows the state court to completely circumvent a Tribal decision, thus undermining Tribal sovereignty. Under federal Indian law, civil jurisdiction is primarily within the Tribal court system, including appeals. State courts have no jurisdiction over civil matters on federal Indian reservations.

3. This settlement allows the state to determine the parameters of Tribal court jurisdiction, not federal law. See, e.g., Section 11(b)(1)(C): "The subject matter jurisdiction of the court shall be limited to crimes within the jurisdiction of the State's Magistrates' Courts...."

4. This settlement allows the state to waive Tribal sovereign immunity and subjects the Tribe to the South Carolina Tort Claims Act, "to the same extent as the political subdivisions of the state." (Section 12(f) of H.R. 2399.) Federal Indian law provides for Tribal sovereign immunity, unless waived by the Tribal government, just like any other sovereign entity.

D. South Carolina will have the power to subject the federal government to state law.

Section 27-16-90(J) of the state legislation states as follows:

> Unless the Tribe and the State agree upon a valuation formula for pricing easements over the Reservation, **the Secretary is subject to proceedings for condemnation and eminent domain to acquire easements and rights-of-way for public purposes through the Reservation under the laws of South Carolina** in circumstances where no other reasonable access is available.

Will Congress allow South Carolina the right to subject the Secretary of the Interior to state law?

E. South Carolina has built into all three pieces of legislation a right to tax Tribal trust lands and Catawba governmental operations at the end of 99 years.

H.R. 2399, in Section 18, [(d)(2)(B), (f)(1), (i)(2) and (i)(4)(A)] refers to the 99 year provisions. There is no other Indian Tribe subjected to these termination provisions anywhere else in Indian country.

It is difficult to express the depth of my sadness regarding this 99 year death knell for the Catawba Indian Nation. To me, this symbolizes South Carolina's attitude in a way that no other words can express. This 99 year provision was inserted after South Carolina insisted on conditioning their tax exemptions on the blood quantum of Tribal members. It may be the lesser of evils, but it is still offensive and totally detrimental to the Catawba Indian Nation. I am also concerned about potential implications for other Indian Tribes if Congress sanctions South Carolina's right to tax federal trust lands and a federally recognized Tribe at the end of 99 years.

III. Additional Comments

Nowhere in the documents will you find a means of collecting the additional $5.5 million which must come from private funds. The state implementing legislation only addresses the $12.5 million which South Carolina has agreed to contribute toward settlement. The right to bring suit against the state is limited to $12.5 million, in the event the state fails to pay this amount (Section 27-16-50).

Catawba will relinquish invaluable aboriginal fishing, hunting and water rights in exchange for "free" South Carolina hunting and fishing licenses for Tribal members, but only for 99 years. Catawba will be under the regulatory thumb of South Carolina's subdivisions, subject to local laws and regulations. Land acquisition is so restricted by this agreement as to guarantee the Tribe's failure. The federal government is being asked to provide 64% of the funding for Catawba's termination while South Carolina pays much less (25%) and gains the most.

I have identified these issues in order to assist you in your analysis of H.R. 2399 and with the hope that Congress will restore justice for Catawba. If justice is not to be provided in this settlement, then I ask that Congress keep the promises made 35 years ago and restore Catawba's land claim as well as the federal relationship. The Catawba people have suffered far too long as a result of repressive policies and broken promises. Please take this opportunity to correct H.R. 2399 so as to protect the Catawba Indian Nation from a devious state government and restore our trust in this nation by honoring your word.

INDEX TO EXHIBITS
TESTIMONY OF GILBERT B. BLUE, CHIEF,
CATAWBA INDIAN TRIBE OF SOUTH CAROLINA ON H.R.2399,
JULY 2, 1993

National Congress of American Indians

Est. 1944

RESOLUTION TO NO. GB 93-69

Catawba Indian Tribe Restoration
and
Land Claim Settlement

WHEREAS, The American Indian and Alaska Tribal Governments and people have gathered in Green Bay, Wisconsin for the mid-year meeting for the National Congress of American Indians (NCAI) in order to promote the common interests and welfare of American Indian and Alaskan Native peoples; and

WHEREAS, NCAI is the oldest and largest intertribal organization nationwide representative of and advocate for national, regional, and local tribal concerns; and

WHEREAS, the Catawba Tribe entered into a Treaty at Augusta, Georgia, on November 10, 1763, with the King of England, whereby the Tribe reserved a 144,000 acre tract and ceded its aboriginal territory to the King in return for the King's agreement to protect forever the Tribe's possession of its lands; and

WHEREAS, in 1840 the State of South Carolina took the Tribe's lands, attempting to extinguish forever the Tribe's title to the 144,000 acre reservation through a "treaty" in which the United States did not participate; and

WHEREAS, the historical records, from the Revolutionary War to the present, reflect unequivocally the Tribe's efforts to have the United States protect its title to the 144,000 acre reservation; and

WHEREAS, the United States has consistently refused to help the Tribe resolve its land claim, refused to provide federal assistance for the Tribe, and in 1959 secured legislation (referred to as the Catawba Division of Assets Act) that terminated the Tribe's status as a federally recognized Indian tribe and liquidated the 3,434 acre federal reservation which had been purchased by the State of South Carolina and transferred to the United States in trust for the Tribe in accordance with a 1941 Memorandum of Understanding between the United States and the State of South Carolina; and

Exhibit A
July 2, 1993
House Hearings - H.R. 2399

900 Pennsylvania Avenue S.E. • Washington, D.C. 20003 • (202) 546-9404 • Fax (202) 546-3741

WHEREAS, in response to the Tribe's complaints in the 1950's that the Bureau of Indian Affairs was not providing services to the Tribe, the BIA proposed to the Tribe that its assets be liquidated; and

WHEREAS, the Tribe was not represented by counsel and was wholly reliant on its Federal Trustee for advice and assistance; and

WHEREAS, in order to obtain the Tribe's consent for the 1959 Division of Assets Act, the United States assured the Tribe that its longstanding land claim against the State of South Carolina would not be affected by the Termination Act and that the United States would affirmatively protect the land claim; and

WHEREAS, the United States failed to propose or provide explicit protective language for the Tribe's land claim in the 1959 Catawba Division of Assets Act; and

WHEREAS, in order for the 1959 Division of Assets Act to become effective, Congress required the Bureau of Indian Affairs to obtain a second Tribal vote of approval for the termination of federal status and the liquidation of the Tribe's reservation, resulting in further assurances from the Bureau of Indian Affairs to the Tribe and its members that the tribal land claim was protected; and

WHEREAS, at the time Congress was considering the termination of the Catawba Tribe, the vast majority of the Tribe's members did not read or write and relied on the Bureau of Indian Affairs to draft the tribal resolution reflecting tribal consent to the termination of federal status and the division of tribal assets; and

WHEREAS, although the tribal resolution prepared by the Bureau of Indian Affairs and approved by the Catawba Tribe included a provision conditioning tribal consent on leaving the treaty land claim unaffected, the Bureau of Indian Affairs failed to include this provision in its legislative initiative to Congress; and

WHEREAS, the Tribe submitted a litigation request to the Department of the Interior in 1976 which was reviewed by the Solicitor and resulted in the submission of a litigation request to the Department of Justice in 1977, recommending the Department of Justice to institute litigation on the Tribe's behalf, but not before settlement options had been exhausted; and

WHEREAS, settlement negotiations initiated in 1977 between the Tribe and the State of South Carolina failed to achieve satisfactory results, causing the Tribe to file suit in Federal District Court in 1980 seeking to recover possession of its 1763 Treaty Reservation and historic trespass damages; and

WHEREAS, on appeal of the Federal Court decision in the tribal possessory action the U.S. Supreme Court held in 1986 that the 1959 Division of Assets Act requires the application of the state statute of limitations to the Tribe's claim and remanded the case to the lower court to decide what effect the application of the state statute of limitations would have on the claim; and

WHEREAS, but for the 1959 Division of Assets Act no statute of limitations would apply to the Tribe's claim to recover the 1763 Treaty Reservation, and that as a result of the U.S. Supreme Court ruling, a significant portion of the acreage subject to the Tribe's possessory claim was dismissed from the lawsuit; and

WHEREAS, the Tribe sued the United States in 1990 seeking damages for the Government's breach of its promise to protect the Tribe's land claim from the effects of the 1959 Act, but has never had the chance to litigate the merits of this claim because the U.S. Supreme Court has declined to review the ruling of the lower court which dismissed the Tribe's claim for breach based on procedural grounds (statute of limitations); and

WHEREAS, the remand of the possessory claim by U.S. Supreme Court to the Court of Appeals resulted in a determination by the lower court that a substantial portion of the Tribe's claim remained alive despite the application of the state statute of limitations; and

WHEREAS, the Tribe's preparation to sue over 60,000 individual landowners in South Carolina, in 1992, in order to avoid the running of the state statute of limitations resulted in action by Congress to extend the state statute of limitations for one year to October 1, 1993, in order for settlement negotiations to proceed in earnest; and

WHEREAS, an Agreement in Principle to settle the Tribe's claim was concluded on January 12, 1993, and approved 289-42 by vote of the tribal membership on February 20, 1993, after a series of educational workshops about the agreement sponsored by the Tribe on the Reservation; and

WHEREAS, the state statute ratifying and implementing the Agreement in Principle was signed into law by the Governor of South Carolina on June 14, 1993; and

WHEREAS, the Agreement in Principle, as embodied in the State implementing Act and in the Federal bill to settle the Claim (H.R. 2933 and S_____), includes the restoration of the Tribe's federal status, the acquisition of additional reservation lands, a tribal trust fund comprised of federal state and private funds which will enable the Tribe to participate meaningfully in the economy on and near the Reservation, and a jurisdictional compact between the Tribe and the State of South Carolina;

NOW THEREFORE BE IT RESOLVED, that NCAI hereby expresses its support for the Agreement in Principle negotiated by the Catawba Tribe and approved by its members, and directs the Executive Director to take those actions necessary to convey to the United States Government and any other person or entity our endorsement of the Agreement in Principle and any legislation proposed for its ratification and implementation.

CERTIFICATION

S. Diane Kelley, Recording Secretary

Adopted by the Executive Council during the Mid-Year Meeting, Green Bay, Wisconsin, June 27-30, 1993.

No. _____

In The

Supreme Court of the United States

October Term, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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Exhibit C
July 2, 1993
House Hearings - H.R. 2399

QUESTIONS PRESENTED

1) Where Federal agents contracted to protect the Catawba Tribe's land claim in return for the Tribe's agreement to relieve the Government of financial obligations, and the contract was not repudiated by the Government until 1985; did the Court of Appeals err in holding that the Tribe's 1990 breach-of-contract suit against the Government was barred by the Tucker Act's six-year statute of limitations?

2) Did the Court of Appeals err in holding that the statute of limitations required the Tribe to bring suit against the Government long before the Tribe had suffered damages and before the extent of injury could possibly be determined?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND RULES

LEGISLATIVE MATERIALS

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on January 6, 1993.

OPINIONS BELOW

On August 20, 1991, the United States Court of Federal Claims granted the Government's motion to dismiss under USCC Rule 12(b)(1). *Catawba Indian Tribe of South Carolina v. U.S.*, 24 Cl.Ct. 24 (1991) (Appendix B at 21a). The Court of Appeals affirmed. *Catawba Indian Tribe of South Carolina v. U.S.*, 982 F.2d 1564 (Fed.Cir. 1993) (Appendix A at 1a).[1]

JURISDICTION

The Court of Appeals entered the judgment sought to be reviewed on January 6, 1993. This Court has jurisdiction to review the final decision of the Court of Appeals under 28 U.S.C. § 1254(1) (1976).

[1] This Court's prior decision in a related case, South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) (holding that state statutes of limitations applied to petitioner's possessory land claim as a result of the 1959 Catawba Tribe of South Carolina: Division of Assets Act, 25 U.S.C. §§ 931-938 (the 1959 termination act)), is included herein as Appendix D at 70a.

STATUTE TO BE CONSTRUED

The decision below construes 28 U.S.C. § 2501 (1988) which provides:

> Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT OF THE CASE

This is an action by an Indian tribe for money damages against the United States. Jurisdiction in the Court of Federal Claims is conferred by 28 U.S.C. §§ 1491 and 1505. The Tribe's principal claim against the United States is based upon the Government's breach of an implied-in-fact contract to protect the Tribe's claim to possession of 144,000 acres of land that were reserved by the Tribe in treaties with the Crown.[2]

A. Nature Of The Claim.

In 1960, authorized Federal agents made a bargain with the Catawba Tribe. If the Tribe would agree to release the Government from financial and management

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[2] The facts relevant to the possessory land claim, including the establishment of the 1763 Treaty Reservation, the Tribe's illegal dispossession by the State of South Carolina in 1840, and the eventual establishment of Federal supervision in 1943 are set forth in the Court's majority and dissenting opinions in South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) (Appendix D at 86a) and in the Tribe's complaint in this case. (Appendix C at 39a).

obligations it had undertaken in a 1943 agreement with the Tribe, the Government would protect the Tribe's land claim. This was a tacit understanding between the Government and the Tribe that is demonstrated by the conduct of the parties and the surrounding circumstances.[3]

The Government's 1960 promise was not qualified in any way. The Government did not say, and the Tribe did not agree, that the land claim would continue to be viable for only a certain period, after which the claim could be destroyed if the Tribe took no action. The parties understood that the claim would be protected. This contract implied-in-fact required the Government to either file a protective suit on the Tribe's behalf or, at the very least, notify the Tribe that the Tribe would have to act on its own to protect the claim because it might now be subject to harm as a result of the passage of time.

But the Government took no action to protect the land claim. The Government did not file the claim on the Tribe's behalf. It waited until 1985 to notify the Tribe that it would not act to protect the claim, and that, in the Government's view, the claim had not been protected from the passage of time since the termination act became effective in 1962. In 1986, this Court ruled that the 1959

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[3] Congress had required that tribal consent be obtained by providing in the 1959 termination act that the act would not become effective until a majority of the adult members subsequently agreed. 25 U.S.C. § 931. Congress had been informed of Federal agents' pre-1959-Act assurances to the Tribe that the claim would not be jeopardized and of the Tribe's formal resolution expressly conditioning its consent to termination on the status of the land claim being unaffected.

Act resulted in the application of state statutes of limitations to the Tribe's claim.[4] In 1992, the Court of Appeals for the Fourth Circuit affirmed the dismissal of thousands of acres from the claim based upon possession adverse to the Tribe since the effective date of the termination act in 1962. In this case, the Tribe seeks indemnification from the United States for the value of that portion of the Tribe's possessory claim that is barred as a result of the running of the state statute of limitations.

B. Statement Of Facts

In 1953, only ten years after the Government had contracted with the Tribe and the State to provide Federal services to the Catawba Tribe, Complaint ¶ 16y (Appendix C at 51a), Congress drastically altered the course of Federal Indian policy. House Concurrent Resolution No. 108 declared the Congressional policy of terminating the Federal trust relationship with Indian tribes. Pursuant to

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[4] This Court stated in 1986 that it perceived no contradiction between the applicability of the state statute of limitations and the Government's pre-1959-Act assurance that the status of the claim would be unaffected by the 1959 Act. South Carolina v. Catawba Indian Tribe, *supra*, 476 U.S. at 510. This Court rejected the argument that the 1959 Act extinguished the land claim and "*assume[d]* that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner. . . . " *Id.* (emphasis added). This Court assumed that the obligation to bring suit was the Tribe's, but whether the Government had contractually undertaken a post-1959-Act obligation to bring suit on the Tribe's behalf, or otherwise protect the claim, was not before this Court in 1986.

that policy, the Government in 1954 identified the Catawba Tribe as a likely candidate for termination. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 503.

In 1958, in recognition of the disastrous effects termination was having on Indian people, Congress and the Eisenhower Administration modified the termination policy. The Government rejected coercive termination of Indian tribes in favor of a policy that permitted termination based only on informed tribal consent. Complaint ¶ 20 (Appendix C at 52a). *See* F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.).

Shortly thereafter, the Department of the Interior (Interior) dispatched Special Agent Raymond Bitney to the Catawba Tribe for the purpose of securing tribal consent to termination of federal supervision. Complaint ¶ 28 (Appendix C at 54a). The Federal Government had failed to provide services and funding under the 1943 Memorandum of Understanding. As a result, the Tribe was unable to provide housing or productively utilize its restricted federal reservation lands, and tribal dissatisfaction was running high. Complaint ¶ 25 (Appendix C at 53a).

Federal officials played on this dissatisfaction to garner tribal support for the termination proposal. They told the Tribe that while they were powerless to provide additional services, they could facilitate a removal of federal restrictions from the federal reservation. This would result in the Indians acquiring unrestricted fee title which they could then mortgage and thereby secure the funds to improve their housing and to finance farming operations. *Id.*

Agent Bitney pressed Interior's case for termination to the Indians in a door-to-door, family-by-family campaign during the last quarter of 1958. Complaint ¶ 27 (Appendix C at 53a). His reports contain a detailed narrative of the issues discussed at each visit. They show that during these meetings several tribal officials expressed concern about the Tribe's land claim against the State. One tribal official stated that Interior's plan could not go forward until the land claim was resolved. Agent Bitney assured them that the land claim would in no way be jeopardized by Interior's proposal to withdraw federal supervision. Complaint ¶ 27 (Appendix C at 53a).

The Tribe's resolution, drafted by Agent Bitney, expressly conditioned the Tribe's support for the legislation on there being nothing in the legislation impairing the status of the Tribe's land claim. Complaint ¶ 30 (Appendix C at 54a). After the Tribe adopted the resolution, Interior sent it to Congressman Hemphill. The Congressman returned it to Interior, requesting assistance in drafting a bill "to accomplish the desire [of the Tribe] set forth in the resolution." Complaint ¶¶ 30, 31 (Appendix C at 54a, 55a).

The Congressman and Interior officials thereafter presented the bill to the Tribe, which at no time in the process was represented by counsel. At a March 28, 1959 tribal meeting, they read the bill line by line to the Tribe and assured them that it had been drafted to carry out the intent of the tribal resolution. Complaint ¶¶ 22, 34 (Appendix C at 52a, 55a). According to its official minutes of the meetings, the Tribe understood the draft legislation to be a "contract that was drawn up by the Bureau of

Indian Affairs." It approved the "contract" at the March 28, 1959 meeting. *Id.*

Representative Hemphill's introductory remarks emphasized to Congress that the Tribe's consent was contained in the January 3, 1959 resolution. 105 *Cong. Rec.* 5462 (1959). At the subcommittee hearings on the bill, the Congressman and Interior officials emphasized that the bill had been drafted to conform to the desires of the Tribe as expressed in the January 3, 1959 resolution. Congress took note of the January 3 and March 28 endorsements of the bill by the Tribe. H.R. Rep. No. 910, 86th Cong., 1st Sess.; *reprinted in* 1959 U.S.C.C.A.N. 2671, 2672; Complaint ¶¶ 39, 40 (Appendix C at 57a).

Presumably to ensure that the Federal policy of informed tribal consent was implemented, Congress amended the bill to provide that it would not become effective until a majority of the adult members of the Tribe agreed to accept the division of assets in accordance with the Act's provisions. With that important exception, Congress enacted the same bill that had been read line by line to the Tribe.

The termination act became law on September 21, 1959. Once again Government agents were dispatched to the Tribe to secure the consent required by Congress. Federal agents secured the agreement of tribal members by assuring them that their land claim would be protected. Complaint ¶ 44 (Appendix C at 58a). By June 30, 1960, Government agents had collected enough signatures to permit Interior to announce that the Tribe had

accepted termination. Pursuant to the Act, Interior distributed the 3,434 acres acquired in 1943 and liquidated other tribal assets. On July 1, 1962, the Secretary of the Interior formally decreed that termination of the Catawba Tribe was final. Complaint ¶¶ 41, 42 (Appendix C at 58a).

In 1977, in a formal litigation request to the Department of Justice, the Solicitor of the Department of the Interior concluded that: 1) the Catawba Tribe had been dispossessed of its treaty reservation in violation of Federal law; 2) the 1840 state treaty was void; 3) the Tribe could establish a *prima facie* case for repossession of its reservation under the Nonintercourse Act; 4) "the United States has had a duty under the Non-intercourse Act, since the Treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation;" and 5) *"this duty was not affected by the 1959 Act."* Complaint ¶ 52 (Appendix C at 60a) (emphasis added). "The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible. . . . " *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 518 (1986) (Justice Blackmun, dissenting).[5] Thereafter, efforts to legislatively settle the claim failed. *Id.*

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[5] On March 31, 1983, the Secretary of the Interior included the damages portion of the Catawba Tribe's land claim on the list of potentially meritorious Indian claims to be investigated by the Department of the Interior pursuant to 28 U.S.C. § 2415 (1982). 48 Fed.Reg. 13920 (1983). Interior's inclusion of the claim on the § 2415 list meant that § 2415's Federal statute of limitations would not begin to run on the claim until the Department formally notified the Tribe that it would not pursue the claim on the Tribe's behalf. The Catawba land claim remains on the § 2415 list.

In 1980, the Tribe filed an ejectment action in Federal District Court seeking to recover possession of its treaty reservation based on its unextinguished, recognized Indian title. In 1983, the district court dismissed the claim based on the 1959 Act, concluding, among other things, that the Act resulted in the application of state statutes of limitations to the Tribe's claim and that they operated to bar the claim in its entirety. The Court of Appeals for the Fourth Circuit reversed, holding that the 1959 Act did not extinguish the claim nor had state law become applicable to the claim as a result of the Act. Because it held state law inapplicable to the claim, the Court of Appeals did not decide what effect South Carolina statutes of limitations would have on the claim. *Catawba Indian Tribe v. State of S.C.*, 718 F.2d 1291 (4th Cir. 1983), *aff'd en banc* 740 F.2d 305 (4th Cir. 1984) (*Catawba I*).

The State petitioned this Court for a Writ of Certiorari. This Court requested the views of the Solicitor General. In May 1985, the Department of Justice, overruling Interior's views, urged this Court to grant *certiorari* and reverse the Court of Appeals on the grounds that the 1959 termination act had resulted in the application of state statutes of limitations to the Tribe's land claim. This was the first notification received by the Tribe that the Government would not take action to protect the claim and believed that the claim had been unprotected since 1962.

This Court granted *certiorari* and reversed in 1986. Reviewing the single issue of whether the 1959 Act applied state statutes of limitations to the Tribe's Federal cause of action, this Court, in a 6-to-3 decision, determined that the statute's plain language compelled the

application of state law limitations periods to the claim. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986). The case was remanded to the Court of Appeals to determine the effect of state law limitations on the Tribe's claim.

In 1989, the Court of Appeals ruled that South Carolina's 10-year statute of limitations would operate to bar the Tribe's claim to those lands where the claimant could prove adverse possession for a continuous 10-year period between 1962, when the termination act became effective, and 1980, when the Tribe filed suit. Because tacking successive periods of adverse possession to meet the 10-year statutory period is not permitted by South Carolina law, the Tribe's claim would not be barred as to lands not continuously possessed adversely for 10 years. *Catawba Indian Tribe v. State of S.C.*, 865 F.2d 1444 r(4th Cir. 1989), *cert. denied*, 491 U.S. 906 (1989) (*Catawba II*).

On remand, the district court, on July 19, 1990, found numerous defendants' evidentiary showings to be sufficient to prove adverse possession for 10 years. It then dismissed the Tribe's claims to parcels totaling 10 to 20% of the 1763 Treaty Reservation. On the Tribe's appeal, the Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and vacated and remanded in part. *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334 (4th Cir. 1992) (*en banc*), *cert. denied*, 61 U.S.L.W. 3620 (U.S. Mar. 8, 1993) (No. 92-1088) (*Catawba III*).

In 1990, within six years of the Government's 1985 notice, this Court's 1986 decision that state statutes of limitations applied, and the Fourth Circuit's decision in

Catawba II that some portion of the Tribe's claim would be barred, the Tribe filed suit against the United States.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Is One Of Extreme Importance.

In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 505 (1986), this Court granted the State of South Carolina's petition "because of the importance of the case." Holding that state statutes of limitations applied to the Tribe's claim, this Court observed that the Government's pre-1959-Act assurances that the claim would not be jeopardized by termination were not inconsistent with the application of state statutes of limitations. In dissent, Justice Blackmun, joined by Justices O'Connor and Marshall, observed that:

> Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From my perspective, there is little to be proud of here.
>
> Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," . . . I do not join the judgment of the Court.

Id. at 529 (citation omitted).

At the very core of this case is the very important question whether this great nation will keep its word to a small, unrepresented Indian Tribe that relied in good faith on its bargain with the Government. Whether the United States fulfills its contractual obligations is always a matter of importance. But where a case involves contractual obligations incurred in the exercise of Congress' plenary power over Indian affairs that affect the very survival of valuable treaty property rights, the issues assume special importance. As this Court noted over 50 years ago, in dealing with treaty obligations to Indians, the United States "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

And it cannot rightly be said that these contractual obligations are of lesser importance in this case because they were undertaken in the course of terminating Federal supervision of the Catawba Tribe. Congress plainly intended that the Tribe benefit from the 1959 Act and that its property rights be protected. The lower court's decision in this case, holding that the six-year statute of limitations begins to run in favor of the Government long before the existence of an injury or the amount of damages could possibly be determined, has broad implications for the administration of Indian affairs and the accountability of the Government to its Indian beneficiaries.

In 1985, in a case where the Catawba Tribe was seeking redress in a manner consistent with the assurances of the Government, this Court recognized the

importance of the issue and granted review. Today, this case is no less important simply because the rights of third-party landowners are not at stake. The Court of Appeals' ruling results in manifest injustice to the Catawba Indian Tribe by permitting the Government to remain wholly unaccountable for its breach of contract. The Government benefited from its bargain with the Catawba Tribe, and the Tribe should not be denied at least an opportunity to have its claim heard.[6]

The issues presented are of paramount importance to the Catawba Tribe, to Indian tribes generally, and to the administration of Indian affairs.

B. The Court of Appeals' Decision Conflicts with this Court's Settled Doctrine that a Claimant Need Not Resort to Premature or Piecemeal Litigation, and Conflicts with the Rationale of this Court's Prior Decision in *South Carolina v. Catawba Indian Tribe*.

The Court of Appeals erroneously held that the Tribe was required to file suit against the Government within six years of the effective date of the termination act, *i.e.*, by July 1, 1968. *Catawba Indian Tribe of South Carolina v. U.S.*, 982 F.2d 1564, 1571 (Fed.Cir. 1993). Alternatively, the lower court held that the Tribe's suit had to be filed by

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[6] The facts alleged in the Tribe's complaint must be taken as true and "[i]f these facts reveal any possible basis on which the [Tribe] might prevail, the motion must be denied." W.R. Cooper Gen. Contractor, Inc. v. United States, 843 F.2d 1362, 1364 (Fed.Cir. 1988); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Because the facts in this case reveal a strong basis for recovery, the lower court erred in denying the Tribe an opportunity to offer evidence to support its claim.

July 1, 1978 at the latest, that date being six years after the first of the adverse possessors perfected title against the Tribe. *Id.*

1. *The Tribe could not have maintained suit in 1968 because it had suffered no injury at that time.*

In holding that the Tribe's claim against the Government accrued in 1962, the Federal Circuit ignored the Court of Claims' long-standing principle that "[i]t is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages." *Terteling v. United States*, 167 Ct.Cl. 331, 338, 334 F.2d 250, 254 (1964); *United States v. Dickinson*, 331 U.S. 745 (1947).

In this case, the Catawba Tribe could not possibly have brought suit in 1968. Before 1972, the Tribe had no conceivable claim against the Government because no portion of its third-party land claim had even arguably been barred. *Catawba II, supra*, 865 F.2d at 1456. That the mere application of state law was not an actionable injury is established by this Court's 1986 statement that there was no contradiction between the application of state statutes of limitations and Government assurances that the status of the land claim would not be affected. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 (1986).

The lower court misunderstood the very nature of the Tribe's claim. The actionable injury in this case is not the application of state law. Rather, it is the Government's breach of its agreement to protect a claim that had become subject to state law in return for the Tribe's

consent to termination. As a result of this misunderstanding, the lower court failed altogether to consider the Tribe's breach of implied-in-fact-contract claim. The opinion below contains no analysis relevant to the Government's post-1959-Act obligation to bring suit on the Tribe's behalf or to repudiate its bargain in a timely fashion so that the Tribe itself might act to protect its claim.

2. ***After 1972, the Tribe was not required to bring suit against the Government until the third-party possessory claim was resolved because it would have risked* res judicata *and there was no conceivable way to determine the amount of damages so that a final account could be struck with the Government.***

Although the principles of *United States v. Dickinson*, 331 U.S. 745 (1947) control the analysis of post-1972 accrual, they were ignored by the lower court. *Dickinson* establishes that where the risk of *res judicata* exists and the existence and extent of damages are uncertain as a result of circumstances controlled and methods chosen by the Government, the claimant need not resort to piecemeal or premature litigation. Suit may properly be postponed until the consequences of the Government's action "have so manifested themselves that a final account may be struck." *Id.* at 749.

The lower court failed to consider the Tribe's argument that any suit brought against the United States prior to resolution of the third-party possessory claim would have subjected the Tribe to the risks of *res judicata*. If the Tribe had brought suit in 1977, the Government would

have defended the suit on the grounds that the 1959 Act did not extinguish the land claim or subject it to state law time bars, *i.e.*, that the Government had fulfilled its contractual and trust obligations by fully protecting the land claim. That was the Government's official position from 1977 to 1985. Had the Government prevailed in such a suit,[7] and had the Tribe then pursued its possessory claim against the third-party possessors of the land, the third-party defendants in the possessory claim would not have been bound by the Court of Claims' ruling that the 1959 Act had no effect on the Tribe's land claim. *Hansberry v. Lee*, 311 U.S. 32 (1940). If the federal district court in the possessory claim had then ruled in the defendants' favor and held, contrary to the Court of Claims, that the 1959 Act did in fact extinguish or limit the possessory claim, then the Tribe would have been barred by *res judicata* from again pursuing its breach of contract and trust claims against the Government.

In addition, the lower court's alternative holding that the claim accrued in 1972 when the 10-year adverse possession period ran on some parcels requires the Tribe to bring suit before damages could possibly be determined so that a final account could be struck. The Federal Circuit's analysis failed to consider that South Carolina's 10-year statute operates as an affirmative defense. Under

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[7] In 1967, the Court of Claims had held in similar circumstances in Menominee Tribe of Indians v. United States, 179 Ct.Cl. 496, 388 F.2d 998 (1967), *aff'd*, Menominee Tribe v. United States, 391 U.S. 404 (1968), that the Menominee Termination Act's general application of state law to that tribe did not subject the Menominee's treaty right to hunt and fish to the application of state law.

South Carolina law, legal title to the disputed lands is held by the Tribe and as a result the Tribe is entitled to a presumption of possession. The third-party claimants' actual possession is deemed to be in subordination to the legal title unless and until each claimant proves, by clear and convincing evidence, open, hostile, notorious, continuous, and exclusive possession for 10 years without tacking. *Catawba II, supra.*

In circumstances where: a) a claimant waives his affirmative defense; or, b) land has been unoccupied; or, c) land has been possessed for less than 10 continuous years without tacking between 1962 and 1980; or, d) an adverse claimant fails to prove the character and duration of his possession by clear and convincing evidence; legal title will remain in the Tribe. Thus, with respect to that parcel of land, the Tribe's possessory claim would remain viable and the Tribe would have suffered no damage as a result of the Government's breach of contract. *Catawba II, supra; Catawba III, supra.*

Plainly, such a fact-based determination of rights between the Tribe and third-parties could not take place in a Court of Claims suit between the Tribe and the Government. After 1972, final resolution of the third-party possessory claim became a prerequisite to fixing the Tribe's damages so "that a final account may be struck." *United States v. Dickinson, supra,* 331 U.S. at 749. This principle was applied by the Court of Claims to the implied-in-fact-contract claim in *Terteling*: "*Dickinson* . . . teaches us that these contractors had the right to wait until their full obligations were ascertainable before bringing suit therefor." Key to this analysis is the fact,

relied on heavily in *Dickinson* and *Terteling*, that the Government controlled the circumstances and chose the method that created the uncertainty. In such a situation, this Court recognized the unfairness of placing on the claimant the onus of determining the decisive moment when the fact of injury could no longer be in controversy. *Dickinson, supra* at 747-49.

The lower court ignored the rationale of *Dickinson* and *Terteling* and failed altogether to consider the uncertainty faced by the Tribe as a result of the Government's choice of methods.[8] In holding that the claim in *Terteling*

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[8] While the lower court charged the Tribe with knowledge in 1962 of the effects of the 1959 Act, South Carolina v. Catawba Indian Tribe was a case of first impression. The effect of a termination act on a Nonintercourse Act land claim had not previously been before the courts and its resolution was certainly not clearly foreshadowed. An *en banc* Court of Appeals for the Fourth Circuit ruled in 1984 that the 1959 Act did not apply state law to the claim, Catawba Indian Tribe v. South Carolina, 740 F.2d 305 (4th Cir. 1984), and three dissenting Supreme Court Justices likewise believed that Congress intended to leave the Catawba's land claim wholly exempt from the 1959 Act's general application of state law. Indeed, "[p]rior to [the Supreme Court's decision in] *Catawba*, the federal courts had not held a Nonintercourse claim susceptible to a state law time bar." Note, *South Carolina v. Catawba Indian Tribe: Terminating Federal Protection with "Plain" Statements*, 72 Iowa L. Rev. 1117, 1122 (1987), *citing* Clinton and Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17 (1979). Nor had the federal courts ever held that unextinguished treaty rights or undistributed *tribal* property, as distinguished from the distributed property of individual Indians, were subject to application of state law, even when considering the effect of termination legislation on such rights and property. *See*, Menominee Tribe v. United States, 391 U.S. 404 (1968); Kimball v.

accrued "only when the litigation ended [and] the contractors could determine the total amount of the litigation expenses . . . ," *i.e.*, when the Supreme Court denied *certiorari*, *id*, 334 F.2d at 254, the *Terteling* court relied heavily on the fact that while the Government action that gave rise to the injury may have been lawful, the Government had a choice of methods of fulfilling its contract to furnish gravel pit sites. Had it chosen a more certain method, the injury to the contractors "would probably not have resulted," *id*. But the Government chose a method that created uncertainty. The contractors took action in reliance on the contract implied-in-fact and the Government was held to bear the risk that damages would occur as a result of the Government's choice of methods. *See Juda v. United States*, 6 Cl.Ct. 441, 451 (1984) ("The doctrine announced in *Dickinson* and elaborated by the Court of Claims in a variety of factual contexts has application to the facts of this case," alleging contract implied-in-fact imposing fiduciary obligations). Because the Government had control of and chose the method of carrying out its obligations to protect the claim, the principle of *Dickinson* applies in this case to permit suit to be postponed until damages have been suffered and their amount can be fixed. As long as the Tribe reasonably continued to rely on the Government's assurances, the Government would stand in the role of an indemnifier under its contract implied-in-fact for whatever damages the Tribe suffered as a result of the Government's breach.

Callahan, 493 F.2d 564 (9th Cir.), *cert. denied* 419 U.S. 1019 (1974); Note, *Terminating Federal Protection with "Plain" Statements*, *supra*.

The Government's ability to fulfill its contractual duty by simply notifying the Tribe that its claim might be subject to harm as a result of the passage of time ceased in 1972, when the shortest of the state statutes of limitations arguably became applicable. Before 1972, the Government could have simply notified the Tribe and, regardless of whether the Tribe actually brought suit, the Government would have been discharged of any liability. After 1972, any repudiation by the Government of the 1960 bargain would have required the Tribe to file suit not against the Government, but against the third-party possessors of the land in order to mitigate damages.

While the Tribe might have maintained suit against the Government after July 1, 1972, *Dickinson* makes it plain that the Tribe was not required to bring suit at that time and thereby face the risk of *res judicata* and the uncertainty of the damage. *Id.*, 331 U.S. at 749. Resolution of the third-party possessory claim had become a prerequisite to determining both the existence and amount of damages so that a final account could be struck. While the Government might lessen the amount of its exposure by repudiating its agreement with the Tribe sooner rather than later, it could no longer totally avoid the risk that its actions, or failure to act, might result in extinguishment of a portion or all of the Tribe's title. And, as long as the Tribe's continued reliance on its contract with the Government was reasonable, that risk was the Government's to bear under its contract implied-in-fact.

Until the Government's 1985 *amicus curiae* brief notified the Tribe that the Government had not and would not act to protect the claim, the Tribe's reliance on its 1960 contract with the Government was reasonable. In 1959,

after the bill applying state law was drafted, the Government led the Tribe to believe that application of State law would not impair its claim in any way. In 1960, Government agents secured the Congressionally-mandated tribal consent in return for assurances that the claim would be protected. The Government had affirmatively undertaken both the duty of protecting the claim and the role of advising its unrepresented beneficiary and gave no notice or indication that its actions, or failure to act, might harm that which it had promised to protect.

In 1977, the Interior Solicitor expressly affirmed the Government's duty to protect the claim and recommended that the Government fulfill its obligation to protect the claim by bringing suit on the Tribe's behalf. In 1983, Interior placed the damages portion of the Tribe's land claim on the list of claims against which the applicable federal statute of limitations would not begin to run until the Government notified the Tribe that it would not pursue the claim on the Tribe's behalf. The Solicitor's 1977 conclusion that the Government had a duty to protect the claim remained the official position of the United States until the Justice Department overruled Interior in 1985 and informed this Court that it believed that the 1959 Act had resulted in the application of state statutes of limitations to the Tribe's claim.[9]

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[9] In 1980, notwithstanding that the Tribe's litigation request was still pending with the Department of the Interior and that the Government's official position continued to be that the claim was fully protected, the Tribe for its own reasons filed its third-party land claim. The effect of this filing was to mitigate damages against the Government well in advance of the Government's belated 1985 notice repudiating its 1960 bargain.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a Writ of Certiorari and review the erroneous judgment of the court below.

Dated this 6th day of April, 1993.

Respectfully submitted,

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APPENDIX A

The CATAWBA INDIAN TRIBE of SOUTH CAROLINA, Plaintiff-Appellant,

v.

The UNITED STATES, Defendant-Appellee.

No. 92-5018.

United States Court of Appeals, Federal Circuit.

Jan. 6, 1993.

Don B. Miller, Native American Rights Fund, Boulder, CO, argued, for plaintiff-appellant.

Katherine L. Adams, Environment and Natural Resources Div., Dept. of Justice, DC, argued, for defendant-appellee. With her on the brief were Miles E. Flint, Deputy Asst. Atty. Gen., J. Carol Williams and Andrew M. Eschen, Attorneys.

Before MAYER, MICHEL, and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

In this case, the Catawba Indian Tribe (the Tribe) alleges a series of wrongful acts by the United States Government which, the Tribe contends, caused substantial financial harm to the Tribe through the loss of some, if not all, of their ancestral lands.

After having failed in its effort to recover the actual lands themselves,[1] the Tribe now asks compensation for

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[1] *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986), *on remand*, 865 F.2d

the loss, and, on the basis of the Tucker Act, seeks the aid of the United States Claims Court[2] in obtaining that compensation. The Claims Court, on the grounds that the relevant statutes of limitations have run against the Tribe's claim, dismissed the suit. *Catawba Indian Tribe v. United States*, 24 Cl.Ct. 24 (1991). The only question before us is whether the Claims Court was correct in so ruling. We hold it was and therefore affirm.

I. BACKGROUND

A.

While some would view the origins of this case to be the era when European adventurers came upon the vast North American continent and the peoples whose home it was, the legal issues in this case date from 1763. In that year the King of England conveyed to the Catawba Tribe, then occupying areas of what later became North and South Carolina, a 15 square mile tract, about 144,000 acres, to be their ancestral home.[3] The Tribe subsequently

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1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989).

[2] The Claims Court was renamed the Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506 (1992).

[3] The historical facts in this case are of record and largely undisputed. We need not set them out in full here, since they are given in considerable detail in the several prior opinions that have been written in this litigation, including the majority and dissenting opinions in the Supreme Court. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039. We sketch them here only to put in context the specific events that the Tribe claims as the basis for this suit.

occupied that tract, now wholly within the boundaries of South Carolina.

The Tribe alleges that when the United States was formed, it succeeded to the position of the grantor, with all that entails. Over the years the United States did assume a trustee relationship with the various Native American tribes, including the Catawbas. In that capacity the Government undertook a number of actions intended to assist Native American tribes in their efforts to accommodate to the influx of others into the country.

One of these efforts took the form of an act known as the Nonintercourse Act. Under the terms of the earliest version of the Nonintercourse Act, effective in 1790, (now codified as re-enacted and amended at 25 U.S.C. § 177 (1988)), transfers of title to Native American lands were prohibited unless pursuant to a treaty approved by the United States.

Despite this law, and without approval from the United States, the State of South Carolina in 1840 negotiated with the Tribe an agreement – known as the Treaty of Nation Ford – under which the Tribe conveyed its entire 144,000 acres of ancestral lands to the State for $16,000 and a promise that it would be given a new reservation somewhere in the State as its tribal land.[4] Over the years the State conveyed that original 144,000 acre tract into private ownership, and title to it is now in some 27,000 different owners.

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[4] The record reflects that the State, after some years, eventually provided the Tribe a 630 acre parcel at considerably less cost to the State than had been agreed.

In 1940, the Federal Government undertook tripartite negotiations with the Tribe and South Carolina. South Carolina sought a release and quit-claim from the Tribe in exchange for its participation in a joint rehabilitation program. The Federal Government doubted the legality of this exchange and refused to agree. Then in 1943, the parties signed a Memorandum of Understanding which transferred to the Federal Government 3,434 acres to hold in trust for the Tribe. The Federal Government agreed to provide additional services, and the Tribe adopted a constitution. However, under the agreement the historic land claim remained intact, and unresolved.

In the 1950's, Congress decided to terminate the Government's trustee relationship with the various Native American tribes. A series of acts ensued, known as the Termination Acts. It was the manner in which the Termination Act applicable to the Catawba Tribe was negotiated and executed that gives rise to many of the Tribe's claims in this litigation.

B.

The Tribe alleges that in 1958-59 a representative of the Bureau of Indian Affairs (BIA), on behalf of the Federal Government, undertook negotiations with the surviving members of the Tribe looking to an agreement under which the Government's trustee relationship to the Tribe would be ended, the Tribe and its members would be released from any special relationship to the Government, and the Government would no longer have responsibility for the well-being of the Tribe. During the course

of these negotiations, the Tribe reasserted its long-standing grievance involving its ancestral lands. The Tribe alleges that it was assured that the termination of the Government's trusteeship would not affect its rights under that claim.

Subsequently, with the cooperation of the Tribe, a draft act was prepared and submitted to Congress. On September 21, 1959, the Catawba Indian Tribe Division of Assets Act, now codified at 25 U.S.C. §§ 931-938 (1988) (the Termination Act or Act), was enacted. Following affirmation by the Tribe members, as provided by the Act, the Termination Act became effective by declaration of the Secretary of the Interior on July 1, 1962.

Section 5 of the Act, now codified at 25 U.S.C. § 935, contains the following provision:

> The constitution of the tribe . . . shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, *and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* (Emphasis added).

The meaning and effect of this particular section of the Act, and especially the emphasized language, is a central issue in the current dispute over ownership of the lands in question, the dispute which gave rise to this action.

In 1980 suit was brought in the Federal District Court of South Carolina on behalf of the Catawba Tribe against

various private landowners, claiming ownership in the Tribe of the original ancestral lands. The specific parcels involved were among those that had long ago been conveyed by the State into private ownership. The landowners responded that, even if the Treaty of Nation Ford was invalid, as alleged, section 5 of the Termination Act made the Tribe subject to all State laws, including the South Carolina law on adverse possession. Under the State's law, any landowner who could prove ten years continuous adverse possession would be entitled to keep the land, even against the true owner.

The Tribe responded that, in view of the specific understandings with the Federal Government that accompanied the drafting and enactment of the Termination Act concerning the preservation of their historic claim, the Act could not have been intended to, and did not, have that effect. The District Court ruled in favor of the landowners in 1983.

On appeal to the Fourth Circuit, that court reversed, holding that ambiguous statutes affecting the Tribe should not be construed to their prejudice, and accordingly, the ambiguous phrasing of section 5 must be construed to exclude any congressional intent to adversely affect the Tribe's land claim. The Fourth Circuit held that the provision was intended only to end federal supervision and assistance. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1296-97 (4th Cir.1983), *adopted en banc*, 740 F.2d 305 (4th Cir.1984).

The Supreme Court granted certiorari and reversed the Fourth Circuit. The Court held that the Termination Act provision applied in all respects, and that the Tribe's

claim to its land was subject to any adverse possession rights which may have accrued under South Carolina law. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). On remand to the Fourth Circuit, that court held that adverse possession for ten continuous years subsequent to July 1, 1962 would bar the Tribe's claims against individual possessors. 865 F.2d 1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989). Subsequently the District Court, on July 19, 1990, dismissed the Tribe's claims to parcels totalling about 75% of the original acreage. *See* 24 Cl.Ct. at 28.

C.

Stymied in its efforts to regain its ancestral lands, the Tribe in 1990 turned to the Claims Court for relief under a new theory. The Tribe proffers seven claims upon which its argues monetary relief from the United States should be granted. Claims 1 and 2 allege breach of fiduciary duty based on the Government's permitting South Carolina to acquire the original lands, and subsequent failure to investigate and restore the Tribe to possession.

Claim 3 alleges a continuing breach of fiduciary duty to protect the viability of the Tribe's land claim, based, *inter alia*, upon the Government's conduct and affirmative acts before, during, and after the enactment of the Termination Act. The Tribe alleges that as part of the approval action by the Tribe, the Tribe was assured that nothing in the Termination Act would affect the Tribe's claim to its ancestral lands.

These alleged Governmental assurances turned out to be wrong, and form the basis for the Tribe's claim that the Government failed to protect the Tribe's land claim by a breach of a duty to notify the Tribe of the effect of the 1959 Termination Act (claim 4), breach of an implied-in-fact contract that the ensuing losses the Tribe sustained would not happen (claim 5),[5] and a Fifth Amendment taking of a vested property right – the *claim* to the land, rather than the land itself (claim 6).[6]

Finally, since much of the 144,000 acre tract is now permanently in possession of others pursuant to the State adverse possession provisions and the decisions in *South Carolina v. Catawba Indian Tribe, supra* note 1, the Tribe alleges that the Government has failed to distribute those specific assets to the Tribe in accordance with the Termination Act provision, 25 U.S.C. § 933, constituting a breach of a continuing duty to quiet title and distribute

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[5] At oral argument before this court, the Government contended that the Supreme Court implicitly dealt with the issue of whether an implied-in-fact contract arose as a result of the negotiations related to the enactment of the Termination Act, and in effect determined that no such contract existed. Counsel for the Tribe, who argued the case in the Supreme Court, responded to a question with the statement that the issue of whether a contract arose was never raised or considered by the Court. While a close reading of the Supreme Court's opinions rendered in this matter supports the Tribe's view of the matter, in view of the manner of disposition of the case it is unnecessary for us to resolve this question.

[6] For purposes of this analysis, we assume that this *claim* for the historic lands is a property interest in the nature of a chose in action, and could be subject to 'taking' by the government under the Fifth Amendment. *See generally, Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991).

assets under the terms of the 1959 Termination Act (claim 7).

The United States moved for dismissal of the Tribe's claims on the grounds that whatever wrongful acts there may have been, any remedy available under the Tucker Act is barred because the Tribe waited too long to sue. The Claims Court dismissed all seven claims as barred by the Indian Claims Commission Act (ICCA) five-year statute of limitations, or alternatively by the six-year statute of limitations of the Tucker Act. In reviewing the propriety of this dismissal, we take as true the facts alleged by the Tribe in its complaint. *W.R. Cooper General Contractor, Inc. v. United States,* 843 F.2d 1362, 1364 (Fed.Cir.1988).

At oral argument the Tribe conceded, as it must, that any causes of action which accrued before 1946 were indeed barred by failure to have brought them before the Indian Claims Commission during the five year window provided under the ICCA, discussed in more detail below. But, the Tribe argues, there were a series of post-1946 events between the Tribe and the Government that constituted wrongs by the Government that are not barred by the ICCA. The only issue before us then is whether the alleged wrongs arising from these later actions are barred on the grounds that this suit, filed on June 21, 1990, was filed later than the six years allowed under the Tucker Act after the causes of action first accrued.

II. DISCUSSION

A.

As an initial matter, we address the Government's argument that the Claims Court correctly held that the

ICCA bars all seven of the above-described claims. The ICCA states:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before that date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

25 U.S.C. § 70k (1988).

The Government asserts that all seven of the Tribe's claims may be understood to be one single 'claim' within the meaning of the statute, because "all of the Tribe's claims stem from one basic contention – namely, that the Government had an obligation to protect the Tribe from the effects of the 1840 Treaty of Nation Ford, and it failed to do so." Because that 'claim' existed before August 13, 1946, it is now wholly barred by the ICCA. This is too broad a reading of the Tribe's claims.

The Tribe's claims are grounded upon three separate bases – claims 1 and 2 upon the government's historical failure to restore the Tribe to ownership of its land; claims 3-6 upon the misrepresentations regarding the legal effect of section 5 of the Termination Act, 25 U.S.C. § 935; and claim 7 upon the obligations imposed on the Government by the Termination Act itself. While all seven claims may stem at some general level from the allegations of a unitary disregard by the Government for the Tribe's land claim, this is not enough to have brought claims 3-7 under ICC jurisdiction.

The three groupings of claims depend on different facts which occurred at different times. Indeed, the facts which led to claims 3-7 could hardly have been anticipated in 1946 or within the five year statutory period thereafter (by 1951), since the Federal Government did not announce its policy of terminating its trust relationships until 1953.

The Tribe concedes that 'historical' claims should have been brought by the 1951 deadline. Thus claims 1 and 2 are properly held to be barred by the ICCA, since these claims essentially reside in the Government's alleged ongoing failure to restore to the Tribe the *land* at issue. However, both the Government and the Claims Court err in equating the Government's passive failure to act to restore the land with the Government's alleged active representations that the Termination Act, effective in 1962, would not affect the Tribe's historic claim to the land.

B.

1.

Claims 3 through 6 (we address claim 7 separately, *infra* Part C) are not barred by the ICCA. The question remains whether, as the government contends, they are barred by the Tucker Act six-year statute of limitations, 28 U.S.C. § 2501 (1988).[7]

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[7] Claim 3 is not explicitly limited to conduct and affirmative acts in relation to the passage of the Termination Act. However, any claim based on historical acts relating to the loss of the ancestral land (or any other act occurring prior to August 13,

The text of this provision reads "[e]very claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Claims 3 through 6 stem from the Government's alleged assurances that the land claim would be preserved despite the enactment of the Termination Act. As we know, it was not. The initial question is, when did the cause of action underlying these claims "first accrue" so as to begin the running of the Tucker Act statute of limitations? Suit was filed under the Tucker Act on June 21, 1990; the statute of limitations under the Act is six years. In order not to be barred, the underlying cause of action must have first accrued on or after June 21, 1984.

It is hornbook law that a claim does not accrue until all events necessary to fix the liability of the defendant have occurred – when "the plaintiff has a legal right to maintain his or her action." Corman, *Limitation of Actions*, § 6.1, p. 374 (1991). *See also Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct.Cl.1966) (" 'First accrual' has usually been put, in broad formulation, as the time when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.") The Tribe takes the position that the underlying cause of action did not accrue until the Tribe was 'damaged', because 'damage' was an event necessary to fix the Government's liability. The Tribe argues that it was not 'damaged' until it was clear that

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1946) is barred by the ICCA. Accordingly, we limit our discussion of Claim 3 to conduct and affirmative acts associated with the passage of the Termination Act.

the Government's assurances about the legal effect of section 5 (to the effect that the historic claim had been protected from application of South Carolina law) were incorrect and that losses to the Tribe would ensue.[8] It was not clear, says the Tribe, that this was the consequence of the 1962 Termination Act until the Supreme Court so announced in 1986. Thus the cause of action accrued in 1986 and is not barred.

The difficulty with the Tribe's argument, creative though it is, is that it is contrary to one of the fundamental premises of our legal system. The argument assumes that the adverse effect of the 1962 Act did not become operative against the Tribe – the Tribe was not 'damaged' – until the Supreme Court some 25 years later so construed the Act. While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect. *See, e.g., Chevron U.S.A., Inc. v. United States,* 923 F.2d 830, 834 (Fed.Cir. 1991), *Ide v. United States,* 25 Ct.Cl. 401, 408 (1890), *aff'd,* 150 U.S. 517,

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[8] *See United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) (inverse condemnation action based on gradual flooding of plaintiff's land), *Terteling v. United States,* 334 F.2d 250 (Ct.Cl.1964) (suit seeking reimbursement for litigation costs), and *Illinois v. United States,* 15 Cl.Ct. 399 (1988) (state sued in Claims Court for reimbursement for emergency repair expenditures which were incurred during pendant District Court liability dispute amongst municipal, state, and federal entities).

14 S.Ct. 188, 37 L.Ed. 1166 (1893), *and Jones v. United States*, 6 Cl.Ct. 531, 532-33 (1984). *See also Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed.Cir.), *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984) ("28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights."), *and Dion v. United States*, 137 Ct.Cl. 166 (1956) (suit for damages flowing from government's alleged refusal to recognize plaintiff's civil service status was time-barred; "ignorance of one's legal rights does not toll the statute of limitations.").

This conclusion is reinforced in this case by the Supreme Court's explicit holding that the statute was unambiguous on its face. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 506, 106 S.Ct. at 2044. Whether the harm was caused to the Tribe by the Act itself or by Government misrepresentations about what the effect of the Act might be, the 'damage' was done when the Act became effective in 1962. At that time, possessors of the tribal lands holding under deeds from the State of South Carolina could begin to acquire adverse possession rights against the Tribe. The Government's duty to act, either affirmatively or by way of disclaimer, arose. Any suit based on the theories presented necessarily would have to have been filed by July 1, 1968.

Even if a different view is taken as to when the Tribe was irrevocably damaged, that it was 1972 – the *end* rather than the beginning of the ten year adverse possession period under South Carolina law – when the first of the adverse possessors perfected title, suit should have been filed by July 1, 1978 at the latest. Under either view, the fact that the existence of this legal harm was not finally adjudicated until the Supreme Court opinion in

1986 is not determinative of the basic question of when the injury to the Tribe occurred.

2.

Statutes of limitations sometimes expressly provide that under specified circumstances the running of the statute is suspended, or tolled.[9] Even if there is no express tolling provision applicable, courts may when circumstances require invoke the concept of tolling as an equitable matter.[10] As was explained in *Japanese War Notes Claimants Ass'n v. United States:*

> In certain circumstances the running of the statute will be suspended when an accrual date has

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[9] The statute here at issue is tolled for "a person under legal disability or beyond the seas at the time the claim accrues. . . ." Section 2501. No argument is made that this tolling provision is applicable to the facts of this case.

[10] The concurring opinion of Judge Mayer states that the question of equitable tolling was not raised by either party, and that the discussion thus is a gratuitous offering of the court. We do not agree. A central issue in the case, as framed by appellant, is "whether the Claims Court erred in holding that the Tribe's claims are barred by the six-year limitations period contained in 28 U.S.C. § 2501." A court in an appropriate case may temper the application of the bar in exercise of its equitable powers. *See Irwin v. Veterans Admin.*, 498 U.S. 89, ___ 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990). Under the circumstances of this case we would be remiss not to have considered all aspects of the issue presented by appellant. *Cf.* 5A C. Wright and A. Miller, *Federal Practice and Procedure,* § 1357, 336-37 (1990) ("The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.")

> been ascertained, but plaintiff does not know of his claim. Ignorance of rights which should be known is not enough. . . . Plaintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence, or it must show that its injury was "inherently unknowable" at the accrual date.

373 F.2d 356, 358-59 (Ct.Cl.), *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967) (citations omitted). *Accord, Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed.Cir.) *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984); *cf. Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988).

The Supreme Court recently has confirmed that equitable tolling is available in suits against the United States:

> Once Congress has made such a waiver [of sovereign immunity permitting suit to be brought against the Government within a specified time], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. . . . We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Irwin v. Veterans Admin., 498 U.S. 89, ___, 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990) (citing *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959)).

As noted a traditional ground for equitable tolling of a statute of limitations is based on the avoidance of

penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the *facts* upon which the claim is based. *See* Corman, *Limitation of Actions*, § 11.1 (1991). Particularly is this the case when the facts necessary to know of the harm were intentionally withheld from the plaintiff by the defendant. *Id.* at § 9.7. But in the case before us, all the relevant *facts* were known. It was the meaning of the law that was misunderstood.

But let us put that distinction aside for the moment and assume, as the Tribe would have it, that their ignorance of the import of the law was grounds for equitable tolling. Let us assume further that the Tribe, despite the Supreme Court's pronouncement that the language of Section 5 was unambiguous, could not reasonably have known the import from the language itself. The question that then arises is, when was the earliest that the Tribe could reasonably be said to know, or should have known, that the Termination Act would be used against it in its efforts to reacquire its ancestral lands?

Up until 1980 it could be argued on these assumptions that the Tribe had no reason to believe that its understanding of the Termination Act (that the provisions did not affect its land claims) was incorrect. There is support for this. In 1977 the Solicitor of the Department of the Interior opined that the Act operated prospectively only, and did not affect pre-existing rights. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 517-18, 106 S.Ct. at 2049-50.

But in 1980, when the Tribe brought its title claims in the South Carolina District Court, the landowners raised

as a defense the applicability of the state adverse possession law. The district court held that defense valid. At that point, the Tribe was fully on notice that the Government's earlier legal representations were subject to question, and could well be erroneous. Thus, even on the assumptions we have made about the Tribe initially not knowing or not having reason to know that the Government's representations regarding the legal effect of section 5 were wrong, the causes of action should have been sued upon at the latest by 1989, six years after the district court decision dismissing the Tribe's claim.

Under any of the above scenarios, when suit was filed in 1990, the six year statutory period for filing had run against these claims. The Government invoked the bar of the statute, as it was entitled under the law to do; the Claims Court correctly ruled that claims 3-6 must be dismissed.

C.

Claim 7 speaks of a continuing duty of the United States "to quiet title to the lands of the 1763 Treaty reservation in the Tribe and distribute the proceeds among the members of the Tribe." This duty is premised upon the provision in the Termination Act, § 933, obligating the Government to distribute tribal assets. Under that provision, the Government had the duty to distribute to the Tribe all assets *"held in trust by the United States"* for the benefit of the Tribe, 25 U.S.C. § 932 (emphasis added).

If Claim 7 is understood to include a continuing duty that arose prior to the Termination Act, that part of the claim is little more than a restatement of the historical

duty of Claim 2, considered *supra*. If, on the other hand, the claim alleges an obligation under the Termination Act on the part of the Government to distribute to the Tribe *all* lands to which the Tribe had an historical claim, and not merely those lands then actually in the control of the Government, the breach of that duty would not have occurred until after the effective date of the Termination Act. The question then is, when subsequently did the cause of action accrue for the alleged breach?

The breach of the Government's duty would have been evident in the way in which the Government implemented the Act. The Tribe's claim arguably accrued when the division of tribal assets was completed as part of the Termination Act process without inclusion of the ancestral lands. Alternatively, it accrued shortly thereafter – under the Termination Act, any "tribal asset" which was "not sold within two years from the date of the notice [of agreement to division of tribal assets published in the Federal Register]" was to be conveyed to a "trustee." 25 U.S.C. § 933(f). That notice was published in the Federal Register on July 1, 1962.

If the Government had viewed the land within the historical claim as a tribal asset, it would have been required to convey that land to a trustee. Since the Government failed to take *any* action regarding the historical lands, the Tribe had notice as of July 1, 1964 either that the Government did not consider those lands to be "tribal assets," or that the Government intentionally refused to convey them to a trustee. Under either interpretation the statute of limitations ran at the latest on July 1, 1970, for this claim.

In suits against the Federal Government, the Government has reserved the right to specify the terms of the law under which such suits may be brought. If that law does not permit an alleged wrong to be righted through a judicial remedy, the remedy must lie with Congress.

CONCLUSION

The Claims Court dismissed all seven of the Tribe's claims. The Claims Court was correct in its dismissal since all seven claims are time-barred. Accordingly, the Claims Court judgment is affirmed.

COSTS

No costs.

AFFIRMED.

MAYOR, Circuit Judge, concurring in the judgment.

I would affirm on the basis that all seven claims are barred by the statute of limitations, 28 U.S.C. § 2501. Accordingly, discussion of any other bases is unnecessary, and I do not subscribe to it. Equitable tolling was not raised by any party to this litigation, and is a gratuitous offering by the court, which I decline to join.

APPENDIX B

The CATAWBA INDIAN TRIBE
OF SOUTH CAROLINA

v.

The UNITED STATES.

No. 90-553L.

United States Claims Court.

Aug. 20, 1991.

Don B. Miller, Boulder, Colorado, attorney of record for plaintiff. Jay Bender, Robert M. Jones, Richard Steele, of counsel.

Andrew M. Eschen, Washington, D.C., with whom was Assistant Attorney General Richard B. Stewart, for defendant.

OPINION

YOCK, *Judge.*

Plaintiff, the Catawba Indian Tribe of South Carolina, seeks recovery for damages arising from the government's breach of alleged fiduciary duties. This case is before the Court on defendant's motion to dismiss on the grounds that the complaint is not within the jurisdiction of this court. For the reasons stated herein, the defendant's motion is granted, and the complaint will be dismissed.

22a

Facts

In 1760 and 1763, Great Britain negotiated treaties with plaintiff, the Catawba Indian Tribe of South Carolina (Tribe). As a result of these treaties, a 144,000-acre tract of land was set aside as a reservation for the Tribe. Later, when the United States achieved independence from Great Britain, it became invested with all of the former sovereign's rights and obligations under the 1760 and 1763 treaties. In 1790, Congress enacted the Indian Trade and Intercourse Act (the Nonintercourse Act), presently codified at 25 U.S.C. § 177 (1988), that provides the Federal Government with the exclusive authority to sign treaties with the various Indian tribes, and thus prohibits the individual states from signing such treaties. To the extent that the states did sign treaties affecting Indian land titles with the various Indian tribes in violation of the Nonintercourse Act, the Supreme Court has stated that such a land conveyance without the sovereign's consent would be void *ab initio*. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245, 105 S.Ct. 1245, 1257, 84 L.Ed.2d 169 (1985).

On March 3, 1840, the State of South Carolina (State), without the consent or participation of the United States, entered into the Treaty of Nation Ford with the Tribe. As a result of this treaty, the Tribe ceded its interests in the 144,000-acre tract to the State, the State in return promised to purchase for the Tribe another tract of land valued at $5,000, as well as to pay $16,000 over a nine-year period. However, the only land subsequently purchased for the Tribe by the State was a 630-acre parcel of land

purchased in 1842 for $2,000. This is the only land actually occupied by the plaintiff Tribe today.

Over the next 100 years, the Tribe, with little success, communicated with various federal and State officials concerning its claim to the 1763 Treaty lands, which were ceded to the State of South Carolina in the Treaty of Nation Ford.[1] However, in 1943, the Tribe, the State and the Secretary of the Interior reached an agreement under which the Secretary of the Interior accepted legal title to some 3,434 acres of land to be held in trust for the Tribe. All of this land was within the boundaries of the 1763 Treaty reservation. In addition, this agreement did not require the Tribe to release its claim for the return of the remaining 140,000 some acres, although such a release had been proposed in a preliminary draft of the agreement. Thereafter, in 1944, the Secretary of the Interior approved the Catawba Tribe's constitution under the Indian Reorganization Act.[2]

In 1953, Congress declared that as a matter of policy, the United States was to terminate the Federal

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[1] The Tribe was represented by legal counsel during at least part of this time. For example, in 1905, the Tribe's formal request for assistance that was directed to the Bureau of Indian Affairs was accompanied by a "lengthy legal brief * * * and set forth the legal basis of the claim, *i.e.*, that the Catawbas' lands were protected by federal law (the Nonintercourse Act)." Complaint ¶ 16(h). The Commissioner of Indian Affairs denied the request.

[2] Complaint ¶ 18.

Government's trust responsibilities toward Indian tribes,[3] and in 1958 the United States began an active effort to terminate federal supervision over the Catawba Tribe. During the next four years, Department of the Interior officials negotiated with tribal leaders to secure tribal consent to termination. Allegedly, during these negotiations, tribal officials were assured by a Bureau of Indian Affairs (BIA) official that tribal termination would not jeopardize the Tribe's land claim. The BIA drafted the termination legislation, and Congressman Hemphill of South Carolina, the sponsor of the legislation, told the Tribe that he would not introduce the bill without its approval. On March 28, 1959, the BIA draft of the bill was read line by line to the Tribe, which then approved the introduction of the legislation.

The Department of the Interior, in its testimony and reports to Congress on the termination bill, indicated that the Tribe consented to the termination proposal. Apparently, however, the Department never notified Congress about the existence of the Tribe's land claim or that the Tribe's consent was allegedly conditioned upon protection of that claim. Nevertheless, on September 21, 1959, the Catawba Indian Tribe of South Carolina Assets Distribution Act, 73 Stat. 592, 25 U.S.C. §§ 931-938 (1959) (Catawba Act or 1959 Act) was enacted. The Catawba Act contained substantially the same line-for-line language that the Tribe had approved, although Congress amended the bill to provide that the Catawba Act could not take effect until a majority of adult members of the Tribe

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[3] H.R. Cong. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

agreed to a division of tribal assets. Allegedly, in an attempt to persuade tribal members to vote for termination, Department of Interior officials told the Tribe that the 1959 Act would not jeopardize the land claim. The majority vote of the adult members of the Tribe was achieved on June 30, 1960, and the termination became effective two years later, on July 1, 1962. Pursuant to the 1959 Act, the 3,434-acre reservation that was the subject of the 1943 agreement between the Tribe, the State of South Carolina, and the Secretary of the Interior, was distributed to the members of the Tribe.

In the mid-1970's, the Tribe retained legal counsel to pursue its land claim to the remaining 140,000 some acres, and petitioned the Department of the Interior to initiate legal action on its behalf to secure the return of that land. The Solicitor of the Department of the Interior was initially favorably disposed towards plaintiff's petition, concluding in 1977 both that the rebuffs given the Tribe in the early 1900's were legally unjustified, and that the 1959 Act did not affect pre-existing rights. Accordingly, he requested that the Department of Justice institute legal action on behalf of the Tribe. However, this request was later withdrawn and the Tribe's petition to the Department of the Interior was eventually denied in 1978 or 1979.

In 1980, plaintiff filed suit in its own name in the Federal District Court of South Carolina, seeking trespass damages and recovery of the land at issue which was the subject of the 1840 Treaty with the State. The District Court granted summary judgment in favor of the State, and ruled that the 1959 Act resulted in the application of the South Carolina ten-year statute of limitations to the

Tribe's claim. On appeal, a panel of the Court of Appeals for the Fourth Circuit reversed. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), and that opinion was later adopted by the full Court of Appeals for the Fourth Circuit. *Catawba Indian Tribe v. South Carolina*, 740 F.2d 305 (4th Cir. 1984). Eventually, the suit reached the Supreme Court,[4] which reversed the Court of Appeals and held that the 1959 Act resulted in the application of the South Carolina statute of limitations to the Tribe's land claim.[5] It thereafter remanded the case to the Court of Appeals for the Fourth Circuit to review the District Court's interpretation of the applicable South Carolina statute of limitations. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511, 106 S.Ct. 2039, 2047, 90 L.Ed.2d 490 (1986) (*Catawba*).

On remand, the Court of Appeals held that the applicable South Carolina statute of limitations would bar the

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[4] After *certiorari* was granted, the United States, upon the request of the Supreme Court, filed an *amicus* brief in which it indicated that the 1959 Act made the State's statute of limitations applicable to plaintiff's claim.

[5] The relevant section of the Catawba Act provides: "The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C. 461 et seq.], shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, *and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U.S.C. § 935 (1988) (emphasis added).

Tribe's claim to any lands that had been adversely possessed for ten continuous years during the period between the effective date of the Catawba Act (in 1962), and the date the Tribe filed its land claim (in 1980), and remanded the case to the District Court for further proceedings. *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444 (4th Cir.), *cert. denied*, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989). On remand, the District Court, on July 19, 1990, dismissed the Tribe's claim to approximately 75 percent of the land. The Tribe's claim to the remaining 25 percent of the land is still the subject of active litigation in the Federal District Court of South Carolina.

On June 21, 1990, the Tribe filed this action declaring that the Tribe has now permanently lost approximately 75 percent of its original 1840 land claim. The main thrust of plaintiff's Complaint is that the Government has breached its fiduciary duties to protect the Tribe's 1840 land claim (Complaint, Claims 1 through 3), and to protect it from the effects of the 1959 Act (Complaint, Claims 4 and 7).[6] As earlier indicated, the defendant has now moved to dismiss the Complaint for lack of subject matter jurisdiction pursuant to USCC Rule 12(b).

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[6] Plaintiff also alleges that the defendant breached an implied contract to protect the land claim from the effects of the 1959 Act (Claim 5), that defendant's failure to protect the land claim constitutes a taking of the Tribe's vested property rights in violation of the Fifth Amendment (Claim 6), and that the Government has a continuing duty to quiet title to the land of the 1763 Treaty in the Tribe and distribute such among the members of the Tribe (Claim 7).

Discussion

The Government's motion to dismiss for lack of jurisdiction is premised on two statute of limitations arguments.[7] The first and primary argument is that the plaintiff's claims (all seven claims contained in its Complaint) are time barred and thus outside of this Court's jurisdiction based on 25 U.S.C. § 70k (1976). This is true, asserts the Government, because all of the plaintiff's claims are based on a historical claim for Indian land, which accrued long before 1946 and which was not timely presented to the Indian Claims Commission prior to the expiration period of the applicable statute (August 12, 1951), 25 U.S.C. § 70k. The government's second argument, in the alternative, is based on this Court's own six-year statute of limitations set forth in 28 U.S.C. § 2501 (1988). Here, the Government asserts that, at the latest, all of the plaintiff's claims accrued in 1962 when the Catawba Act went into effect and which terminated any federal responsibility for the Tribe and its individual members. Thus, the plaintiff's claims had to have been presented to this Court before 1968 in order for this Court to have and assert jurisdiction.

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[7] Defendant also argues that the Complaint fails to state a claim upon which relief can be granted, since the decision by the United States whether or not to litigate on behalf of a Tribe is wholly discretionary, rather than a mandatory duty. However, the Court does not have to reach this issue since the defendant's other arguments dispose of this case.

I.

As indicated above, the Government's primary argument is that this Court lacks subject matter jurisdiction over this dispute, since the Indian Claims Commission was the exclusive forum for historic claims (*i.e.*, for wrongs accruing before 1946) asserted against the United States. Defendant contends that all of the plaintiff's claims are based upon the Government's refusal to assist it in obtaining a remedy for its execution in 1840 of the Treaty of Nation Ford with the State of South Carolina. Accordingly, defendant submits that the wrong accrued long before 1946, and that the Tribe was aware that it had a claim against the Government long before 1946. The Government thus concludes that since the plaintiff failed to present its claims to the Indian Claims Commission within five years of August 13, 1946, the claims are now time barred by 25 U.S.C. § 70k.

In its responsive briefing before this Court, the plaintiff agrees that the pre-1946 claims asserted by the Tribe in Claims 1 and 2 of the Complaint are barred by the Indian Claims Commission Act's statute of limitations, but submits that all the other claims contained in its Complaint (*i.e.* Claims 3 through 7) should not be dismissed. Plaintiff emphasizes that its primary claim arises out of Government nonfeasance during the period from 1958 to 1962, which is when the defendant negotiated with tribal officials to terminate the trust relationship with the Tribe.

Unfortunately for the plaintiff, however, the Government is correct in its legal assertions.

Section 12 of the Indian Claims Commission Act (ICCA), 25 U.S.C § 70k (1976), provided an *exclusive* remedy against the United States for Indian tribes' claims first accruing before August 13, 1946. The Indian Claims Commission was established in 1946 to provide a monetary damages remedy against the United States for wrongs allegedly committed by the United States in its dealings with the Indian tribes. Such claims had to be presented to the Indian Claims Commission within five years of August 13, 1946, and could not otherwise be submitted to any court, administrative agency, or Congress.

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim *existing* before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

25 U.S.C. § 70k (1976) (emphasis added). Claims not adjudicated by the Commission were transferred to the United States Court of Claims. Pub. L. No. 94-465, Act of October 8, 1976, 90 Stat. 1990. This Court subsequently inherited the Court of Claims ICCA jurisdiction. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Apr. 2, 1982, 96 Stat. 25, 46.

The ICCA's purpose, explicit provisions, and legislative construction clearly demonstrate that the "chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45, 105 S.Ct. 1058, 1062, 84 L.Ed.2d 28 (1985) (quoting

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)). As noted recently by this Court,

> [t]he purpose of that statute of limitations was to ensure that "there . . . [would] be a prompt and final settlement of all claims between the government and its Indian citizens, . . . and bring them to a conclusion once and for all."

Te-Moak Bands of Western Shoshone Indians v. United States, 18 Cl. Ct. 74, 80 (1989), quoting *United States v. Dann, supra*, 470 U.S. at 46, 105 S.Ct. at 1062. The legislative history of the ICCA reflects the intention of Congress that the Act:

> would require all pending Indians claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this fact-finding body within 5 years, and would outlaw claims not so submitted.

H.R. Rep. No. 1466, 1946 U.S. Code Cong. Service, 1347, 1349. *See also Navajo Tribe v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987). In that case, the Navajo Nation argued that the Indian Claims Commission did not have jurisdiction over claims to land. The Court disagreed, stating:

> The language [in the ICAA, § 2] is sweeping, including even claims "based upon fair and honorable dealings" which did not otherwise constitute recognized actions at law or equity. As the legislative history indicates, Congress did not enumerate the cognizable claims under the new Act to narrowly circumscribe the Commission's jurisdiction. Rather, Congress desired to finally provide a forum for the resolution of all possible accrued claims.

> Congress wished to settle all meritorious claims of long standing of Indian Tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity.

Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 131 F.Supp. 265, 275 (1955) (emphasis in original).

Id. at 1465.

The gravamen of the seven claims alleged in the Complaint is plaintiff's believe that the Tribe was wronged due to the Government's refusal to assist it in obtaining a remedy for its execution in 1840 of the Treaty of Nation Ford with the State of South Carolina. By plaintiff's own admission, the Tribe was aware that any claim it may have had against the United States for its refusal to assist the Tribe in obtaining its aboriginal land, ceded by the 1840 Treaty of Nation Ford, had accrued long before 1946, the effective date of the ICCA. The Tribe was thus on notice that any claim not properly presented to the Indian Claims Commission could not "thereafter be submitted to any court or administrative agency * * * nor * * * entertained by the Congress." ICCA, § 12, 25 U.S.C. § 70k. Accordingly, the Government is correct and all of the plaintiff's claims must be dismissed.

II.

The Government has also argued in the alternative that even if the Court does not find that the plaintiff's claims are time barred by the ICCA statute of limitations, it should find that all of the claims are barred by this Court's own six-year statute of limitations set forth in 28 U.S.C. § 2501 (1988).[8] With respect to plaintiff's Claims 1 through 3, the defendant submits the operative underlying event was the Tribe's 1840 Treaty with the State of South Carolina, and that plaintiff was long aware both of its potential land claim against the State, and the fact that the United States would not act on the claim. With respect to Claims 4 through 7, regarding the Government's alleged failure to protect the Tribe from the effects of the 1959 Act, the defendant argues that since the trust relationship with the United States terminated under the 1959 Act on July 1, 1962, any claim for a breach of trust could not accrue after the relationship was legally terminated. Even if the Government had the fiduciary duties alleged by plaintiff (*e.g.*, to warn of the applicable statute of limitations period), judicial recourse for such a breach was required no later than 1968.

The essence of plaintiff's argument in opposition is that the claim could not have accrued until damage was suffered, and that it was not until 1986, when the Supreme Court ruled in *Catawba* that the land claim was affected by the 1959 Act, that the tribe could determine its

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[8] 28 U.S.C. § 2501 states in pertinent part:

"Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

rights and finally determine whether or not it had suffered damage. *See Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 428-31 (1991). Alternatively, plaintiff contends that even if the claim did accrue in 1962, the running of the six-year statute of limitations is tolled by the concealment and misrepresentation of the United States.

Unfortunately for the plaintiff Tribe, the Court must again agree with the government. Even if the ICCA statute of limitations did not preclude the assertion of the plaintiff's claims in this Court, they would all be precluded by this Court's own six-year statute of limitations. All of the plaintiff's claims in its Complaint accrued prior to the Supreme Court's 1986 decision date. Not only was plaintiff's basic land claim *not* inherently unknowable, but plaintiff was well aware that it was ripe nearly 100 years ago, when it asked for the Department of Interior's assistance in obtaining either compensation or a return of the land in the early 1900's.[9] With respect to the effect of the 1959 Act, as noted by the Supreme Court, the express provision of 25 U.S.C. § 935 stating that South Carolina laws "shall apply to [the Tribe] in the same manner they apply to other persons or citizens within the [ ] jurisdiction," established in "unmistakably clear language" that the State's statute of limitations applied to the Tribe. *Catawba*, 476 U.S. at 505-06, 106 S.Ct. at 2043-44.

As the Supreme Court noted,

> [w]e do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute

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[9] *See supra* note 1.

> became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction.

Id. at 510, 106 S.Ct. at 2046. Thus, the Catawba Act did not *destroy* plaintiff's claim, it merely put the burden on the plaintiff Tribe to pursue its claim within the State's statute of limitations.[10]

The Government's repeated refusal to pursue the claim on the Tribe's behalf dating back from the early 1900's, coupled with the clear language of the 1959 Act, show that the plaintiff was on notice of the existence and basis of the claim. Thus, the facts underlying the claim

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[10] Defendant notes that the Catawba Act was passed by the entire Congress. Defendant is correct in stating that plenary power with respect to all Indian affairs rests with Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Nevertheless, this power is not absolute. *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40, 54, 67 S.Ct. 167, 174, 91 L.Ed. 29 (1946); *see also United States v. Creek Nation*, 295 U.S. 103, 109-110, 55 S.Ct. 681, 684, 79 L.Ed. 1331 (1935). For example, plenary authority "does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * * .' " *Soshone Tribe v. United States*, 299 U.S. 476, 497, 57 S.Ct. 244, 252, 81 L.Ed. 360 (1937) (quoting *Creek Nation*, 295 U.S. at 110, 55 S.Ct. at 684).

In the case at bar, Congress' passage of the Catawba Act did not mean either that plaintiff's land was given to others, or that plaintiff's claim was eliminated. The passage of the Catawba Act only meant that it was up to plaintiff to take timely legal action on its claim.

were neither concealed nor inherently unknowable, and the statute of limitations was not tolled.[11] *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634, 373 F.2d 356, 359, *cert. denied*, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967), *reh'g denied*, 390 U.S. 975, 88 S.Ct. 1020, 19 L.Ed.2d 1192 (1968). Furthermore, this case can be distinguished from *Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417 (1991) which the plaintiff relies upon, since, unlike that case, there was no previous litigation by this plaintiff that resulted in a Supreme Court decree that specifically authorized the Government to seek reconsideration. Since there was no such previous decree for this plaintiff, there was no "potentially viable method for the government to further its trust responsibilities and correct its acknowledged error." *Id.* at 430. Accordingly, the claims accrued by the operation of the 1959 Act (*i.e.*, by 1962), long before the Supreme Court's decision in *Catawba*.

The presence of a fiduciary relationship does not toll the statute of limitations under the facts of this case. While plaintiff has repeatedly alleged Government nonfeasance, nonfeasance by a trustee, as distinguished from repudiation of the trust by the trustee, does not present an exception to tolling. *Hopland Band*, 855 F.2d at 1578; *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565,

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[11] Furthermore, the Supreme Court indicated "we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act." *Catawba*, 476 U.S. at 510, 106 S.Ct. at 2046.

571 (1990); *Jones v. United States*, 9 Cl. Ct. 292, 295 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987). The present facts present a strong case for not tolling the statute of limitations, since the fiduciary relationship was not even arguably ongoing, as the 1959 Act expressly *terminated* the guardianship.[12] *Cf. Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417 (1991) (previous Supreme Court decree created mechanism by which the Government could resecure rights for plaintiffs, hence the trust relationship was ongoing).

While plaintiff argues it was not represented by counsel during the termination negotiations in 1958-59, apparently it was sophisticated enough to have legal counsel advising it on its land claims at least several times in the past. In *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir.), *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984), the Federal Circuit found that the running of the statute of limitations would not be tolled when "the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current

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[12] The general relationship between defendant and Indian tribes has often been characterized as that of a guardian to a ward, rather than as a trustee to a beneficiary. *United States v. Mitchell*, 463 U.S. 206, 234 n.8, 103 S.Ct. 2961, 2978 n.8, 77 L.Ed.2d 580 (1983). This type of relationship implies that at some point the ward will begin to take responsibility for handling its own affairs. *See e.g. Cherokee Nation*, 21 Cl. Ct. 565, 573 (1990). Certainly, terminating a guardianship is an indication that the ward is expected to take responsibility for handling its own affairs.

claim." The court emphasized that the six-year statute of limitations, set forth in 28 U.S.C. § 2501, is not tolled by the Indians' ignorance of their legal rights. *Menominee*, 726 F.2d at 720-21. Plaintiff presents a similar situation here, with a similar result.

Accordingly, the claims accrued well over six years ago, and certainly no later than 1962, and the presence of a fiduciary relationship, even if it were ongoing (which it was not), does not serve to toll the statute of limitations. since the facts alleged in the Complaint reveal no possible basis on which the plaintiff can prevail, the defendant's motion to dismiss for lack of subject matter jurisdiction under USCC Rule 12(b)(1) is granted. *W.R. Cooper Gen. Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988).

CONCLUSION

Defendant's motion to dismiss under USCC Rule 12(b)(1) is granted as the instant claims are barred by the statute of limitations discussed herein. The Complaint is to be dismissed for lack of subject matter jurisdiction, and judgment shall issue accordingly.

Each party is to bear its own costs.

APPENDIX C

UNITED STATES CLAIMS COURT

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 90-553 L COMPLAINT

INTRODUCTION

1. This is an action for money damages against the United States. This case arises out of defendant's breach of trust duties founded in federal treaty, federal statute, and federal common law; defendant's breach of contract; and defendant's taking of property without payment of compensation in violation of the Fifth Amendment to the United States Constitution.

JURISDICTION

2. The United States Claims Court has jurisdiction of this suit under 28 U.S.C. §§ 1505 and 1491, in that plaintiff states a claim for: 1) damages against the United States arising under the Constitution, laws, and treaties of the United States; and 2) damages against the United States founded upon breach of an implied contract with the United States.

PLAINTIFF

3. Plaintiff Catawba Indian Tribe of South Carolina (Tribe) is a tribe of Indians that has resided in South Carolina in the vicinity of its present reservation since time immemorial. In 1760 and 1763, plaintiff entered into two treaties with the King of England. The Tribe currently resides on a reservation of approximately 630 acres outside the City of Rock Hill, South Carolina, which reservation is held in trust for the Tribe by the State of South Carolina. The Catawba Tribe is recognized as an Indian tribe by the United States, having been the subject of congressional legislation enacted in 1848, 1854, and 1959. Federal supervision and the government-to-government relationship between the Tribe and the United States were terminated by the 1959 Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. §§ 931-938. The Catawba tribal government is presently organized pursuant to its inherent sovereign powers and under the laws of South Carolina as a nonprofit corporation.

FACTS

4. In 1760, the Honorable Edmund Atkin, Esq., His Majesty the King of England's Agent to and Superintendant [sic] for Indian Affairs in the Southern District of North America, negotiated a treaty with the Catawba Indian Nation whereby the Catawba Nation agreed to surrender its claims to a tract encompassing all lands within a 30-mile radius of the Catawba towns, which tract had been recognized as Catawba Indian Country by the Colony of South Carolina, in return for being permanently and quietly settled on a tract of land fifteen miles

square, which was to be surveyed to prevent intruders and upon which a fort was to be built for the Catawbas' protection. This treaty is known as the Treaty of Pine Tree Hill. By entering into this treaty, the Crown recognized the property rights of the Catawba Nation in these lands, rights which predated any United States interest in the area. These property rights were – and remain – recognized Indian title.

5. On October 7, 1763, King George III of England issued the Royal Proclamation of 1763, 1 LAWS U.S. 443-48, which ordered that no warrants of survey or patents be issued upon any lands which had been reserved to the Indians and further forbade private purchases of lands from the Indians and settlement upon Indian lands. This Proclamation established the policy that all grants of land from the Indians would be valid only with the approval of the Sovereign.

6. On November 16, 1763, His Majesty's Superintendant [sic] for Indian Affairs in the Southern District, John Stuart, together with the Governors of the Southern Colonies, including South Carolina, negotiated the Treaty of Augusta with, among others, the Catawba Indian Nation. The Catawbas were told that the negotiators were acting "in the name and at the command of the Great King George" and that "our King and Father holds out his arms to receive and protect you from all your enemies and . . . you may be assured of his confirming to you all of your lands and hunting grounds" pursuant to the 1760 Treaty of Pine Tree Hill. This treaty provided that the Catawba Nation would remain satisfied with the agreement contained in the 1760 Treaty of Pine Tree Hill, and the Governors and Superintendant [sic] in their part

promised that the terms of the Treaty of Pine Tree Hill would be fulfilled. COLONIAL RECORDS OF NORTH CAROLINA, vol. 2, 180-201 (1890).

7. The 1763 Treaty, together with the 1760 Treaty, established a fiduciary duty on the part of the Crown to protect the Tribe in quiet possession of its reservation and to prevent encroachment on the Tribe's reservation by non-Indians.

8. In 1772, the King's Superintendent of Indian Affairs, John Stuart, took affirmative actions to enforce the provisions of the 1760 and 1673 [sic 1763] Treaties and protect the Tribe in possession of its reservation, thus demonstrating that the Crown understood that it had undertaken fiduciary obligations to protect the Tribe in possession of its lands. Specifically, the King's Superintendent took action to defeat a plan by members of the South Carolina Legislature to lease the land to one of its members. The King's Superintendent, in a letter dated December 27, 1772, explained to the Governor the meaning of the Treaty and the Crown's obligations:

> The Land now Occupied by the Catawba Indians being a parcel of Fifteen Miles Square was, as well as a very considerable Extent of Country besides possessed by them when the Subjects of England first Settled in this part of the World; At the Congress held at Augusta in 1763, by the Governors of Virginia So. & North Carolina & Georgia and the Superintendant of Indian Affairs in the Southern District. The said parcel of Land of Fifteen Miles Square, being judged by the Remains of the Said Once numerous and powerful Nation . . . to be Sufficient for their Support & Maintenance . . . and in

> Consideration of their Having Voluntarily relinquished their Claims to a very extensive Territory as also of their Having been always faithfully & Cordially Attached to the British Interest, was in the most Solemn Manner reserved for their use by Treaty to the Observation of which the said Governor and Superintendant bound Themselves & Their Successors.
>
> The Catawbas never have by any Treaty or Publick Act Ceded the Land so Reserved to them by said Treaty of Augusta in 1763 to His Majesty, and Such a Cession cannot be negotiated for or accepted of, for & on Behalf of His Majesty, by any other person, than His Agent for & Superintendant of Indian Affairs without a Manifest Violation of His Majesty's Orders . . .
>
> Your Excellency & the Honorable Council, cannot in my humble Opinion with any Propriety or Shadow of Right grant or lease the Whole or any Part of the Catawba Lands for any purpose or upon any Pretence whatsoever until they shall have been first Ceded by said Indians to the Superintendant for His Majesty, without a Violation of every Order and Instruction Relative to Indian Lands.

Stuart's efforts to defeat the plan were successful and his position on the matter was upheld by the Crown. In a letter to Stuart dated May 5, 1773, the Crown informed Stuart that "[t]he King very much approves the step you took to defeat Mr. Drayton's intended views."

9. Upon the independence of the United States from Great Britain, the United States put itself in the place of the former sovereign and became invested with all of its

rights and obligations under the Treaties of 1760 and 1763, as described in paragraphs 4, 6, 7 and 8 above.

10. On July 22, 1790, Congress enacted the Indian Trade and Intercourse Act, presently codified at 25 U.S.C. § 177, which continued the policy of the 1763 Proclamation and which provided then as it does now that no interest of any kind may be acquired in the lands of any Indian tribe other than by treaty or convention entered into pursuant to the Constitution, to which the United States is a party. Any interest acquired in violation of 25 U.S.C. § 177 is void in law and equity. The Indian Trade and Intercourse Act establishes a trust duty on the part of the United States to protect the lands of any Indian tribe, including those of the Catawba Indian Tribe.

11. On March 3, 1840, the State of South Carolina, without the consent and participation of the United States, concluded the Treaty of Nation Ford between the State and the Catawba Indian Tribe, whereby the State purported to extinguish the recognized Indian title of the Catawba Tribe to the entire 15 mile square tract secured to the Tribe in the 1760 and 1763 Treaties described in paragraphs 4 and 6 above. In return, the State promised to purchase for the Catawbas, at a cost of $5,000, a tract of land either in Haywood County, North Carolina, or in a similarly mountainous and unpopulated area in South Carolina and, in addition, agreed to pay the Tribe $2,500 cash and $1,500 per year for nine years.

12. On December 18, 1840, the Legislature of the State of South Carolina enacted legislation ratifying and

confirming the March 3, 1840 state treaty, which act provided for the conveyance of the title and interest purportedly acquired by the State of South Carolina in Catawba Reservation lands to the non-Indian lessees of such lands upon the application and payment by the lessees of certain fees or taxes.

13. The Congress of the United States has never ratified or otherwise consented to the alienation of the Catawba Indian Reservation. Such ratification or consent is required by 25 U.S.C. § 177 and the federal common law for an alienation of Indian land to be effective. Thus, except as it is affected as a result of the acts, omissions and misrepresentations of the United States that give rise to this lawsuit, recognized Indian title and the right of possession to the 1763 Treaty Indian Reservation lands remains in the Catawba Indian Tribe and that land is not now and never has been the property of any other person or party. The Tribe's right and title to these lands is now and has since 1789 been subject to a federal trust responsibility founded in federal treaty, statute and common law, and protected by the Fifth Amendment to the United States Constitution.

14. Following the 1840 treaty, the State did not purchase a new reservation for the Catawba Tribe in North Carolina or in South Carolina as required by the 1840 treaty. Instead, in 1842 the State of South Carolina bought back a 630 acre tract located within the boundaries of the 1763 reservation which the Tribe had purportedly ceded to the state in the 1840 Treaty. The State paid $2,000 for this tract, which remains to this day the only land actually occupied and enjoyed by the Catawba Tribe.

15. Since prior to the adoption of the Constitution, the United States has been aware that the Catawba Tribe possessed recognized Indian title to lands in South Carolina and that the Tribe's lands were being encroached upon by non-Indians:

a. In 1782, the Catawba Tribe petitioned the Continental Congress to protect its reservation lands.

b. In 1791, chiefs of the Catawba Nation met President George Washington in Lancaster County, South Carolina and asked for protection of their treaty lands.

c. In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those tribes which still held lands within the United States. An attached War Department chart indicated the Catawbas possessed 144,000 acres.

16. Since shortly after the 1840 Treaty described in paragraph 11 above, the United States has been aware that the Catawbas lost possession of their lands without the participation or approval of the United States, that the Catawbas were homeless and destitute for extended periods of time, that the Catawbas contested the 1840 Treaty and that the Catawbas desired federal assistance in securing the return of their lands or otherwise resolving their claim arising out of the 1840 Treaty:

a. In the Act of July 29, 1848, Congress acknowledged the existence of the Catawba Tribe and demonstrated the United States' awareness that the Tribe had lost its lands by appropriating funds for the removal of the Catawbas west of the Mississippi River.

b. The 1849 Annual Report of the Commissioner of Indian Affairs notes the failure to find a home for the Catawbas among the Chickasaws in Indian Territory.

c. In the Act of July 31, 1854, 10 Stat. 315, 316, Congress again recognized the existence of the Catawba Tribe and again appropriated funds for their removal west of the Mississippi.

d. In 1887, Catawba Chief Thomas Morrison visited the Interior Department and petitioned the United States for assistance in resolving the Tribe's claim to its 144,000 acre treaty reservation.

e. Also in 1887, James Kegg wrote to Secretary of the Interior L.L.C. Lamar requesting United States assistance in reaching a settlement concerning the Catawba lands in South Carolina.

f. In a letter dated November 28, 1889, Catawba Indian P.H. Head wrote to Senator William Teller inquiring as to the rights of the Catawbas to a 15 mile square tract of land in South Carolina, noting that in 1885 Catawba Indian James Harris visited Washington to investigate this claim.

g. In an 1895 "Petition and Memorial in the Matter of Claims and Demands of the Catawba Indian Association, to the United States," a group of Catawbas asked the United States to investigate the claims of the Catawba Tribe and secure justice for the Tribe. They inquired whether the Catawbas have tribal lands in South Carolina to which title has not been extinguished and whether Catawbas may receive allotments of land under the General Allotment Act of 1887.

h. In 1905, the Catawba Tribe submitted to the Bureau of Indian Affairs a formal request for assistance based upon the requirements of the Nonintercourse Act asserting that the Tribe was entitled to rentals from the 1763 treaty reservation or to recovery of possession of the land. The Tribe's request was accompanied by lengthy legal briefs which documented the history of the reservation and set forth the legal basis of the claim, *i.e.*, that the Catawbas' lands were protected by federal law (the Nonintercourse Act). The Commissioner of Indian Affairs denied the request in 1906 based upon an erroneous legal interpretation that the Catawbas and their lands were not protected by federal law.

i. In 1908, the Catawba Tribe again petitioned the United States for aid in securing from the State of South Carolina the land belonging to the Tribe in York and Lancaster Counties or, in the alternative, adequate compensation for the land. The petition, again accompanied by lengthy legal briefs detailing the history and the federal law basis of the claim, further requested the aid of the Justice Department in seeking a judicial determination of the claim. The Commissioner of Indian Affairs denied the Tribe's request in 1909.

j. In 1910, the United States Indian Service of the Department of the Interior directed an investigation of the Catawba Tribe and their claims against the State. In 1911, Special Indian Agent Davis submitted a 21-page report detailing the circumstances of the Tribe, their legal status as wards of the State without citizenship or access to the courts, their belief that the 1840 Treaty was unfair and illegal and their desire to secure a return of their reservation lands. Special Agent Davis told the Tribe that

their desire to secure a return of their lands was unrealistic and that they should submit their claim to the mercy of the State legislature. The 1911 Report of the Commissioner of Indian Affairs acknowledges and discusses the Catawba Tribe's unresolved land claim.

k. In 1912 and 1913, the State of South Carolina requested the United States to take responsibility for the Catawba Tribe.

l. In 1926, J. Clifford Newell wrote to the Commissioner of Indian Affairs stating that he had been contracted by the Catawba Indians to investigate their land claims with the view of regaining possession of the land.

m. In 1929, Catawba Chief Blue wrote to the Commissioner of Indian Affairs, stating that the Tribe was looking forward to a final settlement of its land claim with the State of South Carolina and asking how such settlement could be structured.

n. In 1930, the United States Senate authorized the Bureau of Indian Affairs to investigate the Catawba Indians. Sen. Res. No. 217, 71st Cong., 2d Sess. (Feb. 26, 1930).

o. In 1930, a subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina and visited the Catawba Indian Reservation. The Tribe's land claim arising out of the 1840 treaty was discussed at length, as was the extreme poverty and hardship occasioned by the Tribe's loss of possession of its reservation.

p. In 1932, Catawba Chief Samuel Blue wrote to President Herbert Hoover asking for assistance for the Catawba Tribe.

q. In 1933, Catawba Agent T.O. Flowers wrote to Commissioner John Collier requesting assistance for the Catawba Tribe.

r. In 1934, Catawba Chief Samuel Blue wrote to President Franklin D. Roosevelt appealing for assistance to the Catawba Tribe.

s. In 1935, the Bureau of Indian Affairs conducted an extensive investigation of the Catawba Reservation and alternatives for federal assistance in rehabilitating the Tribe and its members.

t. In a January 1937 letter from Professor Speck of the University of Pennsylvania, the Commissioner of Indian Affairs was advised of an offer to the Catawba Tribe by the State of South Carolina to settle the Tribe's claim to 144,000 acres for $250,000. D'Arcy McNickle investigated the proposed settlement at the direction of the Commissioner and submitted a report to the Commissioner stating, among other things, that the State had taken the Tribe's lands in an 1840 treaty, that the state had not fulfilled the terms of the treaty, and that the state had on occasion in the past acknowledged that the 1840 treaty was never fairly carried out. McNickle aiso reported that the Catawba Indians' economic condition was as hopeless as it could be.

u. In 1938 and 1940, the Interior Department opposed legislation that, if enacted, would have extended federal services to the Catawba Tribe, and further would

have provided for establishment of a larger reservation for the Tribe at no cost to the United States.

v. In 1939, Catawba Indian P.H. Head wrote President Roosevelt stating that both the State of South Carolina and the United States have ignored the Tribe's land claim and requesting that a settlement be made.

w. In 1940, BIA official Ward Shepard reported that the Catawba Tribe probably has a claim against the State of South Carolina arising out of the 1840 treaty.

x. In 1941, the Interior Department took affirmative steps to protect the Tribe's land claim and refused to accede to the desires of the State of South Carolina that a proposed agreement for rehabilitation of the Catawba Tribe include a provision for extinguishment of the Tribe's land claim. In a 1942 memorandum to the Commissioner of Indian Affairs, the Solicitor noted with approval that the claim-extinguishment provision had been deleted, characterizing the claim as one which the Tribe "might be able to enforce in the courts."

y. On December 14, 1943, the State of South Carolina, the Catawba Indian Tribe and the Secretary of the Interior entered into a Memorandum of Understanding to provide relief and rehabilitation assistance to the Catawba Tribe. The agreement did *not* provide for extinguishment of the Tribe's claim. Pursuant to the agreement, the Secretary accepted title to 3,434 acres of land, more or less, and held the same in trust for the Catawba Tribe of South Carolina.

17. In 1944, the Solicitor of the Interior Department in a written opinion concluded that the Catawba Tribe

had been federally recognized since the 1848 Congressional Act described in paragraph 16 a. above, and that the Tribe was therefore eligible to adopt a constitution under the Indian Reorganization Act.

18. On June 30, 1944, the Secretary of the Interior approved the Catawba Tribe's constitution under the Indian Reorganization Act.

19. In 1953, Congress declared it to be the policy of the United States to terminate the Federal Government's trust responsibilities toward Indian tribes.

20. In 1958, Congress and the Eisenhower Administration revised the termination policy to abandon coercive termination and require tribal consent as a prerequisite to termination of federal trust relationship.

21. During the period 1958 to 1962, the Department of the Interior acted consistently with the revised federal termination policy: Interior Department officials negotiated with the tribal leaders to secure tribal consent to its termination proposal and the sponsoring Congressman and Congress itself took measures to ensure that the Tribe consented to termination.

22. At no time during the period 1953 to 1962, during which the Federal Government implemented its plan to terminate the federal trust relationship with the Catawba Tribe, was the Catawba Tribe represented by legal counsel.

23. In addition to the fiduciary duties founded in federal treaty, statute and common law, the United States, through its affirmative acts, representations, and conduct,

has undertaken the fiduciary responsibility of protecting the Tribe's land claim.

24. In 1958, when the United States began its active effort to terminate federal supervision and services to the Catawba Tribe, the United States had full knowledge of the Tribe's land claim and the fact that the Tribe had consistently, over at least the previous 70 years, contested the validity of the 1840 state treaty.

25. In its efforts to secure the Tribe's consent to its termination proposal, federal officials took advantage of tribal dissatisfaction with the BIA's failure to provide services under the 1943 Memorandum of Understanding and the Trie's [sic] resultant inability to productively use the 3,434 acres held in trust by the Secretary. Federal officials characterized termination to the Tribe as a process for dividing the Tribe's 3,434 acres, acquired in 1943, among tribal members. Through this device, the Indians were told, they would be given full title to their lands and as a result would be able to mortgage the land to finance housing and farming, etc., assistance which the BIA was unable or unwilling to provide.

26. In 1958, the Bureau of Indian Affairs assigned Program Officer Raymond Bitney to the Catawba Reservation for the purpose of securing tribal consent to the Bureau's plan to terminate federal responsibilities to the Catawba Tribe.

27. To secure tribal consent to termination in late 1958 and early 1959, Bitney met numerous times with individual Catawba Indian leaders and family heads in their homes and filed reports detailing the results of his meetings and the attitudes of the tribal members with

whom he spoke. Bitney's report of January 30, 1959 reveals that in late 1958 several tribal officials expressed concern about the Tribe's land claim against the state, with one tribal official stating that the BIA's proposed division of tribal assets could not go forward until after the Tribe's land claim was resolved. The tribal officials were assured by Bitney that the Tribe's land claims would not be jeopardized by the Bureau's proposal to terminate federal responsibilities. At no time did Bitney advise the Tribe to seek independent legal counsel.

28. On January 3, 1959, Bitney attended the General Council meeting at which the Tribe voted to accept the Federal Government's proposal to divide tribal assets. No written resolution was considered by the Tribe at this meeting.

29. Prior to January 26, 1959, Agent Bitney was asked to draft a written resolution for the Tribe in support of termination. On January 24, 1959, in a meeting with Chief Albert Sanders, Bitney drafted the resolution for the Tribe "making sure it was exactly what Albert wanted" and had it typed for the Chief. The resolution was back-dated to January 3, 1959. Agent Bitney then accompanied Chief Sanders to visit each of the other Executive Committee members and have them sign the resolution.

30. The resolution drafted by Bitney specifically conditioned the Tribe's consent to termination upon nothing in the legislation affecting the status of any claim against the State of South Carolina by the Catawba Indian Tribe. Thereafter, the BIA sent the resolution to Congressman Robert W. Hemphill.

31. On January 26, 1959, Congressman Robert W. Hemphill requested the BIA to draft legislation "to accomplish the desire [of the Tribe] set forth in the Resolution."

32. On February 5, 1959, Douglas Summers Brown (Mrs. Henry Dockery Brown), author of The Catawba Indians: People of the River, wrote to Agent Bitney documenting the existence of a tribal claim and setting forth in detail a history of the 1840 state treaty and the eventual creation of the 630 acre State reservation. Brown also stated her conclusions that the Tribe had never been paid in full for the lands taken from it by the State and that "[t]herefore, any agreement or settlement made now cannot be final, but the question will be brought up again and again in the future."

33. Prior to March 28, 1959, the BIA drafted termination legislation for Congressman Hemphill. This legislation did not mention the land claim but did provide generally for the application of State law to the Tribe and for the nonapplicability of federal laws which affect Indians because of their status as Indians.

34. On March 28, 1959, Congressman Hemphill and Bureau of Indian Affairs officials met with the Tribe and reviewed the bill. Congressman Hemphill told the Tribe, according to the BIA's minutes of the meeting, that he had had the "legislation drawn up to carry out the intent of the resolution" and that he would not introduce the bill without the Tribe's approval. Relying on the assurances of federal officials that the claim would not be jeopardized and that the officials were acting in the

Tribe's best interest, the Tribe then approved introduction of the legislation.

35. The Catawba Indian Tribe understood the proposed legislation being considered at the March 28, 1959 meeting to be a "contract that was drawn up by the Bureau of Indian Affairs:" it was exclusively characterized as such in the tribal minutes of the March 28 meeting and that is what was voted on and approved at the March 28 meeting.

36. Both the federal officials who negotiated to obtain tribal consent to termination of federal supervision and the tribal officials who consented, understood and intended that a condition of tribal consent was that the land claim would not be jeopardized or affected in any way by the enactment of the legislation being proposed by the Interior Department.

37. Agent Bitney, as well as the other federal officials who met with officials of the Catawba Tribe for the purpose of obtaining tribal consent, had actual authority to bind the United States to the conditions upon which tribal consent had been obtained.

38. On April 6, 1959, BIA Assistant Commissioner Reid wrote Agent Bitney congratulating him on the success of the Catawba termination proposal and notifying Bitney that the BIA had edited his report: "For your information, we have deleted any controversial statements with the idea that in the event they are called for by the committee, a clean report free of controversial issues will be available for them. We are retaining your draft copies in our confidential file."

39. In its testimony and reports to Congress on the termination bill, the Department of the Interior emphasized that the Catawba Tribe had consented to its termination proposal, but did not mention to Congress that the Tribe's consent had been conditioned upon protection of its land claim.

40. In its testimony and reports to Congress on the termination bill, the Department of the Interior failed to even mention the existence of the Tribe's claim, and misrepresented to Congress the history of the Tribe's reservation in such a fashion as to mislead Congress. The Departmental Reports falsely stated that the Tribe's 1763 Treaty was with South Carolina when in fact the Treaty was with the King of England, thereby creating the false impression that the United States had no obligation under the 1763 Treaty. Furthermore, the Departmental Reports falsely stated that the 1840 treaty was a cession by the Tribe of all but its present 640 acre reservation and created the false impression that the Tribe's loss of possession of its 1763 treaty reservation was not contested by the Tribe and that the Tribe had no claims arising out of the loss of possession of its treaty reservation. Specifically, the Departmental Report stated:

> The Catawba Indians in South Carolina have only a relatively short history of relationships with the Federal Government. They made a treaty with South Carolina on November 10, 1763, by which their original reservation was set aside for them. In 1840 they agreed with the State to a cession of this reservation with the exception of a single square mile of land, which is still held in trust for them by the State. In return for the Catawba land, the State provided

> services to them. The United States never made a treaty with these Indians. they [sic] have no claims filed with the Indian Claims Commission.

41. Congress enacted the Catawba Indian Tribe of South Carolina Division of Assets Act on September 21, 1959, 25 U.S.C. §§ 931-938, without amending the language which the Tribe had approved on March 28, 1959, and which the Tribe had been assured would not jeopardize or affect the land claim or its status.

42. Congress did, however, amend the bill to provide that the 1959 Act would not take effect until a majority of the adult members of the Tribe agreed to a division of tribal assets in accordance with the termination act. The Department of the Interior announced tribal agreement on June 30, 1960. The termination act did not become effective until two years later on July 1, 1962.

43. All federal trust responsibilities to preserve and protect tribal property and claims continued in full force and effect until the effective date of the termination act on July 1, 1962.

44. Throughout the period of time following enactment of the termination act and up to June 30, 1960, when the Department of the Interior announced that a majority of the Catawbas had voted to accept the termination act, Interior Department officials actively sought to persuade tribal members to vote for the termination act and continued to assure the members of the Tribe that the 1959 Act would not jeopardize their land claim and that the 1959 Act implemented the Tribe's resolution dated January 3, 1959. Tribal members who agreed to termination relied on the representations and assurances of federal officials.

45. A July 11, 1961 letter from BIA Program Officer Arthur Arnston to the Commissioner of Indian Affairs forwards to the Commissioner a copy of Mrs. Brown's letter of February 5, 1959 to Agent Bitney regarding the Tribe's land claim, described in paragraph 32 above. Arnston states that "the Catawba land claim . . . is often mentioned by Chief Albert Sanders. Sr." The Program Officer concludes: "I have made no comments."

46. At no time did the United States advise the Tribe of the necessity of filing a lawsuit within a timeframe in order to protect the claim from the running of a statute of limitations, nor did the United States file, on behalf of the Tribe, a protective lawsuit within the limitations period which had become applicable as a result of the 1959 Act.

47. The United States concealed from the Tribe its failure to protect the Tribe's land claim and, as a result, the Tribe was unaware that a limitations period had been applied to its land claim.

48. From the date of enactment of the termination act, until May 1985, when the United States filed an amicus brief in the United States Supreme Court arguing that the 1959 Act imposed state statutes of limitation on the Tribe's land claim, the Tribe continued to rely on the misrepresentations of Interior Department officials that the 1959 Act did not jeopardize or affect the land claim or its status.

49. At no time prior to 1985 did the United States advise the Tribe that the 1959 Division of Assets Act might affect or limit the Tribe's land claim.

50. In 1975, the Tribe retained legal counsel to pursue its land claim.

51. In 1976, the Tribe again petitioned the Department of the Interior to initiate legal action to secure the return of the 1763 reservation.

52. In 1977, the Solicitor of the United States Department of the Interior concluded, in a formal litigation request to the Department of Justice, that the Catawba Tribe had been dispossessed of its treaty reservation in violation of federal law; that the 1840 treaty was void; that the Tribe could establish a *prima facie* case for repossession of its reservation under the Nonintercourse Act; that "the United States has had a duty under the Non-intercourse Act, since the Treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation;" that "this duty was not affected by the 1959 . . . Act;" that the United States "had never taken any action to fulfill its duty to help the Catawba recover the land;" that the United States had denied legal assistance to the Tribe under an erroneous legal theory, and that "the United States had an obligation to bring an action on behalf of the Tribe to obtain return of their lands to tribal ownership." The Solicitor's litigation report concluded: "Thus, the case is a particularly inviting one for a negligence claim against the United States should this Department fail to advocate relief of the Catawba."

53. In 1978 or 1979, Interior withdrew its litigation request after being advised by the Department of Justice that the Attorney General would not authorize suits on behalf of Indian tribes to displace non-Indian occupants of land wrongfully taken from tribes.

54. On October 28, 1980, after the failure of lengthy efforts to settle the claim, the Tribe filed suit in federal district court seeking the return of possession of its 1763 treaty reservation and trespass damages.

55. In 1983, the United States Court of Appeals for the Fourth Circuit held, among other things, that the 1959 Act did not extinguish federal trust responsibility to the 1763 Treaty lands and did not make state statutes of limitations applicable to the Tribe's land claim. *Catawba Indian Tribe v. State of S.C.*, 718 F.2d 1291 (4th Cir. 1983).

56. In 1986, the United States Supreme Court reversed the court of appeals and ruled that the 1959 Termination Act resulted in the application of South Carolina state statutes of limitations to the Catawba land claim. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986).

57. In 1989, the United States Court of Appeals for the Fourth Circuit ruled that the applicable South Carolina statute of limitations would operate to bar the Tribe's claim to any lands that had been adversely possessed for ten continuous years, without tacking, during the period between July 1, 1962 (the effective date of the termination act) and October 28, 1980 (the date the Tribe filed its land claim) and remanded the case to the district court for further proceedings. *Catawba Indian Tribe v. State of S.C.*, 865 F.2d 1444 (4th Cir. 1989).

58. As a result of the actions of the United States and the 1986 and 1989 judicial interpretations of the 1959 Act referred to in paragraphs 56 and 57 above, a substantial, though as yet undetermined, portion of the Tribe's land claim was barred and permanently lost before the

United States notified the Tribe in May, 1985 that it believed that the 1959 Act resulted in the application of state statutes of limitations to the Tribe's claim.

59. Based on the prior representations of federal officials and the duties and obligations undertaken by the United States, the Tribe had no reason to know or believe that its claim became subject to state statutes of limitations as a result of the 1959 Act. The Tribe was not made aware that the United States believed that the 1959 Act resulted in the application of state statutes of limitations until the United States filed its brief in the United States Supreme Court in May, 1985 and the Tribe was not made aware that the 1959 Act actually resulted in application of state statutes of limitations until the Supreme Court issued its decision in June, 1986. Both the position taken by the United States in its 1985 brief and the Supreme Court's 1986 interpretation of the 1959 Act, were unanticipated by the Tribe.

60. Prior to the final judicial interpretation in 1986 of the meaning of the 1959 Act with respect to application of state law limitations periods, the Tribe had no way of knowing it had actually suffered damages as a result of actions by the United States. Had the Supreme Court ruled in the Tribe's favor, the Tribe would have no cause of action against the United States arising out of the events and actions surrounding the 1959 Act. Thus, the final judicial determination in 1986 was a prerequisite to enable the Tribe to determine its rights and to determine whether it had suffered damages because of the United States' nonfeasance during the period 1958 to 1962.

61. The acts, omissions, and misrepresentations of the Interior Department, together with the actions of Congress and the 1986 and 1989 judicial interpretations of the 1959 Act referred to in paragraphs 56 and 57 above, have resulted in a substantial, though as yet undetermined, portion of the Tribe's land claim being barred and permanently lost. Because the Tribe's rights in its Treaty reservation are vested property rights protected by the Fifth Amendment to the United States Constitution, the actions of the United States constitute a taking of property without payment of compensation.

62. As a result of the loss of possession of its treaty reservation lands between 1790 and 1840 and the United States' failure to protect the Tribe in possession of its 1763 Treaty reservation lands, the Tribe has suffered great damage.

63. As a result of the United States' repeated refusal to take action to restore the Tribe to possession of its treaty reservation lands, the Tribe has suffered great damage.

64. As a result of the Treaties of 1760 and 1763, the 1790 Nonintercourse Act, the 1943 Memorandum of Understanding, and the affirmative acts, representations and conduct of federal officials, the United States had and undertook control or supervision over Catawba tribal property. This created a fiduciary responsibility on the part of the United States to protect Catawba tribal assets from waste and mismanagement, a fiduciary duty on the part of the United States not to squander tribal lands and claims to lands in favor of third parties, and a fiduciary

obligation to initiate litigation in a timely fashion to protect tribal assets.

65. The Interior Department's misrepresentations to Congress in 1959 and its concealment from Congress of the existence of the Catawba Tribe's land claim and the conditions upon which the Tribe's consent to termination had been obtained, resulted in the enactment by Congress of a law which applied state statutes of limitation to the Tribe's claim. The Interior Department's concealment from the Tribe of its failure to protect the claim from the effects of the 1959 Act, together with its failure to either advise the Tribe that the 1959 Act applied state statutes of limitations to the Tribe's claim or file a protective action on the Tribe's behalf, have resulted in an as yet undetermined portion of the Tribe's land claim being barred and permanently lost, to the Tribe's great damage.

66. Section 3 of the 1959 Act, 25 U.S.C. § 933(f), requires the Secretary of the Interior to sell all assets of the Tribe that are not selected and conveyed to members under the Act and to distribute the proceeds to the Tribe. The Tribe's land claim is an asset of the Tribe within the meaning of the 1959 Act. The Secretary has failed to quiet title to the Treaty Reservation in the Tribe or to sell or convey that asset to a trustee selected by the Secretary for disposition as required by § 933, to the Tribe's great and continuing damage.

CLAIM NO. 1

65. Paragraphs 1 through 66 are hereby incorporated by reference.

66. The United States had treaty, statutory and federal common law fiduciary duties to protect the Tribe in possession of its treaty reservation lands. The United States' failure to carry out those duties, thereby permitting the Tribe to lose possession of its entire treaty reservation, constitutes a breach of trust for which the United States is liable.

CLAIM NO. 2

67. Paragraphs 1 through 66 are hereby incorporated by reference.

68. The United States had treaty, statutory and federal common law fiduciary duties to investigate and take action to restore the Tribe to possession of its treaty reservation. The United States' failure to carry out those duties constitutes a breach of trust for which the United States is liable. The failures of the government and the resulting damage to the Tribe have been continuing.

CLAIM NO. 3

69. Paragraphs 1 through 66 are hereby incorporated by reference.

70. The United States, through treaty, statute, federal common law, agreement and through its conduct and affirmative acts, had and undertook the fiduciary responsibility to preserve the Tribe's assets and specifically to protect the Tribe's land claim. The United States' failure to carry out those responsibilities constitutes a breach of trust for which the United States is liable. The failures of

the government and the resulting damage to the Tribe have been continuing.

CLAIM NO. 4

71. Paragraphs 1 through 66 are hereby incorporated by reference.

72. The United States, through its affirmative acts and conduct, undertook the responsibility to protect the Tribe's land claim from the effects of the 1959 Act: this included the duty to notify the Tribe that, as a result of the 1959 Act and contrary to government officials' assurances, the Tribe would be required to file its land claim within a period of years or it would be barred. The United States' failure to carry out that responsibility constitutes a breach of trust for which the United States is liable.

CLAIM NO. 5

73. Paragraphs 1 through 66 are hereby incorporated by reference.

74. The actions of the United States which have resulted in the permanent loss of the Tribe's claim to possession of a large portion of the 1763 Treaty reservation constitute a breach of a contract implied-in-fact, entered into between the United States and its tribal beneficiaries providing that the United States would, among other things, protect the Tribe's land claim from the effects of the 1959 Act in return for the Tribe's consent to the withdrawal of federal supervision.

CLAIM NO. 6

75. Paragraphs 1 through 66 are hereby incorporated by reference.

76. The actions of the United States which have resulted in the permanent loss of the Tribe's claim to possession of a large portion of the 1763 Treaty reservation constitute a taking of the Tribe's vested property rights in violation of the Fifth Amendment to the United States Constitution.

CLAIM NO. 7

77. Paragraphs 1 through 66 are hereby incorporated by reference.

78. Pursuant to 25 U.S.C. § 933, the United States has a continuing duty to quiet title to the lands of the 1763 Treaty reservation in the Tribe and distribute the proceeds among the members of the Tribe. The United States has failed to carry out that duty. The failure of the government and the resulting damage to the Tribe have been continuing.

RELIEF

WHEREFORE, plaintiff prays that this Court find:

1. That the United States breached its fiduciary duties to the Tribe to:

   a) protect the Tribe in possession of its reservation;

   b) take action to restore the Tribe to possession of its reservation;

c) protect Catawba tribal assets from waste and dissipation;

d) protect the Tribe's land claim from the effects of the 1959 Act;

and is liable for damages arising from that breach.

2. That the United States breached its implied contract with the Tribe to protect the Tribe's land claim from the effects of the Termination Act in return for the Tribe's consent to the United States' termination proposal and that such breach gives rise to contract damages.

3. That the actions of the United States constitute a taking of the Tribe's vested property rights in violation of the Fifth Amendment to the United States Constitution for which compensation and interest to the Tribe is due.

4. That the United States breached its statutory fiduciary duty to quiet title to the 1763 reservation in the Tribe and distribute the proceeds among tribal members and is liable for damages arising from that breach.

Plaintiff further prays that this Court award it damages, the costs of this action, attorney's fees and such further relief as the court may deem appropriate.

DATED this 19th day of June, 1990.

Respectfully submitted,

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APPENDIX D

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SOUTH CAROLINA et al., Petitioners

v.

CATAWBA INDIAN TRIBE, INC.

476 US 498, 90 L Ed 2d 490, 106 S Ct 2039

[No. 84-782]

Argued December 12, 1985. Decided June 2, 1986.

APPEARANCES OF COUNSEL

James D. St. Clair argued the cause for petitioners. **Don Brantley Miller** argued the cause for respondent. Briefs of Counsel, p 1104, infra.

OPINION OF THE COURT

Justice **Stevens** delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising

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[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors 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

144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 USC §§ 931-938 [25 USCS §§ 931-938]. We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent

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the aforesaid survey shall be compleated 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." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App 35.

[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch 33, § 4, 1 Stat. 138. The Act, now codified at 25 USC § 177 [25 USCS § 177], states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I.

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue. For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in

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[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty – it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

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[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 SC acts 1700, Joint Res No. 904, § 1.

[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it

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and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on HR 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong. 1st Sess (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. Id., Ex 50, p 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. Ibid.

thereafter adopted a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 USC § 476 [25 USCS § 476].

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era" – a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." HR Con Res 108, 83d Cong, 1st Sess (1953), 67 Stat B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, e. g., Cornell, The New Indian Politics, 10 Wilson Q 113, 121 (1986); F. Prucha, supra, at 1046-1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L Rev 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 NDL Rev 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

services.[12] Moreover, members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation

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[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. HR Rep No. 2680, 83d Cong, 2d Sess, 2-3 (1954). In contrast to the report made by Senator Thomas in 1930, n 7, supra, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S Rep No. 863, 86th Cong, 1st Sess, 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S Rep, at 4; HR Rep, at 5.

[13] See 105 Cong Rec 5462 (1959) (statement of Rep. Hemphill); App 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id., at 103.

authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC §§ 931-938 [25 USCS §§ 931-938]. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. Ibid. Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F2d 305 (1984). Because of the importance of the case, we

requested the views of the Solicitor General of the United States and granted certiorari, 471 US 1134, 86 L Ed 2d 691, 105 S Ct 2672 (1985). We now reverse.

II.

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 USC § 935 [25 USCS § 935].

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual

Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is

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[15] DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); Antoine v Washington, 520 US 194, 199-200, 43 L Ed 2d 129, 95 S Ct 944 (1975); Mattz v Arnett, 412 US 481, 504-505, 37 L Ed 2d 92, 93 S Ct 2245 (1973).

[16] See Oregon Dept. of Fish and Wildlife v Klamath Indian Tribes, 473 US 753, 774, 87 L Ed 2d 542, 105 S Ct 3420 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' DeCoteau v District County Court, 420 US 425, 447 [43 L Ed 2d 300, 95 S Ct 1082] (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v Washington Commercial Passenger Fishing Vessel Assn. 443 US [658, 673 [61 L Ed 2d 823, 99 S Ct 3055] (1979)], clearly runs counter to a tribe's later claims"); Rice v Rehner, 463 US 713, 732, 77 L Ed 2d 961, 103 S Ct 3291 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); Andrus v Glover Construction Co. 446 US 608, 618-619, 64 L Ed 2d 548, 100 S Ct 1905 (1980); DeCoteau v District County Court, 420 US, at 447, 43 L Ed 2d 129, 95 S Ct 944 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, e. g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); Board of Regents v Tomanio, 446 US 478, 483-484, 64 L Ed 2d 440, 100 S Ct 1790 (1980); Johnson v

type of action in the absence of a specific congressional enactment to the contrary, County of Oneida v. Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19]

Railway Express Agency, Inc. 421 US 454, 462, 44 L Ed 2d 295, 95 S Ct 1716 (1975); Auto Workers v Hoosier Cardinal Corp. 383 US 696, 703-704, 16 L Ed 2d 192, 86 S Ct 1107 (1966); Cope v Anderson, 331 US 461, 463, 91 L Ed 1602, 67 S Ct 1340 (1947); Rawlings v Ray, 312 US 96, 97, 85 L Ed 605, 61 S Ct 473 (1941); O'Sullivan v Felix, 233 US 318, 322-323, 58 L Ed 980, 34 S Ct 596 (1914); Chattanooga Foundry & Pipe Works v Atlanta, 203 US 390, 397-398, 51 L Ed 241, 27 S Ct 65 (1906); McClaine v Rankin, 197 US 154, 158, 49 L Ed 702, 25 S Ct 410 (1905); Campbell v Haverhill, 155 US 610, 617, 39 L Ed 280, 15 S Ct 217 (1895); M'Cluny v Silliman, 3 Pet US 270, 277, 7 L Ed 676 (1830).

[19] See, e.g., Larkin v Paugh, 276 US 431, 439, 72 L Ed 640, 48 S Ct 366 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the inci-

Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of states laws and state taxation."[20] These

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dental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction – so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); Dickson v Luck Land Co. 242 US 371, 375, 61 L Ed 371, 37 S Ct 167 (1917) ("With those restrictions [of congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); United States v Waller, 243 US 452, 461-462, 61 L Ed 843, 37 S Ct 430 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); Shrimpscher v Stockton, 183 US 290, 296, 46 L Ed 203, 22 S Ct 107 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

[20] Bryan v Itasca County, 426 US 373, 389, 48 L Ed 2d 710, 96 S Ct 2102 (1976). See also United States v Antelope, 430 US 641, 647, n 7, 51 L Ed 2d 701, 97 S Ct 1395 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); Affiliated Ute Citizens v United States, 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law.

As the Court of Appeals noted, in Menominee Tribe v United States, 391 US 404, 20 L Ed 2d 697, 88 S Ct 1705 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read in pari materia with an Act passes in the same Congress that preserved hunting and fishing rights. Id., at 411, 20 L Ed 2d 697, 88 S Ct 1705. In this case, of course, there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a "backhanded" abrogation of treaty rights, id., at 412, 20 L Ed 2d 697, 88 S Ct 1705; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:
"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 USC § 936 [25 USCS § 936].

Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v Franklin, 439 US 379, 392, 58 L Ed 2d 596, 99 S Ct 675 (1979). See also Mountain States Tel. & Tel. Co. v Pueblo of Santa Ana, 472 US 237, 249, 86 L Ed 2d 475, 105 S Ct 2109 (1985); United States v Menasche, 348 US 528, 538-539, 99 L Ed 615, 75 S Ct 513 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v Ramsdell, 107 US 147, 152 [27 L Ed 431, 2 S Ct 391], rather than to emasculate an entire section").

[23] See 718 F2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that " 'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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[24] See Pembaur v Cincinnati, 475 US 469, 484-485, n 13, 89 L Ed 2d 452, 106 S Ct 1292 (1986); Regents of University of Michigan v Ewing, 474 US 214, 224, n 10, 88 L Ed 2d 523, 106 S Ct 507 (1985); Bishop v Wood, 426 US 341, 345-347, 48 L Ed 2d 684, 96 S Ct 2074 (1976); Propper v Clark, 337 US 472, 486-487, 93 L Ed 1480, 69 S Ct 1333 (1949).

SEPARATE OPINION

Justice **Blackmun**, with whom Justice **Marshall** and Justice **O'Connor** join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC § 931 et seq. [25 USCS §§ 931 et seq.], was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter, Foreward to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L Rev 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that

territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763 – "a mere token of the[ir] once large domain" – that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, e.g., id., at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, ibid., but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163-166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on HR 3274, 96th Cong, 1st Sess, 135, 151-153 (1979) (Hearing).

Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160-161 (J. Cushing ed 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Maine L Rev 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763 – shortly before the signing of the Treaty of Augusta – flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 USC § 177 [25 USCS § 177], has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition – which in 1793 was extended to include not only outright purchases but also acquisitions

of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat 330 – mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." Ibid. The Catawbas soon were reduced to "a state of starvation and distress," ibid., and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty" – which the United States never joined or approved – the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars,"

including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App 38-39.[2]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 SC Stats 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6 (CA4) p 23, n 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

[3] See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation – which works out to roughly $3.17

Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that

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per acre – contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier – the approximate equivalent of 15 cents per acre payable in installments over 10 years.

[4] 6 Record, Exs 18, 20. But see United States v Candelaria, 271 US 432, 442, 70 L Ed 1023, 46 S Ct 561 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any " 'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,' " quoting Montoya v United States, 180 US 261, 266, 45 L Ed 521, 21 S Ct 358 (1901); Joint Tribal Council of Passamaquoddy Tribe v Morton, 528 F2d 370, 376-378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition.)

the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op SC Atty Gen 17, 18, 29-32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex 21, pp 11-12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. Id., Ex 48 (letter from Ass't Comm'r of Indian Affairs to SC State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see id., Ex 49, p 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App 43-44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal

restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex 53, pp 7-8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, ante, at 510, n 23, 90 L Ed 2d, at 501). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." Id., at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." Id., at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong Rec 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He

further concluded that the Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussion that the Tribe already had initiated with South Carolina officials. See App to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15-17 (Hearing) (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see Oneida Indian Nation v County of Oneida, 414 US 661,

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See Yankton Sioux Tribe v United States, 272 US 351, 357, 71 L Ed 294, 47 S Ct 142 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

666-678, 39 L Ed 2d 73, 94 S Ct 772 (1974) (Oneida I), and the statute of limitations is thus a matter of federal law, see County of Oneida v Oneida Indian Nation, 470 US 226, 240-244, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Oneida II). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, e.g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); DelCostello v Teamsters, 462 US 151, 158-163, 76 L Ed 2d 476, 103 S Ct 2281 (1983); Occidental Life Ins. Co. v EEOC, 432 US 355, 367, 53 L Ed 2d 402, 97 S Ct 2447 (1977).

In Oneida II, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat 845, 25 USC § 233 [25 USCS § 233]. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 USC § 2415(c) [28 USCS § 2415(c)].[6] The Court in Oneida II

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[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian

concluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those

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Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." Oneida II, 470 US, at 242, 84 L Ed 2d 169, 105 S Ct 1245. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands – including the 144,000 acres claimed by the Catawbas. See, e.g., 123 Cong Rec 22166-22167 (1977) (Rep. Cohen, discussing Catawba claim and others); id., at 22168 (Rep. Walsh); id., at 22170 (Rep. Hanley); 126 Cong Rec 5748-5749 (1980) (Rep. Holland, discussing Catawba claim); id., at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, e.g., 123 Cong Rec 22170 (1977) (Rep. Collins); id., at 22171 (Rep. Johnson); 126 Cong Rec 3289 (1980) (Sen. Cranston); id., at 5745-5746 (Rep. Clausen); id., at 5747 (Rep. Danielson); id., at 5750 (Rep. Swift). See also 123 Cong Rec 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years – many at the hands of the American Government – it is incumbent on the United States to give these people – our country's first inhabitants – a full chance to redress their grievances"); 126 Cong Rec 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 US, at 244, 84 L Ed 2d 169, 105 S Ct 1245.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule – which the Court today implicitly reaffirms, see ante, at 506, 90 L Ed 2d, at 498-499 – that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, e.g., Oneida II, 470 US, at 247-248, 84 L Ed 2d 169, 105 S Ct 1245; Bryan v Itasca County, 426 US 373, 392, 48 L Ed 2d 710, 96 S Ct 2102 (1976); Northern Cheyenne Tribe v Hollowbreast, 425 US 649, 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793 (1976); DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); United States v Santa Fe Pacific R. Co. 314 US 339, 353-354, 86 L Ed 260, 62 S Ct 248 (1941); Alaska Pacific Fisheries v United States, 248 US 78, 89, 63 L Ed 138, 39 S Ct 40 (1918); Choate v Trapp, 224 US 665, 675, 56 L Ed 941, 32 S Ct 565 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, Santa Fe Pacific, 314 US, at 353, 86 L Ed 260, 62 S Ct 248, it must be assumed that Congress did not intend to belie its "avowed solicitude" for the Indians, id., at 354, 86 L Ed

260, 62 S Ct 248, with a "backhanded" abrogation or limitation of their rights, Menominee Tribe v United States, 391 US 404, 412, 20 L Ed 2d 697, 88 S Ct 1705 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," ante, at 506, 90 L Ed 2d, at 498, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 USC § 935 [25 USCS § 935]. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See ante, at 505-509, 90 L Ed 2d, at 498-500. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the

Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." Ante, at 508, 90 L Ed 2d, at 499-500. The cases it cites for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See Oneida II, 470 US, at 240-244, 84 L Ed 2d 169, 105 S Ct 1245. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in Oneida I that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 US, at 676, 39 L Ed 2d 73, 94 S Ct 772. In this case, however, as in Oneida I, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 US, at 677, 39 L Ed 2d 73, 94 S Ct 772. Here, as in Oneida I, the complaint thus "asserts a

present right to possession under federal law." Id., at 675, 39 L Ed 2d 73, 94 S Ct 772.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex 7, p 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486-493 (1982); Cohen, Original Indian Title, 32 Minn L Rev 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum L Rev 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, e.g., United States v Title Insurance & Trust Co. 265 US 472, 484, 68 L Ed 1110, 44 S Ct 621 (1924), quoting Barker v Harvey, 181 US 481, 491-492, 45 L Ed

title, at least, the Nonintercourse Act merely " 'put in statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States.' " Oneida II, 470 US, at 240, 84 L Ed 2d 169, 105 S Ct 1245, quoting Oneida I, 414 US, at 678, 39 L Ed 2d 73, 94 S Ct 772.[10]

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there

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963, 21 S Ct 690 (1901) (" 'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal' "); Mitchel v United States, 9 Pet 711, 9 L Ed 283 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in Johnson v McIntosh, 8 Wheat 543, 573-574, 5 L Ed 681 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art I, § 8, cl 3, which made "Indian relations . . . the exclusive province of federal law," Oneida II, 470 US, at 234, and n 4, 84 L Ed 2d 169, 105 S Ct 1245. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Main L Rev 17, 28-29 (1979). In Oneida II, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See 470 US, at 236-240, 84 L Ed 2d 169, 105 S Ct 1245.

anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." Menominee Tribe, 391 US, at 412, 20 L Ed 2d 697, 88 S Ct 1705 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

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[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art I, § 8, cl 3, and the constitutional prohibition against state treaties, Art I, § 10, cl 1. App 23. Reading the complaint liberally "so . . . as to do substantial justice," Fed Rule Civ Proc 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as Amicus Curiae in Connecticut v Mohegan Tribe, O T 1980, No. 80-1365 [452 US 968, 69 L Ed 2d 981, 101 S Ct 3124], p 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in Mohegan Tribe as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See ante, at 506-507, 90 L Ed 2d, at 498-499. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba – or by the Catawba Tribe – must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold

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Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians, the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S Rep No. 863, 86th Cong, 1st Sess, 1 (1959); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18-century treaty lands. See S Rep No. 863, at 3; HR Rep No. 910, at 4.

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. Ante, at 508, 90 L Ed 2d, at 499; see also ante, at 510, 90 L Ed 2d, at 501.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, Northern Cheyenne Tribe, 425 US, at 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in Menominee Tribe, supra, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not " 'strain to implement [an assimilationist] policy Congress has now rejected.' " Bryan v Itasca County, 426 US, at 389, n 14, 48 L Ed 2d 710, 96 S Ct 2102, quoting

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[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, e.g., HR Rep No. 910, 86th Cong., 1st Sess, 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

Santa Rosa Band of Indians v Kings County, 532 F2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see ante, at 510, 90 L Ed 2d, at 501, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, e.g., Choctaw Nation v Oklahoma, 397 US 620, 631, 25 L Ed 2d 615, 90 S Ct 1328 (1970); Jones v Meehan, 175 US 1, 11, 44 L Ed 49, 20 S Ct 1 (1899); Worcester v Georgia, 6 Pet 515, 582, 8 L Ed 483 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might some day prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act

bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p 1C, reprinted in Hearing at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." Ibid.

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[14] See, e.g., Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); id., at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

When an Indian Tribe has been assimilated and dispersed to this extent – and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see ante, at 499-500, 90 L Ed 2d, at 494-495, and n 4 – the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," FPC v Tuscarora Indian Nation, 362 US 99, 142, 4 L Ed 2d 584, 80 S Ct 543 (1960) (dissenting opinion), I do not join the judgment of the Court.

No. 84-782

In The
Supreme Court of the United States
October Term, 1985

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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i

QUESTION PRESENTED

In 1943, the Secretary of the Interior took 3,434 acres into trust for the Catawba Tribe. Sixteen years later, the Tribe and the federal government agreed to end the federal trust over this tract, but only on the condition that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Basing its action on tribal consent, Congress enacted the 1959 Catawba Division of Assets Act for the purpose of distributing the 3,434 acres. The question presented is:

Whether, in addition to distributing the 3,434 acres, Congress also intended to violate the condition upon which tribal consent was obtained and *sub silentio* extinguish or limit the Tribe's long-standing claim to its 144,000-acre 1763 Treaty lands.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, TREATIES AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In 1760 and 1763, the British Crown entered into treaties with the Catawba Indian Tribe under which the Tribe ceded vast portions of its aboriginal territory in return for the Crown's guarantee of protection for a 15-mile-square, 144,000-acre reservation. In 1840 the State of South Carolina, without the knowledge, consent, or participation of the United States, negotiated a "sale" of the Catawba Reservation, promising it would purchase a new reservation elsewhere for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. The State continues to this day to hold this tract in trust for the Tribe.

In 1980, after more than a century of unsuccessful efforts to resolve its claim legislatively and administratively, including 1905 and 1909 administrative petitions to the Secretary of the Interior, the Tribe filed suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that it acquired, in 1763, a protected, recognized property right through its treaties with Great Britain and that since the adoption of the United States Constitution, its reservation lands have been protected by federal law. As a result, the 1840 "treaty" between the State and the Tribe is void, and the subject lands retain to this day their status as Indian tribal lands.

The question to be determined by the Court is whether the Tribe's federal law right to possess its 1763 Treaty land was taken away *sub silentio* in 1959 when Congress acted to distribute among tribal members 3,434 acres of land that the United States and South Carolina had acquired in 1943 for the purpose of rehabilitating the Tribe.

II. THE PROCEEDINGS BELOW AND THE ISSUES FOR REVIEW

The district court postponed class certification and filing of answers in favor of first considering petitioners' motion for summary judgment based solely on the effects

of the 1959 Catawba Division of Assets Act.[1] 73 Stat. 592, 25 U.S.C. §§ 931-938 ("1959 Act"). The district court then granted summary judgment for petitioners by adopting *verbatim* their proposed findings of fact and conclusions of law.

For purposes of summary judgment, petitioners' motion necessarily assumed that, until the effective date of the 1959 Act:

(1) the Catawba Tribe possessed a vested, constitutionally-protected property right in its 144,000-acre 1763 Treaty Reservation;

(2) the 1763 Reservation was subject to the same federal constitutional, statutory, and common law protection as other federal treaty reservations; and

(3) neither the Tribe's property interest nor its federally-restricted status was validly disturbed until 1959, *i.e.*, the 1840 state treaty was void.

The only question before the Court is whether the 1959 Act implicitly extinguished, in abrogation of an express understanding with the Tribe, the federally-protected status of an additional 140,000 acres of Treaty lands over and above the 3,434 acres that it was intended to affect. The Court of Appeals held that the 1959 Act did not have this effect, finding that it dealt only with the distribution of the 3,434 acres administratively acquired 16 years earlier.

III. FACTS

A. The 1763 Treaty Of Augusta.

In 1760, the Catawba Tribe and His Majesty's Superintendent of Indian Affairs entered into the Treaty of Pine Tree Hill, whereby the Catawba Tribe ceded its remaining aboriginal territory in return for "being quietly settled in a Tract of only fifteen Miles square . . ." Lt.

[1]Petitioners uniformly refer to this 1959 Act as the "Catawba Termination Act." *See, e.g.*, Pet. Br., Table of Contents. This is petitioners' own label for the 1959 Act created for this lawsuit. Congress' title for the 1959 Act is the "Catawba Indian Tribe Division of Assets Act." 73 Stat. 592; 25 U.S.C. § 931 (1982). Its stated purpose is to "provide for the division of tribal assets of the Catawba Indian Tribe of South Carolina among the members of the Tribe . . ." *Id.* Neither the word "terminate" nor any of its variants appears in the title or text of the Catawba Act.

Governor Bull to South Carolina General Assembly, October 14, 1760, S.C. Commons House Journal, No. 33, pt. 2, 14 (R. Vol. VI, Ex. 3). In 1763, the Crown issued a proclamation forbidding the colonial governors from patenting or authorizing surveys of Indian lands and forbidding private land purchases or settlement on Indian lands (R. Vol. VI, Ex. 4). The Proclamation of 1763 was the definitive statement of British Indian policy and continued in force until the American Revolution.[2]

Shortly after issuing the 1763 Proclamation, the Crown convened a treaty conference at Augusta with the Chickasaw, Choctaw, Cherokee, Creek and Catawba Tribes. Because the terms of the 1760 Treaty of Pine Tree Hill had not been honored by the British, the Catawbas renewed their claims to a larger area. The governors told the Catawbas that "our King and Father holds out his arms to receive and protect you from all your enemies and . . . you may be assured of his confirming to you all your just claims to your Lands and Hunting Grounds pursuant to [the Treaty of Pine Tree Hill]." Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30). The Governors urged the Catawbas to stand by their former agreement and promised that the Treaty obligations would be fulfilled. The Catawbas agreed, and Article IV of the Treaty of Augusta provides:

> And We the Catawba Head Men and Warriors 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 Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated 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.

[2]Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-49 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 594-98 (1823); see Clinton and Hotopp, Judicial Enforcement of the Federal Restraints on alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 22 (1979).

Id. at 201-02 (J.A. 35). Following the Treaty, the Reservation was surveyed and a fort built for the Tribe's protection.[3]

B. Attempted State Extinguishment—The 1840 "Treaty" Of Nation Ford.

During the Revolutionary War, the Catawba Tribe fought alongside the Colonists against the British. Following Independence, the United States recognized the

[3]In 1772, the Crown actively protected the Tribe's possession, opposing a plan by members of the South Carolina General Assembly to lease the Catawba Reservation to one of its own members. John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the 1763 Treaty, wrote the South Carolina Governor:

> The Land now Occupied by the Catawba Indians being a parcel of Fifteen Miles Square was, as well as a very considerable Extent of Country besides possessed by them when the Subjects of England first Settled in this part of the World; At the Congress held at Augusta in 1763, by the Governors of Virginia So. & North Carolina & Georgia and the Superintendant of Indian Affairs in the Southern District. The said parcel of Land of Fifteen Miles Square, being judged by the Remains of the Said Once numerous and powerfull Nation . . . to be Sufficient for their Support & Maintenance . . . and in Consideration of their Having Voluntarily relinquished their Claims to a very extensive Territory as also of their Having been always faithfully & Cordially Attached to the British Interest, was in the most Solemn Manner reserved for their use by Treaty to the Observation of which the said Governor and Superintendant bound Themselves & their Successors.
>
> The Catawbas never have by any Treaty or Publick Act Ceded the Land so Reserved to them by said Treaty of Augusta in 1763 to His Majesty, and Such a Cession cannot be Negotiated for or accepted of, for & on Behalf of His Majesty, by any other person, than His Agent for & Superintendant of Indian Affairs without a Manifest Violation of His Majesty's Orders . . .
>
> Your Excellency & the Honorable Council, cannot in my humble Opinion with any Propriety or Shadow of Right grant or lease the Whole or any Part of the Catawba Lands for any purpose or upon any Pretence whatsoever untill they shall have been first Ceded by said Indians to the Superintendant for His Majesty, without a Violation of every Order and Instruction Relative to Indian Lands.

Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI, Ex. 7).

Catawbas' title to their 1763 Treaty lands,[4] but neither entered into new treaties or agreements with nor provided services to the Tribe for 160 years, until 1943. While the Colony, and later the State of South Carolina, initially recognized the validity of the 1763 Treaty guarantees (R. Vol VI, Ex. 8, 10, pp. 19-22), increasing pressure from settlers in the area resulted in the enactment of several State statutes in the early 1800's—all without federal approval—purporting to authorize leasing of Catawba tribal lands to non-Indians (R. Vol. VI, Ex. 10). By the 1830's, nearly all of the Catawba Treaty lands had been leased to non-Indians in violation of federal law, and the lessees began pressuring the State to extinguish the Tribe's title (R. Vol. VI, Ex. 10, 11 & 12). In 1838, South Carolina conveyed its pre-emptive rights in the Catawba lands to the non-Indian lessees (R. Vol. VI, Ex. 10, pp. 20-22). The State's initial efforts to convince the Catawbas to sell were rebuffed by the Tribe, but in 1840 the State succeeded in "negotiating" the "Treaty" of Nation Ford whereby the Tribe purportedly relinquished its 144,000-acre tract in return for South Carolina's promise to spend $5,000 to acquire new tribal land in North Carolina or some unpopulated area of South Carolina (J.A. 38).[5] The South Caro-

[4]In 1782, Congress, operating under the Articles of Confederation, recognized the Tribe's claim to occupy its Treaty Reservation, and urged South Carolina to take whatever steps it deemed necessary "for the satisfaction and security of said tribe . . ." Journals of Congress, Saturday, Nov. 2, 1782. In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those "tribes" which still "held" lands "within our States." American State Papers, Indian Affairs, Vol. II 541 (1834), *Plan For Removing The Several Indian Tribes West Of The Mississippi River* (Jan. 27, 1825). A War Department chart attached to the report indicates that the Catawba Tribe comprised 450 persons and claimed 144,000 acres in South Carolina. *Id.* at 545.

[5]A 1908 legal memorandum submitted to the Department of the Interior states:

> The Indians assert that this treaty was obtained by opening a barrel of whiskey, hanging tin cups around the barrel, and allowing each Indian to help himself. They are prepared to make affidavit to the fact that this is the generally accepted version and statement among all their people.

Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906 (R. Vol. V at 23, n.30).

lina legislature ratified the "treaty" and in turn authorized the issuance of patents to the leaseholders who occupied the land (R. Vol. VI, Ex. 10, pp. 23-24).

The United States was not a party to and did not participate in the 1840 "treaty" (R. Vol. VI, Ex. 10).

Nor did South Carolina perform its duties under the "treaty." The State did not purchase new lands, and the Tribe wandered homeless for more than two and one-half years. In 1842, the State purchased for $2,000 a 630-acre tract located entirely within the boundaries of the 1763 Treaty lands (R. Vol. VI, Exs. 13, 14). This "new" reservation comprised less than one-half of one percent of the 1763 Treaty lands. The 630-acre tract continues to this day to be held in trust for the Tribe by the State as an Indian reservation (R. Vol. VI, Ex. 15).

C. Events Leading To The 1943 Memorandum Of Understanding.

1. Early Tribal Attempts To Regain Possession.

In the century following the "Treaty" of Nation Ford, the Catawba Tribe made numerous appeals to both the State and Federal Governments to regain possession of at least a portion of its Treaty lands. In 1905 and 1909, the Catawba Tribe petitioned the Department of the Interior to assist the Tribe to regain possession. The Tribe's petitions were based on the Nonintercourse Act but were rejected because the Catawbas were "state Indians" for whom the Department concluded the United States had no responsibility (R. Vol. VI, Exs. 18, 20). During the period 1900-1930, the Catawbas made numerous appeals to the State of South Carolina seeking citizenship and "final settlement of all their claims against the state" (R. Vol. VI, Ex. 25). Although a 1908 South Carolina Attorney General opinion concluded that the 1840 treaty was valid and that its terms had been fulfilled (R. Vol. VI, Ex. 10), the State's Governor and Legislature generally acknowledged the legitimacy of the tribal claim and a number of state investigative committees were appointed, but no action was ever taken[6] (R. Vol. VI, Exs. 19, 23, 25, 28, 30).

[6] In 1910 The Tribe was advised by a federal Indian agent that they could not even get into court for a legal hearing on their claim and that they should be content with a reasonable grant from the State Legislature (R. Vol. VI, Ex. 21, pp. 11-12, 16, 21).

7

2. Early Efforts To Secure Federal Assistance For The Catawbas.

Following 1930 field hearings in Rock Hill, South Carolina, by a subcommittee of the Senate Committee on Indian Affairs,[7] at which Catawba Chief Blue testified that the State had taken the Tribe's 144,000-acre Treaty Reservation and left the Tribe poverty stricken, attention again focused on securing federal assistance for the Tribe.[8] Senator Thomas of Oklahoma, a member of the Senate Subcommittee that visited the Reservation in 1930, wrote in 1932 that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." *Division of Tribal Assets of Catawba Indian Tribe, Hearings on H.R. 6128, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 86th Cong., 1st Sess. (unpublished) ("*Hearings*"), Insert 5 at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (R. Vol. VI, Ex. 56), *quoting* Feb. 10, 1932 letter, Senator Thomas to Commissioner Rhoads. Senator Thomas later described the Catawba Tribe as "the most pathetic and deplorable Indian Tribe that I have discovered in the United States." *Hearings on S. 2755 and S. 3654, Before Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. 263 (1934).

The State began to actively seek assistance from the federal government, both for the purposes of providing relief and securing a final settlement of the Tribe's claim arising out of the 1840 "treaty" (R. Vol. VI, Exs. 33, 34, 35, 36, 45, 46, 47, 48). In 1937 and 1939, legislation was introduced in Congress authorizing general federal super-

[7] *Survey of Condition of the Indians in the United States,* Sen. Doc. No. 92, 71st Cong., 2d Sess. 7535 (1930).

[8] In 1929, Chief Samuel Blue had written the United States Commissioner of Indian Affairs, informing him that the Chief was to appear before the State Legislature, seeking "final settlement from South Carolina on land lease, which has been standing for over 130 years," and asking how the BIA "settled" with Indians of other reservations so he would have an idea what to request (R. Vol. VI, Ex. 30).

vision of the Catawbas on the condition that the State purchase additional lands (R. Vol. VI, Exs. 32, 39).[9]

D. The 1943 Memorandum Of Understanding.

With the failure to secure legislation authorizing assumption of general federal supervision, the Catawbas' Congressman and the Interior Department began to explore administrative alternatives for establishment of a program to "rehabilitate these Indians." 90 Cong. Rec. A2091-92 (May 2, 1944) (Remarks of Rep. James P. Richards) (R. Vol. VI, Ex. 43). This effort, which began in 1940, focused on the development of a joint assistance program by the state and federal governments. The State initially conditioned its participation upon a release and quit-claim by the Tribe of its claims arising out of the 1840 treaty (R. Vol. VI, Ex. 45), but the Interior Department refused to agree to extinguishment of the tribal claim as a condition for establishing a rehabilitation program (R. Vol. VI, Exs. 47, 48, 50) (J.A. 43-44)[10]

[9]The State sought to leverage its support of the 1937 legislation into a "final settlement" of the Tribe's 1840 taking claim (R. Vol. VI, Exs. 33, 34, 35). The BIA investigated the matter, however, and prepared a report documenting the Reservation's history and the State's failure to comply with the terms of the 1840 "treaty" (R. Vol. VI, Ex. 36). Neither bill was reported out of committee, despite formal action in support of the 1939 bill by the South Carolina Legislature authorizing the State Budget Commission "to negotiate and enter into an agreement with the Federal Government having as its objective the rehabilitation of the Catawba Indians and a final settlement with them so that the State may be relieved of their support" (R. Vol. VI, Ex. 41).

[10]Early drafts of the cooperative agreement, known as the Memorandum of Understanding, had contained a provision purporting to extinguish the Tribe's reservation claim (R. Vol. VI, Ex. 49), but that provision was deleted in 1941. The Solicitor of the Department of the Interior confirmed BIA's position that the Agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, etc." *reprinted in* I *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974,* 1080, 1081-82 (Gov't. Printing Office, n.d.) (*"Interior Opinions"*) (J.A. 43-

(Continued on next page)

The State agreed to participate in the rehabilitation program without the extinguishment provision and on December 14, 1943, the Secretary of the Interior approved the Memorandum of Understanding between the Tribe, the State and the Department of the Interior. It contained no language concerning extinguishment of the Tribe's claim. The Memorandum clearly defined its purpose as limited to rehabilitation of the Catawbas and securing them "equal treatment with other citizens . . ." (J.A. 45).

Pursuant to the Memorandum, the State of South Carolina acquired 3,434 acres of farm land close to the existing 630-acre state reservation at a cost of $70,000 and conveyed the lands in trust to the Secretary of the Interior. The State did not convey the 630-acre reservation to the Secretary.

E. The 1959 Catawba Division Of Assets Act.

In the 1950's, the BIA began to consider withdrawing from its obligations to provide services under the 1943 Memorandum of Understanding. The federal presence at Catawba was of fewer than 15 years duration and had been consistently minimal. *Hearings* at 87-88; *see* R. Vol. III, Exs. 11, 12, 13. Federal interest in withdrawal coincided with tribal dissatisfaction over the inability of members to secure financing for farm operations and home building and improvement. The lack of federal services, coupled with federal restrictions on the alienation of any interest in reservation lands, meant that much of the newly acquired 3,434-acre tract could not be productively used (R. Vol. VI, Exs. 54, 56; R. Vol. III, Ex. 22).

In 1956, Catawba Chief Blue publicly expressed dissatisfaction: "The agreement called for a rehabilitation program for us, but nothing has been done about it so far

(Continued from previous page)

44). The Solicitor also examined the source of the Department's authority to enter into the Memorandum. Noting that the "Federal Government did not take jurisdiction over these Indians until the fiscal year 1941, when the Interior Department Appropriation Act appropriated $7,500 for the relief of the Catawba Indians," the Solicitor concluded that the special appropriation "implies the grant of such jurisdiction for the purposes for which the funds were appropriated." *Id.* at 1080-81 (J.A. 40-41).

to help the Catawbas." *Hearings* at 4-5, Insert 1 (Letter to the Editor, Rock Hill Evening Herald, May 9, 1956). Shortly thereafter, BIA officials met with the Tribe at the Reservation and discussed in detail the 1943 Memorandum of Understanding and the services provided pursuant to its terms. *Hearings* at 5 and Insert 2.

In 1957 and 1958, Congressman Robert W. Hemphill sponsored large public meetings among the BIA, the Tribe and State officials in an effort to resolve the problems raised by the Tribe. *Hearings* at 6. At the 1957 meeting, BIA Associate Commissioner H. Rex Lee explained that the BIA offered "very little in the way of services" and that the BIA's ability to provide services was limited by the Memorandum of Understanding "as there had never been any treaties or agreements prior to the Memorandum of Agreement." *Hearings,* Insert 4 at 1-3 (Minutes of Dec. 20, 1957 meeting). Nonetheless, the Associate Commissioner stated that it was "the desire of the Bureau of Indian Affairs to work with the Catawbas and continue to assist them . . . ." *Id.* at 1

At the 1958 meeting, a special BIA program officer detailed the history leading to the Memorandum of Understanding, its principal provisions, and the steps that had been taken to make it effective. *Hearings,* Insert 5 (Minutes of Oct. 21, 1958 meeting) (R. Vol. VI, Ex. 56). Associate Commissioner Lee then told the Tribe "[y]our main problem is inadequate housing—the main reason being, it is impossible to borrow money. The land status has been deterior [sic] to the Indians because of the restricted status of land . . . ." Lee suggested to the Tribe that federal funds were not the answer to the Catawbas' problems, but rather the solution lay in each family acquiring title to its lands. *Hearings,* Insert 5 at 7 (R. Vol. VI, Ex. 56). Lee stated that the "[m]echanics to get lands back into the hands of the Indians" would be to reach agreement among the Indians and then approach Congress to "get the necessary legislation." Lee further told the Tribe that he knew "that you do not want to see the Tribe broken up. You might try some possible fee-simple agreements which

would be entirely feasible, but must have some help from the Congress." *Id.*

Following the October 21, 1958 meeting, the BIA Program Officer met with numerous tribal leaders in their homes "to acquaint them further with possible solutions to their problems as well as the procedure necessary to carry them out." Jan. 30, 1959, Program Officer to Chief, Branch of Tribal Programs, at 2 (R. Vol. VI, Ex. 53). The program officer's report shows that a number of tribal officials expressed concern about the status of the Tribe's claim against the State, but were assured by the program officer that the Tribe's claims would be unaffected by the BIA's proposal to distribute tribal assets.

> Had a long talk with Willie Sanders again after he had time to read my report. First, he talked about a settlement with the State before anything else could take place, but I told him that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government [for the distribution of assets] . . . .

(R. Vol. VI, Ex. 53 at 7; *see also* pp. 8-9, 14, 16-17).

At a January 3, 1959 tribal meeting, the Catawba Tribe agreed to the federal withdrawal program and adopted a tribal resolution drafted for the Tribe by the BIA. *Hearings* at 8. The tribal resolution requested the removal of federal restrictions on the Tribe's "3,388.8 acre reservation in York County." *Hearings,* Insert 6 (J.A. 102).[11] The tribal resolution was based solely upon the inability of members to "obtain credit to build homes . . . or to improve or develop the property." *Id.* The resolution specifically conditioned tribal support of division of assets legislation on preserving intact the Tribe's longstanding Treaty claim: "*and that nothing in this legislation shall*

[11] In 1957, Congress authorized the transfer of "approximately forty-nine" acres of the land acquired pursuant to the 1943 Memorandum of Understanding to the City of Rock Hill. Act of May 17, 1957, 71 Stat. 31. To avoid confusion, we refer to the lands distributed pursuant to the 1959 Act as "3,434 acres," although in fact only 3,383.8 acres were affected by the Act.

affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id. (emphasis added) (J.A. 103).[12]

On January 26, 1959, Congressman Hemphill requested BIA Associate Commissioner Lee to draft legislation "to accomplish the desires [of the tribe] set forth in the Resolution. I believe it will be of great benefit to the Tribe, both individually and collectively . . . ." (J.A. 50).

On March 28, 1959, the Congressman presented the BIA's draft bill to the Tribe, reading it to the members "line by line". *Hearings* at 9. According to the BIA's minutes of the meeting, the Congressman also read the tribal resolution and told the Tribe that he had had the "legislation drawn up to carry out the intent of the resolution." (J.A. 111). Congressman Hemphill stated that Associate Commissioner Lee had told him on his first trip to Washington that BIA services under the Memorandum of Understanding could not be expanded and that, "in his [Hemphill's] opinion, the [1943] memorandum of understanding had been of no advantage to the Tribe." (J.A. 112). Congressman Hemphill assured the Tribe that no legislation would be introduced without the Tribe's approval. *Id.* Referring to the draft bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the introduction of the bill by a vote of 40 to 17 and it was introduced on April 7, 1959.

The Congressman's introductory remarks note that the Tribe "just voted a resolution to have me introduce a bill" and cite the Tribe's need to have title to its "4,000 acres" so that members might no longer be excluded from "the privileges of development." 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116).

Congressman Hemphill's testimony before the House Interior Subcommittee described the problem to be remedied by his bill solely in terms of tribal members' inability

[12]Petitioners incorrectly assert that the Tribe's January 3, 1959 resolution was not "before Congress" (Pet. Br. at 40, n. 116). The resolution is a part of the July 10, 1959 hearing record, however, having been introduced by the bill's sponsor. *Hearings* at 8, 13

to "borrow any money on community property" as a result of an agreement "in 1944 [sic] which was . . . worthless . . . ." *Hearings* at 7. The Congressman assured the subcommittee that his bill was based upon the Tribe's consent as expressed in the January 3, 1959 tribal resolution:

> I refused to introduce a bill until the Catawba Indian Tribe requested it. On January 3, 1959, the Catawba Tribe passed the following resolution—I ask permission to insert that resolution at this point as a part of the record.
>
> As a result of that resolution, I asked the Bureau of Indian Affairs to assist me in the preparation of a bill, and I introduced the bill which is before you today.

Hearings at 8. Associate Commissioner Lee's testimony before the Interior subcommittee confirmed to Congress that the legislation had been drafted to conform to the wishes of the Tribe:

> After this meeting they petitioned their Congressman to introduce a bill. The Congressman asked us for drafting service, and we drafted a bill along the lines that we thought the Indians had been discussing.
>
> After the bill had been drafted, however, we advised Congressman Hemphill that before we could report favorably on the bill we thought a specific bill should be presented to the Indians and explained to them in detail so we could be sure this was the type of program they wanted. This was done at the March 28 meeting . . . .

Hearings at 84.

The reports of the House and Senate Committees are virtually identical, stating that the Act's purpose is to "provide for the division of the tribal assets of the . . . Tribe . . . among the . . . members . . ." (J.A. 120). "The assets consist principally of the tribal land which comprises nearly 4,000 acres . . ." (J.A. 121). The committee reports, like the Act itself, make no mention of the 1763 Treaty claim sought to be preserved by the Tribe. The reports do show that Congress was basing its action on the Tribe's consent as expressed in its meetings of January 3 and March 28, 1959:

> The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17.

H. R. Rep. No. 910, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672 (J.A. 121).[13]

Both the House and Senate Reports portray the subject matter of the 1959 Act exclusively in terms of duties undertaken and assets acquired pursuant to the 1943 Memorandum of Understanding:

> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.
>
> In accordance with the memorandum of understanding the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that would be conveyed under the provisions of the bill.*

H.R. Rep. No. 910, *supra* at 2673 (emphasis added) (J.A. 123-124).

[13]The efforts of the BIA and Congress to ensure tribal agreement to the division of assets were in accord with the newly revised congressional policy regarding termination of Indian tribes. In 1958, Congress and the Eisenhower Administration rejected coercive termination in favor of a policy that permitted termination based only on informed tribal consent. See F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.), discussed *infra* at 35.

The Catawba Division of Assets Act was signed into law on September 21, 1959. Following distribution by the Secretary of the Interior of only the assets acquired in 1943, the Secretary formally notified South Carolina Governor Hollings and Catawba Chief Sanders that the Department had carried out the mandate of the 1959 Act: the notice spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

Thereafter, the Catawba Tribe continued to reside on the small 630-acre state reservation. In 1971, the South Carolina Legislature enacted legislation exempting reservation mobile homes from state taxation and in 1975, the South Carolina Attorney General issued a formal opinion that the State continued to hold the 630-acre "old reservation" in trust for the Tribe. Op. Atty. Gen. S.C. No. 3988, March 6, 1975 (R. Vol. VI, Ex. 15).

SUMMARY OF ARGUMENT

In 1840, the State of South Carolina, in the last of a series of illegal land transactions spanning more than 30 years, convinced the Catawba Tribe to "sell" its 144,000-acre 1763 Treaty Reservation. The State promised to purchase for the Tribe a new reservation elsewhere, but did not, acquiring instead a 630-acre farm that had been part of the 1763 Treaty Reservation. During the century that followed, successive generations of tribal leaders attempted to regain the land, and successive generations of state and federal officials turned their backs, each telling the Tribe that responsibility rested with the other.

In the 1930's, the State and the Department of the Interior began negotiations toward reaching a cooperative agreement for the purpose of rehabilitating the Catawba Tribe. At that time, the State attempted to secure an extinguishment of the 1840 tribal claim as a condition to participating in the rehabilitation program, but the Tribe and the Department refused and the three-party cooperative agreement was executed in 1943. Under its terms, the Secretary took into trust 3,434 acres, located within the 1763 Treaty boundaries, and agreed to provide limited services to assist the State in the relief effort.

Fifteen years later, with the relief program failing due to lack of federal assistance and tribal dissatisfaction high, the BIA and the local Congressman proposed to the Tribe that the 3,434 acres be distributed among tribal members. Tribal leaders initially refused, saying that the 1840 dispossession claim against the State would have to be resolved first. But the BIA assured them that the division of assets plan would not affect the claim. On January 3, 1959, a majority of the Tribe, which at no time during this period was represented by counsel, consented to the division plan and adopted a resolution, drafted by the BIA, that specifically conditioned tribal consent on leaving the "status of any claim" against the State unaffected. The Congressman then asked the BIA to draft a bill that carried out the resolution. The BIA complied and the Congressman then returned to the Tribe, read the bill line-by-line, and assured them it carried out the intent of their resolution. Based on these assurances, the Tribe approved introduction of the bill. Throughout the entire legislative process, Congress professed to be acting in reliance on and consistently with tribal consent.

This understanding between the Tribe, the Congressman, and the BIA is at the heart of this case. Tribal consent to the legislation was required by congressional and administrative policy. Therefore, absent a clear expression of Congressional intent to override, the Act must be read consistently with the assurances and conditions upon which that consent was obtained.

Petitioners rely on the failure of the 1959 Catawba Division of Assets Act to mention the tribal claim and a section of the Act containing language designed only to end active federal supervision. In complete disregard of the legislative history, petitioners would have the Court focus only on isolated statutory language and rule that Congress, without mention, breached the understanding with the Tribe and removed all federal protections from the 1763 Treaty lands that had admittedly (for summary judgment purposes) applied until 1959.

But Congress does not deal in so cavalier a fashion with important Indian treaty rights. In view of the strong

congressional policy against application of state statutes of limitations to Indian treaty lands, *County of Oneida v. Oneida Indian Nation,* 105 S.Ct. 1245, 1255 (1985), if Congress had intended to apply a limitations period, it would have provided that the claim would be deemed to have accrued on the Act's effective date as it did in 1966 when it enacted 28 U.S.C. § 2415. At the very least, some notice would have been provided to the Tribe that the "status" of the claim would, after all, be affected; that the earlier assurances were no longer in effect; and that the Tribe would have to file its claim within a period of years or lose it forever.

The legislative history and surrounding circumstances of the 1959 Act show clearly that Congress intended only to withdraw from the 1943 cooperative agreement and distribute only the 3,434 acres acquired pursuant to its terms. To that end, the 1959 Act removed federal restrictions only from the 3,434 acres, and the Secretary in fact distributed only the 3,434 acres. The relationship undertaken by the federal government in 1943 was not a general assumption of guardianship supervision; it was demonstrably limited to relief and rehabilitation of the Tribe and found its source exclusively in a limited 1940 congressional appropriation for that purpose. The federal protections at issue here are unrelated to and pre-date the federal relief project by more than 100 years, finding their source in treaty, the Constitution and federal statutory and common law.

In similar circumstances, this Court held that treaty rights not otherwise clearly included within the scope of a termination act would not be abrogated by the language relied on by petitioners here. *Menominee Tribe v. United States,* 391 U.S. 404 (1968). Such language, the Court held, was limited to the withdrawal of federal supervision. Because that language, contained in this case in 25 U.S.C. § 935, does not purport to identify the property from which supervision is withdrawn, its blanket application to tribal property would result in the indirect abrogation of rights not mentioned in the act and intended by Congress to be left outside the scope of the Act's coverage. The Court

thus looked to the "overall legislative plan" and found no clear intent to abrogate or modify treaty rights. The mere lifting of federal supervision was not sufficient to extinguish treaty rights not otherwise mentioned.

The *Menominee* analysis is fully applicable here. What the Catawba Tribe bargained for and received from the Crown in 1763 was not a tract of land--they already possessed the land. Rather, what the Tribe received in exchange for its vast aboriginal territory was the promise of sovereign protection. The United States assumed the Crown's obligations and thus the removal of federal protection from and application of state law to the 1763 Treaty lands would extinguish the fundamental incident of Catawba Treaty title—federal protection. That, in turn, would lead directly to extinguishment of the possessory interest, thereby defeating the very purpose of the Treaty.

Construction of the 1959 Act in accord with the understanding between the Tribe and the federal government to leave the status of the claim unaffected means only that the Tribe will have its long-awaited day in court. The end result of the 16-year federal effort to rehabilitate the Catawba Tribe should not be extinguishment of the historic claim that the Tribe persistently sought to protect, both when it agreed to accept federal relief and when it agreed to its discontinuance.

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ARGUMENT

I. THE 1959 ACT HONORED THE BIA'S AGREEMENT WITH THE TRIBE AND DID NOT EXTINGUISH OR LIMIT THE TRIBE'S 1763 TREATY CLAIM.

For purposes of summary judgment, petitioners' motion necessarily assumed that the 1840 state "treaty" was void under federal law and that the Tribe retained a right to possession of its 1763 Treaty lands until 1959. Petitioners' motion also assumed that the federally-protected status of the 144,000-acre Treaty tract was not validly disturbed until 1959. Thus, whether it is claimed that the 1959 Act applied state statutes of limitations or that the Act terminated any and all trust relationships between the Tribe and the United States, the underlying issue is

the same: did the 1959 Act extinguish *sub silentio* the federally-protected status of the 1763 Treaty lands in addition to the 3,434 acres acquired in 1943. These questions should be resolved in light of the fundamental principles recently affirmed in *County of Oneida v. Oneida Indian Nation*, 105 S.Ct. 1245 (1985) (*Oneida II*): time-related state law defenses will not be applied to determine rights in tribal lands and Congressional intent to extinguish Indian title must be plain and unambiguous.

A. The 1959 Act Removed Federal Restrictions Only From The 3,434 Acres Acquired In 1943—Congress Took No Action With Respect To The 1763 Treaty Claim.

The 1959 Division of Assets Act deals with only two classes of assets, *i.e.*, "the tribe's assets that are held in trust by the United States," 25 U.S.C. § 932, and those "assets that are held by the State in trust for the Tribe." 25 U.S.C. § 933(a). In 1959, although the Tribe's 1763 Treaty lands were still subject to federal protection, the technical fee title to the Treaty lands was not actually held by either the federal government or the State of South Carolina.[14] Hence, the 1959 Act directed or permitted distribution of tribal assets that did not include the 1763 Treaty claim. To enable the distribution, § 4 of the Act removes federal restrictions from only the lands "disposed of" under the provisions of § 3 and provides for the issuance of "unrestricted title" to only the "property conveyed." 25 U.S.C. §§ 933, 934. Therefore, the Act by its terms removed federal restrictions from only the 1943 Reservation.

This legislative scheme is confirmed by the committee reports on the 1959 Act, as well as the actions taken by Interior to implement it. The reports demonstrate conclu-

[14]While fee title, or the pre-emptive right to purchase from the Indians, became vested in the State of South Carolina upon this Nation's independence, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667, 670 (1974) (*Oneida I*); see Clinton and Hotopp, *supra*, 31 Me. L. Rev. at 36, South Carolina in 1838 conveyed its pre-emptive rights in the 1763 Treaty Reservation to the non-Indian lessees who occupied the Catawba Reservation at that time. Act of Dec. 19, 1838, S.C. Code of Laws, § 27-15-30 (1976), VI Stat. 602; see Op. Atty. Gen. S.C., Jan. 27, 1908, 20-21 (R. Vol. VI, Ex. 10).

sively that the Tribe, the Interior Department and Congress were concerned only with the reservation acquired in 1943, and to a lesser degree the 630 acres acquired in 1842:

> The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.

H.R. Rep. No. 910, *supra* at 2672 (J.A. 121).

> In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and [in] . . . 1945 . . . conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.*

Id. at 2673 (emphasis added) (J.A. 124).

The Report also states that the 3,388.8 acres held in trust by the United States and the 630-acre state reservation "comprise the tribe's total real property." *Id.* at 2674 (J.A. 124).

Following passage of the 1959 Act, the Department of the Interior acted consistently with the condition upon which tribal consent had been obtained and distributed only the federally-held trust lands acquired in 1943, Letter of March 29, 1966, Commissioner of Indian Affairs to Dir., S.C. Archives (R. Vol. III, Ex. 37). The Department took no action to quiet title to the Treaty lands in the Tribe or to otherwise distribute or affect the Tribe's 1763 Treaty claim, confirming that the Department did not interpret the 1959 Act to include the claim among the tribal assets subject to the Act.[15]

Petitioners, however, find Congressional intent to extinguish federal protection of the additional 140,000 acres of the 1763 Treaty tract in the language of § 5, relying on that section's general application of state law and termination of the Catawbas' limited eligibility for federal In-

[15]The statutory interpretation of the agency to which the administration of the statute is charged is entitled to deference, Udall v. Tallman, 380 U.S. 1, 16 (1965), particularly where the agency participated in drafting the statute and directly made known its views to Congress, as Interior did here. Zuber v. Allen, 396 U.S. 168, 192 (1969).

dian services. This Court has held that language very similar to § 5 of the Catawba Act is limited by its terms to the "termination of Federal *supervision* over the property and members of the Tribe." *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968) (emphasis in original).[16] Section 5 by its terms does not remove federal restrictions from tribal property, nor does it define the property which will no longer be subject to federal supervision upon the lifting of federal restrictions. Therefore, the applicability of § 5 with respect to restricted tribal property must be determined with reference to the other sections that do in fact identify the property that is the subject of the Act, §§ 2, 3, and which accomplish the actual removal of federal restrictions, § 4.

The all-encompassing application of § 5 advocated by petitioners would result in the extinguishment of rights intended to be left outside the Act's scope. That is precisely the result which the Court in *Menominee* refused to reach: treaty-secured rights to tribal property that is not clearly included with a termination act's coverage will not be backhandedly affected by the general lifting of federal supervision. Moreover, this Court has repeatedly held that congressional intent to impair Indian rights "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412 U.S. 481, 505 (1973); *Bryan v. Itasca County,* 426 U.S. 373, 392-93 (1976).

Congress simply did not deal with the 144,000-acre Treaty claim in any manner in 1959. As the parties to the

[16] In *Menominee,* the Court considered whether a provision in the Menominee Termination Act, 25 U.S.C. §§ 891-902, that was similar to § 5 of the Catawba Division of Assets Act, had the effect of subjecting that Tribe's Treaty right to hunt and fish to the laws of Wisconsin. The Menominee Act made no mention of either preserving or extinguishing the right, but did contain the provision that all federal Indian statutes would no longer be applicable and "the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens. . . ." 25 U.S.C. § 899. The Court examined the "overall legislative plan" and found that § 899 was limited to withdrawal of federal supervision: Congress had not intended to backhandedly extinguish the Treaty right through the general lifting of federal supervision.

Memorandum of Understanding had done in 1943, Congress left the Treaty claim entirely outside the scope of the Act. Petitioners' argument that Congress, by ending the Tribe's limited eligibility for federal services and the BIA's supervisory duties for the 3,434-acre 1943 Reservation, also *sub silentio* extinguished or limited the 1763 Treaty claim in violation of the express understanding reached between the Tribe and the federal government is untenable.

B. The Legislative History And Circumstances Surrounding The 1959 Act Demonstrate That Congress Did Not Intend To Affect In Any Manner The Tribe's Treaty Claim.

The Court of Appeals correctly held that the legislative history of the 1959 Act demonstrates congressional intent not to affect the Treaty claim. Rather, the Act and its history show an intent "only to end federal supervision and authority arising out of the 1943 Memorandum of Understanding." (Pet. App. 15a-16a). While the Act itself does not mention the Tribe's 1763 Treaty land, its legislative history reveals that Congress intentionally left the Tribe's Treaty claim unaffected.[17]

Petitioners and the United States, however, would dismiss entirely the relevant legislative history that shows so clearly what Congress intended to accomplish in 1959. They argue that the 1959 Act unequivocally makes state law applicable to the Tribe's 1763 Treaty claim and would have the Court look no further than the words of § 5 for its result. The first major difficulty with this approach to construction of the 1959 Act is that it ignores the limited construction already given very similar language by this Court in *Menominee Tribe, supra.* An equally serious difficulty lies in the complete failure to account for the understanding reached between the United States and the Tribe, *i.e.*, tribal consent to the division of federal assets

[17]This Court has stated that whenever it is asserted that an Act of Congress affected the status of an Indian reservation, a court must "in all cases" consider "the face of the Act, the surrounding circumstances, and the legislative history" to determine the Congressional intent. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977); Mattz v. Arnett, 412 U.S. 481, 505 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975) *See Solem v. Bartlett,* 104 S.Ct. 1161 (1984).

was expressly conditioned upon nothing in the act affecting the "status of any claim" arising out of the 1840 dispossession. *Hearings,* Insert 6. Moreover, petitioners' approach fails to account for Congress' exclusive focus in 1959 on the 1943 Memorandum of Understanding.[18]

The Court should not construe the provisions of § 5 in isolation from the remainder of the Act and its history, but should consider § 5 with Congress' overall purpose in mind:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . . .
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole," this Court has followed that purpose, rather than the literal words.

[18] In its analysis of whether the 1959 Act ratified the 1840 "treaty," the United States concedes that (1) the Act should be construed in light of the January 3, 1959 tribal resolution; (2) the "Catawba Act was drafted to carry out the intent of the resolution," U.S. Br. at 8, n. 7; and (3) "Congress's focus in this case [was] on the 1943 Memorandum of Understanding." *Id.* at 15. But in its analysis of the applicability of state law to the 1763 Treaty claim, the United States does an about-face and accords absolutely no significance to the tribal resolution, or other legislative history, arguing instead that only the language of § 5 should be considered. *Id.* However, all sections of the Act must be construed in light of the conditions and assurances upon which tribal consent was obtained.

United States v. American Trucking Ass'n., 310 U.S. 534, 542-3 (1940) (footnotes omitted); *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395 (1975). Petitioners' and the United States' reliance on only the language of § 5 in isolation from the rest of the Act and its history is misplaced, for even if the provisions of § 5 were clear, which they are not, their application here would lead to a result that is "plainly at variance" with the overall purpose of the legislation. *Id.*

1. Congress Intended The 1959 Act To Implement The Division Of Assets Plan Agreed To By The Tribe, Their Congressman And The BIA: Congress Understood That Plan To Be Embodied In The January 3, 1959 Tribal Resolution.

In 1958, the BIA's special program officer met with tribal leaders and assured them that the Tribe's 1763 Treaty claim would be unaffected by the proposed legislation to divide the federal assets (R. Vol. VI, Ex. 53). The tribal resolution endorsing the division of assets legislation was drafted by the BIA (the Tribe was not represented by counsel), and specifically conditioned tribal consent on the Tribe's understanding "that nothing in this legislation shall affect the status of any claim against the State . . . by the . . . Tribe." *Hearings*, Insert 6 (J.A. 103). Thereafter, Congressman Hemphill requested the BIA to draft a bill to accomplish the desires of the Tribe as set forth in the tribal resolution (J.A. 50). The BIA complied. *Hearings* at 84.

The Congressman then returned to the Tribe on March 28, 1959, read line-by-line the BIA's draft bill containing § 5 as enacted, *Hearings* at 9, and assured the Tribe that the bill had been drafted to carry out the intent of the January 3, 1959 resolution (J.A. 111). Referring to the bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the bill and the Congressman introduced it, emphasizing to his colleagues that the Tribe had enacted a resolution supporting it. 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 117).

At the congressional subcommittee hearing, the Congressman emphasized "the deplorable situation of the Indians" and the Tribe's dissatisfaction with the 1943 Mem-

orandum of Understanding. *Hearings* at 4-5. The Congressman testified that his bill was "to do something about" the problems resulting from the "worthless" 1943 agreement that resulted in the Indians' inability to "borrow any money on community property [or] . . . develop the reservation." *Hearings* at 7. The Congressman told the subcommittee that he had refused to introduce this bill until the Tribe requested it and then introduced the tribal resolution into the record to establish tribal agreement. *Hearings* at 8, 13. He emphasized throughout his testimony that the Tribe had consented to the bill. Summarizing the situation, the Congressman testified:

> We are frankly, faced with this alternative: *Do what the Indians want*, or leave the situation in its present status which bars many who want to own their lands, their homes, from expecting progress in the future.

Hearings at 11 (emphasis added). The congressional committee reports on H.R. 6128 show that Congress relied specifically on the January 3 and March 28 endorsements by the Tribe. H.R. Rep. No. 910, *supra* at 2672, 2675 (J.A. 121, 126).

This legislative history demonstrates that Congress honored the agreement with the Tribe and left the tribal claim unaffected. Neither the Act itself nor the Committee Reports contain even a suggestion that Congress intended to alter the status of the Tribe's understanding with the BIA in any way.[19] The 1959 hearing record contains the January 3 tribal resolution, as well as an October

[19]Petitioners urge the Court to disregard tribal consent as expressed in the January 3, 1959 resolution, arguing that a more relevant indicator of what the Tribe agreed to is the post-Act "vote" of the Tribe (Pet. Br. at 45, n. 133). Interior's post-Act explanation, however, contained nothing to indicate that the prior assurances were no longer in effect—§ 5 had not been amended from the time that BIA and the Congressman read it line-by-line and assured the Tribe that the Act carried out the resolution's intent. Moreover, as Assistant Commissioner Lee testified, *Hearings* at 86-87, the purpose of the amendment to § 1 requiring a plebiscite was merely confirmatory of the earlier understanding, *i.e.*, "to dispell all doubt" that the earlier meetings (January 3 and March 28) were "indicative that the large majority . . . actually want this type of legislation." Lee told the subcommittee that the BIA was "reasonably sure" they were. *Id.*

29, 1958 letter from Chief Blue claiming that the state "owes us a great deal" for the "land under lease,"—described as the area presently claimed by the Tribe. *Hearings,* unnumbered insert. Congress was thus certainly aware that the Catawba Tribe possessed a claim that it desired to protect, that the Tribe had expressly conditioned its consent to division of the 3,434 acres on leaving the status of the claim unaffected, and that the bill had been drafted to conform to tribal desires. At every stage of the legislative process, from agency drafting to final enactment, it was emphasized that the Tribe had consented to the provisions of the bill.

2. Because Tribal Consent Was Required By Congressional And Administrative Policy, The 1959 Act Must Be Construed Consistently With The Conditions Upon Which Tribal Consent Was Obtained.

The congressional and departmental concern for tribal consent conformed to an important recent revision in federal termination policy that occurred in 1958. In that year, Congress and the Eisenhower Administration rejected the coercive termination policy that underlay the first nine termination acts enacted in 1954 and 1956. F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.). The revised policy placed special emphasis on both the Indians' understanding and consenting to termination. On September 18, 1958, Secretary of the Interior Fred Seaton publicly renounced coercive termination. Seaton stated that no Indian tribe or group should be terminated:

> unless such tribe or group has clearly demonstrated-first, that it understands the plan under which such a program would go forward, and second, that the tribe or group affected concurs in and supports the plan proposed . . .

Id., Broadcast address over Radio Station KCLS, Flagstaff, Ariz., *quoted in* 105 Cong. Rec. 3105 (1959). Thus, unlike earlier termination acts, Congress expressly conditioned implementation of post-1958 acts on the consent of the affected Indians or tribes. *See* 72 Stat. 619, § 2(b) (California Rancheria, 1958); 25 U.S.C. § 931 (Catawba, 1959); 25 U.S.C. § 971 (Ponca, 1962).

If Congress had intended to repudiate the conditions and assurances upon which the Tribe's consent was obtained, then it certainly would have notified the Tribe to that effect. Petitioners' interpretation of the legislative history, in particular their reliance on general statements and explanations made to the Tribe regarding ending federal responsibility and the inapplicability of federal Indian laws, *see, e.g.,* Pet. Br. at 17, would require the Tribe —which at no time during the legislative process was represented by counsel (other than the BIA)—to simply discover at some later date that the prior guarantees were no longer in effect.

But Congress certainly could not have expected the Catawba Tribe in 1959 to understand the intricacies of the applicability of time-related state law defenses or whether its claim was in fact founded in state or federal law. Chief Samuel Blue, who led his Tribe for most of the 40-year period preceding the 1959 Act, *see* 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116), had never attended school and was unable to read or write. *Survey of Condition of the Indians, etc.,* S. Doc. No. 92, *supra* at 7552. The Tribe simply understood that the State had taken its 1763 Treaty lands and had not honored its agreement to buy new tribal lands—leaving the Tribe destitute on a barren tract comprising less than one percent of its former holdings. As best it could, the Tribe sought to ensure that the Division of Assets Act would not "affect the *status* of *any* claim against the State of South Carolina"—whatever that claim might be—and the United States agreed.[20] Indeed, the Tribe viewed the bill presented by Congressman Hemphill as a "contract" (J.A. 106). If Congress had intended to change the terms of that agreement and apply state stat-

[20]Petitioners argue that the Tribe sought only to preserve a "claim against the State," as distinguished from the other public and private defendants (Pet. Br. at 46, n. 135). However, the history of events leading to the 1943 Memorandum of Understanding demonstrate that this was simply the common manner of referring to the claim arising out of the 1840 dispossession. *See, e.g.,* R. Vol. VI, Ex. 47. The Tribe, South Carolina, and the United States *all* knew that the 1763 Treaty claim had been persistently pursued by successive generations of tribal leaders and that the claim had not been addressed and resolved.

utes of limitations—thereby drastically affecting the "status" of the claim—it must be presumed that Congress would have notified the Tribe that its claim would have to be filed within a certain period of years or be forever lost.[21]

Absent such clear expression of contrary intent by Congress, the intent of the Tribe, the Interior Department and Congressman Hemphill to leave the 1763 Treaty claim unaffected is controlling, for Congress clearly intended to enact legislation that would implement the division of assets plan agreed to by the Tribe. Moreover, Congress knew that tribal consent was embodied in the January 3, 1959 resolution. *Hearings* at 8, insert 6. *See Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656-8 (1976) ("Nothing in the legislative history shows any congressional purpose not to follow the Secretary's proposal [that honors the Tribe's request] . . .").

Petitioners argue that because Congress explicitly preserved certain Indian rights or claims in other termination acts, Pet. Br. at 43-44 and n. 127, its failure to do so here shows congressional intent to subject the claim to state law. However, petitioners' assertion is squarely inconsistent with the rule established by the Court in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), where the Court held that notwithstanding the Menominee Termination Act's failure to preserve or even mention treaty hunting and fishing rights, that Act's explicit provision that "the laws of the several States shall apply to the Tribe and its members in the same manner as they apply to other citizens . . .," 25 U.S.C. § 899, would not operate to extinguish the federally-protected right to hunt and fish free of state law. Congress' failure to expressly preserve the tribal claim in this case is fully consistent with its express and limited plan to distribute the 3,434 acres acquired

[21] In *Oneida II,* this Court noted the strong congressional policy against the application of state statutes of limitations to Indian land claims. If Congress had intended to change this policy with respect to the Catawba's Treaty claim, it would have surely given notice and provided that the claim would be deemed to have accrued on the effective date of the 1959 Act, as it did in 1966 when it enacted 28 U.S.C. § 2415.

pursuant to the 1943 Memorandum of Understanding.[22] Consistent with the guarantees made to the Tribe and the conditions upon which tribal consent to the legislation had been obtained, Congress simply was not addressing the much larger 144,000-acre 1763 Treaty claim.

C. Federal Protection Of The 1763 Treaty Lands Was Not Extinguished By The 1959 Act.

1. The Federal Protections At Issue Here Are Unrelated To The Duties Undertaken By The United States In 1943 And Hence Were Unaffected By The 1959 Act.

The legislative history of the 1959 Act demonstrates that the federal duties and responsibilities that were ended in 1959 were founded in a 1940 Congressional appropriation of $7,500 to enable the BIA "to cooperate with the State of South Carolina in the rehabilitation of the Catawba Indians". *Hearings,* Insert 5 at 3 & 4 *quoting* Oct. 31, 1940 memorandum from Commissioner of Indian Affairs to Secretary of Interior.[23] In fact, Congress had twice refused, in 1937 and 1939, to enact legislation that would have extended general federal supervision to the Catawbas (R. Vol. VI, Exs. 32, 39); *see* note 9, *supra.* Associate Commissioner Lee testified at the hearings on the 1959 Act that the BIA "gave no service at all until 1943. We had no relationship with these Indians whatsoever of any kind. It was only in 1943 that we entered into this cooperative agreement with the State of South Carolina to give some supplementary services to this group." *Hearings* at 88.

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[22]When Congress intended to preserve a tribal property right, but subject that right to the operation of state law after a period of years, it specifically so provided. Section 14 of the Klamath Termination Act, 25 U.S.C. § 564m, provides that the Tribe's water rights shall not be abrogated by the Act and that Oregon law "with respect to abandonment and nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation . . . ."

[23]The Oct. 31, 1940 memorandum further stated: "[t]here is no question of assuming federal guardianship jurisdiction, but merely of carrying out the apparent desire of Congress to give a small degree of aid to the state coupled with expert advice." *Hearings,* Insert 5 at 4.

The Committee Reports on the 1959 Act speak exclusively of a relationship and duties that "date back only to the 1940's" and which were undertaken for the limited purpose of "improv[ing] the economic conditions of the members." H.R. Rep. 910, *supra* at 2672 (J.A. 120-121). The departmental report likewise identifies the duties and assets that are the subject of the Act as those acquired pursuant to the Memorandum of Understanding. The limited nature and scope of the particular trust relationship that is the object of the 1959 Act is confirmed by the following departmental disclaimer:

> The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the federal government.

Id. at 2673 (J.A. 123). In fact, it is noteworthy that the other stated objective of the Memorandum, in addition to rehabilitation of the Tribe, was that the "Catawba Indians be accorded equal treatment with other citizens, without discrimination." (J.A. 45). In 1962, the "Notice" that the Interior Department had complied with the 1959 Act, provided by the Secretary to the Tribe and the South Carolina Governor, spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

The limited scope of duties undertaken by the United States in 1943 is further illustrated by the fact that the Department of the Interior deliberately left the Tribe's land claim outside the scope of the duties undertaken in 1943, refusing to agree to a clause in the Memorandum of Understanding that would have purported to extinguish the claim. Mem. Sol. Int., Jan. 13, 1942, I *Interior Opinions* at 1081-82 (J.A. 43-44). Instead, the Department maintained the *status quo* and advised the State that "the State itself could most properly take the initiative in negotiating with the Catawba Business Committee on the matter of the Tribal claim." Aug. 28, 1941, Assistant Com-

missioner of Indian Affairs to South Carolina State Auditor (R. Vol. VI. Ex. 47).[24]

The legislative history and surrounding circumstances demonstrate that the federal duties and responsibilities that were extinguished in 1959 were only those undertaken in 1943 to provide relief for the Catawbas. In contrast, the federal protections at issue here are unrelated to and pre-date the 1940 appropriations act by more than 100 years. The federal protections at issue here are founded in the 1760 and 1763 Treaties with the Crown, the Constitution, federal common law, and the Indian Nonintercourse Act, 25 U.S.C. § 177.

Lower courts that have considered the continuing applicability of Nonintercourse Act protections have concluded that, in order to maintain such a claim, a tribe must demonstrate that "the trust relationship between the United States and the tribe, *which is established by coverage of the Act*, has never been terminated." *Narragansett Tribe v. So. R.I. Land Devel.*, 418 F.Supp. 798, 803 (D.R.I. 1976) (emphasis added). In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975), the First Circuit Court of Appeals held that

[24]The Interior Department's interpretation of the scope of authority granted by Congress is entitled to weight. Udall v. Tallman, *supra*. In his August 28 letter, the Assistant Commissioner of Indian Affairs explained to the State Auditor the limited nature of the "responsibilities this Office can assume":

> As you will recall, after the State Legislature made its original offer a few years ago to contribute $100,000 toward a rehabilitation program for the Catawba Indians, a bill was introduced into Congress to bring the Catawbas under Federal supervision. This bill, however, was disapproved by the Bureau of the Budget, and in lieu thereof Congress authorized a small appropriation of $7,500 to enable us to cooperate with the State and with other Federal agencies to work out a program. This appropriation is limited to relief and to administrative expenses in connection with the cooperative project.

See Mem. Sol. Int., Jan. 13, 1942 (J.A. 41), discussed *supra* at n. 10, where the Solicitor held that the source of the Department's authority to enter into the 1943 Memorandum was the FY'41 appropriations act, but that the authority was limited to the purposes of the appropriation, *i.e.*, "relief" of the Catawbas.

federal protection under the Nonintercourse Act may exist even in the absence of any formal or recognized relationship between a Tribe and the United States:

> the 'trust relationship' we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities . . .

In this case, the federal protection pertaining to the 1840 land transaction was intentionally left outside the scope of limited duties undertaken in 1943. In 1959, although Congress certainly could have terminated federal protection of the 1763 Treaty claim, it did not do so. Instead, in furtherance of the current policy of requiring informed tribal consent, it enacted limited legislation, tribal support of which had been expressly conditioned upon leaving the "status" of the Tribe's Treaty claims unaffected. Because it cannot be argued that extinguishment of federal protection under the Treaties, Constitution, and federal statutory and common law would not affect the "status" of the claim, petitioner's broad interpretation of the effects of § 5 of the 1959 Act is precluded.

The net effect of the 1959 Act was simply to return the Catawba Tribe to its pre-1943 status—a "state" Tribe on a state reservation, ineligible for federal Indian services and subject to state law for most purposes; but not with regard to its claim to its federally-protected Treaty lands.

2. Even If The 1959 Act Removed Statutory Rights, It Did Not Remove Federal Protection Under Treaties And The Constitution.

Petitioners argue that the only source of protection for the 1763 Treaty lands is the Nonintercourse Act, claiming that the Tribe acquired pursuant to its treaties "no right to own property or to enforce claims under different laws than non-Indians." Petitioners argue that *Menominee*

is therefore inapplicable here because no treaty right is involved in this case. Pet. Br. at 43 and n. 125.

However, the issue here, as it was in *Menominee*, is whether § 5's language subjected federally-protected treaty rights to the operation of state law. Here, as in *Menominee*, the property right finds its source in a treaty with the national sovereign. The Catawba Tribe, like the Menominees, bargained for and received the protection of the sovereign for its reservation land base. While the Menominee treaty did not specifically include the right to hunt and fish, the Court applied the canon of construction requiring ambiguous expressions to be construed as the Indians would have understood them, and held that the Treaty language confirming their reservation "for a home, to be held as Indian lands are held" included the right to hunt and fish. *Menominee* at 405-406. That canon is fully applicable here.

Application of state law to the Catawba Treaty land would as surely extinguish treaty rights as would the application of state law to the Menominees' treaty rights. What the British offered and what the Catawbas thought they had received in exchange for cession of most of their ancestral lands, was sovereign protection of the Tribe's right to unmolested occupancy of its retained lands. The minutes of the 1763 Treaty negotiations ("our King and Father holds out his arms to . . . protect you . . . and you may be assured of his confirming to you all your just claims to your lands")[25]; the terms of the Treaty itself (Crown's agents "promise . . . that the Catawbas shall not in any respect be molested . . .")[26]; and the subsequent protective actions of the crown (South Carolina cannot lease Catawba lands "without a Manifest violation of His Majesty's Orders . . .")[27]; demonstrate beyond doubt that one of the most important guarantees for which the Catawba Tribe bargained in 1760 and 1763 was the promise of sov-

[25]Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30).

[26]*Id.* at 201-202 (J.A. 35).

[27]Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI. Ex. 7); see n. 3, *supra*.

ereign protection.[28] The United States succeeded to the Crown's protective obligations under the 1763 Treaty.[29] The application of state law would thus result in abrogation of an express treaty right, *i.e.*, the complete extinguishment of sovereign protection of the Catawbas' lands. This in turn would have the direct result of confirming non-Indians in the possession of tribal lands—the very evil from which the sovereign had promised to protect the Tribe in the first instance.

The guarantees of the 1760 and 1763 treaties, that the Catawbas would be quietly settled on their lands free from white incursion, provide an independent source of continuing federal protection for the 1763 Treaty lands that is separate and distinct from the Nonintercourse Act. *See Oneida I, supra* at 667. In addition, they provide an independent basis for invalidating state action inconsistent with the supreme law of the land. *Washington v. Fishing Vessel Assoc.*, 443 U.S. 658 (1979); *Menominee Tribe, supra; Missouri v. Holland*, 252 U.S. 416 (1920).

Furthermore, the restraint on alienation is a necessary incident of Indian title. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 576, 591, 603 (1823). The exclusive authority of the United States to extinguish Indian title is founded in the Constitution itself. U.S. Const., art. I, § 8, cl. 3. First under Great Britain, and later the United States, Indian tribes have always been disabled from alienating their lands absent the consent of the general government. This fundamental principle antedates the statutory restraints found in the Nonintercourse Act. Thus, the

[28]The Catawba Tribe did not acquire its lands in the 1760 and 1763 Treaties; it already had them. What the Tribe acquired was sovereign protection: it *reserved* the 15-mile-square tract and relinquished its claims to a vastly larger portion of its aboriginal territory. Thus, with regard to the Treaty lands, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). In return for its cession of lands, the Tribe received promises of protection by the Crown on those lands which it reserved.

[29]United States v. Title Ins. & Trust Co., 265 U.S. 472, 484 (1924); Mitchel v. United States, 35 U.S. (9. Pet.) 711, 745, 747-48 (1835).

Constitution also provides an independent basis for invalidating the 1840 state treaty and protecting the Tribe's Treaty lands. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 670 (1974) (fact that fee title to Indian lands in original 13 states lay in the states "did not alter the doctrine that federal *law*, *treaties* and *statutes* protected Indian occupancy") (emphasis added); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 604 (1823) (invalidating pre-Nonintercourse Act land grants by tribe without consent of general government);[30] *see* F. Cohen, *Handbook of Federal Indian Law* 270, n. 2 (1982 ed.).

Thus, the central question in this case, as in *Menominee*, is whether treaty property rights may lose their federally-protected status solely by operation of a general section intended only to lift active federal supervision. Thus, even if the language of § 5 is sufficient to lift federal statutory protections, § 5 may not operate to extinguish the protections found in the 1760 and 1763 Treaties and the Constitution. Use of the word "statutes" in § 5 of the 1959 Act "is potent evidence that no *treaty* was in mind." *Menominee*, *supra* at 412 (emphasis in original).

D. State Law May Not Be Applied To Determine Rights In Undistributed Tribal Property.

The overall scheme of the Catawba Division of Assets Act, as well as every other act of Congress terminating federal supervision over tribal land, provides for the termination of federal protection and trust duties only for those tribal assets that are included within the scope of the Act, *i.e.*, those assets from which federal restrictions are removed and which are distributed under the Act. We are aware of no instance in the history of federal Indian legislation, and petitioners have pointed to none, where Congress, in dealing with tribal trust property, has removed federal protections and applied state law without specifying the affected property and giving precise and careful instructions directing the Secretary of the In-

[30] See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-46 (1941).

terior in the method and manner of division and distribution of the property. *See, e.g.*, 25 U.S.C. § 564d, e, & p.

This Court has long relied on the strong congressional policy against the application of state law to determine tribal rights in restricted property,[31] and has applied without exception the rule that state law defenses may not be invoked to overrule federal law and defeat a claim of *tribal* title.

Each of the cases upon which petitioners rely for the proposition that all federal protection was extinguished by the 1959 Act involved the question whether federal protection or trust duties continue toward former tribal property after the express removal of federal restrictions from that property and its actual distribution to individual tribal members.[32] Likewise, each of the cases cited for the proposition that state statutes of limitations apply to the 1840 taking claim after 1959 involve the application of state law to allotted individual Indian lands that were expressly the subject of the treaty or legislation at issue, *i.e.*, the lands at issue were the same lands from which federal restrictions had been removed.[33] Because these cases deal

[31]See County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245, 1255 and n. 13 (1985) (*Oneida II*); Board of County Commissioners v. United States, 308 U.S. 343, 350-51 (1939); United States v. Minnesota, 270 U.S. 181, 196 (1926); Ewert v. Bluejacket, 259 U.S. 129, 137-38 (1922).

[32]Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128 (1972), involved the issue of continuing federal supervision over individual Indian property (stock shares) that had been distributed pursuant to the Ute Termination Act, 25 U.S.C. § 677. The property at issue was not tribal, and federal restrictions had been removed. *Id.*, 406 U.S. at 150. Significantly, the *Affiliated Ute* Court observed, at 139, that § 677v "of course did not purport to terminate the trust status of the undivided assets", (*citing Menominee*). Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981), likewise involved the distributed property of an individual Indian. United States v. Heath, 509 F.2d 16 (9th Cir. 1974), involved no property; rather, it dealt with the post-termination status of an individual Indian for purposes of criminal prosecution.

[33]See Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dickson v. Luck Land Co., 242 U.S. 371 (1917); Dillon v. Antler Land

(Continued on next page)

only with the allotted lands of individual Indians, they have no relevance to a determination of rights in undistributed tribal property.[34]

Congress neither removed federal restrictions from the 1763 Treaty lands nor provided for their distribution. They thus retain their status as federally-protected tribal lands to which state statutes of limitations do not apply.

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Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied,* 421 U.S. 992 (1975); Dennison v. Topeka Chambers Indus. Dev. Corp., 724 F.2d 869 (10th Cir. 1984). The discussion in Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976), relied on by petitioners for the proposition that termination acts subject Indians to the full sweep of state law (Pet. Br. at 20), states no more than the fundamental proposition that a termination act subjects individual "tribal members" and their "distributed property" to state law. In this case, as in *Schrimpscher* and *Dillon,* both the Catawba Tribe and its members became subject to state law with respect to the "distributed property," i.e., the 1943 Reservation from which federal restrictions were removed. Likewise, the federal responsibility to hold title and provide services to those distributed lands was ended. But for the 140,000 acres of undistributed tribal Treaty lands that remained wholly outside the scope of the 1959 Act, federal restrictions continued unaffected.

[34]Lands that have been allotted to individuals are destined eventually to become unrestricted private property, and they take on some of the characteristics of state law prior to the final lifting of federal restrictions. Thus, the right of possession of a restricted allotment (absent an allegation of jurisdiction under 25 U.S.C. § 345), is a matter for state courts. Taylor v. Anderson, 234 U.S. 74 (1914). In 1834, Congress removed the lands of individual Indians from Nonintercourse Act coverage. Jones v. Meehan, 175 U.S. 1 at 12-13 (1899). The question of *tribal* occupancy, on the other hand, is exclusively federal in nature. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974) (*Oneida I*): The court in *Oneida I* explained this important distinction:

> In Taylor [v. Anderson], the plaintiffs were individual Indians, not an Indian Tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands . . . . Individual patents had been issued with only the right to alienation being restricted for a period of time . . . Once patent issues, the incidents of ownership are, for the most part, matters of local property law. . . ." *Id.* at 676 (citations omitted).

E. The Tribe's Treaty Claim May Not Be Extinguished Or Limited Absent A Plain And Unambiguous Statement Of Congressional Intent And Ambiguities Must Be Resolved In The Tribe's Favor.

1. The 1959 Act Is Ambiguous: It Does Not Clearly Apply State Law To The Tribe; Rather, In Light Of The Legislative History And Surrounding Circumstances, It Applies State Law To Only Individual Tribal Members.

In addition to dismissing as irrelevant the Act's legislative history and surrounding circumstances, petitioners' reliance on the isolated wording of § 5 is inappropriate because that section, standing alone, is ambiguous. A careful reading of § 5 reveals that it is unclear whether, upon the Act's effective date, (1) state law shall thereafter apply to both the Tribe and its members or simply to the individual members of the Tribe, and (2) whether statutes of the United States that affect Indians because of their status as Indians were rendered inapplicable to both the Tribe and its members or only to the individual members of the Tribe. Because the right at issue here is a tribal right, and assuming *arguendo* that § 5 could apply to lands from which federal restrictions were not expressly removed, the distinction that Congress drew between Indians as individuals and Indian tribes is an important one.

This point can best be understood by reference to the last sentence in § 5, providing that "[n]othing in this subchapter, however, shall affect the status of *such persons* as citizens of the United States." (Emphasis added). This sentence plainly refers to individuals, its purpose being to preserve the citizenship status of individual Indians. *See* 8 U.S.C. § 1401(b). While this is a standard provision that was contained in each termination act, the other termination acts accomplish the same purpose using slightly different language—and that difference is significant here. Each of the other termination acts, with the exception of one, provides that the citizenship status of the "members of the tribe" shall be unaffected. *See* 25 U.S.C. §§ 564q(b); 703(b); 727; 757(b); 803(b); 823(b); 848(b); 899. In contrast, § 5 of the 1959 Act provides that the citizenship status of "such persons" shall be unaffected. The words "such persons" must necessarily have reference to individual In-

dians in an earlier sentence. The final clause of the previous sentence in § 5 provides that "the laws of the several states shall apply to *them* in the same manner as they apply to other persons or citizens within their jurisdiction."

The conclusion that "them" refers to individual Indians and that Congress thus applied state law only to individual Catawba Indians is strengthened by a comparison of the similar provisions of other termination acts. In each of the other termination acts that affected both tribes and individuals,[35] Congress explicitly provided that state law would thereafter apply to both the "tribe and its members." *See* 25 U.S.C. §§ 564q(a); 703(a); 726; 757(a); 803(a); 823(a); 848(a); 899. In contrast, the application of state law to "them" in the 1959 Catawba Act is identical to the state law provision in its immediate predecessor, the 1958 California Rancheria Act, 72 Stat. 619, § 10(b). There, § 10(b) in its entirety dealt only with the removal of federal supervision over individual Indians. *See* n. 35, *supra*.

Moreover, the clause in § 5 rendering inapplicable statutes that affect Indians because of their status as Indians is also identical to that contained in § 10(b) of the California Rancheria Act, which affected only individuals. In fact, in eight termination acts, Congress provided that such statutes would be inapplicable only "to the members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. In two termination acts, Congress provided that statutes that affect Indians because of their Indian status would be inapplicable both to the tribes and the individual members. 25 U.S.C. §§ 726, 980.

[35]Two termination acts were directed primarily at individual Indians, not Indian tribes. The Mixed-Blood Ute Termination Act, 25 U.S.C. § 677, terminated certain tribal members but left the status of the Ute Tribe and its full-blood members unaffected. The California Rancheria Act, 72 Stat. 619, likewise did not deal with tribal assets. *See* § 10(b) and S. Rep. No. 1874, 85th Cong., 2d Sess. 3 (1958) (Membership rolls not prepared because "groups are not well-defined," and "lands were for the most part acquired . . . by the United States for Indians in California, generally, rather than for a specific group . . ." and assets distributed according to plans developed or approved by "administratively selected users of the land.").

Thus, Congress plainly distinguished between tribes and individuals when it terminated federal supervision. Section 5 of the 1959 Catawba Act is patterned most closely after § 10(b) of the 1958 California Rancheria Act, which by its terms affected individuals only. In 1959, when Congress sought to broaden the scope of the provision to include the Catawba Tribe among those no longer entitled to special Indian services, it expressly so provided in the first clause, but it left the scope of coverage of the remaining clauses unchanged, using the exact wording from the California Rancheria Act.

In 1962, when Congress intended to further broaden the scope of the section and ensure that the Ponca Tribe, as well as its members, would be among those to whom Indian statutes would no longer be applicable and to whom state law would apply, it specifically inserted the words "or Indian Tribe" after the word "Indians." 25 U.S.C. § 980. *See Bryan v. Itasca County*, 426 U.S. 373, 386 (1976) ("we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments. *Moe v. Salish and Kootenai Tribes*, 425 U.S., at 472-475 . . .").

Finally, because the 1962 Ponca Act had rendered state law applicable to both the Tribe and its members, it was necessary in the next and final sentence of that Act to preserve the citizenship status of "any Indian," rather than "such persons," as had been done in the California and Catawba Acts.

Thus, petitioners' argument that § 5 is clear depends not only upon reading § 5 without reference to those sections of the act that define the lands from which restrictions are to be removed, *see* Section I.A., *supra*, but also depends upon reading § 5 as though the final sentence regarding citizenship status were contained elsewhere in the Act or did not exist at all.

The Court of Appeals was correct in considering the overall purpose of the Act as demonstrated by its legislative history and surrounding circumstances and refusing to impute to Congress an intent to apply state law to the *tribal* Treaty claim. The Court of Appeals noted that

Congress withdrew the Nonintercourse Act's protection of individual Indians' lands in 1834, *Jones v. Meehan*, 175 U.S. 1, 12-13 (1899), and correctly held that, in terms of the type of lands under its protection, the Nonintercourse Act was a statute that affected tribes rather than individual Indians (Pet. App. 20a-21a).

The conclusion that the Nonintercourse Act is not a statute that "affect[s] Indians because of their status as Indians"—as Congress used that phrase in the Catawba Act—is strengthened by the fact that in eight termination acts Congress made such statutes inapplicable to only "members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. This Court has held in *Menominee Tribe, supra*, that language similar to § 5's is limited to withdrawal of federal supervision. The type of federal supervision Congress had in mind, as demonstrated by the eight acts cited above, was eligibility for services, active guardianship supervision of individual Indians' affairs, and active management of tribal real property. The protections and restrictions of the Nonintercourse Act however, do not fall within the class of federal supervisory matters intended by Congress to be addressed by § 5. Congress addressed the policies and purposes of the Nonintercourse Act in other sections of the 1959 Act.

Thus, protection of the Indians' rights in their lands that were subject to the 1959 Act was accomplished by § 3 of the Act, providing for appraisal and equal distribution of assets held in trust. Protection of the governmental interest of the United States in maintaining exclusive control over tribal land transfers was accomplished by § 4's specific lifting of federal restrictions. Thus, as Congress used the phrase in § 5 of the 1959 Act, the Nonintercourse Act was not a statute that affected Indians because of their status as Indians.

2. The Canons Of Construction Applicable To Indian Laws Preclude Indirect Extinguishment Of Treaty Rights And Require That Ambiguities Be Resolved In The Tribe's Favor.

The Court of Appeals was likewise correct in applying the canons of construction to the 1959 Act. This Court

has consistently reaffirmed the cardinal principle that "congressional intent to extinguish Indian title must be 'plain and unambiguous.'" *Oneida II, supra,* 105 S.Ct. at 1258, *quoting United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 346 (1941). Doubtful or ambiguous expressions in statutes ratifying agreements with the Indians are not to be construed to their prejudice; rather, they are to be resolved liberally in the Indians' favor, as they would have understood. *Antoine v. Washington,* 420 U.S. 194, 199-200 (1975). In *Menominee Tribe v. United States,* 391 U.S. 404 (1968), the Court, faced with a similar situation, refused to find an abrogation of federally-protected treaty rights through the indirect method of a termination act's general lifting of federal supervision.

The general assimilationist policy pronouncements that attended the enactment of all termination legislation have never been relied on by this Court to justify an indirect, backhanded extinguishment of Indian treaty rights. *Menominee Tribe, supra; see Bryan v. Itasca County,* 426 U.S. 373 (1976). As the Court noted in *Bryan,* "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected . . .'" *Id.* at 388, n. 14.[36]

These principles are fully applicable here. The 1959 Act does not mention the 1763 Treaty claim. With provisions much less clear than even the Menominee Act regarding applicability of state law, the 1959 Catawba Act removes federal restrictions from only a 3,434-acre tract of federally-held trust land, leaving the 1763 Treaty lands,

[36]This is particularly so where, as here, the Act is somewhat removed both in time and federal policy from the fervent assimilationist policy announced in House Concurrent Resolution No. 108. As we have noted, the 1959 Act was passed near the end of the termination era, at a time when federal termination policy had been modified to require informed tribal consent. Moreover, the Catawbas were never "wards of the Federal Government," H.R. Rep. No. 910, *supra* at 2673 (J.A. 123), in the same sense as were the tribal Indians subject to a full-fledged federal trusteeship at whom the termination policy was primarily directed. Indeed, the title of the 1959 Act is the Catawba Division of Assets Act and neither the word "terminate" nor any of its variants appears in the Catawba Act, as it does in each of the other termination acts.

like the Menominee Treaty rights, wholly outside the purview of the Act. Removal of federal protection and extinguishment of the Catawbas' Treaty claim can come about only through the same "backhanded" method that this Court refused to sanction in *Menominee Tribe, i.e.,* a general lifting of federal supervision resulting in the extinguishment of specific treaty property rights. Moreover, the glaring ambiguities on the face of the Act would have to be resolved against the Tribe. Finally, and most significantly, the assurances upon which the United States secured the Tribe's consent would be rendered meaningless.

II. THE 1959 ACT DID NOT EXTINGUISH THE TRIBE'S STATUS AS A TRIBE.

Petitioners argue in the alternative that § 5 of the 1959 Act extinguished tribal political existence which precludes the Tribe's ability to maintain this action. As we understand this argument, it concedes that a claim survived the 1959 Act but contends that no entity capable of enforcing it survived. In any event, it is certain that Congress specifically contemplated the ongoing political existence of the Tribe, intending only to extinguish the 16 year federal obligation to participate in the joint rehabilitation effort under the Memorandum of Understanding. The 1959 Act on its face provides for the continued existence of the 630-acre state Reservation, provides for some 1943 Reservation lands to be set aside for tribal purposes and refers to the "tribe" prospectively, providing in § 5 that the "tribe" and its members "shall" henceforth be ineligible for federal Indian services and in § 6 that the rights of the "tribe" under South Carolina law "shall' be unaffected.[37]

Even where Congress acted to terminate much lengthier and more expansive trust relationships than that involved here, such action did not operate to end the exist-

[37]The Solicitor General agreed with the Court of Appeals' ruling that the Tribe has the capacity to bring this suit, but expressed no view about whether the 1959 Act precluded the Tribe as a matter of law from establishing that it is an Indian Tribe for purposes of the Trade and Intercourse Act. He concluded instead that the Tribe could maintain this suit as a successor-in-interest. U.S. Br. at 8-9, n. 8.

ence of the affected tribes: rather, what was terminated was a relationship between the tribe and the United States. *See Menominee Tribe v. United States*, 388 F.2d 998, 1000 (Ct. Cl. 1967)), *aff'd* 391 U.S. 404 (1968) (Menominee Termination Act "did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the Tribe.") (emphasis in original); *Kimball v. Callahan*, 590 F.2d 768, 775-6 (9th Cir.), *cert. denied*, 442 U.S. 915 (1979) (sovereign authority of Klamath Tribe to regulate tribal hunting and fishing unaffected by termination act); *see* F. Cohen, *Handbook of Federal Indian Law* 19, 815 (1982 ed.); *see also* S. Rep. No. 481, 96th Cong., 1st Sess. 13 (use of term "federal trust relationship," rather than "federal recognition," in act restoring terminated tribe "would insure that what is restored to the tribe . . . is the same as what was diminished or lost under the 1954 [termination] Act.").

Petitioners rely heavily on the 1959 Act's revocation of the Tribe's constitution in support of their argument. The committee reports on the 1959 Act, however, show that Congress understood well that the Tribe's constitution had been adopted pursuant to the Memorandum of Understanding in order that the State and the BIA would have a more structured government with which to contract for the delivery of services:

> In the memorandum of understanding the tribe agreed to organize to transact community business, and on June 30, 1944, an IRA constitution and bylaws were approved by the Secretary of the Interior.

H.R. Rep. No. 910, *supra* at 2674 (J.A. 125-126). As the Court of Appeals correctly held, § 5's revocation of the tribal constitution was part of the overall legislative scheme to withdraw the BIA from the 1943 agreement and return the State and the Tribe to their pre-1943 status.

Moreover, because tribal powers of self-government are not derivative of federal powers,[38] revocation of the

[38]Indian tribes have always been recognized as "distinct, independent, political communities," Worcester v. Georgia, 31

(Continued on next page)

Tribe's federal constitution cannot be said to extinguish the Tribe's political existence. It is axiomatic that tribal political existence is in no way dependent upon federal approval or recognition of any particular form of government.[39] Indeed, independent political existence was required by the IRA before a tribe would be permitted to organize under its provisions, *see* F. Cohen (1982 ed.), *supra* at 13-15, and the Catawba Tribe was no exception.

The Catawba tribal constitution revoked by the 1959 Act was adopted by the Tribe pursuant to § 16 of the IRA. Prior to authorizing the Catawba Tribe's IRA election, the Solicitor of the Department of the Interior ruled that the Catawbas existed politically:

> The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. The Indians have done business as a tribe and the relationship between the tribal organization and its members conforms to the usual tribal pattern. There can be no doubt that the Catawba Indians now exist as a tribe

(Continued from previous page)

U.S. (6 Pet.) 515, 559 (1832), whose sovereign powers may be recognized, but are not created, by the federal government. Talton v. Mayes, 163 U.S. 376 (1896); United States v. Wheeler, 435 U.S. 313, 322, 328 (1978); McClanahan v. Arizona Tax Comm., 411 U.S. 164, 172-3 (1973); *see Powers of Indian Tribes*, Mem. Sol. Int., 55 I.D. 14, 19, 30 (Oct. 25, 1934).

[39]Tribal governments have always varied widely in degree of structure and organization. *See* F. Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.); Montoya v. United States, 180 U.S. 261, 265 (1901). In 1934 Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461-479 ("IRA") to encourage tribes to adopt a more formal structure. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-2 (1973); *see* F. Cohen, *supra* (1982 ed.) at 18, n. 107. The Act provided that a tribe "may" adopt a constitution and bylaws, by majority vote, and also provided for revocation of a constitution upon a majority vote, 25 U.S.C. §§ 476, 478. Under the IRA, the Secretary conducted 258 elections in which 181 tribes elected to organize under the Act and 77 tribes, including the largest (Navajo), rejected it. *See* Kerr-McGee Corporation v. Navajo Tribe of Indians, 105 S.Ct. 1900, 1902: Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 972 (1972); *see also* F. Cohen (1982 ed.), *supra* at 150.

and have had a known tribal existence for almost a century.

The Solicitor further ruled that the Catawbas had been a federally-recognized tribe since 1848, had continuously "retained their tribal organization ever since . . ." and were therefore entitled to vote on an IRA constitution. *Questions Of the Catawbas' Identity and Organization As A Tribe And Right To Adopt An IRA Constitution,* Mem. Sol. Int. (April 11, 1944), *reprinted in* II *Interior Opinions* at 1261 (J.A. 51-52).

It is certain that Catawba tribal political existence was not dependent upon or founded in its IRA constitution. The Tribe's recognized political existence predated its adoption of an IRA constitution by more than 200 years (R. Vol. VI, Ex. 1)—or since 1848 according to the Solicitor—and the revocation of that document cannot logically be said to extinguish an existence not in any way founded within it. The tribal constitution had been adopted to facilitate the 1943 rehabilitation program, and its revocation was simply part of the overall legislative plan to return the Tribe to its pre-1943 status. The State has continued to hold the 630-acre reservation acquired in 1842 in trust for the Tribe. Op. Atty. Gen. S.C., No. 3988 (March 6, 1975) (R. Vol. VI, Ex. 15).

III. EVEN IF STATE LAW WERE TO APPLY, THE TRIBE WOULD STILL HAVE SIGNIFICANT CLAIMS.

Because South Carolina, alone among the state jurisdictions, does not permit tacking of successive periods of possession by adverse occupants in order to establish title pursuant to its 10-year statute of limitations, S.C. Code Ann. § 15-3-340 (1976), an 18-year delay under South Carolina law would not establish even a presumption of title. Indeed, the United States concedes that application of state statutes of limitations to the Tribe's claim might not immediately resolve the underlying controversy (U.S. Br. at 17, 20).

South Carolina law is clear. As the foremost commentator on South Carolina property law has observed:

> The rule in this state, contrary to the view of the overwhelming majority of jurisdictions, is that even though

> there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.

D. Means, *Survey of Property Law*, 10 S.C.L.Q. 90 (Fall 1958). Professor Means' statement is supported by an unbroken line of South Carolina Supreme Court decisions. *See Adams v. Adams*, 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock v. Haithcock*, 123 S.C. 61, 68, 115 S.E. 727, 729 (1928) ("A man cannot tack, in order to make ten years . . . . The 10 years must be 10 years in himself alone, or by way of inheritance", *quoting with approval* trial judge's jury charge); 7 R. Powell, *The Law of Real Property*, ¶ 1014[2] at 91-63 (1984).

In *Crotwell v. Whitney*, 229 S.C. 213, 220-21, 92 S.E. 2d 473, 477 (1956), the South Carolina Supreme Court stated plainly that the adverse occupant has the burden of establishing possession for the entire 10-year statutory period without tacking:

> Plaintiffs having established their legal title to the premises, appellant['s] . . . claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, *without tacking of possession* except by descent cast. Code 1952, Sections 10-2421 [now codified as § 15-67-210], 10-124 [now codified as § 15-3-340]; . . . (citations omitted, emphasis added).

See also Gregg v. Moore, 226 S.C. 366, 371, 85 S.E.2d 279, 281 (1954) ("The burden of proof of adverse possession is on the party relying thereon . . . ."). Thus, in order to defeat the Tribe's claim of title, each defendant would be required to prove open, hostile, notorious and continuous possession for a 10-year period.[40]

[40]It is also certain that under South Carolina law, those defendants against whom the claim was not barred by the 10-year statute of limitations could not invoke the equitable defense of laches. "Laches within the period of the statute of limitations is no defense at law." Crotwell v. Whitney, *supra*, 229 S.C. at 223, 92 S.E.2d at 478.

48

The consistent line of South Carolina Supreme Court decisions demonstrates that South Carolina's anti-tacking rule and the 10-year statute of limitations are inextricably linked: the 10-year limitations period contained in S.C. Code Ann. § 15-3-340 (1976) may only be asserted by an adverse possessor who has been in possession for at least 10 years. *Crotwell v. Whitney, supra;* Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina*, 10 S.C.L.Q. 292, 298 (Winter 1958); *see* 7 R. Powell, *supra*, ¶ 1012[2] at 91-4 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.").

Petitioners argue, however, that S.C. Code Ann §§ 15-3-340 (statute of limitations) and 15-67-210 (adverse possession) (1976) set up two different defenses to an action to recover possession: (1) that the plaintiff has not possessed the land within the past ten years, and (2) that defendant has adversely possessed the land for ten years. They assert that the anti-tacking rule applies only to the second, whereas petitioners rely upon the first. Lastly, petitioners attempt to derive significance from the fact that the two statutory sections appear in different chapters of the Code.

Petitioners' attempt to sever the relationship between these two statutory sections has no foundation in law. At the time of enactment, the predecessors of the present sections appeared as sections 101 and 104 of the same Act. *See* 14 Stats. of S.C. 444 (1870). It is apparent from the text of the two sections that § 15-67-210 refines and modifies § 15-3-340:

> § 15-3-340. First and second actions by individual for recovery of land.
>
> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the

premises in question within ten years before the commencement of such action.

§ 15-67-210. Presumption of possession; when occupation deemed under legal title.

In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

The case law since enactment of the 1870 Act has uniformly recognized the integral relation between these two provisions. Indeed, had petitioners continued their quote from *Haithcock v. Haithcock*, *supra*, Pet. Br. at 27, they would have found, immediately after the assertion that possessors may defeat the owner's title by showing that he has not been in possession for ten years preceding the action, the explanation that South Carolina law presumes possession in anyone who shows legal title:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession of that land, and that his title gives him the possession; that is, the possession follows the title. . . .
>
> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he shows a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.
>
> So I say, the establishment of a perfect legal title to a tract of land is a presumption that the person is in possession, unless and until someone else, by the pre-

ponderance of the testimony, shows that he has been in actual adverse possession of that land for 10 consecutive years.

Haithcock, supra, 123 S.C. at 69-70, 115 S.E. at 729-30. Similarly, in *Love v. Turner*, 71 S.C. 322, 330, 51 S.E. 101, 104 (1904), the South Carolina Supreme Court stated: "If the plaintiff had the legal title, he was presumed to be possessed of the land within the 10 years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for 10 years", [*citing Garrett v. Weinberg*, 48 S.C. 28, 26 S.E. 3 (1896)]. These cases make clear that there are not two, but one, statutory defense, and that adverse possession and the statute of limitations are two names for the same legal rule.

Petitioners' assertion that the Tribe "admittedly did not possess the land at any time during the ten years before they commenced this action" (Pet. Br. at 28) is therefore flatly incorrect. The Tribe's perfect title is presumed for purposes of this motion and therefore, under South Carolina law, the Tribe is presumed to be in possession under § 15-3-340 until someone else proves "actual adverse possession of that land for 10 consecutive years." *Haithcock, supra*, 123 S.C. at 70, 115 S.E. at 730.

CONCLUSION

Petitioners read far too much into the 1959 Act. It was legislation of limited scope, designed only to implement a clear understanding between the Tribe and the federal government that certain lands would be distributed: but only on the condition that this claim be unaffected. Absent a clear expression of congressional intent to abrogate, the assurances upon which tribal consent was obtained are controlling. Congress professed only to be acting consistently with tribal consent and neither the Act nor its history even suggests an intent to extinguish or modify this claim. Congress in 1959 did not intend to deprive the Tribe of its opportunity to resolve the claim it had so persistently sought to protect.

The judgment and opinion of the Court of Appeals should be affirmed.

51

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[476 US 498]

SOUTH CAROLINA et al., Petitioners

v

CATAWBA INDIAN TRIBE, INC.

476 US 498, 90 L Ed 2d 490, 106 S Ct 2039

[No. 84-782]

Argued December 12, 1985. Decided June 2, 1986.

Decision: Catawba Indian land claim held subject to state statute of limitations pursuant to Catawba Indian Tribe Division of Assets Act (25 USCS §§ 931-938).

SUMMARY

In 1959, Congress passed the Catawba Indian Tribe Division of Assets Act (25 USCS §§ 931-938). The Act generally authorized the disposal of the tribal assets and terminated federal responsibility for the tribe and its members, while § 5 of the Act (25 USCS § 935) provided that state laws would apply to members of the tribe in the same manner that such laws applied to non-Indians. In 1980 the tribe filed an action for possession of a 225-square-mile South Carolina tract, and for trespass damages, for the period of the tribe's dispossession, in the United States District Court for the District of South Carolina. The tribe cited a 1763 treaty with Great Britain, and argued that an 1840 treaty with the state of South Carolina, purporting to convey the tract to the state, was void. The District Court, however, granted a motion for summary judgment against the tribe. On appeal, the United States Court of Appeals for the Fourth Circuit reversed. In a panel decision (718 F2d 1291), later adopted en banc (740 F2d 305), the Court of Appeals held that the Act did not (1) ratify the 1840 treaty, (2) extinguish the tribe's existence, (3) terminate the trust relationship of the tribe with the Federal Government arising out of the Indian Nonintercourse Act of 1970 (25 USCS § 177), or (4) make the state statute of limitations applicable to the tribe's land claim.

On certiorari, the United States Supreme Court reversed and remanded the case. In an opinion by STEVENS, J., joined by BURGER, Ch. J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., it was held, without reach-

Briefs of Counsel, p 1104, infra.

ing the merits of the Catawba land claim, that the explicit redefinition of the federal relationship reflected in the Catawba Indian Tribe Division of Assets Act required the application of the state statute of limitations to the claim.

BLACKMUN, J., joined by MARSHALL and O'CONNOR, JJ., dissented, expressing the view that the state statute of limitations was not applicable to the Catawba land claim, for Congress in 1959 did not express an unambiguous desire to encumber the Catawbas' claim.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Indians § 33; Limitation of Actions § 182 — Catawba land claim — application of state statute of limitations — federal statute

1a-1d. The explicit redefinition of the federal relationship reflected in the Catawba Indian Tribe Division of Assets Act (25 USCS §§ 931-938), § 5 of which (25 USCS § 935) terminates federal services to the tribe and provides that state law shall apply to members of the tribe in the same manner that such laws apply to non-Indians, requires the application of the state statute of limitations to a Catawba land claim. (Blackmun, Marshall, and O'Connor, JJ., dissented from this holding.)

Appeal § 1692.2 — remand — issue not decided

2a, 2b. The United States Supreme Court will remand a case to a Federal Court of Appeals, for interpretation of a state statute of limitations, where (1) the Federal District Court held that a land claim was barred by the statute, (2) the Court of Appeals' construction of a federal law made it unnecessary for that court to review the District Court's interpretation, (3) the Supreme Court has held the statute of limitations applicable, and (4) the Court of Appeals is in a better position than the Supreme Court to evaluate such an issue of state law.

Indians § 11 — Catawba Tribe — statute terminating protection

3. Section 5 of the Catawba Indian Tribe Division of Assets Act (25 USCS § 935) establishes two principles: (1) that the special federal services and statutory protections for Indians are no longer applicable to the tribe and its members, and (2) that state laws apply to the tribe and its members in precisely the same fashion that such laws apply to others.

Indians § 13 — statutory construction

4. The canon of construction regarding the resolution of statutory ambiguities in favor of Indians does not permit either reliance on ambiguities that do not exist, or the disregard of the clearly expressed legislative intent of Congress.

Courts § 900; States, Territories, and Possessions § 46 — state statute of limitations — applicability to federal claims

5. Federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.

Indians § 84 — removal of restraints on alienation

6. When Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims, under a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

Indians § 11 — tribal termination acts

7. Indian tribal termination acts subject members of the terminated tribe to the full sweep of state laws and state taxation, under a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

Indians §§ 11, 33 — section of federal act preserving Catawba rights — land claim — applicability of state statute of limitations

8. Section 6 of the Catawba Indian Tribe Division of Assets Act (25 USCS § 936), providing that nothing in the Act affects the rights of the tribe under the laws of South Carolina, (1) cannot be read to preserve a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5 of the Act (25 USCS § 935), and (2) does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of a state statute of limitations to a Catawba land claim.

Statutes § 81 — construction

9a, 9b. It is a canon of construction that a statute should be interpreted so as not to render one part inoperative.

Indians § 33 — Catawba land claim — state statute of limitations — assurance prior to federal act

10a, 10b. There is no contradiction between the applicability of a state statute of limitations to a Catawba Indian land claim, and the federal assurance to the tribe, prior to the passage of the Catawba Indian Tribe Division of Assets Act (25 USCS §§ 931-938), that the status of any state claims would not be affected by the Act. (Blackmun, Marshall, and O'Connor, JJ., dissented from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

In 1760 and 1763, respondent Indian Tribe surrendered to Great Britain its aboriginal territory in return for the right to settle permanently on a 225-square-mile tract of land now located in South Carolina. In 1840, the Tribe conveyed the tract to South Carolina in return for the State's establishing a new reservation for the Tribe. In 1959, Congress, pursuant to its changed policies concerning Indian affairs, enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act) authorizing a division of Catawba tribal assets. Section 5 of that Act provided for revocation of the Tribe's constitution, rendered inapplicable to the Tribe and its members special federal statutory protections for Indians, and made state laws applicable to the Tribe and its members in the same way that they apply to all "other persons or citizens." In 1980, the Tribe brought an action in Federal District Court against petitioners (South Carolina and other claimants to the 225-square-mile tract), seeking possession of the tract and trespass damages for the period of its dispossession on the ground that the 1840 conveyance to South Carolina was null and void because the United States never consented to it as required by the Nonintercourse Act to make it effective. The District Court granted summary judgment for petitioners, in part on the ground that the Tribe's claim was barred by the South Carolina statute of limitations. The Court of Appeals reversed, holding that, under its interpretation of the Catawba Act, the state statute of limitations did not apply.

Held: The explicit redefinition of the relationship between the Federal Government and respondent Tribe

reflected in the Catawba Act's clear language requires the application of the state statute of limitations to the Tribe's claim. But whether that statute bars the claim should be determined by the Court of Appeals on remand.

740 F2d 305, reversed and remanded.

Stevens, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Marshall and O'Connor, JJ., joined.

APPEARANCES OF COUNSEL

James D. St. Clair argued the cause for petitioners.

Don Brantley Miller argued the cause for respondent.

Briefs of Counsel, p 1104, infra.

OPINION OF THE COURT

[476 US 499]

Justice Stevens delivered the opinion of the Court.

[1a, 2a] At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising 144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 USC §§ 931-938 [25 USCS §§ 931-938].

[476 US 500]

We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any con-

1. The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors 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 compleated 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." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App 35.

2. The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

3. See Act of July 22, 1790, ch 33, § 4, 1 Stat 138. The Act, now codified at 25 USC § 177 [25 USCS § 177], states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

veyance of tribal land without the consent of the United States; and that the United States never gave its consent to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue.

[476 US 501]

For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty—it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any

[476 US 502]

event, both state officials and representatives of the

4. The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

5. An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

6. See 1920 SC Acts 1700, Joint Res No. 904, § 1.

Federal Government took an interest in the plight of the Tribe.[7]

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it thereafter adopted a constitution approved

[476 US 503]

by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 USC § 476 [25 USCS § 476].

[1b] In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era" —a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that

7. In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on HR 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong, 1st Sess (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

8. Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs, Id., Ex 50, p 3.

9. The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. Ibid.

10. That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." HR Con Res 108, 83d Cong, 1st Sess (1953), 67 Stat B132.

11. According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, e. g., Cornell, The New Indian Politics, 10 Wilson Q 113, 121 (1986); F. Prucha, supra, at 1046-1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L Rev 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 NDL Rev 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal services.[12] Moreover, members of

[476 US 504]

the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC §§ 931-938 [25 USCS §§ 931-938]. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. Ibid. Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

[476 US 505]

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F2d 1291 (1983); sitting en banc, the

12. In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. HR Rep No. 2680, 83d Cong, 2d Sess, 2-3 (1954). In contrast to the report made by Senator Thomas in 1930, n 7, supra, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S Rep No. 863, 86th Cong, 1st Sess, 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S Rep, at 4; HR Rep, at 5.

13. See 105 Cong Rec 5462 (1959) (statement of Rep. Hemphill); App 102.

14. The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id., at 103.

full Court of Appeals adopted the panel's opinion. 740 F2d 305 (1984). Because of the importance of the case, we requested the views of the Solicitor General of the United States and granted certiorari, 471 US 1134, 86 L Ed 2d 691, 105 S Ct 2672 (1985). We now reverse.

II

[1c] Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 USC § 935 [25 USCS § 935].

[3] This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the

[476 US 506]

Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

[4] The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear

15. DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); Antoine v Washington, 420 US 194, 199-200, 43 L Ed 2d 129, 95 S Ct 944 (1975); Mattz v Arnett, 412 US 481, 504-505, 37 L Ed 2d 92, 93 S Ct 2245 (1973).

16. See Oregon Dept. of Fish and Wildlife v Klamath Indian Tribes, 473 US 753, 774, 87 L Ed 2d 542, 105 S Ct 3420 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' DeCoteau v District County Court, 420 US 425, 447 [43 L Ed 2d 300, 95 S Ct 1082] (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v Washington Commercial Passenger Fishing Vessel Assn. 443 US [658, 673 [61 L Ed 2d 823, 99 S Ct 3055] (1979)], clearly runs counter to a tribe's later claims"); Rice v Rehner, 463 US 713, 732, 77 L Ed 2d 961, 103 S Ct 3291 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); Andrus v Glover Construction Co. 446 US 608, 618-619, 64 L Ed 2d 548, 100 S Ct 1905 (1980); DeCoteau v District County Court, 420 US, at 447, 43 L Ed 2d 129, 95 S Ct 944 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose

[476 US 507]

and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

[5] Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, County of Oneida v Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in

[476 US 508]

County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

[6, 7] That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent

17. Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

18. See, e. g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); Board of Regents v Tomanio, 446 US 478, 483-484, 64 L Ed 2d 440, 100 S Ct 1790 (1980); Johnson v Railway Express Agency, Inc. 421 US 454, 462, 44 L Ed 2d 295, 95 S Ct 1716 (1975); Auto Workers v Hoosier Cardinal Corp. 383 US 696, 703-704, 16 L Ed 2d 192, 86 S Ct 1107 (1966); Cope v Anderson, 331 US 461, 463, 91 L Ed 1602, 67 S Ct 1340 (1947); Rawlings v Ray, 312 US 96, 97, 85 L Ed 605, 61 S Ct 473 (1941); O'Sullivan v Felix, 233 US 318, 322-323, 58 L Ed 980, 34 S Ct 596 (1914); Chattanooga Foundry & Pipe Works v Atlanta, 203 US 390, 397-398, 51 L Ed 241, 27 S Ct 65 (1906); McClaine v Rankin, 197 US 154, 158, 49 L Ed 702, 25 S Ct 410 (1905); Campbell v Haverhill, 155 US 610, 617, 39 L Ed 280, 15 S Ct 217 (1895); M'Cluny v Silliman, 3 Pet US 270, 277, 7 L Ed 676 (1830).

claims.[19] Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of state laws and state

[476 US 509]

taxation."[20] These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

[8, 9a] The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law. Section 6 cannot be read to preserve, of its

[476 US 510]

own force, a

19. See, e.g., Larkin v Paugh, 276 US 431, 439, 72 L Ed 640, 48 S Ct 366 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); Dickson v Luck Land Co. 242 US 371, 375, 61 L Ed 371, 37 S Ct 167 (1917) ("With those restrictions [of Congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); United States v Waller, 243 US 452, 461-462, 61 L Ed 843, 37 S Ct 430 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); Schrimpscher v Stockton, 183 US 290, 296, 46 L Ed 203, 22 S Ct 107 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

20. Bryan v Itasca County, 426 US 373, 389, 48 L Ed 2d 710, 96 S Ct 2102 (1976). See also United States v Antelope, 430 US 641, 647, n 7, 51 L Ed 2d 701, 97 S Ct 1395 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); Affiliated Ute Citizens v United States, 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

As the Court of Appeals noted, in Menominee Tribe v United States, 391 US 404, 20 L Ed 2d 697, 88 S Ct 1705 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read in pari materia with an Act passes in the same Congress that preserved hunting and fishing rights. Id., at 411, 20 L Ed 2d 697, 88 S Ct 1705. In this case, of course, there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a "backhanded" abrogation of treaty rights, id., at 412, 20 L Ed 2d 697, 88 S Ct 1705; no comparable abrogation is at issue here.

21. As currently codified, § 6 provides: "Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 USC § 936 [25 USCS § 936].

federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

[10a, 10b] Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

[1d] We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba

[476 US 511]

Act requires the application of the state statute of limitations to the Tribe's claim.

III

[2b] The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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22. [9b] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v Franklin, 439 US 379, 392, 58 L Ed 2d 596, 99 S Ct 675 (1979). See also Mountain States Tel. & Tel. Co. v Pueblo of Santa Ana, 472 US 237, 249, 86 L Ed 2d 475, 105 S Ct 2109 (1985); United States v Menasche, 348 US 528, 538-539, 99 L Ed 615, 75 S Ct 513 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v Ramsdell, 107 US 147, 152 [27 L Ed 431, 2 S Ct 391], rather than to emasculate an entire section").

23. [10b] See 718 F2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that " 'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

24. See Pembaur v Cincinnati, 475 US 469, 484-485, n 13, 89 L Ed 2d 452, 106 S Ct 1292 (1986); Regents of University of Michigan v Ewing, 474 US 214, 224, n 10, 88 L Ed 2d 523, 106 S Ct 507 (1985); Bishop v Wood, 426 US 341, 345-347, 48 L Ed 2d 684, 96 S Ct 2074 (1976); Propper v Clark, 337 US 472, 486-487, 93 L Ed 1480, 69 S Ct 1333 (1949).

SEPARATE OPINION

Justice Blackmun, with whom Justice Marshall and Justice O'Connor join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC § 931 et seq. [25 USCS §§ 931 et seq.], was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter,
[476 US 512]
Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L Rev 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763—"a mere token of the[ir] once large domain" —that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, e.g., id., at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English
[476 US 513]
colonists." F.

1. In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, ibid., but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163-166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on HR 3274, 96th Cong, 1st Sess, 135, 151-153 (1979) (Hearing).

Prucha, American Indian Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160-161 (J. Cushing ed 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Maine L Rev 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763—shortly before the signing of the Treaty of Augusta—flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 USC § 177 [25 USCS § 177], has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition—which in 1793 was extended to include not only outright purchases but also acquisitions of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat 330—mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing

[476 US 514]

of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." Ibid. The Catawbas soon were reduced to "a state of starvation and distress," ibid., and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty"—which the United States never joined or approved—the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it

would purchase a new reservation "of the value of five thousand dollars," including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App 38-39.[2]

[476 US 515]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 SC Stats 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in

[476 US 516]

the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that the Tribe had no

2. According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6 (CA4) p 23, n 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

3. See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation—which works out to roughly $3.17 per acre—contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier—the approximate equivalent of 15 cents per acre payable in installments over 10 years.

4. 6 Record, Exs 18, 20. But see United States v Candelaria, 271 US 432, 442, 70 L Ed 1023, 46 S Ct 561 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any "'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,'" quoting Montoya v United States, 180 US 261, 266, 45 L Ed 521, 21 S Ct 358 (1901); Joint Tribal Council of Passamaquoddy Tribe v Morton, 528 F2d 370, 376-378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition).

outstanding claim to any of the 144,000 acres. 1908 Op SC Atty Gen 17, 18, 29-32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex 21, pp 11-12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. Id., Ex 48 (letter from Ass't Comm'r of Indian Affairs to SC State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see id., Ex 49, p 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App

[476 US 517]

43-44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex 53, pp 7-8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, ante, at 510, n 23, 90 L Ed 2d, at 501). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." Id., at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." Id., at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong Rec 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe.

In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He further concluded that the

[476 US 518]

Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussions that the Tribe already had initiated with South Carolina officials. See App to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15-17 (Hearing) (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see Oneida Indian Nation v County of Oneida, 414 US 661, 666-678, 39 L Ed 2d 73, 94 S Ct 772 (1974) (Oneida I), and the statute of limitations is thus a matter of federal law, see County of Oneida v Oneida Indian Nation, 470 US 226, 240-244, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Oneida II). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, e.g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); DelCostello v Teamsters, 462 US 151, 158-163, 76 L Ed 2d 476, 103 S Ct 2281

[476 US 519]

(1983); Occidental Life Ins. Co. v EEOC, 432 US 355, 367, 53 L Ed 2d 402, 97 S Ct 2447 (1977).

In Oneida II, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat 845, 25 USC § 233 [25 USCS § 233]. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United

5. Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See Yankton Sioux Tribe v United States, 272 US 351, 357, 71 L Ed 294, 47 S Ct 142 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 USC § 2415(c) [28 USCS § 2415(c)].[6] The Court in Oneida II concluded that

[476 US 520]

the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 US, at 244, 84 L Ed 2d 169, 105 S Ct 1245.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms, see ante, at 506, 90 L Ed 2d, at 498-499—that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, e.g., Oneida II, 470 US, at 247-248, 84 L Ed 2d 169, 105 S Ct 1245; Bryan v Itasca County, 426 US 373, 392, 48 L Ed 2d 710, 96 S Ct 2102 (1976); Northern Cheyenne Tribe v Hollowbreast, 425 US 649, 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793 (1976); DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); United States v Santa Fe Pacific R. Co. 314 US 339, 353-354, 86 L Ed 260, 62 S Ct 248 (1941); Alaska Pacific Fisheries v United States, 248 US 78, 89, 63 L Ed 138, 39 S Ct 40 (1918); Choate v Trapp, 224 US 665, 675, 56 L Ed 941, 32 S Ct 565 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a

6. The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." Oneida II, 470 US, at 242, 84 L Ed 2d 169, 105 S Ct 1245. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands—including the 144,000 acres claimed by the Catawbas. See, e.g., 123 Cong Rec 22166-22167 (1977) (Rep. Cohen, discussing Catawba claim and others); id., at 22168 (Rep. Walsh); id., at 22170 (Rep. Hanley); 126 Cong Rec 5748-5749 (1980) (Rep. Holland, discussing Catawba claim); id., at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, e.g., 123 Cong Rec 22170 (1977) (Rep. Collins); id., at 22171 (Rep. Johnson); 126 Cong Rec 3289 (1980) (Sen. Cranston); id., at 5745-5746 (Rep. Clausen); id., at 5747 (Rep. Danielson); id., at 5750 (Rep. Swift). See also 123 Cong Rec 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years—many at the hands of the American Government—it is incumbent on the United States to give these people—our country's first inhabitants—a full chance to redress their grievances"); 126 Cong Rec 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, Santa Fe Pacific, 314 US, at 353, 86 L Ed 260, 62 S Ct 248, it must be assumed that Congress did not intend to belie its

[476 US 521]

"avowed solicitude" for the Indians, id., at 354, 86 L Ed 260, 62 S Ct 248, with a "backhanded" abrogation or limitation of their rights, Menominee Tribe v United States, 391 US 404, 412, 20 L Ed 2d 697, 88 S Ct 1705 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," ante, at 506, 90 L Ed 2d, at 498, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 USC § 935 [25 USCS § 935]. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See ante, at 505-509, 90 L Ed 2d, at 498-500. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." Ante, at 508, 90 L Ed 2d, at 499-500. The cases it cites for that proposition all were decided well before the emergence during the

[476 US 522]

past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See Oneida II, 470 US, at 240-244, 84 L Ed 2d 169, 105 S Ct 1245. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in Oneida I that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 US, at 676, 39 L Ed 2d 73, 94 S Ct 772. In this case, however, as in Oneida I, "the assertion of a federal controversy does not rest solely on the claim of a right to

possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 US, at 677, 39 L Ed 2d 73, 94 S Ct 772. Here, as in Oneida I, the complaint thus "asserts a present right to possession under federal law." Id., at 675, 39 L Ed 2d 73, 94 S Ct 772.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and

[476 US 523]

their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original title, at least, the Nonintercourse Act merely " 'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.' " Oneida II, 470 US, at 240, 84 L Ed 2d 169, 105 S Ct 1245, quoting Oneida I, 414 US, at 678, 39 L Ed 2d 73, 94 S Ct 772.[10]

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7. John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex 7, p 1.

8. See generally F. Cohen, Handbook of Federal Indian Law 486-493 (1982); Cohen, Original Indian Title, 32 Minn L Rev 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum L Rev 655 (1975).

9. This Court long has respected grants of land to Indian tribes by prior governments. See, e.g., United States v Title Insurance & Trust Co. 265 US 472, 484, 68 L Ed 1110, 44 S Ct 621 (1924), quoting Barker v Harvey, 181 US 481, 491-492, 45 L Ed 963, 21 S Ct 690 (1901) (" 'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal' "); Mitchel v United States, 9 Pet 711, 9 L Ed 283 (1835).

10. The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in Johnson v McIntosh, 8 Wheat 543, 573-574, 5 L Ed 681 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art I, § 8, cl 3, which made "Indian relations . . . the exclusive province of federal law," Oneida II, 470 US, at 234, and n 4, 84 L Ed 2d 169, 105 S Ct 1245. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Maine L Rev 17, 28-29 (1979). In Oneida II, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an indepen-

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this

[476 US 524]

common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." Menominee Tribe, 391 US, at 412, 20 L Ed 2d 697, 88 S Ct 1705 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

[476 US 525]

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See ante, at 506-507, 90 L Ed 2d, at 498-499. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just

dent basis for legal relief. See 470 US, at 236-240, 84 L Ed 2d 169, 105 S Ct 1245.

11. The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art I, § 8, cl 3, and the constitutional prohibition against state treaties, Art I, § 10, cl 1. App 24. Reading the complaint liberally "so . . . as to do substantial justice," Fed Rule Civ Proc 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as Amicus Curiae in Connecticut v Mohegan Tribe, O T 1980, No. 80-1365 [452 US 968, 69 L Ed 2d 981, 101 S Ct 3124], p 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in Mohegan Tribe as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba—or by the Catawba Tribe—must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians,

[476 US 526]

the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. Ante, at 508, 90 L Ed 2d, at 499; see also ante, at 510, 90 L Ed 2d, at 501.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, Northern Cheyenne Tribe, 425 US, at 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in Menominee Tribe, supra, when it refused to read into the Menominee Termination Act an abrogation of the Menominees'

[476 US 527]

treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are

12. The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S Rep No. 863, 86th Cong, 1st Sess, 1 (1959); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18th-century treaty lands. See S Rep No. 863, at 3; HR Rep No. 910, at 4.

13. The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, e.g., HR Rep No. 910, 86th Cong, 1st Sess, 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

faced here with a particular statute, and we should not " 'strain to implement [an assimilationist] policy Congress has now rejected.' " Bryan v Itasca County, 426 US, at 389, n 14, 48 L Ed 2d 710, 96 S Ct 2102, quoting Santa Rosa Band of Indians v Kings County, 532 F2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see ante, at 510, 90 L Ed 2d, at 501, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, e.g., Choctaw Nation v Oklahoma, 397 US 620, 631, 25 L Ed 2d 615, 90 S Ct 1328 (1970); Jones v Meehan, 175 US 1, 11, 44 L Ed 49, 20 S Ct 1 (1899); Worcester v Georgia, 6 Pet 515, 582, 8 L Ed 483 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might someday prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act bars the Catawbas' claim if the limitations period under South Carolina law expired between

[476 US 528]

the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p 1C, reprinted in Hearing, at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The

14. See, e.g., Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); id., at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." Ibid.

When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see ante, at 499-500, 90 L Ed 2d, at 494-495, and n 4—the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning

[476 US 529]

a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," FPC v Tuscarora Indian Nation, 362 US 99, 142, 4 L Ed 2d 584, 80 S Ct 543 (1960) (dissenting opinion), I do not join the judgment of the Court.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina, Appellant,

v.

STATE OF SOUTH CAROLINA, Richard W. Riley, as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater North American Corporation; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright; Ned Albright; J.W. Anderson, Jr.; John Marshall Wilkins, II; Jesse G. Anderson; John Wesley Anderson; David Goode Anderson; W.B. Ardrey, Jr.; Eliza Beth Ardrey Grimball; John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron; Wilson Barron; Archie B. Carroll, Jr.; Hugh William Close; James Bradley; Francis Lay Springs; Lillian Crandel Close; Francis Allison Close; Leroy Springs Close; Patricia Close; William Elliot Close; Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris; Annie F. Harris; T.W. Hutchinson; Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.E. Reid, Jr.; Will R. Simpson; John S. Simpson; Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshal E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Goode; R.N. Bencher; W.O. Nisbet, III; Pauline B. Gunter; J. Max Minson; W.A. McCorkle; Mary McCorkle; William O. Nisbet; Eugenia Nisbet White; Mary Nisbet Purvis; E.N. Martin; Robert M. Yoder, Appellees.

No. 82-1671.

United States Court of Appeals, Fourth Circuit.

Argued March 8, 1983.

Decided Oct. 11, 1983.

Appeal was taken from a summary judgment of the United States District Court for the District of South Carolina, Joseph P. Wilson, Senior District Judge, sitting by designation, in favor of state and other defendants in suit by Catawba Indian tribe for land allegedly granted to State in violation of Indian Nonintercourse Act. The Court of Appeals, Butzner, Senior Circuit Judge, held that Catawba Indian Tribe Division of Assets Act did not ratify 1840 treaty with South Carolina by which tribe gave up 144,000 acres granted it by treaties of 1760 and 1763, did not extinguish tribe's existence, did not terminate trust relationship of tribe with federal government arising out of Indian Nonintercourse Act, and did not make South Carolina statute of limitations applicable to tribe's claim to land allegedly granted to State in 1840 treaty in violation of Nonintercourse Act.

Reversed and remanded.

K.K. Hall, Circuit Judge, dissented and filed opinion.

1. Indians ⇐33

To establish prima facie case for violation of Indian Nonintercourse Act, tribe must prove four elements: that it is or represents an Indian tribe within meaning of Act; that land in issue is covered by Act

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

2. Indians ⇐6

Statutes that affect Indian tribe should not be construed to Indians' prejudice.

3. Indians ⇐3

Congressional intent to abrogate or modify a treaty right must be clearly expressed, and doubtful expressions are to be resolved in favor of Indians.

4. Indians ⇐2, 3

Catawba Indian Tribe Division of Assets Act did not ratify 1840 treaty with South Carolina by which tribe gave up 144,000 acres granted it by treaties of 1760 and 1763, did not extinguish tribe's existence, did not terminate trust relationship of tribe with federal government arising out of Indian Nonintercourse Act, and did not make South Carolina statute of limitations applicable to tribes' claim to land allegedly granted to state in 1840 treaty in violation of Nonintercourse Act. 25 U.S.C.A. §§ 931–938; SDCL 15–3–340; 25 U.S.C.A. § 177.

5. Indians ⇐33

Indian Nonintercourse Act creates trust or fiduciary relationship between federal government and tribe somewhat akin to relationship of guardian and ward. 25 U.S.C.A. § 177.

6. Indians ⇐33

Trust relationship between federal government and Indian tribe created by Indian Nonintercourse Act exists even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the tribe. 25 U.S.C.A. § 177.

7. Indians ⇐33

Absence of federally recognized tribal government and exercise of state jurisdiction over tribe and its members neither dissolves trust relationship between federal government and tribe arising out of Indian Nonintercourse Act, nor renders Act inapplicable to tribe's claims. 25 U.S.C.A. § 177.

8. Indians ⇐33

Congress may terminate trust relationship between federal government and Indian tribe arising out of Indian Nonintercourse Act, thus abrogating federally recognized right of tribe to its occupancy of reservation lands, but its intention to do so must be plain and unambiguous to be effective; doubtful expression of legislative intent must be resolved in favor of Indians. 25 U.S.C.A. § 177.

Don B. Miller, Native American Rights Fund, Boulder, Colo., Jean H. Toal, Columbia, S.C. (Belser, Baker, Barwick, Ravenel, Toal & Bender, Columbia, S.C., Robert M. Jones, Rock Hill, S.C., Mike Jolly and Richard Steele, Union, S.C., on brief), for appellant.

James D. St. Clair, Boston, Mass. (James L. Quarles, III, William F. Lee, David H. Erichsen, Hale & Dorr, Boston, Mass., on brief) and John C. Christie, Jr., Chicago, Ill. (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd, Chicago, Ill., J.D. Todd, Jr., Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann, Greenville, S.C., Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd & Byrd, Rock Hill, S.C., T. Travis Medlock, Atty. Gen., Kenneth P. Woodington, Asst. Atty. Gen., State of S.C., Columbia, S.C., on brief), for appellees.

Before HALL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Catawba Indian Tribe of South Carolina appeals from the district court's grant of summary judgment in favor of South Carolina and 76 other defendants.[1] The

1. For convenience, we will refer to the appellees collectively as South Carolina.

court held that the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931–38, and the South Carolina statute of limitations, S.C.Code Ann. § 15–3–340 (Law.Co-op.1976), barred the Tribe's claim to land allegedly granted to the state in 1840 in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. We reverse and remand for further proceedings on the merits of the Tribe's claim. We hold only that the grant of summary judgment cannot be sustained. For the purpose of ruling whether summary judgment was appropriate, we have assumed without deciding, as did the district court, that disputed facts on which the Tribe relies are true.

I

Long before English and European settlers came to North America, the Catawba Tribe occupied its aboriginal territory in what is now parts of North and South Carolina. In the 1760 Treaty of Pine Tree Hill between the Tribe and the King of England's Superintendent for Indian Affairs, the Tribe relinquished its aboriginal territory in exchange for being quietly and permanently settled on a 144,000 acre tract.

The Tribe protested that England had failed to carry out the terms of the 1760 treaty and reasserted a right to its aboriginal territory. In 1763, the Tribe entered into the Treaty of Augusta with the King's representatives. In exchange for relinquishing its aboriginal territory, the Tribe again agreed to be settled on a 144,000 acre tract in South Carolina.[2] England fulfilled the terms of this treaty.

After the Revolutionary War, South Carolina initially recognized the Treaty of Augusta. There was increasing pressure from settlers, however, who wished to move onto the Tribe's land. By the 1830s, nearly all of the Tribe's land had been leased to non-Indians pursuant to state statutes. South Carolina then began to negotiate with the Tribe to purchase its land. These efforts culminated in 1840 in the Treaty of Nation Ford in which the Tribe gave up the 144,000 acres granted by the treaties of 1760 and 1763. In exchange South Carolina promised to spend $5,000 to acquire a new reservation, $2,500 cash in hand, and yearly payments of $1,500 for nine years. The United States was not a party to and did not participate in the Treaty of Nation Ford.

In 1842 South Carolina purchased a 630 acre tract for $2,000 as a new reservation for the Tribe. This land continues to be held in trust for the Tribe by South Carolina as an Indian reservation.[3]

In the early 1900s, the Tribe sought to have the federal government assume responsibility for its welfare. These efforts resulted in a 1943 Memorandum of Understanding between the Tribe, the federal government, and South Carolina.[4] In ac-

2. The 1763 Treaty of Augusta provides in relevant part:

> And We the Catawba Head Men and Warriors 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 compleated 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.

XI *Colonial Records of North Carolina*, at 201–02. The tract lies at the northern border of South Carolina in York, Lancaster, and perhaps Chester counties. The precise boundaries are uncertain because of the deficiencies of the survey.

3. *See* Op. Att'y Gen. S.C., No. 3988 (Mar. 6, 1975).

4. The federal government refused to include a clause in the 1943 Memorandum that would have specifically extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. In a "formal expression of opinion," the solicitor of the Department of the Interior stated that elimination of the clause was "most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Memorandum for the Commissioner of Indian Affairs from the Solicitor of the Department of the Interior, undated, at 3. *See also* Letter of the Assistant Commissioner of

cordance with this agreement, the state purchased 3,434 acres of land and conveyed it in trust for the Tribe to the United States. In addition, the United States agreed to provide economic development assistance to the Tribe, and the Tribe agreed to organize to conduct its business on the basis of the federal government's recommendations.

With the advent of the termination era in 1953,[5] the federal government designated the Tribe as a likely candidate for the withdrawal of federal services. Federal assistance during the previous decade had been minimal. In addition, members of the Tribe desired an end to federal restrictions on alienation in order to facilitate financing for farm operations, homes, and improvements on the 3,434 acre reservation.

Efforts at securing the withdrawal of federal services began in earnest in 1958 and resulted in the enactment in 1959 of the Catawba Indian Tribe Division of Assets Act.[6] The Act became effective in 1962, and the 3,434 acre reservation, which had been acquired pursuant to the 1943 Memorandum of Understanding, was distributed among tribal members, either as land or as proceeds from its sale.

Indian Affairs to the State Auditor of South Carolina, dated Aug. 28, 1941.

5. "Termination era" refers to the federal policy from 1953 to the mid-1960s of ending the federal government's supervisory responsibilities for Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 152–80 (R. Strickland ed. 1982) [cited as Cohen, *Federal Indian Law* (1982)].

6. 73 Stat. 592, 25 U.S.C. §§ 931–938. The Act provides for the preparation of a tribal membership roll, the tribal council's designation of sites for church, park, playground, and cemetery purposes, and the division of remaining assets among the enrolled members of the tribe.

Sections 935 and 936, with which this litigation is particularly concerned, provide:

§ 935. The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

§ 936. Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina.

7. 25 U.S.C. § 177 (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Transactions in violation of the Nonintercourse Act are void. Cohen, *Federal Indian Law* 512 (1982).

8. *See supra* note 6.

II

In 1980 the Tribe brought suit against South Carolina and the other defendants. It claims it acquired a vested property right in the 144,000 acre reservation granted the Tribe in the 1760 and 1763 treaties and that upon our nation's independence these lands came within the scope of the federal program for the protection of Indian lands. Consequently, the Tribe asserts the 1840 Treaty of Nation Ford, whereby South Carolina purported to acquire the 144,000 acres, is void because the United States did not participate in or consent to the alienation of the Tribe's reservation as required by the Indian Nonintercourse Act.[7] The Tribe seeks to be restored to possession of its reservation as well as trespass damages for the entire period of its dispossession.

South Carolina argues the 1959 act of Congress bars the Tribe's claim. It contends that § 935[8] terminates the Tribe, ends any trust relationship between the Tribe and the federal government, and makes state law applicable to the Tribe's claim. The state also argues that the legislative history supports this interpretation and indicates Congress intended to ratify the 1840 Treaty.

The Tribe counters by arguing that § 935 on its face only terminates federal services to the tribe and makes state law applicable to the individual Indians, not to tribal claims. Furthermore, it argues the text and legislative history indicate Congress only intended to end the federal relationship with the Tribe created by the 1943 Memorandum of Understanding and did not intend to affect any tribal claims arising out of the 1760 and 1763 treaties.

On cross-motions for summary judgment, the district court assumed, without deciding, that prior to 1959 the Tribe was a "tribe" within the meaning of the Nonintercourse Act; that the 1760 and 1763 treaties granted the Tribe some interest in the land in issue; that the land was covered by the Nonintercourse Act; and that prior to 1959 the United States neither approved, ratified, nor consented to the 1840 Treaty of Nation Ford. The court also assumed that a trust relationship existed between the Tribe and the United States at least up to 1959.

The district court granted South Carolina's motion for summary judgment. It held that the 1959 Act extinguished the Tribe's existence; ratified the 1840 treaty; terminated the trust relationship between the Tribe and the federal government; and made state law applicable to the Tribe's claim. It then held that the state statute of limitations barred the claim.

III

In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–68, 94 S.Ct. 772, 777, 39 L.Ed.2d 73 (1974), the Supreme Court reiterated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land.... The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians ... within the United States, shall be valid to any person ... or to any state ... unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. (footnote omitted)

[1] To establish a *prima facie* case for a violation of the Nonintercourse Act, the Tribe must prove four elements: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act: (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; and (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir.1979); *Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798, 803 (D.R.I.1976).

The district court assumed these elements existed until the enactment of the Catawba Indian Tribe Division of Assets Act of 1959. Thus, the principal issue is whether the 1959 Act precludes the Tribe from relying on the Nonintercourse Act and subjects its claim to the South Carolina statute of limitations.

IV

[2, 3] In considering the effect of the 1959 Act on the Tribe's claim, we must be mindful of the canons of construction the Supreme Court has enunciated for use in construing statutes that affect Indian tribes. Such statutes should not be construed to the Indians' prejudice. Congressional intent to abrogate or modify a treaty right must be clearly expressed, and doubtful expressions are to be resolved in favor of the Indians. *See Antoine v. Washington*, 420 U.S. 194, 199–200, 95 S.Ct. 944, 948, 43 L.Ed.2d 129 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504–05, 93 S.Ct. 2245, 2257–58, 37 L.Ed.2d 92 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13, 88 S.Ct. 1705, 1710–11, 20 L.Ed.2d 697 (1968).

Both sides present plausible arguments to support their reading of the 1959 Act in which they rely in part on the Act's legislative history in order to discern Congress's intent. We conclude that it is appropriate to examine the legislative history and surrounding circumstances in order to construe the Act properly. *See Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

The process toward passage began in late 1958 when Bureau of Indian Affairs officers met tribal members. An Indian expressed concern about the Tribe's treaty reservation claim against South Carolina, but the Bureau officer assured him "that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government" for the distribution of tribal assets.[9]

In January 1959, the Tribe adopted a resolution, drafted by the Bureau, which requested the removal of federal restrictions on their 3,434 acre reservation. The resolution specifically conditioned tribal support of division of assets legislation on leaving the treaty reservation claim unaffected:

> Now, therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, its General Council ... hereby formally requests [our Congressman] to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land, in York County, South Carolina, so that it can be patented, ... *and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.* (emphasis added)

The Congressman then requested the Bureau to draft legislation "to accomplish the desires set forth in the Resolution."[10] The Congressman presented the draft bill to the Tribe two months later, again saying it "carr[ied] out the intent of the resolution."[11] The Tribe then approved the bill and it was introduced in Congress on April 7, 1959.

The House and Senate committee reports on the bill are similar. Both state: "The purpose of [the bill] is to provide for the division of the assets of the Catawba Indian Tribe of South Carolina among its enrolled members in approximately equal shares."[12] In addition, the reports quote from a Department of the Interior recommendation which states:

9. Memorandum of Jan. 30, 1959, from a Program Officer to the Chief of the Branch of Tribal Programs of the Bureau of Indian Affairs, at 7.

   For a number of years, South Carolina and the Tribe have unsuccessfully negotiated to settle the Tribe's claim. *See, e.g.*, Letter from the Assistant Commissioner of the Bureau of Indian Affairs to the Chief of the Catawba Tribe, dated Feb. 3, 1937; Letter from the Assistant Commissioner of the Bureau of Indian Affairs to the State Auditor of South Carolina, dated Feb. 3, 1937. *See generally* U.S. Comm'n on Civil Rights, *Indian Tribes* 117–18 (1981).

10. Letter from the Congressman to the Legislative Associate Commissioner of the Bureau of Indian Affairs, dated January 26, 1959.

11. Minutes of Meeting of the Catawba Council held March 28, 1959, at 2.

12. S.Rep. No. 863, 85th Cong., 1st Sess. 1 (1959); H.R.Rep. No. 910, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.Code Cong. & Ad.News 2671, 2672.

> In accordance with the [1943] memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and . . . conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.[13]

The bill was signed by President Eisenhower on September 21, 1959, and became effective in 1962. At that time, the Department of the Interior informed the Tribe of the revocation of its constitution, the transfer of jurisdiction to the state, and the termination of the 1943 Memorandum of Understanding.[14]

[4] Viewed in its entirety, we believe the legislative history of the 1959 Act fails to suggest any congressional intent to affect any claim the Tribe might have against South Carolina. Rather, the legislative history and text of the Act indicate it was intended only to end federal supervision and assistance arising out of the 1943 Memorandum of Understanding. Although the House and Senate reports show Congress was aware of the 1840 Treaty, there is no explicit or implicit indication of any desire to extinguish any tribal claims against South Carolina. In fact, the Act's history suggests a congressional intent not to affect any such claims. The Tribe conditioned introduction of the Act on leaving the treaty reservation claim unaffected, and the Act's congressional sponsor stated it was designed to accomplish the Tribe's desires as expressed in the tribal resolution.

We therefore cannot accept the district court's interpretation of the 1959 Act as ratifying the 1840 Treaty. The Act does not expressly ratify it. There also is no mention of the 1760 and 1763 Treaties, by which the Tribe received the 144,000 acres in issue. Thus, the district court's construction of the Act is contrary to the requirement that congressional intent to terminate a treaty reservation must be clear. *See DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975).

V

Essential elements of a cause of action under the Nonintercourse Act are proof that the complainant is an Indian tribe and that it has maintained a trust relationship with the federal government. The district court assumed that the Catawbas satisfied these requirements before 1959, but it concluded that the Division of Assets Act terminated the Tribe's existence. The court also held that the Act terminated the Tribe's trust relationship with the federal government with respect to the Nonintercourse Act. In support of the district court's decision, South Carolina emphasizes that the 1959 Act revoked the Tribe's constitution.

The authoritative commentary, Cohen, *Federal Indian Law* 815 (1982), explains the effect of termination on tribal status:

> Termination legislation did not literally terminate the existence of the affected tribes. Further, its effect was not necessarily to terminate all of the federal government's relationship with those tribes. Tribal powers can be extinguished only by clear and specific congressional action. Indian tribes can be recognized by the United States for some purposes and not for others. (footnotes omitted)

Cohen's explanation is fully supported by cases that have considered this issue. *See, e.g., Menominee Tribe of Indians v. United States*, 388 F.2d 998, 1000–01, 179 Ct.Cl. 496 (1967), *aff'd*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (by implication); *Kimball v. Callahan*, 590 F.2d 768, 773–75 (9th Cir.1979).

Revocation of the Tribe's constitution did not terminate the Tribe. The tribal constitution was adopted pursuant to 25 U.S.C.

13. S.Rep. No. 863, 86th Cong., 1st Sess. 3 (1959); H.R.Rep. No. 910, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1959 U.S.Code Cong. & Ad.News 2671, 2673.

14. *See* Letter from the Secretary of the Department of the Interior to the Chief of the Catawba Tribe, dated June 15, 1962.

§ 476[15] and the 1943 Memorandum of Understanding. Its revocation is consistent with the termination of federal assistance arising out of that Memorandum. As we mentioned in note 4, *supra*, the federal government on advice of the Solicitor of the Department of Interior refused to include a clause in the 1943 Memorandum of Understanding that would have extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. The constitution was adopted to implement the Memorandum of Understanding. Consequently, it would be illogical, and indeed ironic, to hold, as South Carolina urges, that Congress intended revocation of the constitution to defeat the same treaty claims that the parties to the Memorandum of Understanding had refused to extinguish.

The Supreme Court has defined a "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901). The Court has applied this definition to bring within the scope of the Nonintercourse Act a tribe of Indians that did not have a federally recognized form of government. *See United States v. Candelaria*, 271 U.S. 432, 441–42, 46 S.Ct. 561, 562–63, 70 L.Ed. 1023 (1926). *See also* Cohen, *Federal Indian Law* 18 (1982) ("any continuing organization, however informal, would deny the abandonment of tribal existence"). Despite revocation of the tribal constitution, the Catawba Tribe continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory. Indeed, South Carolina to this date recognizes the Tribe's existence by continuing to hold a 630 acre reservation in trust for it.[16]

Any doubt about the effect of the 1959 Act on the Tribe's existence is put to rest by reference to its text. The Act provides for a final roll of the membership of the Tribe for the disposition of its assets. It authorizes the tribal council to designate any part of the Tribe's land that is to be set aside for church, park, playground, or cemetery purposes. 25 U.S.C. §§ 931 and 933. Furthermore, it provides that nothing in the Act shall affect the rights, privileges, and obligations of the Tribe under the laws of South Carolina. 25 U.S.C. § 936. Clearly, the Congress did not intend the Division of Assets Act of 1959 to end the Tribe's existence.

We also hold that the 1959 Act did not end the trust relationship between the Tribe and the federal government. The *res* of this trust is the Tribe's reservation, which was created by the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763 with the English Crown. When the Nonintercourse Act was enacted some 27 years later, these treaties were in effect. The Tribe's right of occupancy, conferred by the treaties, was honored by the United States which had succeeded to the rights claimed by the English Crown, and the Tribe's right of occupancy could be abrogated only by the federal government. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–70, 94 S.Ct. 772, 777–78, 39 L.Ed.2d 73 (1974); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345–47, 62 S.Ct. 248, 251–52, 86 L.Ed. 260 (1941); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 586, 5 L.Ed. 681 (1823).

[5–7] The purpose of the Nonintercourse Act was to assert the primacy of federal law and to acknowledge and guarantee the Tribe's rights of occupancy to their lands. *See Oneida Indian Nation*, 414 U.S. at 667, 94 S.Ct. at 777; *Santa Fe Pacific R.R.*, 314 U.S. at 348, 62 S.Ct. at 252. The Nonintercourse Act creates a trust or fiduciary rela-

15. "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . ."

This provision was enacted in order to encourage revitalization of tribal self-government through the adoption of more formal governmental procedures. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151–52, 93 S.Ct. 1267, 1271–72, 36 L.Ed.2d 114 (1973).

16. *See supra* note 3 and accompanying text.

tionship between the federal government and the tribe somewhat akin to the relationship of guardian and ward. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir.1975). *Passamaquoddy* establishes that a trust relationship created by the Nonintercourse Act exists even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the Tribe. *Passamaquoddy* also establishes that the absence of federally recognized tribal government and the exercise of state jurisdiction over a tribe and its members neither dissolves the trust relationship arising out of the Nonintercourse Act nor renders the Act inapplicable to the tribe's claims.

[8] Congress, of course, may terminate the trust relationship, thus abrogating the federally recognized right of the tribe to its occupancy of reservation lands, but its intention to do so must be plain and unambiguous to be effective. *See DeCoteau v. United States*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Santa Fe Pacific R.R.*, 314 U.S. at 346, 62 S.Ct. at 251; *Passamaquoddy*, 528 F.2d at 380. Doubtful expressions of legislative intent must be resolved in favor of the Indians. *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1092.

In support of its contention that the Division of Assets Act of 1959 terminated both the existence of the Tribe and its trust relationship with the federal government, South Carolina particularly relies on the clause in 25 U.S.C. § 935 which provides:

> [T]he Tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

South Carolina argues that this provision included the withdrawal of the protection conferred on the Tribe by the Nonintercourse Act. The Catawbas insist that this provision of the 1959 Act applies only to individual Indians and not to the Catawba Tribe. The applicability of the Nonintercourse Act to the rights of the Tribe, they assert, was not affected.

The legislative histories of both the Nonintercourse Act and the 1959 Act, and Supreme Court precedent, support the position of the Catawbas. Although the terms "Indians" and "Indian tribes" frequently have been used interchangeably in various contexts, the distinction is critical when the application of the Nonintercourse Act is an issue. Initially the Act applied to both Indians and Indian tribes. Later, however, Congress deleted the reference to Indians. *See* 4 Stat. 730–31 (1834). Henceforth, the Nonintercourse Act afforded protection only to the lands of Indian tribes. We do not feel free to assume that Congress was unaware of this distinction. We cannot attribute to Congress an intention to bar by the 1959 Act the Catawba's claim to tribal lands. By providing that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them," we conclude that Congress did not intend to render inapplicable the Nonintercourse Act which by its terms applied to Indian tribes. As we have pointed out, the Catawbas had been assured by a representative of the Bureau of Indian Affairs and the congressional sponsor of the 1959 Act that their resolve to preserve their claims against South Carolina would not be affected by the Act. We will not impute to Congress an intent to circumvent these assurances by implicitly enlarging the term "Indians" to embrace the "Catawba Indian Tribe."

Precedent supporting the Catawbas is found in *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). In that case the question arose whether the Menominee Termination Act of 1954 abrogated the Tribe's fishing and hunting rights conferred by a treaty in 1854. The Court held that the Act did not have this effect, saying at 412–413, 88 S.Ct. at 1710–1711:

The Termination Act by its terms provided for the "orderly termination of Federal *supervision* over the property and members" of the tribe. 25 U.S.C. § 891. (Emphasis added.) The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction."

The provision of the Termination Act (25 U.S.C. § 899) that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists . . . "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

There is no explicit or clear implicit indication in the 1959 Act that Congress intended to terminate the relationship arising out of the Nonintercourse Act's application to the lands granted by the 1760 and 1763 Treaties. Furthermore, in at least one similar act, Congress clearly terminated the federal trust relationship with respect to the affected tribe, something it did not do in the 1959 Act. *Compare* 25 U.S.C. § 935 (Catawba Tribe, no explicit termination) *with* 25 U.S.C. § 980 (Ponca Tribe, explicit termination).

VI

Having concluded that the 1959 Act made the South Carolina statute of limitations applicable to the Tribe's claim, the district court went on to hold that the state statute barred the claim.

Section 936 explicitly provides that nothing in the Act shall affect the rights of the Tribe under the laws of South Carolina.[17] For the purpose of the summary judgment entered by the district court, it was assumed that prior to the enactment of the Division of Assets Act in 1959 the South Carolina statute of limitations did not affect the right of the Tribe to claim its tribal reservation. Consequently, it is incongruous to say, despite § 936, that the 1959 Act did affect this right by allowing application of the state statute of limitations to bar the claim. Yet this is precisely what the district court did through its interpretation of the 1959 Act.[18] The 1959 Act neither prohibits nor authorizes the application of state law to bar the Tribe's reservation claim.

We cannot accept the district court's interpretation of the 1959 Act. Consequently, its decision that the state statute of limitations bars the Tribe's claim must be set aside. The Nonintercourse Act and the supremacy clause preempt state law defenses, such as adverse possession or statutes of limitation, which might otherwise preclude the Tribe's suit. *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 614-15 (2d Cir. 1981); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir.1938).

VII

We conclude that the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim. In short, the 1959 Act is neutral with respect to the Tribe's reservation claim. It

17. *See supra* note 6.

18. The district court held:

> Because [§ 935] of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked.

neither confirms the claim nor extinguishes it.

The judgment of the district court is reversed, and the case is remanded for entry of an order denying the defendants' motion for summary judgment and for further proceedings consistent with this opinion.

K.K. HALL, Circuit Judge, dissenting:

I cannot accept the majority's conclusion that the district court erred in granting defendants' motion for summary judgment and in dismissing plaintiff's action. In my view, the 1959 Catawba Indian Tribe Division of Assets Act, 25 U.S.C. § 931 *et seq.*, unquestionably terminated the Tribe's legal existence, ended any trust relationship between the Catawbas and the federal government, and made South Carolina law fully applicable to whatever claim plaintiff may have had to the Tribe's ancestral land. I agree with the district court that plaintiff's claim, if valid at all, is in any event barred by South Carolina's statute of limitations governing real property. I must, therefore, dissent.

Plaintiff in this case, a non-profit corporation, alleges that it is the successor to the Catawba Indian Tribe and that, as such, it has an ownership interest in approximately 144,000 acres of land in three South Carolina counties. According to the record, however, by 1840, the Catawbas had leased to white settlors all of the 144,000 acres now in dispute.[1] In 1840, the Catawbas entered into an agreement with the State of South Carolina, known as the Treaty of Nation Ford, in which they gave up any remaining interest they had in the 144,000 acres. Now, by seeking to defeat this 1840 transaction, plaintiff requests relief which would destroy the titles of more than 27,000 South Carolina citizens. In light of this history and because of the provisions of the Catawba Act, it is clear to me that plaintiff's claim to the Tribe's ancestral land must fail.

Unlike the majority, I am convinced that the central purpose of the Catawba Act was to terminate federal responsibility to the Tribe and its individual members. Partial termination was specifically rejected by the bill's sponsor and the Catawbas, who voted in favor of complete termination. Furthermore, the plain and far-reaching language of the Act clearly reflects congressional intent to terminate any special federal status the Catawbas may previously have held and to put them on an equal footing with other citizens. To this effect, the Act even includes a provision which revokes the tribe's constitution. Under Section Five of the Catawba Act, 25 U.S.C. § 935:

> The constitution of the tribe adopted pursuant to . . . this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and *the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States. (Emphasis added).

Section 6 of the Catawba Act, 25 U.S.C. § 936, similarly provides that "[n]othing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members *under the laws of South Carolina.*" (Emphasis added).

In my view, the revocation of the Tribe's constitution unequivocally ended the Catawbas' existence as a political or governmental entity under federal law and prevents plaintiff from having the necessary standing to bring this action under the Nonintercourse Act. As the majority opinion correctly notes, there are four prerequisites to establishing a prima facie case under the Nonintercourse Act. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir.1979). One of these requirements is that plaintiff show

1. The 1763 Treaty of Augusta, entered into between the Tribe and the representatives of the King of England, in which the Catawbas agreed to be settled on the 144,000-acre tract, contained no restrictions on alienating this property.

that it is or represents an Indian tribe. In my view, the revocation of the Tribe's constitution makes it impossible for plaintiff to establish this necessary element of a prima facie case. Furthermore, the revocation of the Catawbas' tribal constitution terminated the trust relationship between the Tribe and the United States, rendering it impossible for plaintiff to meet yet another prerequisite to a prima facie case under the Nonintercourse Act. Because plaintiff can establish neither of these requirements, its claim under the Nonintercourse Act is fatally defective.

Moreover, the explicit statutory language of Sections 5 and 6 of the Catawba Act makes it clear that the legislation was intended to accord the Catawbas the same privileges and responsibilities as other South Carolina citizens. Thus, from the time the tribe's constitution was revoked on July 1, 1962, the Catawbas, and any federal claim they might have then had, were subject to the operation of state law in the same manner as all other citizens of South Carolina and their claims.

One of the laws that became applicable to the Catawbas in 1962 was South Carolina's statute of limitations governing real property claims. S.C.Code § 15–3–340 states in pertinent part that "[n]o action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action." Thus, even if the Catawba Act did not extinguish the Catawbas' claim to the land which their ancestors had long since alienated, this suit, brought some 18 years after the statute of limitations had begun to run, is unquestionably time-barred.

The application of South Carolina's statute of limitations in this case is entirely consistent with Supreme Court precedent. In *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), the Supreme Court's most recent decision construing a termination act, terminated Indians were required to challenge allegedly fraudulent transfers of property under the same laws as non-Indians. In an earlier decision, *Schrimpscher v. Stockton*, 183 U.S. 290, 22 S.Ct. 107, 46 L.Ed. 203 (1901), Indian heirs sued to recover land conveyed by a Wyandotte Indian at a time when alienation was prohibited by federal treaty. In light of a subsequent treaty, which had terminated such restrictions, the Supreme Court held that the state statute of limitations had run, precluding recovery:

> Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered [sic] title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, *they were bound to assert their claims within the period limited by law*. This they did not do under any view of the statute, (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years. *Id.* at 296, 22 S.Ct. at 110. (Emphasis added).

See also, Dillon v. Antler Land Co., 341 F.Supp. 734 (D.Mont.1972), *aff'd* 507 F.2d 940 (9th Cir.1974), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975); *Dennison v. Topeka Chambers Industrial Development Corp.*, 527 F.Supp. 611 (D.Kan.1981) (both holding that state statutes of limitations begin to run once restrictions are removed and state law is made applicable).[2]

2. The majority's reliance on the Supreme Court's decision in *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), is misplaced. In *Menominee*, the tribal constitution was not revoked, as in the present case. Furthermore, the hunting and fishing rights, which were the subject of the Menominees' claim, had never been alienated. In this case, the Catawbas have not occupied the property in question for more than 180 years.

As the Tenth Circuit noted in *Reyos v. United States*, 431 F.2d 1337, 1343 (10th Cir.1970), *aff'd in part and rev'd in part, Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), "[i]t is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination." I submit that the majority in this case has impermissibly substituted its own judgment for that of Congress. By doing so, it has succeeded in nullifying the clear mandate of the Catawba Act and has placed in jeopardy the long-established rights of over 27,000 South Carolina citizens. Because I believe the district court was correct in dismissing plaintiff's action, I would affirm the judgment below.

ESTATE OF Helen M. JOHNSON, Deceased, Lolita McNeill Muhm, Independent Executor, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

No. 82-4074.

United States Court of Appeals, Fifth Circuit.

Oct. 24, 1983.

Rehearing Denied Nov. 30, 1983.

Commissioner of Internal Revenue appealed from a decision of the United States Tax Court, 77 T.C. 120, allowing deduction of value of homestead interest of surviving spouse from value of property included in decedent's gross estate. The Court of Appeals, Randall, Circuit Judge, held that waivable forced heirship provision of Texas homestead law was enacted in lieu of dower or curtesy, and therefore value of surviving spouse's homestead interest is includible in decedent's gross estate for federal estate tax purposes.

Reversed and remanded.

1. Dower and Curtesy ⇐1

Term "dower" generally refers to interest widow takes in estate of her deceased husband; "curtesy" is corresponding right of husband by which he is entitled, on death of his wife, to life estate in lands of which she was seized during her coverture, provided they have had lawful issue born alive which might have been capable of inheriting estate.

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

2. Homestead ⇐58

"Homestead," in both popular and legal sense, means "homeplace" or family home, and also property which is protected because it is family home.

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

3. Homestead ⇐1

Under Texas law, homestead interest is an estate in property itself which vests at marriage.

4. Dower and Curtesy ⇐3
Internal Revenue ⇐4152

Waivable forced heirship provision of Texas homestead law was enacted in lieu of dower or curtesy, and therefore value of surviving spouse's homestead interest is includible in decedent's gross estate for federal estate tax purposes. 26 U.S.C.A. §§ 2033, 2034, 2051; Vernon's Ann.Texas Const. Art. 16, § 52.

5. Internal Revenue ⇐4151

For purposes of federal estate tax, while courts must look to state property law to determine nature of decedent's interest in property, taxation under federal law is not determined by local characterization; however, this rule has no application in cases in which federal statute makes its operation dependent upon state law.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,

v.

STATE OF SOUTH CAROLINA, Richard W. Riley, as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater North American Corporation; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright; Ned Albright; J.W. Anderson, Jr.; John Marshall Wilkins, II; Jesse G. Anderson; John Wesley Anderson; David Goode Anderson; W.B. Ardrey, Jr.; Eliza Beth Ardrey Grimball; John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron; Wilson Barron; Archie B. Carroll, Jr.; Hugh William Close; James Bradley; Francis Lay Springs; Lillian Crandel Close; Francis Allison Close; Leroy Springs Close; Patricia Close; William Elliot Close; Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris; Annie F. Harris; T.W. Hutchinson; Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.E. Reid, Jr.; Will R. Simpson; John S. Simpson; Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshal E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Goode; R.N. Bencher; W.O. Nisbet, III; Pauline B. Gunter; J. Max Minson; W.A. McCorkle; Mary McCorkle; William O. Nisbet; Eugenia Nisbet White; Mary Nisbet Purvis; E.N. Martin; Robert M. Yoder, Appellees.

No. 82-1671.

United States Court of Appeals, Fourth Circuit.

Argued June 4, 1984.

Decided Aug. 17, 1984.

Don B. Miller, Boulder, Colo., and Jean H. Toal, Columbia, S.C. (Native American Rights Fund; Belser, Baker, Barwick, Ravenel, Toal & Bender, Columbia, S.C., Robert M. Jones, Rock Hill, S.C., Mike Jolly and Richard Steele, Union, S.C., on brief), for appellant.

John C. Christie, Jr., Chicago, Ill., J.D. Todd, Jr., Greenville, S.C., James D. St. Clair, Boston, Mass. (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd, Chicago, Ill., Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann, Greenville, S.C., Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd & Byrd, Rock Hill, S.C., James L. Quarles, III, William F. Lee, David H. Erichsen; Hale & Dorr, Boston, Mass., T. Travis Medlock, Atty. Gen., Kenneth P. Woodington, Asst. Atty. Gen. for the State of South Carolina, Columbia, S.C., on brief), for appellees.

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge. (en banc) *

* Judge Russell, Judge Ervin, and Judge Chapman did not participate in the hearing or the decision of this appeal.

PER CURIAM:

The judgment of the district court is reversed, and this case is remanded for further proceedings for reasons stated in the opinion of the panel. *Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291 (4th Cir.1983). Judge Widener, Judge Hall, and Judge Phillips, dissenting, would affirm the judgment of dismissal for the reasons stated in Judge Hall's dissent to the panel opinion. 718 F.2d at 1301–03.

MURNAGHAN, Circuit Judge, concurring:

For the reasons so cogently expressed by Judge Butzner in his opinion for the panel majority, I agree that "the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim." *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 718 F.2d 1291, 1300 (4th Cir.1983).[1] While the dissent has delivered a respectable argument to the contrary, we face at most a case in which the congressional statement is open to dual interpretations. We may, however, permit only a plain and unambiguous expression of congressional intent to abrogate a federally recognized right and terminate a trust relationship. Furthermore, construction of statutes affecting Indian tribes should proceed on the basis of tender concern for the rights of Indians. The uncertainty in statutory interpretation in the instant case is properly resolved in favor of the Catawba Tribe.

I therefore unreservedly join in the opinion of Judge Butzner, reversing the award of summary judgment in favor of South Carolina. As for the other defendants, landowners of parcels compositely comprising the 144,000 acres, no arguments separate and distinct from those advanced on behalf of the State of South Carolina have been made, and, consequently, on the present state of the record I also agree that summary judgments in their favor should be reversed.

My concurrence with respect to the private defendants, however, is a troubled one. Since the Tribe's claim at present includes the right to actual possession, a complete victory for the Catawba Tribe would leave up in the air or by the side of the road the approximately 27,000 people claiming title through deeds or other sources to the 144,000 acres. It appears to be a tacit assumption that ejectment would never be allowed actually to occur, even were we in the end to validate continued vitality of the Indian title to the 144,000 acres. Rather, through accommodation between the Indians and either or both of the United States and the State of South Carolina, the Catawba Tribe would relinquish all possessory claims in return for money or other benefits.

For myself, I take little solace in the consideration that a proper, fair and equitable result *may* possibly come about by reason of enlightened, but by no means mandatory, legislative or executive action. Such a posture would still leave too many innocent good faith landowners at an awesome risk that political realities related to efforts by both sovereigns to right a long standing wrong, might lead to the Queen of Spades ultimately winding up in the hands of the individual owners.

While I therefore harbor grave doubts, that, as a matter of grace, a government will rescue the current occupants of the land, I take greater comfort in the realization that there may be available on remand an argument that would at once retain the vitality of the claims of the Catawba Tribe and also afford protection to the innocent, private landowners.

1. Judge Butzner's panel majority opinion is adopted by reference in the *per curiam* opinion following *en banc* rehearing. Judge Butzner was joined by Chief Judge Winter, Judge Sprouse, and now by me. The opposing opinion of Judge Hall was joined by Judge Widener and Judge Phillips. It, too, is incorporated by reference in the *per curiam* opinion.

> [A]s the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, *id.* at 357, 47 S.Ct. at 143, the court has authority to award monetary relief for the wrongful deprivation. *Id.* at 359, 47 S.Ct. at 144.

Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1083 (2nd Cir.1982). In reaching its result, the *Yankton* court expressed its concerns for the plight of the innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers ....

Yankton Sioux Tribe v. United States, *supra*, at 357, 47 S.Ct. at 144. The court concluded that, since the Indians were entitled to a judgment in their favor, but a restoration of the lands to the Indians was an impossible remedy, the Indians were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359,[2] 47 S.Ct. at 144.

Under *Yankton* and *Oneida*, therefore, one or both of the sovereigns (the United States or South Carolina) may indeed owe to the Tribe just compensation. On that basis, the titles of the 27,000 landowners would be held to be paramount and they, without surrender of the land or payment in cash, would be entitled to judgment. South Carolina's liability might arise from the fact that, assuming that the 1840 Treaty is invalid under the Nonintercourse Act, the state entered into an invalid treaty with the Catawba Tribe and induced innocent landowners to settle on the land. That may be held to translate into an obligation to protect the present occupants or other claimants by paying just compensation to the Catawbas for the land.

As for the United States,[3] it remains to be explored whether liability to pay just

2. It is not particularly earthshaking for a court to tailor the remedy to the problem at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 554.54 Acres of Land*, 441 U.S. 506, 510, 99 S.Ct. 1854, 1856, 60 L.Ed.2d 435 (1979); *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 77, 78 L.Ed.2d 88 (1983) ("[T]he government must, and need do no more than, put the owner in '... as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875, *quoting Olson v. United States*, *supra*, 292 U.S. at 255, 54 S.Ct. at 708). The public purpose to justify a taking is not open to serious question. At a bare minimum, present occupants should not be required, because customarily in unitary instances of ejectment the remedy is return of the property itself and not a monetary "substitute," to surrender possession, if just compensation is indeed awarded to the Catawba Tribe.

3. Nothing should preclude amendment by the Catawba Tribe of its complaint to name the United States as a defendant, thereby presenting the issue for resolution. Similarly, South Carolina might endeavor to raise the question through impleading the federal government.

It would remain to be seen whether either the Catawba Tribe or South Carolina could overcome a likely claim of sovereign immunity raised by the United States. *See, e.g., Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141–143, 92 S.Ct. 1456, 1466–1467, 31 L.Ed.2d 741 (1972). *Cf. Antoine v. United States*, 637 F.2d 1177, 1181–82 (11th Cir.1981); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146–147 (8th Cir.1970). *See also United States v. Oneida Nation of New York*, 477 F.2d 939 (Ct.Cl. 1973). It might become necessary to explore the possibility that consent in this instance can be inferred from the Nonintercourse Act, the 1959 Act or even some future legislation Congress may see fit to enact.

An analogous obstacle to recovery from South Carolina may arise in the Eleventh Amendment context. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *But cf., Parden v. Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). *See generally*, L. Tribe, *American Constitutional Law*, 129–138 (1978).

Alternatively, the time may be at hand to decide whether, in the dying writhings of an outmoded concept, time has passed sovereign immunity by if not elsewhere in the absence of legislative consent to be sued, at least in the area of executive and legislative actions relating to relationships at the highest governmental levels such as those between the United States and an Indian tribe.

compensation to the Indians arises, either from the Government's failure to protect their claim to possession despite the special relationship between the United States and the Indians, or from the government's failure to extinguish the Catawba's possessory claims in light of the extensive reliance by the innocent parties on apparently good and clear title.[4]

The resolution of the competing claims through the just compensation concept has the great and equitable advantage of protecting the innocent landowners from sustaining monetary injury. Certainly, the two sovereigns, the United States and the State of South Carolina, have done nothing to warn them off the land. To the contrary, the sovereigns have actively encouraged their settlement or the settlement of their predecessors, and, no doubt, have actively benefited through real property and income taxes assessed against the land in their hands or against profits generated by its use.

Resolution of the issues raised above is, of course, premature. After remand, it remains possible that one, or both, sovereigns can be stimulated into doing what together they should have done long since. Additionally, the parties may be able to resolve their differences by means wholly apart from those suggested here. The route described is merely one attempt to avoid remedying one inequity by perpetrating another, perhaps greater, one. It would indeed be tragic and unfair for the long-overdue resolution of the Catawba Tribe's claims to occur exclusively and disproportionately at the expense of the more than 27,000 innocent South Carolina citizens with claims to the contested land, more recent in the sense of strict accuracy than those of the Tribe, but long standing in fact, reaching back over 140 years. By our society's general attitude, a title of that uninterrupted duration should be good against the world.

Even if sovereign immunity concepts still would preclude in this case recovery against the United States and South Carolina, they concern only a jurisdictional barrier, and do not preclude judicial allocation of rights and responsibilities. If the United States and South Carolina elect to plead sovereign immunity, and therefore to waive the right to appear and assert their positions when a court is determining who owes what to whom, a right of the Catawba Tribe against the sovereigns may no less be asserted and established even if judicially it may not be enforced. The right, outstanding if not realizable by judicial process, may nevertheless be pursued in the halls of the legislatures. It should not lightly be inferred that a government, the best we know and have, will not respond to a valid claim or claims simply because it cannot be compelled to pay.

The question here remains as to where rights and responsibilities to the land or to compensation for it lie. Legally, the question of who is entitled is not the same as who may enforce in court the entitlement. It remains for a later stage in these proceedings to address potentially far-reaching and tantalizingly fascinating questions.

4. It may also become necessary to consider whether cases such as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284–5, 75 S.Ct. 313, 319–320, 99 L.Ed. 314 (1955) are distinguishable on the basis that, in those cases, explicit and affirmative action by the Congress, rather than neglect or a failure to act, led to the abrogation of the Indians' possessory claims.

Alvin R. MOORE, Jr., Petitioner-Appellee Cross Appellant,

v.

Ross MAGGIO, Jr., Warden, Louisiana State Penitentiary and William J. Guste, Jr., Attorney General, State of Louisiana, Respondents-Appellants Cross Appellees.

No. 83-4718.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1984.

Rehearing and Rehearing En banc Denied Sept. 12, 1984.

Petitioner, who had been convicted of murder and sentenced to die, filed a peti-

been detained but released on appropriately stringent conditions.

Circuit Judge MURNAGHAN and Circuit Judge ERVIN join in this separate opinion.

Timothy A. BROWN, Plaintiff-Appellee,

v.

Robert J. LOWEN, et al, Defendants-Appellants.

No. 88-2876.

United States Court of Appeals, Fourth Circuit.

Jan. 11, 1989.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Prior report: 857 F.2d 216.

The appellants' petition for rehearing and suggestion for rehearing in banc was submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the April 1989 Term of Court. Within ten days of the date of this order 11 additional copies of appellants' informal brief and 11 additional copies of appellee's informal brief shall be filed.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina, Appellant,

v.

STATE OF SOUTH CAROLINA, et al., Appellees.

No. 82-1671.

United States Court of Appeals, Fourth Circuit.

Argued April 6, 1988.

Decided Jan. 23, 1989.

Indian tribe brought suit to recover possession of its land and damages. The United States District Court for the District of South Carolina, Joseph P. Wilson, J., sitting by designation, granted summary judgment in favor of defendants, and tribe appealed. The Court of Appeals, 718 F.2d 1291, 740 F.2d 305, reversed and remanded, and defendants petitioned for certiorari. The Supreme Court, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490, reversed and remanded. The Court of Appeals, Butzner, Senior Circuit Judge, held that: (1) statutes of limitations pertaining to disabled persons did not bar suit; (2) fact that treaty which was source of tribe's Indian title was not recorded in South Carolina's Registry of Mesne Conveyances did not defeat tribe's claim; (3) tribe was presumed to have been possessed of the land within the ten years specified for bringing action for recovery of real property; (4) tribe was barred from recovering possession and damages from person who held and possessed property that had been held and possessed adversely to tribe's legal title for ten years after revocation of tribe's constitution and before commencement of suit, without tacking except by inheritance, but statute of limitations did not bar tribe's claim against any other person; and (5) court had jurisdiction.

Affirmed in part, reversed in part and remanded.

Widener, Circuit Judge, filed dissenting opinion in which K.K. Hall, Circuit Judge, joined.

K.K. Hall, Circuit Judge, filed dissenting opinion in which Widener, Circuit Judge, joined.

1. Indians ⇐27(4)

Statutes of limitations pertaining to disabled persons did not bar Indian tribe's suit to recover possession of land and damages. S.C.Code 1976, §§ 15-3-340, 15-3-370.

2. Indians ⇐10

"Indian title" is title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign, and includes a right to possession superior to that incident to fee simple title.

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

3. Indians ⇐10

Where Indian title and fee simple title coexists, fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian right.

4. Indians ⇐10, 19

Indian title includes right to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass.

5. Indians ⇐15(2)

Indian title cannot be alienated except by act of Congress; a purported conveyance of the possessory right, even if made by tribe having such title, is void and no title passes.

6. Indians ⇐22, 27(4)

Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession or laches.

7. Indians ⇐3(1)

Fact that 1763 Treaty of Augusta, which was source of tribe's Indian title, was not recorded in South Carolina's Registry of Mesne Conveyances did not defeat tribe's claim; South Carolina legislature had affirmed that 1764 survey of Indian lands was duly filed. S.C.Code 1976, § 27-15-30.

8. Indians ⇐10

Reversionary interest, conditioned upon United States' extinguishing tribe's Indian title, was so remote that, like a possibility of reverter, it did not rise to dignity of an estate.

9. Indians ⇐27(6)

Tribe's Indian title was legal title and thus, under South Carolina statute, tribe was presumed to have been possessed of the land within the ten years specified for bringing action for recovery of real property. S.C.Code 1976, §§ 15-3-340, 15-67-210.

10. Indians ⇐27(4)

Under South Carolina law, Indian tribe was barred from recovering possession and damages from person who held and possessed property that had been held and possessed adversely to tribe's legal title for ten years after revocation of tribe's constitution and before commencement of suit, without tacking except by inheritance; statute of limitations did not bar tribe's claim against any other "person," including joint tenants, tenants in common, partnerships, associations and corporations. S.C. Code 1976, §§ 15-3-340, 15-67-210.

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

11. Indians ⇐27(2)

Indian tribe's capacity to invoke federal jurisdiction over an action or proceeding arising under act of Congress regulating commerce or over claim asserted "by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy rises under the Constitution, laws, or treaties of the United States" was not defeated by enactment of Catawba Act. 25 U.S.C.A. §§ 931-938; 28 U.S.C.A. §§ 1337, 1362.

12. Indians ⇐27(2)

Indian tribe's complaint alleging right of occupancy under treaties with British Crown that were implemented by Indian

Nonintercourse Act sufficed to provide jurisdiction under statute giving district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

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Before WIDENER, HALL, PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Supreme Court remanded this case for us to determine whether the claim of the Catawba Indian Tribe to a tract of land is barred by South Carolina statutes of limitations. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). We hold that the statutes of limitations pertaining to disabled persons, sections 15-3-370 and 15-3-40 of the Code of South Carolina, do not bar the tribe from maintaining this action. We also hold that sections 15-3-340 and 15-67-210 bar the tribe from recovering possession and damages from a person who holds and possesses property that has been held and possessed adversely to the tribe's legal title for ten years after the revocation of the tribe's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance. We also hold that the statutes of limitations do not bar the tribe from recovering possession and damages from other persons. We therefore affirm in part and reverse in part the district court's grant of summary judgment in favor of the state and all persons in possession and remand the case for further proceedings on the issues remaining to be tried.

I

The facts that we assume for the purpose of summary judgment are recounted in the majority and dissenting opinions of the Supreme Court [1] and need only be summarized here. In the 1760 Treaty of Pine Hill and the 1763 Treaty of Augusta, the tribe agreed with representatives of the King of England to relinquish its aboriginal territory in exchange for permanent resettlement on a fifteen square mile tract in South Carolina. In the 1840 Treaty of Nation Ford, the tribe transferred its interest in the tract to South Carolina. The United States did not participate in the Treaty of Nation Ford.

In 1959, Congress passed the Catawba Act, 73 Stat. 592, 25 U.S.C. §§ 931-38 (1976), which ultimately led to the revocation of the tribe's constitution on July 1, 1962. As of that date, the tribe's claim to the land it relinquished in 1840 became subject to South Carolina statutes of limitations.

In 1980, the tribe brought suit to recover possession of its land and damages. It asserts that the 1840 Treaty of Nation Ford was void because the United States did not participate in it or consent to the alienation of the tribe's reservation as required by the Indian Nonintercourse Act.[2]

1. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. at 500-05 and 511-18, 106 S.Ct. at 2041-43 and 2046-50 (Blackmun, J., dissenting).

2. 25 U.S.C. § 177 (1976) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto,

II

The state argues that the tribe was a disabled plaintiff within the meaning of sections 15–3–370 and 15–3–40 from 1840 to 1962, when Congress passed the Catawba Act. Therefore, the state asserts, the tribe had no longer than ten years after 1962, when its disability was lifted, to bring suit. According to the state, since the tribe did not file suit within this period, the statute of limitations bars its claim.[3]

Section 15–3–370 on which the state primarily relies provides:

> Persons under disability.
>
> If a person entitled to commence any action for the recovery of real property, or make an entry or defense founded on the title to real property or to rents or services out of the same be, at the time such title shall first descend or accrue, either:
>
> (1) Within the age of eighteen years;
>
> (2) Insane; or
>
> (3) Imprisoned on a criminal or civil charge or in execution upon conviction of a criminal offense for a term less than life;
>
> The time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making of such entry or defense, but such action may be commenced or entry or defense made after the period of ten years and within ten years after the disability shall cease or after the death of the person entitled who shall die under such disability. But such action shall not be commenced or entry or defense made after that period.

Section 15–3–40 recognizes identical disabilities for other causes of action.

[1] The state's position cannot be reconciled with section 15–3–370. The statute applies to only three classes of plaintiffs: infants, the insane, and persons imprisoned for less than their natural lives. Nothing in the statute creates a fourth class of plaintiffs in the tribe's position. Application of the statute obliges us to ascertain the legislature's intent. We cannot read something into the statute that the legislature did not contemplate. Quoting its precedents, the South Carolina Supreme Court has emphasized:

> [C]ourts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws.

Belk v. Nationwide Mutual Insurance Company, 271 S.C. 24, 27, 244 S.E.2d 744, 746 (1978). We conclude that the Supreme Court of South Carolina would not construe sections 15–3–370 and 15–3–40 to include Indians in the legislatively defined class of disabled persons. Therefore we hold that the disability statutes do not bar the tribe's claim.

III

Section 15–3–340 provides that no action for the recovery of possession of real property shall be brought unless the plaintiff or his predecessor was seized or possessed of the premises within 10 years before the commencement of the action. Section 15–67–210 creates a presumption of possession if the plaintiff establishes legal title.[4] The tribe acknowledges that it has not been in possession of the tract since 1840, but it maintains that it has Indian title to the tract and that Indian title is legal title

from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

3. For convenience we refer to all defendants collectively as the state.

4. Sections 15–3–340 and 15–67–210 are quoted in part V of this opinion.

within the meaning of section 15-67-210. Therefore, the tribe claims that it is entitled to the presumption of possession prescribed in section 15-67-210 and that the state cannot defeat its claim on the basis of the statute of limitations. The state argues that the tribe is not entitled to the presumption because Indian title is not legal title and that the presumption is inapplicable because the tribe admits it has been out of possession since 1840.

[2-6] Indian title is a creation of federal law. It is the title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign. Indian title includes a right to possession superior to that incident to fee simple title; where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title. Indian title includes the right to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass. Indian title cannot be alienated except by Act of Congress; a purported conveyance of the possessory right, even if made by a tribe having such title, is void and no title passes. Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession, or laches. *See generally Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-74, 94 S.Ct. 772, 776-81, 39 L.Ed.2d 73 (1974); F. Cohen, *Handbook of Federal Indian Law*, 471-574 (1982 ed.).

The state correctly points out that the 1763 Treaty of Augusta, which is the source of the tribe's Indian title, is not recorded in the Registry of Mesne Conveyances. Relying on this fact, it argues that the tribe's Indian title is not legal title. It insists that legal title is record title; that is, the title that is reflected in the Registry of Mesne Conveyances, and it cites numerous cases from South Carolina and other jurisdictions that refer to legal title and record title synonymously.[5]

[7] Neither South Carolina nor federal law supports the state's argument. The tribe's source of title is recorded, though not in the Registry of Mesne Conveyances. The Treaty of Augusta recites that the Catawbas accepted "the Tract of Land of Fifteen Miles square, a Survey of which by our consent and at our request has been already begun." XI Colonial Records of North Carolina 201-02 (1763). Current South Carolina law affirms that the survey was filed in the office of the Secretary of State. Section 27-15-30 describes the Catawba Indian lands as "situated in the counties of York and Lancaster, within a boundary of fifteen miles square and which are represented in the plat of survey made by Samuel Wiley, dated February 22, 1764 and now on file in the office of the Secretary of State." The state legislature recognized the survey filed in the office of the Secretary of State as a muniment of title, and it is reasonable to assume that the Supreme Court of South Carolina would take similar notice of it.

Our conclusion that lack of recordation in the Registry of Mesne Conveyances does not defeat the tribe's claim is substantiated by sound judicial precedent. The Superior Court of Law sustained a reservation for German immigrants in *Hawkins' Devisees v. Arthur*, 2 S.C.L. (2 Bay) 195 (1798). In 1730, the King of England offered "bounties of land" to his subjects residing in Germany. Notwithstanding the lack of a recorded deed, the court held that a reservation granted by the crown was superior to a subsequent grant from the state. The plat of a survey entered in the council books was a sufficient muniment of title. 2 S.C.L. (2 Bay) at 202-03. Even though the crown and subsequently the state held the reservation in trust for those persons who had a right of occupancy, the court ruled:

> As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between

5. *See, e.g., Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977); *Lynch v. Lynch*, 236 S.C. 612, 115 S.E.2d 301 (1960); *Knight v. Hilton*, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954).

> the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township and their heirs for ever, and to and for no other intent and purpose whatsoever.

2 S.C.L. (2 Bay) at 203.

In *Thomas v. Daniel*, 13 S.C.L. (2 McCord) 354, 357 (1823), the Constitutional Court of South Carolina stated that a 1777 treaty between the Cherokees and the state which by "mutual engagements" granted the Indians the right to inhabit certain lands during good behavior "was at least as binding as any contract can be upon sovereign powers." The court held that an estate granted a nation during good behavior "must be an estate forever" and that as long as the Cherokees conformed to the treaty, that is "'behaved themselves well,' this State was morally bound to permit them to continue in undisturbed possession of the land in question." 13 S.C.L. (2 McCord) at 357. The court then held that a subsequent grant by the state of a part of the reservation to a person who challenged the Cherokee grant was void. The lack of recordation in the Registry of Mesne Conveyances was no impediment to the Cherokees' title. Although the Constitutional Court did not use the term Indian title, the Indians' "estate forever" had incidents of Indian and legal title.

Current South Carolina law is consistent with the precedent established by *Thomas* and *Hawkins' Devisees*. Recordation in the Registry of Mesne Conveyances, while often a convenient proof of a conveyance, is not essential to establish legal title. In *Haithcock v. Haithcock*, 123 S.C. 61, 68, 115 S.E. 727, 729 (1923), the Supreme Court of South Carolina approved an instruction that explained to a jury how a claim of title can be established:

> Now, those are the ways in which a man may show title to land: First, by tracing it to the state, under a grant from the state; second, by tracing his title from a common source; third, by showing possession for 20 years in himself and those under whom he claims; and, fourth, by showing 10 years' possession in himself, or by inheritance.

The tribe rests its title on the first way—a grant of a reservation from the crown recognized by the state. Indeed, this grant is the common source of title, because the lessees of land encompassed by the grant and their successors, present occupants, trace title to the same crown reservation through grants made pursuant to the subsequent Treaty of Nation Ford. *See* S.C. Code Ann. §§ 27-15-30, -40, and -50.

Haithcock is also singularly instructive because it applies the statutory presumption on which the tribe relies without requiring proof of recordation or registry. After repeating four ways in which a person can prove title, the trial court correctly charged the jury: "Now, if he has shown that kind of title, then the possession is presumed to have been in the man who shows title in either one of these four ways." 123 S.C. at 85, 115 S.E. at 734. This presumption of possession is precisely what the tribe claims, having traced its title in the first of the four ways explained by the court.

Since 1698 South Carolina has had recording acts. *See Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927). Notwithstanding this long established provision for recordation, the state has cited no case holding that proof of recording in the Registry of Mesne Conveyances is necessary in order to establish legal title within the meaning of section 15-67-210. This lack of precedent is not surprising because "recording becomes material only when there are double conveyances by the same person, or where there are subsequent creditors." *First Carolinas Joint Stock Land Bank v. Hudgens*, 171 S.C. 18, 21, 171 S.E. 449, 451 (1933). Neither of these situations is involved in this case.

Because the South Carolina legislature recognized in section 27-15-30 that the 1764 survey of Catawba lands was duly filed, we conclude that based on its precedents the Supreme Court of South Carolina

would hold that the tribe's claim to legal title for the purpose of invoking the presumption provided in section 15-67-210 is not defeated by lack of recording in the Registry of Mesne Conveyances.

IV

The state also argues that the tribe lacks legal title because Indian title cannot be alienated except by Act of Congress. Without the ability to alienate the tract of fifteen square miles, the state argues the Indians had only equitable, not legal, title.

The state's argument requires us to examine the relationship of the United States as a guardian or trustee for the tribe particularly with respect to the nature of the tribe's Indian title. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 94 S.Ct. 772, 777-78, 39 L.Ed.2d 73 (1974), the Court succinctly stated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land.... The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians ... within the United States, shall be valid to any person ... or to any state ... unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day.

[8] The original 13 states hold the underlying fee simple title for lands subject to Indian title within their respective borders. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139-43, 3 L.Ed. 162 (1810). Elsewhere the United States holds fee simple title. But this naked fee gives the holder no possessory interest in the land. It constitutes merely a reversionary interest until Congress extinguishes the Indian title.[6] Congress's exclusive right to extinguish Indian title results from its trust relationship over Indian tribes. F. Cohen, *Handbook of Federal Indian Law*, 489 (1982 ed.). The federal trust relationship over Indian tribes is derived from the constitutional power conferred on Congress to regulate commerce with the Indian tribes and to make treaties. U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2; *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n. 7, 93 S.Ct. 1257, 1262 n. 7, 36 L.Ed.2d 129 (1973); F. Cohen, *Handbook of Federal Indian Law* 207-12 (1982 ed.).

In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1823), Chief Justice Marshall described a tribe holding Indian title "as the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Because only the United States could extinguish the tribal right, a conveyance by the tribe without the assent of the United States was inoperative. *Johnson*'s principles, as developed in subsequent decisions, indicate that "Indian title represents a perpetual right of use and occupancy (until extinguished) virtually equivalent to a fee interest against all but

6. In 1838, South Carolina transferred its reversionary interest in the tribe's land to lessees of the land. *See* § 27-15-30. This reversionary interest, conditioned upon the United States extinguishing the tribe's Indian title, is so remote that, like a possibility of reverter, it does not rise to the dignity of an estate. *See Adams v. Chaplin*, 10 S.C.Eq. (1 Hill) 265, 277 (1833).

the United States." F. Cohen, *Handbook of Federal Indian Law* 488, 489 (1982 ed.).

Johnson dealt with aboriginal land, but the Court has applied similar principles to lands that were the subject of grants or reservations by the crown. In *Mitchel v. United States*, 34 U.S. (9 Peters) 711, 9 L.Ed. 283 (1835), the Court recognized Indian title that originated in royal grants. Speaking of rights conferred on the Indians, the Court said that "it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites." 34 U.S. (9 Peters) at 746.

Again, in *United States v. Shoshone Tribe*, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938), the Court said: "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title."

In *United States v. Tillamooks*, 329 U.S. 40, 46, 67 S.Ct. 167, 170, 91 L.Ed. 29 (1946), the Court reiterated: "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will." But termination at will does not leave a tribe wholly unprotected. The Court held:

> The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute. It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

329 U.S. at 54, 67 S.Ct. at 174.

In *United States v. Kagama*, 118 U.S. 375, 381, 6 S.Ct. 1109, 1112, 30 L.Ed. 228 (1886), the Court observed: "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." Perhaps in no other context is this anomaly more apparent than the government's trusteeship of Indian lands. Indian title is not a common garden variety equitable title entirely governed by the precepts of chancery. It is a title derived from aboriginal possession subject to the right of discovery and conquest and in many instances, as here, dignified by royal grant. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all the States, including the original 13." *Oneida*, 414 U.S. at 670, 94 S.Ct. at 778. The Court has instructed that the Indians' right of occupancy is to be "as securely safeguarded as is fee simple absolute title." *Shoshone*, 304 U.S. at 117, 58 S.Ct. at 798. Indian title confers on a tribe occupying the soil "a legal as well as just claim to retain possession of it." *Johnson*, 21 U.S. (8 Wheat.) at 574. A legal claim presupposes a legal title. Chief Justice Marshall did not speak of an equitable claim based on equitable title. These precedents establish that as a matter of federal law, for the purpose of recovering possession of real property and damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title.

[9] The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust. Serious issues involving the application of the Supremacy Clause and the Equal Protection Clause would arise if a state in violation of the Nonintercourse Act were to dispossess a tribe and then defeat a tribe's legal claim to possession by denominating its title as equitable. Fortunately, we need not address these constitutional issues because we have no doubt that the Supreme Court of South Carolina, taking cognizance of

federal precedents and its own precedents, would hold that section 15–67–210 entitles the tribe to the presumption of possession.

V

Having determined that the tribe's Indian title is legal title within the context of section 15–67–210, we must next decide the effect of the statutory presumption of possession on the rights of the tribe and the rights of the present occupants.

Standing alone South Carolina's 10–year statute of limitations would bar the tribe's claim.[7] This is the basis of the district court's opinion, and it is the position urged by the state. Section 15–3–340 provides:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

But the 10–year statute cannot be read in isolation. It must be read in conjunction with section 15–67–210. This section provides:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

This section is applicable to the tribe's claim. It brought an action to recover possession of real property. It has legal title to the property. Consequently, it is "presumed to have been possessed thereof within the time required by law." What time? The 10 years specified in section 15–3–340 that is a prerequisite for bringing an action for the recovery of real property. Therefore, the plain text of sections 15–3–340 and 15–67–210 authorizes the tribe to maintain its action to recover possession of their tribal lands.

The state, however, contends that inasmuch as the tribe acknowledges that it has not been in possession of the land since 1840, this judicial admission precludes it from relying on the presumption. It relies on the axiom that a presumption must give way to reality when a fact is shown, and for this proposition it cites cases that do not discuss section 15–67–210.[8]

The difficulties with the state's argument are several. The tribe never admitted that it is not entitled to the presumption of possession. It has steadfastly maintained that its legal title enables it to claim possession for the necessary 10 years to maintain this action.

Section 15–67–210 does not require a plaintiff to show both legal title and possession, and we decline to place such a gloss on the statute. True, the presumption of possession is not conclusive. It can be rebutted, and the statute expressly states how it can be rebutted. Rebuttal may be accomplished according to the terms of the statute by showing "such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." The statute does not allow rebuttal by simply showing that the plaintiff has not been in possession or that the plaintiff has admitted lack of possession.

The tribe's position is sustained by *Love v. Turner*, 71 S.C. 322, 51 S.E. 101 (1905). In that case the plaintiff claimed title to a 100–acre tract by a grant from the state, subsequent deeds, and a will. The defendant denied the plaintiff's title and pled the statute of limitations and adverse possession, claiming title through a sheriff's deed and subsequent deeds. Judgment was en-

7. South Carolina also recognizes a 20–year presumption of grant doctrine and a 40–year statute of repose, § 15–3–330. But these are not an issue in this case.

8. *See, e.g., Galpin v. Page*, 85 U.S. 350, 366, 21 L.Ed. 959 (1873); *Fouche v. Royal Indemnity Co. of New York*, 217 S.C. 147, 60 S.E.2d 73 (1950); *Kaylor v. Hiller*, 77 S.C. 393, 58 S.E. 2 (1907).

tered for the plaintiff, and the defendant assigned error to the trial court's refusal to give the following charge:

> If neither the plaintiff nor any one under whom he claims title to the land in dispute has been seized or possessed of the land in question within ten years before the alleged acts of trespass were committed, then the plaintiff cannot recover.

71 S.C. at 330, 51 S.E. at 104. Ruling on this assignment of error, the Supreme Court said:

> If plaintiff had the legal title, he was presumed to be possessed of the land within the ten years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for ten years. The request embodying the foregoing proposition was, therefore, properly refused. (citations omitted)

71 S.C. at 330, 51 S.E. at 104. It should be noted that the charge, which the defendants sought and the court properly refused, is similar to the proposition the state asserts in the instant case. The court's ruling reflects the position of the tribe.

Similarly in *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473 (1956), the Court applied the predecessor of section 15–67–210 without the gloss that the state now seeks. In *Crotwell*, the plaintiffs founded their claim to title upon a deed executed by their father. The defendants claimed under a tax deed, adverse possession, presumption of a grant, and laches. The trial court entered judgment for the plaintiffs, and the Supreme Court affirmed, holding:

> Plaintiffs having established their legal title to the premises, appellant Whitney's claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, without tacking of possession except by descent cast.

229 S.C. at 220–21, 92 S.E.2d at 477. Again, the Court's construction of the statute is precisely that which the tribe asserts should be applied to its claim.

In *Crotwell*, the Court cited as authority *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), a case on which both parties rely. The plaintiff in *Haithcock* alleged title to 37 acres. The defenses were a general denial, adverse possession for 35 years, and the statute of limitations for 10, 20, and 30 years. The plaintiff prevailed, and the defendant appealed, assigning numerous errors. The Supreme Court affirmed. It held that the charge was correct and ordered that it be reported. Thus, the precedent established by the case is set forth in the charge.

The trial court explained to the jury that a man may obtain title by grant. It said:

> The title to all land was originally in the state, in the sovereign, or, prior to the Revolution, in the crown of England —and that is called the source of all title, in the state. So the first way in which a man may establish title to land is by showing a grant from the state, the source of all title, to himself, or a grant from the state to some one, and then by successive deeds, down to him. That is called a perfect legal paper title, a deed to himself, and then tracing back to some one else and to some one else, until it reaches the state, and then a grant from the state to the first holder of the land.

123 S.C. at 66–67, 115 S.E. at 729. This is precisely the way the tribe obtained title—by a grant from the English Crown before the Revolution. By well established law, and as a matter of fact, South Carolina recognized the grant.

The *Haithcock* trial court then explained how a defendant can defeat title. As a part of its charge it explained the 10-year statute of limitations now codified as section 15–3–340 upon which the state relies. The state quotes the following extract of the charge to establish its position:

> [The defendant] may defeat the plaintiff's title by showing that the plaintiff himself has not been in possession for 10 years next before the beginning of this action; for, gentlemen, the law makes possession a very strong factor in the question of title to real estate, and it says that if a man stays out of posses-

> sion for 10 years, asserts no claim to a piece of property, does not occupy it by himself or tenants, and lets that situation remain for 10 years, the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years, he cannot come in afterwards and assert his rights.

123 S.C. at 69, 115 S.E. at 729. Taken in isolation out of context this extract from the charge would seem to support the state. But it does not. For in the next paragraph of the charge, which the state omitted to quote, the Court explained that possession could be established by the presumption that is now codified as section 15-67-210 upon which the tribe relies. The Court said:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession of that land, and that his title gives him the possession; that is, the possession follows the title. Perhaps I had better read you what the statute says on that question. Now, pay attention to this, because this is the act of the Legislature, and is the law that governs us all: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for 10 years before the commencement of such action." Code Civ. Proc. 1912, § 126.
>
> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he show a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.

123 S.C. at 69-70, 115 S.E. at 729-30. It is quite apparent that the trial court's charge, approved by the Supreme Court of South Carolina, expressly refutes the state's argument. It is difficult to envision how a plaintiff who has "not been in 10 miles of the land" or who "may never have seen the land" could satisfy the state's argument that he must also be in possession of the land for 10 years. The correct analysis of the law, as the trial court lucidly explained in *Haithcock*, is that legal title without actual possession will satisfy the statutory presumption of possession.

We conclude that the tribe is entitled to invoke the presumption set forth in section 15-67-220, and its claim is not barred because it acknowledged that it did not actually possess the land for the 10 years specified in section 15-3-340.

VI

[10] The second sentence of section 15-67-210 defines both the status and the rights of the present occupants. The first clause provides: "The occupation of such premises by any other person shall be deemed to have been under and in subordination of the legal title...." This clause without more would defeat the state's claim, for permissive possession is not adverse. *Haithcock*, 123 S.C. at 84, 115 S.E. at 734. But the clause is subject to this important proviso, "unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." This proviso would appear to doom the tribe's claim, because this action was not commenced until 1980. But South Carolina's tacking doctrine forestalls this conclusion.

The doctrine is succinctly stated by David H. Means, Professor of Law, University of South Carolina, as follows:

> The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations. Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate. (footnotes omitted)

D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90 (1957).

Ellen v. Ellen, 16 S.C. 132, 141 (1881), explains the reason tacking is prohibited:

> [A]n adverse possessor is a trespasser from the beginning to the end. His possession begins in trespass, and so continues until it ripens into a right at the end of the statutory period of ten years. During this time he has nothing that he can convey; nor can his possession be tacked with that of his grantee so as to defeat the title of the true owner.

In contrast, an heir can tack the possession of his ancestor dying intestate "upon the theory that there is no new entry or trespass, but that the possession of the ancestor is cast by operation of law upon the heir, hence there is no break in the continuity of possession." *Burnett v. Crawford*, 50 S.C. 161, 166, 27 S.E. 645, 647 (1897).[9]

South Carolina's prohibition against tacking applies to both a plaintiff who seeks to establish title by 10 years of adverse possession and a defendant who asserts the 10-year statute of limitations, section 15-3-340, as a defense. *See, e.g., Haithcock*, 123 S.C. at 75, 115 S.E. at 731 (plaintiff); and *Crotwell*, 229 S.C. at 221-22, 92 S.E.2d at 477-78 (defendant).

Application of South Carolina's tacking doctrine precludes the tribe from prevailing against a person who owns property that has been held adversely for 10 years in the relevant period of time without tacking except by inheritance. Conversely, a person who must rely on prohibited tacking cannot prevail against the tribe.

VII

In view of the dissent's concern, a brief explanation of the district court's jurisdiction is appropriate. In paragraph 2 of its complaint, the tribe invoked jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1337 (an action or proceeding arising under an act of Congress regulating commerce), and § 1362 (claim asserted "by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). In paragraph 3, the tribe alleged that its claims for relief arise under the Treaty of Pine Tree Hill, the Treaty of Augusta, Article I, Section 8 and Article VI of the Constitution (Commerce Clause and Supremacy Clause), and 25 U.S.C. § 177 (the Indian Nonintercourse Act).

[11] On the basis of the facts assumed for the purpose of considering the summary judgment motion, which the state filed, there is no suggestion that the district court would have lacked jurisdiction to decide the tribe's claim if the tribe had brought its action before the passage of the Catawba Act in 1962. The question, therefore, is to what extent Congress intended the Catawba Act to affect the tribe's claim. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, 106 S.Ct. at 2046, the Supreme Court answered this question, saying:

> We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely man-

9. Tacking is permitted when a claim or defense is founded on the 20-year presumption of a grant or on the 40-year statute of repose. D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90, n. 2 (1957).

ner as would any other person or citizen within the State's jurisdiction.

The Court's explanation establishes that, with the exception of the application of the state statute of limitation, Congress intended that every element of the tribe's claim "remained exactly the same immediately before and immediately after the effective date of the Act." The tribe's capacity to invoke federal jurisdiction pursuant to 28 U.S.C. §§ 1337 and 1362 was not defeated by the enactment of the Catawba Act.

[12] Section 1331 provides another independent basis for jurisdiction. This section gives district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." The tribe's complaint alleged a right of occupancy under treaties with the British Crown that were implemented by the Nonintercourse Act. These allegations of Indian title sufficed to satisfy the well-pleaded complaint rule.

The tribe's allegations distinguish the case from *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), where federal jurisdiction was lacking. In that case the plaintiffs did not allege Indian title, but only that the defendant's title was void because of an Act restricting alienation of Choctaw and Chickasaw allotments. The distinction is fully explained in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), which held that a complaint alleging right of occupancy based on Indian or aboriginal title protected by the Nonintercourse Act established jurisdiction under section 1331. *Oneida* explained that the right to possession under a claim of Indian title is based on federal law. Therefore, the federal issue does not arise solely in anticipation of a defense. *Oneida* also reiterated that Indian title is a matter of federal law and that it can be extinguished only with federal consent. 414 U.S. at 666–74, 94 S.Ct. at 776–81. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, 106 S.Ct. at 2046, the Court held that the Catawba Act did not extinguish the tribe's claim of Indian title.

Many federal issues remain to be tried on remand, and the tribe may ultimately lose its case. Nevertheless, here, as in *Oneida*, the tribe's assertion of a federal right of occupancy governed by federal law is not "so devoid of merit as not to involve a federal controversy within the jurisdiction of the district court." 414 U.S. at 666, 94 S.Ct. at 776. The principles explained in *Oneida* demonstrate that the tribe's complaint did not run afoul of the well-pleaded complaint rule.

We conclude that sections 1331, 1337, and 1362, and each of them, confer jurisdiction on the district court. Moreover, the Supreme Court has definitively decided the effect that Congress intended the Catawba Act to have on the tribe's claim. On this issue its decision is final. We are not at liberty to attribute to Congress a different intention in order to question jurisdiction. The Supreme Court has issued its mandate directing us to decide the issue pertaining to the state statute of limitations. *See* 476 U.S. at 511, 106 S.Ct. at 2046. Sound principles of appellate procedure counsel compliance with the Court's mandate. *See Skillern's Ex'rs v. May's Ex'rs*, 10 U.S. (6 Cranch) 267, 3 L.Ed. 220 (1810).

VIII

We hold that sections 15–3–340 and 15–67–210 bar the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 20, 1980, without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitations do not bar the tribe's claim against other persons. "Person" includes joint tenants, tenants in common, partnerships, associations, and corporations.

The judgment of the district court is affirmed in part and reversed in part, and this case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

WIDENER, Circuit Judge, dissenting:

Although I join in Judge Hall's dissent, I write separately to add a few words.

First, the Supreme Court has not hesitated to dismiss actions on grounds akin to jurisdictional even after prolonged litigation. In *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the Court dismissed the action, finding that the defendant's actions were immune from the antitrust laws. The dismissal took place some eleven years after the suit began and seven years after the Supreme Court had the opportunity to address the same issue and did not.[1] *Hughes Tool Co.*, 409 U.S. at 392, 93 S.Ct. at 663 (Chief Justice Burger dissenting). Merely because the Catawbas' suit has been in the court system for some time and the Supreme Court has addressed the suit without explicitly considering jurisdiction is no reason to shy away from the jurisdictional issue. *Hagans v. Lavine*, 415 U.S. 528, 534-35 n. 5, 94 S.Ct. 1372, 1378 n. 5, 39 L.Ed.2d 577 (1974).

Second, I see no reason why the presumption of possession relied upon by the Catawbas to save their action from South Carolina's statute of limitations is not rebutted by the Catawbas' judicial admission that they had been out of possession for 140 years when they filed suit. Although there are no South Carolina cases, similar presumptions in other States have been subject to rebuttal. See *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 270 P.2d 830 (1954). In *Kirkman v. Holland*, 139 N.C. 185, 51 S.E. 856, 857 (1905), the court would not even consider the presumption of possession arising from a statute indistinguishable from the one at issue here, given a judicial admission rebutting it. In South Carolina, the "allegations, statements or admissions contained in a pleading are conclusive as against the pleader." *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964). In their complaint, the Catawbas admit being out of possession since 1840. The presumption of possession in favor of the Catawbas, assuming arguendo that they have "legal title," has therefore been rebutted. The majority's approach, not permitting the defendants to rebut the presumption of possession once legal title is established (except by adverse possession), defeats the very purpose of South Carolina's statute of limitations by allowing a stale claim. If South Carolina had intended to give parties who could establish "legal title" *no* time limit to file suit, it could have done so instead of merely creating a presumption of possession. Civil presumptions in South Carolina are usually rebuttable. *Palm v. General Painting Co. Inc.*, 296 S.C. 41, 370 S.E.2d 463, 466 (1988) (presumption of legitimacy when born in wedlock); *McDowell v. S.C. Dept. of Social Services*, 296 S.C. 89, 370 S.E.2d 878, 880 (App.1987) (presumption of gift to a close relative); *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 149, 150 (1988) (presumption that public contract not enforceable by an individual as third party beneficiary); *Mathias v. Hicks*, 363 S.E.2d 914, 916 (S.C.App.1987) (presumption that collateral is worth indebtedness); *Woods v. Bivens*, 292 S.C. 76, 354 S.E.2d 909, 911 (1987) (presumption that possession of one tenant in common is possession by all); *Estate of Mason v. Mason*,

1. In 1964, the Supreme Court granted certiorari, but, after oral argument and briefing, which included the issues upon which the case was ultimately decided, in 1965 dismissed the writ as improvidently granted. *Hughes Tool Co.*, 409 U.S. at 391-92, 93 S.Ct. at 662-63. The Court nevertheless did not hesitate to dismiss the suit on the same grounds in 1973 when the case was there a second time.

I have used the words "akin to jurisdictional" in an abundance of caution and out of deference to the Court in *Hughes Tool* which stated that the Federal Aviation Act did not "completely replace" the antitrust laws. Of course if *Hughes Tool* is not purely jurisdictional, it is an even stronger precedent for my point of view than a case decided on a question relating purely to subject matter jurisdiction. In this respect, I note that the Second Circuit, in an earlier appeal in this same case, *Trans World Airlines v. Hughes*, 332 F.2d 602 (2d Cir.1964), treated the question as jurisdictional and that Sullivan in his treatise, *Antitrust*, West 1977, p. 746, et seq, considers the question one of primary jurisdiction. I also note that the Court in *Hughes Tool*, 409 U.S. at 364, 365, n. 1, 93 S.Ct. at 650, n. 1, as precedent for proceeding as it did, relied on *Indianapolis v. Chase National Bank*, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941), in which case a question of jurisdiction which had been presented to the Court, but not decided, was later decided upon subsequent consideration by the Court.

289 S.C. 273, 346 S.E.2d 28, 31 (App.1986) (presumption that a missing will was destroyed by testator); *McBride v. Atlantic Coast Line R. Co.*, 140 S.C. 260, 138 S.E. 803, 807 (1927) (presumption that when railroad fails to use warning signals that the failure is proximate cause of injury); *McMillan v. General American Life Ins. Co.*, 194 S.C. 146, 9 S.E.2d 562, 574–75 (1940) (presumption against suicide). Logic and South Carolina precedent require, I think, the conclusion that the presumption of possession created in S.C.Code § 15–67–210 is also rebuttable and has been rebutted in this case by the admission of the Catawbas.

Circuit Judge HALL, joins in this dissent.

HALL, Circuit Judge, dissenting:

As an intellectual exercise, I disagree with the majority's analysis of South Carolina law as it relates to the Catawbas' duty to assert their claim within ten years of the Tribe's 1962 dissolution. In my view, either the removal of disability provision of S.C.Code § 15–3–370 [1] or the more general statute of limitations in S.C.Code § 15–3–340 [2] would effectively bar the Catawbas' instant possessory action. My principle objection to the majority's decision is more fundamental, however. In light of the Supreme Court's discussion of the effect of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931–938 in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986), and the well-established jurisdictional doctrine of *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), I am persuaded that federal jurisdiction over the Catawbas' claim has never existed.

In the original complaint, the Catawbas sought to invoke federal jurisdiction on three bases: (1) federal question pursuant

1. The majority mechanically rejects any role for § 15–3–370 on the ground that it specifically applies only to minors, mental incompetents, and prisoners. The majority fails to recognize, however, that the statute was broadly written to cover all classes of citizenry normally assumed to be under a legal disability. See 51 *Am.Jur.2d*, Limitations of Action §§ 178 *et seq.* Although the South Carolina legislature did not expressly provide for Indians, it clearly did intend that any South Carolina citizen whose legal status excused a timely assertion of legal rights would pursue those rights within ten years of a change in that status. The Catawbas' action, in my view, falls within the broad intent of the statute by analogy and should be barred for that reason.

2. In reasoning that Indian title is legal title conferring a presumption of possession under § 15–67–210 and, thereby defeating the ten-year statute of limitations provided in § 15–3–340, the majority has permitted an exception to devour the rule. South Carolina has clearly sought to impose finality in potential land disputes by requiring a party out of actual possession to bring an action within ten years. The only exception to that general rule is the presumption of possession accorded the holders of "legal title" by § 15–67–210. Logically, however, "legal title" must be some mechanism that would give adequate notice to another claimant that the statute of limitations is unavailable.

South Carolina law unquestionably treats recordable titles with special deference. South Carolina Code § 15–3–380 specifically provides that a chain of title "by virtue of a written instrument" extending for forty years "shall be deemed valid against the world." In my view, the presumption of possession in § 15–67–210 is a product of the same rationale that produced § 15–3–380. Although it has not been expressly asserted on appeal, I am convinced that the present South Carolina landholders, who undoubtedly have chains of title exceeding forty years, are entitled to prevail under 15–3–380 and to defeat the presumption of possession in § 15–67–210.

In reaching a contrary position, the majority has fallen into the morass created by careless language in older South Carolina property law decisions such as *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923). In *Haithcock* the term "title" is alternatively used to refer to a superior possessory interest as well as the legal indicia of that interest. Significantly, however, the court in *Haithcock* discussed the presumption of possession only in connection with a "paper title"—a recordable instrument. 123 S.C. at 69–70, 115 S.E. at 729–30. By focusing instead upon the four ways upon which a possessory interest in land can be validly obtained in South Carolina and granting to each a presumption of possession, the majority has created a statute of limitations that doesn't limit anyone except parties who could not prevail in any event. I find this interpretation of the South Carolina statute utterly irrational. I also find the failure to address § 15–3–380 particularly troubling in light of the extensive treatment of South Carolina law attempted in the majority opinion.

to 28 U.S.C. § 1331 [jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States"]; (2) Indian tribe pursuant to 28 U.S.C. § 1362 [jurisdiction over "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States"]; and (3) regulation of commerce pursuant to 28 U.S.C. § 1337 [jurisdiction over a civil action arising under "any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"]. The last theory was advanced to support the allegation that an 1840 conveyance of the land at issue by the Catawbas was achieved in contravention of the 1799 Indian Nonintercourse Act, 25 U.S.C. § 177. The Supreme Court's decision in *Catawba* leaves no doubt, however, that neither section 1362 nor 1337 was ever a legitimate ground for federal litigation.

In *Catawba*, the Court quoted prominently from section 5 of the Catawba Act, which provides that:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

Based on that provision, the Court clearly concluded that after the 1962 effective date of the Catawba Act, the trust relationship between the United States and the Catawbas was dissolved, the federal statutory protection for Indians was no longer applicable to them and the laws of South Carolina controlled their right, if any, to the land claimed in this case. *Catawba*, 106 S.Ct. at 2043.[3]

It is now beyond question that when the plaintiffs/appellees initiated their action in 1980 they were not Indians as that term is used in federal law. At most, the appellees are a collection of South Carolina residents of Indian descent who are successors in interest to a defunct tribe—a point expressly acknowledged by the Supreme Court when it described appellees as "a nonprofit corporation organized under the laws of South Carolina in 1975." 106 S.Ct. at 2040 n. 2. The essential jurisdictional prerequisite for 28 U.S.C. § 1362—an "Indian tribe ... duly recognized by the Secretary of the Interior...." was plainly absent.[4] Similarly, the dissolution of the Catawbas in 1962 undermined the jurisdictional validity of the Nonintercourse Act claim asserted under 28 U.S.C. § 1337. The continued existence of a trust relationship is required in order to invoke a Nonintercourse Act claim in federal court. *See e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1975).

Without sections 1362 or 1337, the only remaining ground on which appellees might assert federal jurisdiction is the general federal question provision of section 1331. A review of the history of this case reveals, however, that jurisdiction on that theory runs afoul of the long-established rule that a federal question must appear on the face of a "well-pleaded complaint." See Wright, Miller & Cooper, *Federal Practice and*

3. The Court's reasoning was supported prominently by citation to cases such as *Larkin v. Paugh*, 276 U.S. 431, 48 S.Ct. 366, 72 L.Ed. 640 (1928) (termination of trust relationship rendered consideration of land disputes appropriate in state courts, "the land being there.") *Catawba*, 106 S.Ct. 2045 n. 19.

4. The unavailability of section 1362 has particular significance in light of the fact that the State of South Carolina is a named defendant. The statute abrogates a state's normally applicable immunity under the eleventh amendment. *Lac Courte Oreilles Band, etc. v. State of Wisconsin*, 595 F.Supp. 1077 (W.D.Wisc.1984). If section 1362 is, as I believe, inapplicable, the Catawbas' action against the State is constitutionally suspect.

Procedure: Jurisdiction 2d § 3566. The Catawbas' initial complaint, which asserted purely state claims for ejectment and trespass damages, failed that test. Indeed, federal law did not enter this case until it was belatedly asserted by the Catawbas in response to the defendants' attempted reliance upon South Carolina statutes of limitation.

The Supreme Court in *Taylor, supra,* unhesitatingly applied the well-pleaded complaint rule to defeat a possessory land claim advanced by individual Indians. The Indians had alleged that certain defendants were in possession of Indian land in violation of "legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians." 234 U.S. at 74–75, 34 S.Ct. at 724. The Court reasoned that federal jurisdiction was lacking since the action was one for ejectment and the allegations involving federal law were "neither essential nor appropriate." *Id.* In approving of the result in *Taylor,* modern commentators have agreed that an action for the possession of land does not arise under federal law simply because there is a potential federal issue in the chain of title. Wright, Miller & Cooper, *Id., see also* F. Cohen, *Handbook of Federal Indian Law,* 312 (1982 ed.).

The subsequent decision in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), recognized an exception to the *Taylor* rule for possessory actions brought by an Indian tribe in a current trust relationship with the federal government. In circumstances where the land title is under "continuous" federal protection, the Court reasoned that a right of possession necessarily raises a federal question. *Id.* at 676–77, 94 S.Ct. at 781–82. I see nothing in *Oneida,* however, that would extend its reach to situations where there is no trust relationship that would indicate a "continuing federal interest" in the land in dispute. 414 U.S. at 683, 94 S.Ct. at 785, Rehnquist, J., concurring.[5] It follows, therefore, that the Catawbas, who unquestionably had no trust relationship with the United States, have asserted what must be seen as a purely state law cause of action falling squarely within the jurisdictional limitations of *Taylor v. Anderson.*

I, of course, recognize that it is late in the day to raise a jurisdictional objection to this prolonged litigation. It is also true that this Court, as did the district court below and the Supreme Court above, has addressed this case on the merits without examining the jurisdictional implications. This omission is in large part a result of the parties' failure to raise the issue. It cannot, however, relieve us of our fundamental responsibility to insure that we decide only those cases that fall within our lawful authority as a court of limited jurisdiction.

We certainly cannot assume that the Supreme Court's treatment of the merits in *Catawba* or even its remand of the state law issues to this Court amounts to a finding of jurisdiction. Jurisdiction was not specifically addressed in *Catawba.* Moreover, the Court itself has acknowledged on other occasions that the passing of a jurisdictional question *sub silentio* does not resolve that issue. *Hagans v. Lavine,* 415 U.S. 528, 534–35 n. 5, 94 S.Ct. 1372, 1378 n. 5, 39 L.Ed.2d 577 (1974). The existence of jurisdiction remains open for consideration when properly raised.

The implications of the majority's decision are profound. The ownership interests of over 25,000 South Carolina landowners will be impaired and in many cases overturned notwithstanding chains of title of previously unquestioned validity. If South Carolina law, which the Supreme Court has recognized as controlling, com-

5. Certainly the Supreme Court did not intend for its decision to "disturb the well-pleaded complaint rule of *Taylor v. Anderson,*" *Oneida,* 414 U.S. at 677, 94 S.Ct. at 782. Lower courts have also recognized that *Oneida* left *Taylor* intact. *See State of New York v. White,* 528 F.2d 336, 339 (2d Cir.1975) (concluding that *Oneida* was a "narrow ruling" based on the "unique relationship" between the federal government and Indian nations). In the present case, the "unique relationship" had obviously been terminated well before the litigation began. It is a clear failure to appreciate the interplay of *Taylor* and *Oneida,* as well as a serious misreading of *Catawba* that dooms the effort to assert jurisdiction in section VII of the majority opinion.

pels that result then so be it. It offends reason and justice, however, for the assessment of South Carolina law to be conducted by a court without jurisdiction and with no special familiarity with the relevant law.[6] I am persuaded that, today, we are such a court. Accordingly, I respectfully dissent from the majority's resolution of this matter.

Andrew W. HANSARD,
Plaintiff-Appellee,
Cross-Appellant,

v.

PEPSI-COLA METROPOLITAN BOTTLING CO., INC., d/b/a Pepsi-Cola Bottling Group, Defendant-Appellant, Cross-Appellee.

No. 87-1717.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1989.

Former employee brought action against former employer alleging violation of Age Discrimination in Employment Act when employer discharged and refused to rehire employee. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., entered judgment in favor of employee. Employer appealed and employee cross-appealed. The Court of Appeals, Sneed, Circuit Judge, sitting by designation, held that: (1) evidence was sufficient to support jury's verdict that former employee was discriminated against because of his age; (2) employee was not entitled to back pay after March, 1984; and (3) employee was entitled to prejudgment interest.

Affirmed in part, reversed in part, and remanded.

Jerre S. Williams, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Civil Rights ⇐44(6)

Sufficient evidence existed in age discrimination action arising out of employee's termination for finding that employee was discharged by employer and did not quit his employment; employee testified that he did not refuse any jobs that were offered to him by employer, employer failed to contest payment of unemployment benefits, and there was ambiguity in employer's own records as to reason for employee's absence.

2. Civil Rights ⇐9.15

Under Age Discrimination in Employment Act, plaintiff must prove that age was determinative factor in his discharge. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

3. Civil Rights ⇐43

Employer's indirect references to employee's age and timing of termination of employee can support inference of age discrimination.

4. Civil Rights ⇐44(6)

Evidence was sufficient in age discrimination case to support jury's verdict that former employee was discriminated against because of his age when he was dis-

6. The Supreme Court's remand of the state law issue in *Catawba* was based upon the traditional deference accorded the Courts of Appeals and the district courts to resolve state law issues arising within their jurisdictions. *E.g. Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). That deference, however, is rooted in the assumption that at least some of the district and appellate judges involved are usually from the state where the legal question has arisen and, thus, are trained in that state's law. That situation is not present here where neither the district judge who originally heard this case nor any member of this appellate court is a South Carolina jurist. By bringing this case in federal court and proceeding against a broad range of commercial defendants thereby compelling the recusal of many members of this Court, the Catawbas have managed to have their state law case decided by a court with substantially reduced familiarity with South Carolina law.

1

Juan RODRIGUEZ; Maria A. Rodriguez, Plaintiffs–Appellants,

v.

MEBA PENSION TRUST; Lucille Hart, Administrator, Defendants–Appellees.

No. 91-2336 (L).
(CA-87-3430-R).

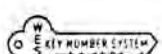
United States Court of Appeals, Fourth Circuit.

July 20, 1992.

ORDER

This case was initially decided by this Court on February 10, 1992 by published opinion found at 956 F.2d 468. On March 18, 1992 this Court granted appellees' petition for rehearing and suggestion for rehearing in banc. The granting of rehearing in banc vacated the previous panel judgment and opinion pursuant to this Court's Local Rule 35(c). On June 1, 1992 this Court granted the parties' stipulation of dismissal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. As a result of settlement pending the outcome on appeal, we hereby vacate as moot the judgment of the district court. *See United States v. Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *Kennedy v. Block*, 784 F.2d 1220 (4th Cir.1986).

Entered at the direction of Chief Judge ERVIN with the concurrence of Circuit Judge PHILLIPS and Circuit Judge WILKINSON.



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CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South America, Plaintiff–Appellant,

v.

STATE OF SOUTH CAROLINA, Richard Riley, as Governor of the State of South Carolina; County of Lancaster, and its county council consisting of Francis L. Bell, as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus, City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr., Bowater North American Corporation of America, Catawba Timber Co., Celanese Corporation of America, Citizens and Southern National Bank of South Carolina, Cresent Land & Timber Corp., Duke Power Company, Flint Realty and Construction Company, Herald Publishing Company, Home Federal Savings and Loan Association, Rock Hill Printing & Finishing Company, Roddey Estates, Inc., Southern Railway Company, Springs Mills, Inc., J.P. Stevens & Company, Tega Cay Associates, Wachovia Bank and Trust Company, Ashe Brick Company, Church Heritage Village & Missionary Fellowship, Nisbet Farms, Inc., C.H. Albright, Ned Albright, J.W. Anderson, Jr., John Marshall Wilkins, II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson, W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms, F.S. Barnes, Jr., W. Watson Barron, Wilson Barron, Archie B. Carroll, Jr., Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandal Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr., Robert A. Fewell, W.J. Harris, Annie F. Harris, T.W. Hutchinson, Hiram Hutchinson, Jr., J.R. McAlhaney, F.M. Mack, Jr., Arnold F. Marshall, J.E. Marshall, Jr., C.E. Reid, Jr., Will R. Simpson, John S.

Simpson, Robert F. Simpson, Thomas Brown Snodgrass, Jr., John M. Spratt, Marshall E. Walker, Hugh M. White, Jr., John M. Belk, Jane Nisbet Goode, R.N. Bencher, W.O. Nisbet, III, Pauline B. Gunter, J. Max Minson, W.A. McCorkle, Mary McCorkle, William O. Nisbet, Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin, Robert M. Yoder, Defendants–Appellees.

No. 90–2446.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 4, 1992.

Decided Sept. 22, 1992.

Indian tribe brought action against landowners for claim and title. The District Court dismissed. The Court of Appeals reversed, 718 F.2d 1291 and 740 F.2d 305. The United States Supreme Court reversed, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490. The Court of Appeals remanded, 865 F.2d 1444. The United States District Court for the District of South Carolina, Joseph P. Willson, Senior District Judge, entered summary judgment in favor of landowners, and tribe appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) tacking periods of adverse possession is permitted under South Carolina law when the change of ownership occurs by operation of law; (2) doctrine of worthier title may apply to permit tacking of periods when there is a transfer by will; and (3) some affidavits of landowners did not establish that they were based on personal knowledge.

Affirmed in part, reversed in part, and vacated and remanded in part.

1. Federal Civil Procedure ⇐2481

Claimant who produces affidavits or other sufficient documents establishing without contradiction in fact that he or a predecessor held record title to property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers for the requisite ten-year period without tacking, except by descent, has met his burden of establishing that there is no genuine issue of material fact on claim of adverse possession under South Carolina law.

2. Federal Civil Procedure ⇐2544

Averment of possession in affidavit is sufficient to establish possession for purposes of motion for summary judgment on claim of adverse possession and, once claimant states in affidavit sufficient facts to sustain motion for summary judgment or burden shifts to the opposing claimant to establish material issue of fact.

3. Federal Civil Procedure ⇐2546

Claimants who identified the nature and use of property which they claimed by adverse possession as timber farming, timber growing, timberlands, or tree farm adequately established the nature of their possession for summary judgment purposes.

4. Adverse Possession ⇐110(2)

Under South Carolina law, averments that property is used for recreational or farming purposes are sufficient to establish possession for adverse possession purposes.

5. Federal Civil Procedure ⇐2543

In ordinary circumstances, with nothing else appearing, individual can be presumed to have personal knowledge, as required for summary judgment, of the possession of land by a family member. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

6. Federal Civil Procedure ⇐2539

Ordinarily, corporate officers would have personal knowledge of acts of their corporations and affidavit setting forth those facts can be sufficient for summary judgment purposes. Fed.Rules Civ.Proc. Rule 56(e), 28 U.S.C.A.

7. Federal Civil Procedure ⇐2539

Affidavit setting forth certain facts which did not allege that statements were based on personal knowledge of the affiant, combined with supplemental affidavit in which claimant stated that he was familiar with use and possession of property referred to his prior affidavit, was suffi-

cient to support summary judgment on claim of adverse possession. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

8. Adverse Possession ⇐43(4, 6)

Under South Carolina law, tacking of possession to establish adverse possession is allowed in a case of intestate succession, but not when the disseisor conveys by deed.

9. Adverse Possession ⇐43(2)

South Carolina law would allow tacking of periods of adverse possession when a change in possession occurs by operation of law but not when it occurs other than by operation of law.

10. Adverse Possession ⇐43(8)

Tacking of periods of adverse possession is permitted under South Carolina law when land is transferred from predecessor to successor by virtue of corporate merger.

11. Corporations ⇐1.4(1, 2)

Under South Carolina law, corporate veil may be pierced in appropriate case and in furtherance of ends of justice.

12. Corporations ⇐1.4(1)

Sole shareholder may not choose to ignore corporate entity when it is convenient.

13. Adverse Possession ⇐43(8)

If transfer of land from parent to subsidiary was intended to allow parent to avoid legal obligation, that would be evidence tending to show that the parent treated the subsidiary as a separate corporation and not as its alter ego, so that periods of adverse possession could not be tacked under South Carolina law.

14. Adverse Possession ⇐43(8)

If transfer of land between subsidiaries of the same parent is found as a matter of fact and law to be to an alter ego, periods of adverse possession may be tacked.

15. Wills ⇐713

Under the doctrine of "worthier title," devise to heirs of testator was nullity if interest limited in their favor was identical to that which heirs would have taken by descent if there had been no devise to them.

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

16. Wills ⇐713

Rule of worthier title originated because feudal incidents of relief, wardship, and marriage were preserved only if new tenant of land acquired an interest by descent from the former tenant.

17. Adverse Possession ⇐43(6)

Under South Carolina law, which permits tacking of periods by adverse possession only in the case of intestate succession, tacking is permitted under the doctrine of worthier title when there is a conveyance by will.

18. Courts ⇐90(1)

Overruling by implication is not favored.

19. Adverse Possession ⇐46

Appointment of successor trustee upon death of former trustee does not interrupt running of statute of limitations for adverse possession purposes.

20. Trusts ⇐160(2)

Trust will not fail for want of a trustee.

21. Adverse Possession ⇐46

Transfer of beneficial interest in trust does not interrupt limitations period for adverse possession under South Carolina law.

22. Adverse Possession ⇐60(2)

Claimant's possession of land was exclusive and continuous for adverse possession purposes even though members of Indian tribe which also claimed the property entered onto it for the purpose of collecting clay, where he allowed the members of the tribe onto the property for that purpose.

23. Adverse Possession ⇐43(8)

Operation of rule that possession of one cotenant is possession of all ceases only if that possession becomes adverse to co-owners of the possessor.

24. Adverse Possession ⇐43(8)

Cotenant who satisfies adverse possession requirement does so for all cotenants so long as he does not claim to be holding adversely to his cotenants.

25. Adverse Possession ⇐56

South Carolina statute providing that statute of limitations is tolled if a defendant is out of the state for more than one year when or after cause of action arises does not apply to adverse possession claims. S.C.Code 1976, § 15-3-340.

Jay Bender, Baker, Barwick, Ravenel & Bender, Columbia, S.C., argued (Don B. Miller, Native American Rights Fund, Boulder, Colo., Robert M. Jones, Rock Hill, S.C., Richard Steele, Union, S.C., for plaintiff-appellant.

James Linwood Quarles, III, Hale & Dorr, Boston, Mass., Michael John Giese, Leatherwood, Walker, Todd & Mann, P.C., Greenville, S.C., argued. James D. St. Clair, William F. Lee, Hale & Dorr, Boston, Mass., J.D. Todd, Jr., Leatherwood, Walker, Todd & Mann, P.C., Greenville, S.C., John C. Christie, Jr., J. William Hayton, David M. Novak, Bell, Boyd & Lloyd, Washington, D.C., Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd & Byrd, David A. White, Carolyn W. Rogers, Roddey, Carpenter & White, P.A., Rock Hill, S.C., T. Travis Medlock, Atty. Gen., Kenneth P. Woodington, Asst. Atty. Gen., State of S.C., Columbia, S.C., Joseph W. Grier, Jr., J. Cameron Furr, Jr., Grier & Grier, P.A., Charlotte, N.C., W.C. Spencer, Emil W. Wald, Spencer & Spencer, P.A., Rock Hill, S.C., for defendants-appellees.

Before WIDENER, HALL, MURNAGHAN, SPROUSE, NIEMEYER, and LUTTIG, Circuit Judges, sitting in banc.

WIDENER, Circuit Judge:

The Catawba Indian Tribe appeals from an order of the district court granting summary judgment in favor of certain defendants as to a number of parcels of real estate on the ground that those defendants had established the adverse possession requirements of South Carolina. We affirm in part, reverse in part, and vacate and remand in part.

This litigation began when the Tribe filed a complaint and motion to certify a defendant class on October 28, 1980.[1] In the complaint, the Tribe seeks to be declared the owner of approximately 144,000 acres of land that was set aside for the Tribe's benefit in the 1760 Treaty of Pine Tree Hill and the 1763 Treaty of Augusta and to recover trespass damages for the period of its dispossession. The complaint names seventy-six individuals, companies and public entities as defendants and as representatives of a putative defendant class of more than 27,000 persons with an interest in any portion of the lands in question.

In 1981, the defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The motion was based on the effect of the 1959 Catawba Division of Assets Act (Catawba Act), 25 U.S.C. §§ 931-938. The district court treated the motion to dismiss as a Rule 56 motion for summary judgment, granted the defendants' motion and dismissed the case. The court held that the Catawba Act terminated the special relationship that the Tribe had had with the federal government and that the termination of the special federal status of the Tribe made state law apply to it and any claim it might have. Therefore, South Carolina's adverse possession statute began to run against the Tribe's claim on July 1, 1962, the date the Tribe's constitution was revoked pursuant to the Catawba Act. Because South Carolina Code § 15-3-340, the applicable South Carolina statute of limitations, requires actions to recover

1. The historical facts surrounding the Catawbas' claim to the property in question are set forth at length in this court's first opinion and the Supreme Court's opinion on the matter. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986); *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir.1983), adopted en banc, 740 F.2d 305 (4th Cir.1984), rev'd, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

title or possession to be brought within ten years, the district court held that the Tribe's claims were filed eighteen years after the statute began to run and the claims were barred. The court, while noting that South Carolina does not allow a party to obtain title by adverse possession by "tacking" his period of possession to a predecessor's period of possession (unless the land passes by inheritance), held that South Carolina's non-tacking rule "is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations."

First a panel of this court and then the court sitting en banc reversed the district court and held that the state statute of limitations does not apply to the Tribe's claim. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983), adopted en banc, *Catawba Indian Tribe v. South Carolina*, 740 F.2d 305 (4th Cir.1984). Because this court held that the state statute of limitations does not apply, we did not reach the question of whether the district court had correctly applied the statute of limitations. The Supreme Court then reversed this court and held that the South Carolina statute of limitations does apply to the Tribe's claim. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510–11, 106 S.Ct. 2039, 2046–47, 90 L.Ed.2d 490 (1986). The Court then remanded the case to this court for consideration of the district court's application of the South Carolina statute of limitations to the Tribe's claim. On remand from the Supreme Court, this court held that the Tribe is entitled to invoke the presumption of possession set forth in S.C.Code § 15–67–220; that the Tribe's acknowledgement that it did not actually possess the land within the ten year period specified in S.C.Code § 15–3–340 is not a bar to its claim; and that South Carolina's disallowance of tacking means that the Tribe's claim is only barred as to those persons who held or whose predecessors held the property for ten years without tacking except by inheritance. We summarized our portion of the holding pertinent to the present matter as follows:

> [S]ections 15–3–340 [2] and 15–67–210 [3] [of the South Carolina Code] bar the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 20, 1980,[4] without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitations do not bar the tribe's claim against other persons. "Persons" includes joint tenants, tenants in common, partnerships, associations, and corporations.

Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1456 (4th Cir.), cert. denied, 491 U.S. 906, 109 S.Ct. 3190, 105 L.Ed.2d 699 (1989). Therefore, on remand from this court, the district court was required to determine which claimants met the adverse possession requirements.

Forty-six of the named defendants filed a supplemental brief and affidavits in support of their summary judgment motion. The district court entered summary judg-

2. Section 15–3–340, at the time this action was brought, provided as follows:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.
>
> A second action for the recovery of real property shall be brought within two years from the rendition of the verdict or judgment in the first action or from the granting of a nonsuit or discontinuance therein.

3. Section 15–67–210 provides as follows:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

4. The complaint actually was filed on October 28, 1980. Therefore, the defendants had until October 28, rather than October 20, to fulfill the ten year requirement.

ment in a series of orders with respect to certain properties for which summary judgment was sought. The court also dismissed twenty-nine defendants from the case as it determined that summary judgment had been granted as to all property in which they had an interest.

Summary Judgment Standard

Our review of summary judgments is de novo. *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 118 (4th Cir. 1991). Summary judgment is appropriate when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, summary judgment is appropriate. *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

The party moving for summary judgment has the burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2727 (1983). However, once the moving party has met its burden under Rule 56(c), the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). See also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985) ("Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes"). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

I.

South Carolina Adverse Possession Law

"[C]laim of title by adverse possession require[s] proof of actual, open, notorious, hostile, continuous and exclusive possession by [the claimant], or by one or more persons through whom [the claimant] claim[s], for the full statutory period of ten years, without tacking of possession except by descent cast." *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473, 477 (1956); see S.C.Code § 15-3-340; S.C.Code § 15-67-210. "[T]he burden of proof of adverse possession is on the party relying thereon." *Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61, 63 (1961). In South Carolina, "[o]rdinarily, adverse possession is a question of fact for the jury and it becomes a question of law only when the evidence is undisputed and susceptible of but one inference." *Gardner v. Mozingo*, 293 S.C. 23, 358 S.E.2d 390, 392 (1987).

II.

Sufficiency of the Allegations in Claimants' Affidavits

The district court made the following rulings with respect to the sufficiency of the affidavits submitted in support of the claimants' motions for summary judgment:

> A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years

(without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.

A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

Mortgage documents are writings sufficient to constitute color of title for purposes of establishing adverse possession.

Timber growing or farming is sufficient occupation or possession of the property to establish adverse possession.

A deed to a husband serves as color of title for his wife if their marriage took place while Dower rights still attached to all lands of which a husband was seized during coverture.

The Tribe argues that the requirements set forth by the district court are insufficient because they do not require allegations of specific acts of possession. They argue that any affidavits which fail to set forth specific acts of possession are insufficient as a matter of law to meet the requirements of adverse possession.

[1] We are of opinion that a claimant who produces affidavits or other sufficient documents establishing without contradiction in fact that he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers for the requisite ten-year period without tacking except by descent, has met his burden under Rule 56(c) of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Therefore, in those cases where the claimant has so met his burden, to avoid summary judgment, the Tribe, by affidavit or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial.

"As a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse." *Mullis*, 118 S.E.2d at 66. In this court's earlier decision, we determined that if the Tribe held Indian title to the property in question in 1962, then it held the legal title at that time. 865 F.2d 1444, 1451 (4th Cir.1989). Therefore, applying the rule stated in *Mullis*, any person other than the Tribe who exclusively possessed the property would be a stranger to the holder of the legal title and would be presumed to be holding it adversely.

In addition, when "a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement." *Sudduth v. Sumeral*, 61 S.C. 276, 39 S.E. 534, 539 (1901). "The claimant's possession and its continuity will be sufficient if by his acts and conduct it is apparent to men of ordinary prudence that he is asserting and exercising ownership over the property; and for this purpose it is necessary to take into consideration the nature, character, and location of the property and the uses for which it is fitted or to which it has been put." *Smith v. Southern Railway*, 237 S.C. 597, 118 S.E.2d 440, 443 (1961) (quoting 1 Am.Jur. *Adverse Possession* § 149).

The Tribe has not met its burden in establishing that there is a genuine issue for trial as to many of the claimants.[5] To

5. The Tribe makes numerous attacks against the affidavits, but in nearly every instance it has not shown a need for a trial. We reject the Tribe's argument that certain affidavits were insufficient because they did not attach certified copies of all the documents referred to in the affidavits. The documents referred to are, in most, if not all, cases, available as public records concerning property. The Tribe has not disputed the veracity of the statements concern-

survive the claimants' motions for summary judgment, the Tribe must establish that there is a genuine issue as to whether the claimants have satisfied South Carolina's adverse possession requirements. Once a claimant met his burden under Rule 56(c), the Tribe was required to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R.Civ.P. 56(e).

[2] The Tribe argues that an averment of possession in an affidavit is insufficient to establish possession for summary judgment purposes. We disagree. Once a claimant stated in an affidavit sufficient facts to sustain a motion for summary judgment in his favor, the burden shifted to the Tribe to establish that there is a "material issue of fact." Affidavits by a claimant that he possessed the property or held and occupied the property as his own, paid taxes on it, and took steps to protect it from trespassers is sufficient to sustain a motion for summary judgment so long as the ten-year requirement is met and the statements were made on personal knowledge. Therefore, in order to avoid summary judgment when faced with such an affidavit, the Tribe was required, by affidavit or as otherwise provided for in Rule 56, to allege facts showing that there is a dispute as to whether a claimant did those things claimed in the affidavit. Absent such a showing, there is no "material issue of fact" and summary judgment was properly granted to the claimant.

[3] Some of the claimants, by affidavit, identified the nature and use of the property they claimed as timber farming, timber growing, timberlands, or tree farm. The Tribe argues that these descriptions are insufficient to sustain a motion for summary judgment. Again, the Tribe has mistaken the summary judgment standard. The statements by the claimants are sufficient to meet the requirements of adverse possession. See *Mullis*, 118 S.E.2d at 66 (claimant who entered upon the land under color of title and occupied the land for his ordinary use in growing timber upon land and obtaining timber therefrom satisfied adverse possession requirements). Therefore, to avoid having summary judgment granted against them, the Tribe had the burden of disputing, by affidavit or otherwise, that the property was not used for timber farming and that any other acts alleged which would establish possession were not present.

[4] Further, we are of opinion that averments that property was used for recreational or farming purposes are sufficient to establish possession for adverse possession purposes. See *Mullis*, 118 S.E.2d at 65 (acts of adverse possession "are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property...."). Again, to avoid summary judgment the Tribe was required to controvert facts alleged in the claimants' affidavits.

In sum we find that those averments made in the affidavits are sufficient to satisfy the open, notorious, continuous, and hostile requirements.[6] The only questions remaining are whether the affidavits sufficiently established that they were based on personal knowledge and whether they established that the ten-year period was met.

III.

No Personal Knowledge by Affiants

The Tribe argues that some of the affidavits are not based on personal knowledge and, as a consequence, are insufficient as a basis for summary judgment. Federal

ing the use of the property and thus have not shown the need for a trial. Also the Tribe does not contest the content of the documents referred to or even state it does not know their content. Thus, it has shown no prejudice for any non-compliance with the rule.

6. The Tribe claims that a number of the affidavits contain admissions that the property described was "neither occupied, possessed nor used." We have inspected each of those affidavits and find the Tribe's argument to be without merit. When the pertinent section of each affidavit is read it is apparent that the affiant has alleged sufficient acts to establish entry upon and possession of the property.

Rule of Civil Procedure 56(e) provides as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters therein.

To comply with Rule 56(e), there must be a showing that the statements made in the affidavits were made on personal knowledge. "The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon [is] improper." *Antonio v. Barnes*, 464 F.2d 584, 585 (4th Cir.1972).

[5] The Tribe asserts that some of the affidavits are insufficient because there has been no showing that the statements contained in them are based on personal knowledge. Some of these statements were made by individuals concerning use of the property by family members. We are of opinion that, in ordinary circumstances, and nothing else appearing, an individual can be presumed to have personal knowledge of the possession of land by a family member. Absent a specific showing by the Tribe that an individual did not have personal knowledge of the use of a tract of land by a family member, the statements concerning familial use of the property comply with Rule 56(e)'s personal knowledge requirement.

Therefore, we reject the Tribe's argument that the affidavits were not based on personal knowledge as to those statements concerning use of property by family members of the affiant.

[6] The Tribe also attacks certain affidavits made by corporate officers on behalf of the corporation. We are of opinion that, ordinarily, officers would have personal knowledge of the acts of their corporations. Therefore, since the Tribe did not set forth facts, by affidavit or otherwise, that would show that the officers did not have personal knowledge, the personal knowledge requirement is satisfied as to those affidavits.

[7] Two of the affidavits attacked as insufficient for lack of personal knowledge were made by one Alton G. Brown. In his first affidavit, dated May 22, 1989, Brown does not allege that his statements were made based on personal knowledge. However, this is remedied in his supplemental affidavit wherein he states, "During the entire period from 1962 to 1979, I was familiar with use and possession of the Spencer property referred to in my affidavit of May 22, 1989." Therefore, the combined affidavits were sufficient.

As to those affidavits set forth at Appendix C, we are of opinion that, while they do set forth sufficient facts to sustain a motion for summary judgment, on their face, they do not establish that the affiant's statements were based on personal knowledge. Therefore, we remand as to the claims based on those affidavits solely for the district court to determine whether the statements were made on the basis of personal knowledge.

While certain affidavits did not establish that they were based on personal knowledge, summary judgment was properly granted as to the property described therein as supplemental affidavits were filed that remedied the problem.

IV.

Tacking

[8, 9] The general rule in South Carolina, contrary to the rule in most jurisdictions, is that "even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations." D. Means, *Survey of South Carolina Law: Property*, 10 S.C.L.Q. 90 (1957). Tacking has been allowed in South Carolina in cases of intestate succession, but not when the disseisor conveys by deed. See *Epperson v. Stansill*, 64 S.C. 485, 42 S.E. 426 (1902). In the following passage, the Supreme Court of South Carolina explained its reasoning:

> If possession of land is transmitted by the act of disseisor before the statutory

bar is complete, the grantee of the disseisor cannot unite his possession with that of the disseisor in order to show adverse possession for the requisite period. But when the heir is in of his ancestor's possession, and makes no new entry, the possession of ancestor and heir may be united in making out the statutory period; the distinction being that, when possession is cast by operation of law from ancestor to heir in possession, there is no break in the continuity of possession, whereas, in the case of disseisor and grantee, there is a new entry and a break in the continuity of possession.

Epperson, 42 S.E. at 427 (citations omitted). Therefore, following that Court's reasoning, we are of opinion that South Carolina courts would allow tacking when a change in possession occurs by operation of law. It follows that when a transfer in possession occurs other than by operation of law, South Carolina courts would not allow tacking.

The district court in granting summary judgment allowed tacking in a number of situations. The Tribe argues that the court erroneously created new exceptions to South Carolina's no-tacking rule and, in other instances, erroneously applied the no-tacking rule.[7] We take each instance in turn.

IV.A.

Corporate Merger

[10] The district court allowed tacking in instances when a corporate merger occurred. There appears to be no South Carolina authority on this precise point. The Tribe relies on the following language from *Epperson*, 42 S.E. at 427, to support its argument that tacking should not be allowed in the merger context: "If possession of land is transmitted by the act of disseisor before the statutory bar is complete, the grantee of the disseisor cannot unite his possession with that of the disseisor in order to show adverse possession for the requisite period." The Tribe asserts that merger documents are similar to a deed and, therefore, break the period of possession, because they involve a voluntary act.

We are of opinion, however, that the same rationale used by the courts in allowing tacking between an ancestor and heir, that "when possession is cast by operation

7. The district court erred in granting summary judgment as to two parcels claimed by a Close family trust. The chain of title of these tracts contained transfers of record within the ten-year statutory period. One of the parcels was transferred from Southern Appliances to the trustees on May 7, 1971 (nine years after the statute began running against the tribe in 1962 and nine years prior to the filing of the suit in 1980) by deed dated May 7, 1971 and recorded May 12, 1971 in deed book 418 at page 382. The other parcel was deeded to the trustees by deed dated March 18, 1974 and recorded March 21, 1974 in deed book 481 at page 65. The grantor thereon had been conveyed the property by deed dated May 2, 1971 and recorded May 12, 1971 in deed book 418 at page 382. Again, the dates of these transfers make it impossible for one party to have held the property for the requisite ten year period. Barring the applicability of an exception to the no-tacking rule (no exception is offered by the claimant), the ten-year requirement was not met.

The Tribe claims that the record title of another parcel, deeded to the trustees by deed dated September 20, 1972 and recorded September 16, 1972 in deed book 448 at page 38, shows that no party held the property for the requisite ten-year period. The claimants allege that Ann S. Close, who is not a party to the litigation, is the record owner of this parcel and, therefore, that parcel was not subject to the summary judgment motion. It appears, however, that summary judgment was granted as to that parcel. See Third Judgment Order, Exhibit Y (Parcel with Curt Seifart as grantor recorded in deed book 448 at page 38). Since summary judgment was not sought for that parcel, it could not have been appropriately granted. Therefore, the district court erred in granting summary judgment as to that parcel.

The Tribe also alleges that the district court granted summary judgment as to other parcels (Tax Map Numbers 710 0000 003, 732 0000 003, 730 0000 009, 731 0000 002, 710 0000 004) for which summary judgment was not sought and as to which there was no evidence in the record. These parcels are listed in an appendix to a memorandum in support of summary judgment dated July 11, 1990. Summary judgment was granted as to those parcels in the Third Judgment Order filed July 18, 1990. It appears that the Tribe is correct that no affidavits were filed to support a motion for summary judgment as to those parcels. Therefore, with no evidence before it, the district court erred in granting summary judgment as to those parcels.

of law from ancestor to heir in possession, there is no break in the continuity of possession," *Epperson*, 42 S.E. at 427, would allow tacking in the context of a corporate merger. While it is true that merger is a voluntary act, the change in possession of the property occurs by operation of law. See S.C.Code § 33-11-106 ("When a merger takes effect ... the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment...."); S.C.1962 Code § 12-20.6 (superseded) ("All property, real, personal and mixed ... and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed."); Official Comment to S.C.Code § 33-11-106 ("A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer."). Therefore, the district court did not err in allowing tacking in the context of a corporate merger.

IV.B.

Transfers from Parent to Subsidiary

On May 1, 1969, Duke Power Company deeded the perimeter lands surrounding the Lake Wylie hydroelectric project to its wholly-owned subsidiary corporation, Crescent Land and Timber Company. The district court granted Duke Power and Crescent's motion for summary judgment based on a ten year period of possession between July 2, 1964 and July 2, 1974. The court stated that Crescent was "a mere alter ego or instrumentality of Duke" Power and the deed did not interrupt continuous possession by Duke Power for adverse possession purposes. We are of opinion that this holding must be reconsidered in light of this opinion.[8]

The ten year period was met only if the deed from Duke Power to Crescent had no effect on the running of the statute. The Tribe argues that the running of the statute was interrupted by the 1969 transfer.

In South Carolina, "[t]he mere ownership of the capital stock of one corporation by another does not create an identity of corporate interest between the two companies, *or render the holding company the owner of the property of the other*, or create the relationship of principal and agent, or representative, or alter ego between the two." *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E.2d 718, 720 (1948) (emphasis added).

[11-13] Also in South Carolina, however, in an appropriate case and in furtherance of the ends of justice the corporate veil may be pierced. *DeWitt Truck Brokers v. W. Ray Flemming Fruit Company*, 540 F.2d 681 (4th Cir.1976). *Dewitt*, incidentally, is a recent comprehensive exposition of South Carolina law with respect to the facets of *alter ego* which it discusses. Add to that the principle relied upon by the Tribe, that a piercing of the corporate veil generally will not be permitted for the benefit of the parent corporation or its stockholders, 18 AmJur 2d, *Corporations*, § 46, which is in accord with 1 *Fletcher Cyclopedia, Corporations* (1990), p. 615, that a sole shareholder may not choose to ignore the corporate entity when it is convenient. With these principles in mind, it appears that Duke had acquired the perimeter property surrounding Lake Wylie some years prior to 1969 and prior to 1965. In 1965, the Federal Power Commission entered its Order 313 requiring power companies to provide recreational opportunities on properties surrounding their reservoirs. In 1969, Duke conveyed the perimeter lands surrounding Lake Wylie to its subsidiary, Crescent. Standing alone, this might seem to be a conveyance which would prevent tacking on the part of Duke. So far as its title to the perimeter land is concerned, an affidavit of an officer of Crescent, however, states facts which tend to show that Crescent may be the alter ego of Duke. On the other hand, the conveyance of the perimeter lands to Crescent may

8. We are of opinion that Duke is not estopped from asserting that Crescent is its *alter ego*. The Tribe did not rely on any corporate separateness.

tend to show that Duke treated Crescent as a separate corporate entity and not as its alter ego, if, as the Tribe claims, the purpose of the conveyance was to avoid setting up recreational facilities as required by FPC Order 313. The district court found that Duke had not violated Order 313. It gave no reasons, but the affidavit of Crescent's attorney may tend to support that conclusion. Whether or not FPC Order 313 was violated, however, is not the end of the question. If the conveyance from Duke to Crescent enabled Duke to avoid compliance with Order 313, even though such avoidance may have been quite legitimate, that would be evidence which tends to show that Duke treated Crescent as a separate corporation and not as its alter ego. The district court also did not consider whether or not the rule we have cited from *Fletcher*, that a sole shareholder may not choose to ignore the corporate entity when it is convenient, has been violated.

In view of the facts we have stated and the authorities, we are of opinion that the district court erred in granting summary judgment to Duke and Crescent with respect to the perimeter property. Its judgment in that respect is vacated and the case remanded for such further fact finding as may be appropriate.[9]

IV.C.

Transfer between Subsidiary Corporations of Same Parent Corporation

[14] The same rules apply in this situation as apply to a transfer between a parent and subsidiary. If the transfer is found as a matter of fact and law to be to an alter ego, the tacking requirement will be complied with, otherwise it will not. The holding of the district court that the ten year period ran as to property claimed by Bowater, Inc., because the transfer between its subsidiaries East Highlands Company and Catawba Timber Company had the effect of stopping the running of the statute prior to the running of the ten-year period must be vacated and that transfer re-examined under the principles stated above in this opinion.

IV.D.

Devise to Heirs

The district court held that "[a] devise to an heir of a testator does not interrupt possession." This ruling may be valid in some instances, but invalid in others, as the doctrine of worthier title may apply.

[15, 16] Under the doctrine of worthier title, a devise to the heirs of the testator was a nullity if the interest limited in their favor was identical to that which such heirs would have taken by descent if there had been no devise to them. The rule originated because the feudal incidents of relief, wardship, and marriage were preserved only if the new tenant of land acquired an interest by descent from the former tenant. See *Restatement (Second) of Property* § 30.2, Comment on Subsection (2). Because the reason for the rule, the preservation of feudal incidents, no longer exists, the doctrine as it applies to testamentary dispositions has been abolished by statute in several States, but not in South Carolina. See *Restatement (Second) of Property* § 30.2, Statutory Note.

South Carolina applied the doctrine of worthier title in the case of *Seabrook v. Seabrook*, 10 S.C.Eq. 495 (1859). The rule was there stated as follows, p. 503–504:

> "It is undoubted law, that where a testator gives by his will the same estate to the same persons who would be entitled to take that estate by operation of law in case of an intestacy, the devise or legacy will be void, and the right of the party or parties entitled will be referred to the law of distributions and descents. If

9. The Tribe asserts that the district court erroneously held the six-year statute of limitations on actions for inverse condemnation applicable to Duke and Crescent's claim to the Lake Wylie Perimeter Property. We do not agree that the district court so ruled. In its amendment to the second judgment order the district court plainly held that the six-year statute applied to the Lake Wylie Dam Property and the Lake Wylie Basin Property. The order made no mention that the statute would apply to the Lake Wylie Perimeter Property and we do not read it as so holding.

there be any variation between the disposition which the will, and which the law makes in such a case, either in regard to the persons who are to take, or to the quantity of the estate, the title will be referred to the will."

The court held that the devise to the heirs was void and as to the heir in question the testator died intestate.

Without attempting to go into all of the South Carolina cases touching the subject, we come to the case of *Burnett v. Crawford*, 50 S.C. 161, 27 S.E. 645 (1897) which is relied upon by the Tribe. That was a case in which an heir had sued the children of another heir for partition. The plaintiff heir had taken her estate by intestacy and the defendant children of the other heir had taken their interest by devise. The testator had entered into a purported settlement of rights in the property with the plaintiff heir some 9 years prior to the testator's death. During that 9 year period, the court considered, at least for the purposes of its opinion, that the testator held adversely to the plaintiff heir. Although the plaintiff brought suit 11 years after the settlement, the court refused to permit tacking of the 9 year period and the two year period although the devise was to the defendants. The Court stated at 27 S.E. p. 647:

"A devisee under a will does not take possession of the devise as heir, but rather as the grantee or purchaser of the testator."

It is that language the Tribe relies upon. But we note that almost immediately following that language, and indeed in the same paragraph, the following statement at p. 647–648:

"Under a properly framed request, appellant would have been entitled to have the jury instructed as to the right of a devisee claiming under a will to unite his possession with that of his testator so as to make out the statutory period of adverse possession."

While the first statement just quoted may seem to have abolished the doctrine of worthier title (as it applies to possession) by implication, the second statement just as surely provides the doctrine to have survived. We are of opinion that both statements may be reconciled by referring back to page 504 of *Seabrook*, which states that if there be any variation between the disposition made by the will and the law, either in regard to the persons who are to take or the quantity of the estate, the title will be referred to the will. While it is true that the testator in *Burnett* did devise the land in question to his children, the defendants, the terms of the will are not stated and we must suppose, in order to justify the correctness of the opinion and make it consistent with the other South Carolina cases, that the will involved, while it may have devised the land to the same heirs, did not give to them the same quantity of estate they would have received by virtue of intestacy or that the record does not show the quantity of estate. We are reassured in our view of *Burnett* by the subsequent case of *Kilgore v. Kirkland*, 69 S.C. 78, 48 S.E. 44 (1904). In *Kilgore*, the testator had received the property in question, apparently by deed, some 4 or 5 years before his death in 1850, at which time he devised the same to his children, share and share alike. The heirs continued in the testator's possession until the year 1858. On these facts, the South Carolina Court stated:

"... while it is also true to that possession of a devisee cannot be united with that of the testator, to make out adverse possession for the statutory period (*Burnett v. Crawford*, 50 S.C. 161, 27 S.E. 645), nevertheless, when the heir is in of his ancestor's possession and makes no new entry, the possession of ancestor and heir may be united in making out the period necessary to quiet title."

48 S.E. at 46.

[17, 18] Thus our construction of *Burnett* follows *Kilgore*'s construction of *Burnett*, and we think the doctrine of worthier title is extant in South Carolina. We note that Professor Means agrees with our conclusion that tacking should be permitted under the doctrine of worthier title in such cases, although he arrives at his construction of *Burnett* by his view that the problem was not properly presented to the

South Carolina Court. Survey of South Carolina Law, 10 S.C.L.Q. 90, n. 4 (1957). We are further of opinion that *Seabrook* should not be held by us to have been overruled by implication. Overruling by implication is not favored. See *Rodriquez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989); *United States v. Bryan*, 339 U.S. 323, 343 at 345-346, 70 S.Ct. 724, 736 at 737-738, 94 L.Ed. 884 (1950) (Justice Jackson concurring). And in diversity cases also that is the rule in this circuit. See *Walk v. Baltimore & Ohio Railroad*, 847 F.2d 1100, 1108 (4th Cir. 1988)

Thus, this aspect of the case must be remanded with instructions to apply the doctrine of worthier title if the claimant heir took as devisee and with the same quantity of estate he would have taken if an heir. If all those requirements are met tacking should be permitted in such cases.

IV.E.

Change in the Identity of a Trustee

[19, 20] The Tribe argues that the district court erred in holding that a change in the identity of a trustee does not interrupt the running of the ten-year statute. We are of opinion the district court correctly held that the appointment of a successor trustee upon the death of the former trustee does not interrupt the running of the statute of limitations. It is a fundamental rule of trust law that a trust will not fail for want of a trustee. *Leaphart v. Harmon*, 186 S.C. 362, 195 S.E. 628, 629 (1938). Therefore, we hold that, by operation of law, possession is cast from the former trustee to his successor.

IV.F.

Change in Beneficiary of Trust

[21] The Tribe argues that the transfer of a beneficial interest in a trust interrupts the ten-year period. We find no merit to this contention. The property is held adversely by the trust through the trustee. A change in the beneficial ownership has no effect on the running of the statute as there is no new entry onto the property.

V.

William O. Nisbet Property (602.5 and 53 acre tracts)

[22] The Tribe also asserts that a question of fact exists as to the exclusivity and continuity of the possession of William O. Nisbet. Its claim is based on the fact that members of the Catawba Tribe have at times entered the 602.5 and 53 acre tracts owned by Nisbet for the purpose of collecting clay. Mesdames Wade and Campbell submitted affidavits stating that they were never denied access to the property to dig in the clay holes. Nisbet does not dispute that this activity has taken place. However, Nisbet's affidavit shows that he allowed members of the Tribe on to Nisbet's property for access to the clay. He claimed the property as his own and nothing done by the Tribe members amounted to an ouster of Nisbet's possession. Therefore, Nisbet's possession was exclusive and continuous. We agree with the district court's holding that "[a]dverse possession is not interrupted by entry of the owner unless there is also ouster of the claimant." "Actual possession, once taken, will continue, though the party taking such possession should not continue to rest with his foot upon the soil, **until he be disseised**, or until he do some act which amounts to a voluntary abandonment of the possession." *Smith v. Southern Railway*, 237 S.C. 597, 118 S.E.2d 440, 442 (1961).

It is true that the affidavits of Mesdames Wade and Campbell state that members of the Tribe had gone on the property for years, and the Wade affidavit states that such members of the Tribe did not ask permission or notify the Nisbets of their entry. We leave aside for the moment the fact that the Wade affidavit probably shows on its face it is not on personal knowledge as respects other members of the Tribe, but we do not leave aside the fact that it does not show that Nisbet had any knowledge of such entry. Even if the Wade affidavit is construed most favorably to the Tribe, it does not show any ouster of

Nisbet under *Smith*, especially because it does not show that Nisbet knew of any unauthorized entry onto his property.

The Tribe's point is without merit.

VI.

Adverse Possession & Co-Tenancies

The Tribe takes issue with the district court's ruling that "[t]he adverse possession of one co-tenant establishes the adverse possession of his co-tenants." We find no error.

[23, 24] In South Carolina, it is presumed that "the possession of one tenant in common is the possession of all." See *Woods v. Bivens*, 292 S.C. 76, 354 S.E.2d 909, 911 (1987). The operation of the rule that the possession of one co-tenant is the possession of all only ceases if "such possession becomes adverse to the co-owners of the possessor." 354 S.E.2d at 911. Therefore, a co-tenant who satisfies the adverse possession requirements does so for all of the co-tenants so long as he does not claim to be holding adversely to his co-tenants. In *Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165, 167 (1952), the Supreme Court of South Carolina recognized that a co-tenant can establish adverse possession for both herself and her co-tenant. That being so, we are of opinion that a change in identity of co-tenants has no effect on establishing adverse possession so long as one co-tenant possesses the property for the requisite period. Therefore, we find no merit to the Tribe's contention that the transfer of title as to one co-tenant interrupted the running of the adverse possession statute.[10]

VII.

Effect of Non-Residency of Claimants

The district court ruled that "[t]he non-residence of a defendant claiming adverse possession does not toll the statutory period." The Tribe argues that the ten year adverse possession period was tolled against certain defendants because they may have been outside of South Carolina for more than one year. S.C.Code § 15-3-30 provides that if a defendant is out of state for more than one year when or after a cause of action accrues, the statute of limitations is tolled until his return to the state. See *Dandy v. American Laundry Machinery Inc.*, 301 S.C. 24, 389 S.E.2d 866, 868 (1990).

[25] We are of opinion that this tolling statute is not applicable to adverse possession claims. "[T]he purpose of the tolling statute is to remedy the problem of locating a nonresident defendant before expiration of the statute of limitations." 389 S.E.2d at 868. Recently, the Supreme Court of South Carolina has indicated that the tolling statute is inapplicable when the statute's purpose is not fulfilled. See *Dandy*, 389 S.E.2d at 868 (§ 15-3-30 does not apply to a foreign corporation with a registered agent in South Carolina because there is no problem in locating the nonresident defendant before expiration of the statute of limitations). In so doing, the court appears to have rejected the reasoning used in two prior cases that relied on the plain language of the statute. See *Cutino v. Ramsey*, 285 S.C. 74, 328 S.E.2d 72 (1985) (tolling statute applies to an out-of-state defendant even when service can be effected by substitute service on the Chief Highway Commissioner); *Harris v. Dunlap*, 285 S.C. 226, 328 S.E.2d 908 (1985) (amenability to personal service under the long-arm statute does not render the tolling statute inapplicable). The *Dandy* case makes clear that the current test in South Carolina for determining the applicability

10. As an additional argument, the Tribe claims that a transfer by deed from a disseisor's executors to a devisee interrupts the running of the adverse possession statute and therefore certain percentage interests in property claimed by the Nisbet family were not held for the requisite period. Also the Tribe argues that the creation or termination of a trust interrupts the 10 year period. We do not reach these issues as our holding that one co-tenant can establish adverse possession for all co-tenants allows the Nisbets and other claimants to establish adverse possession as to their entire holding by establishing that one co-tenant held the property for the requisite period. For example, it appears that the Nisbet trust held an undivided interest for the entire requisite 10 year period.

of the tolling statute is whether the problem of locating an out-of-state defendant prior to the running of the statute of limitations is present. In the instant case, South Carolina's separate comprehensive statutory scheme for the recovery of real property obviates the need for a tolling statute against out-of-state defendants in adverse possession cases. See S.C.Code, Title 15 *Civil Remedies and Procedures*, Chapter 67—*Recovery of Real Property*. Specifically, S.C.Code § 15–67–30 authorizes summons and service by publication on parties outside of the State in actions "to determine adverse claims." Therefore, the problem that the tolling statute addresses, the difficulty in locating an out-of-state defendant before expiration of the statute of limitations, is not present as there is no need to locate the out-of-state defendant in an adverse possession case. In sum, we follow South Carolina's rule, as stated in *Dandy*, that the tolling statute is inapplicable in cases in which the problem that the statute was meant to address is not present and hold the tolling statute for out of state defendants to be inapplicable to adverse possession claims.

VIII.

Dismissal of Certain Claimants

The Tribe alleges that the district court erroneously dismissed certain parties from the case. The district court dismissed twenty-nine claimants, holding that answers to interrogatories on file established that those claimants were entitled to have all parcels claimed by them dismissed from the action. The Tribe argues that, in fact, no answers to interrogatories were filed with the district court. The claimants argue that the information contained in the interrogatory answers was presented to the district court in summary form in briefs, memoranda, and appendices and the Tribe did not object to the use of this information in this form. We are of opinion the district court did not err in relying on these summaries in its dismissal orders as the Tribe did not dispute their accuracy.

We are of opinion, however, that as to those parties that moved for summary judgment as to certain parcels that were not released by the summary judgment orders, the district court erred in dismissing them from the action. Those parties are listed in Appendix H.[11]

Based on the foregoing, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND VACATED AND REMANDED IN PART.

APPENDICES A THROUGH H

Without necessarily implying any criticism of the attorneys for the Tribe or for the defendants, a glance at the style of this case and a reference to our various opinions herein shows the more than complicated position in which the parties and the court find ourselves. Many of the defendants own multiple tracts of land and the decision of the district court appealed from is contained in large part in four judgment orders accompanied by multiple exhibits.

Perhaps because the Tribe was confined, at least in part, by rules as to numbers of pages, the content of its brief on appeal generally stated its complaints in the most general terms as to parties and tracts affected, while the brief itself may have specifically stated the nature of the legal error claimed.

The reply brief of the defendants in many cases picked up and argued the specific legal issues presented leaving their general application as to parties and parcels of land to an interpretation of the district court's orders and the briefs. While we think with reasonable certainty that the attorneys quite understand the parties and the property affected by the briefs, only a causal inspection will reveal

11. The Tribe argues that John S. Simpson moved for summary judgment as to certain parcels that were not released by the judgment orders. A review of the record indicates that summary judgment was, in fact, granted as to all parcels claimed by John S. Simpson. The Tribe's confusion stems from an apparent typographical error—Tax Map Number 600–11–02–005 became Tax Map Number 600–11–02–035 in the judgment order.

that in most cases such is not shown by a reading of the briefs without minute references to the appendix and in some cases to parts of the record not included in the appendix.

For example, on page 41 of the Tribe's brief, in part B, 2, c. "Tree Farms" the objection is "A number of claims identified the nature and use of the property claimed by them as tree farm, timber farming, timber growing or timber lands." The brief then lists 18 appendix references without giving names of defendants or properties affected. To this, the defendants respond on page 21 of their brief by identifying the property of only two defendants with particularity. Much the same can be said of the Tribe's contentions on page 43, part d. with reference to "Farming or Recreational or Social Purpose." While the defendants response on page 28 is in more detail than the response mentioned for tree farming, nevertheless, it does not identify all of the property as to which the Tribe's claim is made. We could go on and on, some better and some worse, but these two examples are enough to show why the mechanical construction of our opinion, for the most part, speaks in general terms, and shows its application in most cases by way of appendices. That was the only practical means we could devise within any kind of reasonable page limitation to show what we had decided and how our decision applied to a particular defendant or piece of property. We must all remember that this opinion concerns the title to real estate and well may end up being recorded in the real estate records of the State.

We should say without rancor that the briefs we have had in this case do not commend themselves as models of form. We have, however, addressed each question of law raised by the Tribe.

For these reasons, we have included as a part of this opinion and the decision in this case appendices A through H, which will show the parties affected, precisely where to find the properties affected, and the parts of our decision affecting the same, including our disposition of the questions.

APPENDIX A

The defendants' unopposed motion for summary affirmance is hereby GRANTED, and the judgment of the district court is hereby AFFIRMED as to the following parcels of land.

Defendant	*Portion of Judgment Order Describing Parcel*[1]
1. Hoechst Celanese	One, A, (856); Deed dated 10/1/86; Deed Book 922, page 195, York County; except property described on page 2, paragraph 9 of the deed: Deed from Celriver Recreation Assoc. to Celanese

1. The volume and complexity of the records describing the parcels of land in this case has prompted us to develop a system of notation whereby the reader may discern what action we have taken with respect to each individual parcel as to which summary judgment was granted. We have attempted to devise a system that strikes a useful balance between simplicity and precision.

The district court's holdings in this case are collected in the form of five judgment orders. We refer to these judgment orders by the words "One," representing the first judgment order beginning at J.A. 848; "Two," representing the second judgment order beginning at J.A. 948; "Three," representing the third judgment order beginning at J.A. 960; "Amend.," representing the amended second judgment order beginning at J.A. 1012; and "Four," representing the fourth judgment order beginning at J.A. 1019. The first word in a reference under this column, then, refers the reader to the appropriate judgment order containing the parcel at issue.

Each judgment order is accompanied by exhibits which describe with particularity each parcel at issue and naming the defendant who claims that parcel. We reference these exhibits by using the same capital letters, beginning with A and proceeding alphabetically, as does each judgment order. The second letter in a reference in this column is the capital letter designating the exhibit in which the reference occurs.

The next number or entry in a reference represents the specific tract of land contained in a particular exhibit. Regrettably, the exhibits employed by the district court do not use a uniform notation to refer

APPENDIX A—Continued

Defendant	*Portion of Judgment Order Describing Parcel*[1]
	Corp. dated 6/2/78 recorded in York County Clerk's Office, Deed Book 572, page 377, on 6/5/78 and property described on page 2, paragraph 10 of the deed: Deed from David Int'l, Inc., to Celanese Corp. dated 6/11/85 recorded in York County Clerk's Office, Deed Book 825, page 160 on 6/26/85.
2. Wachovia Bank and Trust Company	One, B, ¶ (i), (855); Deed dated 10/30/50, Deed book 164, page 320 York County, SC
3. Heritage Village	One, C, ¶ 4, (857); Deed dated 8/1/85, Deed Book F-6, page 2544 One, C, ¶ 10, (858–59); Deed dated 11/30/81; Deed Book 648, page 311 and Deed dated 1/27/84; Deed Book 741, page 332; One, C, ¶ 11, (859); Deed dated 9/30/82; Deed Book 678, page 230; One, C, ¶ 13, (859); Deed dated 5/2/85, Deed Book 816, page 105
4. T.W. Hutchison	One, J, (866); TMS No. 664-00-00-020; Deed dated 6/20/63; Deed Book 313, page 383
5. Francis M. Mack, Jr.	One, K, (867); Deed dated 11/23/76, Deed Book 540, page 16; Deed dated 11/15/50, Deed Book 165, page 491; and Deed dated 1/24/85, Deed Book 804, page 157
6. John S. Simpson	One, L, (868); Deed dated 11/2/50; Deed Book 165, page 23
7. Thomas Brown Snodgrass, Jr.	One, M, (869); File No. 14644 Probate Court York County and File No. 15772; Probate Court York County
8. City of Rock Hill South Carolina	One, O, (871); Deed dated 9/5/86; Deed Book 906, page 293

APPENDIX B

The judgment of the district court is hereby AFFIRMED as to the following parcels of land.

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*[2]
1. Wachovia Bank and Trust Company	One, B, ¶ (ii), (855)	VI (All tracts*)

to a particular parcel of land. Accordingly, the last number or numbers in a reference represent our best judgment as to the most clear and concise way to identify a specific parcel. Where possible we have employed tax map numbers. Less often we have referred to numbered paragraphs in the exhibit. Only where necessary have we resorted to a more lengthy description of a parcel, such as by deed book and page number, dates and grantors, and the like.

The final number in a reference, in parentheses, is the Joint Appendix number where that reference may be found.

As an example, the reference

One, C, (857)
¶ 1
¶ 2
¶ 3
¶ 4

refers to the parcels found in paragraphs one through four of exhibit C to the first judgment order, appearing at J.A. p. 857.

2. The references to the designated sections of the foregoing opinion are largely self-explanatory. As for the references to section II of our opinion, which deals with several issues relating to the

APPENDIX B—Continued

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*
	Deed dated 10/30/1950 Deed Book 164, page 320 Three, A, (968) ¶ 1.a.—Deed dated 6/20/57 Deed Book 240, page 182 ¶ 1.b.—Deed dated 6/21/57 Deed Book 240, page 179 ¶ 1.c.—Deed dated 12/12/63 Deed Book I, page 203	
	¶ 2.a.—Deed dated 4/20/66	II (poss.)
	¶ 3–275 acres, York County	VII
	¶ 4–680 acres, York County	VII

* An objection was raised as to all tracts in the judgment order and summary judgment is affirmed as to all tracts unless they are specifically mentioned in Appendices C–H.

2. Heritage Village — One, C, (857)

Date of Conveyance	*Book*	*Page*	
?	250	522	VII
12/1/83	733	95	n. 5
(Glover)	812	356	n. 5
7/5/84	772	356	III n. 5
11/15/78	585	18	III
8/10/84	773	39	III
6/15/84	771	188	n. 5
9/16/75	528	226	III
4/29/81	631	555	n. 5
1/15/85	803	202	III n. 5
4/25/78	569	939	III

Three, B, (969)

Date of Conveyance	*Book*	*Page*	
2/15/85	804	99	III n. 5
12/12/77	C–6	5365	II (poss.)
2/84	756	83	III VII
1/6/78	562	914	II (dates)
1/78	C–6	5482	III
1/78	C–6	5483	VII
8/31/83	718	318	II (cont.) III

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sufficiency of the allegations in the defendants' affidavits, we have devised a shorthand notation for purposes of identifying which specific aspect of section II addresses the relevant objection of the Tribe.

Notation	*Title of Corresponding Section of Tribe's Opening Brief*
II (concl.)	"Conclusory Averments of Possession"
II (sp. pc.)	"Possession of Specific Parcels Not Shown"
II (tree)	"Tree Farms"
II (farm)	"Farming and Recreational or Social Purposes"
II (poss.)	"No Actual Possession or Entry"
II (dates)	"Dates of Use"
II (cont.)	"Continuity of Possession"

APPENDIX B—Continued

3.	Herald Publishing Company	One, D, (860) Tract C—Deed dated 5/12/77; Deed Book 548, page 49 Tracts A, B & F—Deed dated 6/26/86; Deed Book 896, page 286 Tract E—Deed dated 5/20/81; Deed Book 631, page 957 Tract D—Deed dated 6/26/86; Deed Book 896, page 286 Three, C, (970) Tracts L & K—Deed dated 10/31/85; Deed Book 849, page 500	II (poss.) III
4.	C.H. Albright	Three, D, (971–972)	III, n. 5 (All tracts below)
		Tax Map Numbers	
		600–02–03–061	II (dates) II (cont.)
		600–02–02–064	II (dates) II (cont.)
		598–19–03–016	II (dates) II (cont.)
		598–19–03–015	II (cont.)
		627–07–04–025	II (dates) II (cont.)
		600–20–01–010	II (dates) II (cont.)
		600–21–03–036	II (dates) II (cont.)
		600–21–01–018	II (dates) II (cont.)
		600–21–02–011	II (dates) II (cont.)
		600–21–02–010	II (dates) II (cont.)
		627–02–02–006	II (dates) II (cont.)
		620–00–00–005	II (tree fm.) II (dates)
		620–00–00–007	II (tree fm.) II (dates)
		620–00–00–008	II (tree fm.) II (dates)
		627–22–02–021	II (poss.) VI
5.	Ned M. Albright	One, F, (862)	

Date of Conveyance	*Book*	*Page*
2/13/56	221	447
2/17/78	565	930
3/21/80	611	528
5/17/79	594	256

APPENDIX B—Continued

Three, E, (973)

III, n. 5 (All tracts below)

Tax Map Numbers
629-06-02-015 — II (dates) II (cont.)

627-22-02-021

6. David G. Anderson — One, G, (863)

Date of Conveyance	*Book*	*Page*	
8/24/85	838	208	
7/8/85	827	350	IV-E VI VII

7. John Wesley Anderson, III — One, H, (864)

Date of Conveyance	*Book*	*Page*	
7/8/85	827	350	IV-E VI
8/24/85	838	208	

Three, I, (977) — n. 10
Tax Map 604-06-01-028 — III II (dates)

8. F.S. Barnes, Jr. — One, I, (865) — III
Deed dated 1/28/57
Deed Book 235, page 415
Three, J, (978) — III (All tracts below)

536-00-00-038 — II (farm) II (dates)

597-00-00-019 — II (tree) II (dates)

639-00-00-022 — II (poss.) II (dates)

639-00-00-025 — II (farm) II (dates)

639-00-00-030 — II (farm) II (dates)

639-00-00-031 — II (farm) II (dates)

639-00-00-032 — II (farm) II (dates)

627-10-02-029 — II (dates)

627-12-01-001 — II (dates)

9. Marshall E. Walker — One, N, (870)

Date of Conveyance	*Book*	*Page*
3/6/69	387	393
10/12/56	202	307
9/26/69	383	307

APPENDIX B—Continued

		Three, P, (985–986)	III, n. 5 (All tracts*)
		624–00–00–016	II (tree)
			II (dates)
		624–00–00–011	II (tree)
			II (dates)
		677–00–00–026	II (tree)
			II (dates)
		624–00–00–012	II (tree)
			II (dates)
		621–00–00–042	II (tree)
			II (dates)
		622–00–00–014	II (tree)
			II (dates)
		674–00–00–003	II (tree)
			II (dates)
		675–00–00–064	II (tree)
			II (dates)
		675–00–00–065	II (tree)
			II (dates)
		752–00–00–031	II (tree)
			II (dates)
		675–00–00–062	II (tree)
			II (dates)
		624–00–00–014	II (tree)
			II (dates)
		678–00–00–017	II (tree)
			II (dates)
		678–00–00–011	II (poss.)
			II (dates)
		622–00–00–007	II (dates)
		622–00–00–013	II (dates)
		624–00–00–015	II (dates)
		692–00–00–046	II (dates)
		598–05–02–010	II (dates)
		677–00–00–019	II (dates)
		674–00–00–006	
		624–00–00–010	
10.	Duke Power Company	One, P, (872–900)	II, n. 5 (All tracts*)

Date of Deed	*Recordation Date*	*Book/Page*
York County, South Carolina		
5/11/100	6/13/00	19/621–633
09/01/25	12/05/25	65/48
09/01/25	12/05/25	65/53
12/19/27	12/21/27	65/303
05/10/32	06/01/32	74/540
06/27/36	08/05/36	87/138
09/08/24	09/17/24	61/283
06/05/24	06/07/24	61/68
03/19/26	04/09/26	2-P/19 (Plat Book)
05/21/30	05/28/30	74/231
05/18/25	12/24/25	65/61
09/03/24	09/17/24	54/623
09/24/24	10/01/24	54/623
09/08/24	09/17/24	54/617
09/23/24	10/01/24	54/622

APPENDIX B—Continued

09/01/25	02/05/25	65/53
06/27/36	08/05/36	87/138
12/24/03	01/23/05	24/637–38
12/30/03	01/23/05	24/636–37
12/23/03	01/23/05	24/635–36
12/26/03	01/23/05	24/634
01/02/04	01/23/05	24/632–33
12/23/03	01/23/05	24/631–32
01/26/04	01/23/05	24–630–31
01/28/04	01/23/05	24/628–29
04/12/04	01/23/05	24/627–28
01/16/04	01/23/05	24/621–22
12/23/03	01/23/05	24/625–26
12/21/03	01/23/05	24/622–23
12/21/03	01/23/05	24/626–27
12/21/03	01/23/05	24/620–21
03/11/04	01/23/05	24/624–25
03/31/04	01/23/05	24/623–24
01/27/04	01/23/05	24/638–39
02/25/05	05/16/05	25/56–57
04/01/04	06/03/05	25/86
07/27/05	07/31/05	25/142
01/30/09	02/01/09	29/455–56
04/11/14	06/06/14	39/614
04/15/16	06/06/14	39/613
03/16/16	03/28/16	44/137
03/16/16	03/28/16	44/138
03/17/16	03/28/16	44/138
03/20/16	03/28/16	44/139
03/17/16	03/28/16	44/139
03/17/16	03/25/16	44/140
03/17/16	03/28/16	44/140
03/17/16	03/28/16	44/141
03/17/16	03/25/16	44/141
03/16/16	03/28/16	44/142
03/16/16	03/28/16	44/142
03/17/16	03/28/16	44/143
03/28/16	04/04/16	44/144
03/29/16	04/04/16	44/144
03/29/16	04/04/16	44/145
03/22/16	04/12/16	44/152
03/29/16	07/28/16	44/166
01/06/04	01/23/05	24/641–42
01/14/04	01/23/05	24/642–43
01/06/04	01/23/05	24/646–47
01/19/04	01/23/05	24/645–46
03/01/04	01/23/05	24/643–44
01/19/04	01/23/05	24/644–45
01/19/04	01/23/05	24/647–48
01/11/04	01/23/05	24/649
07/19/16	07/22/26	44/165
08/08/16	08/14/16	44/172
09/15/25	01/01/25	65/14
09/03/30	10/18/30	74/277
03/30/34	04/03/34	79/184
09/20/38	09/21/38	92/599
03/01/40	03/12/40	98/252
09/26/50	10/12/50	163/384
04/22/53	04/30/53	193/75
03/08/04	01/23/05	24/664
03/08/04	01/23/05	24/665–66

APPENDIX B—Continued

03/07/04	01/23/05	24/659–60
03/25/04	01/23/05	24/663–64
03/08/04	01/23/05	24/660–61
03/08/04	01/23/05	24/662–63
07/19/04	01/23/05	24/639–40
03/10/04	01/23/05	24/650–51
03/11/04	01/23/05	24/650–51
03/11/04	01/23/05	24/658–59
03/07/04	01/23/05	24/651–52
03/10/04	01/23/05	24/653–54
03/08/04	01/23/05	24/654–55
03/15/04	01/23/05	24/652–53
03/11/04	01/23/05	24/656–57
03/07/04	01/23/05	24/655–56
03/07/04	01/23/05	24/657–58
09/01/05	08/24/06	26/370
07/02/07	07/13/07	27/577
03/20/07	09/13/07	27/671
03/20/07	09/13/07	27/673
03/20/07	09/13/07	27/672
05/24/17	06/04/17	44/315
05/22/17	06/05/17	44/313
05/27/17	06/05/17	44/312
05/22/17	06/05/17	44/313
05/24/17	06/05/17	44/313
05/24/17	06/13/17	44/318
06/08/17	06/13/17	44/318
06/14/17	06/19/17	44/320–21
05/26/17	06/05/17	44/315
06/15/17	06/15/17	44/318–19
06/15/17	06/15/17	44/319
06/25/17	07/12/17	44/324–25
01/04/05	01/23/05	24/640–41
01/05/05	05/16/05	25/58
01/18/05	05/16/05	25/59
03/15/06	05/01/06	25/767
09/19/05	05/01/06	25/771–772
06/08/05	05/01/06	26/768–769
03/15/06	05/01/06	25/779–780
06/13/05	05/01/06	25/770–771
09/19/05	05/01/06	25/772–773
09/24/05	05/01/06	25/769–770
02/13/06	05/01/06	25/768
03/15/06	05/01/06	25/773–774
06/05/05	06/28/06	26/186
09/01/05	08/24/06	26/370
06/13/07	06/17/07	27/546–547
09/02/07	10/25/07	27/710–711
06/14/05	05/01/06	25/776–77
10/20/05	05/01/06	25/774–75
10/21/05	05/01/06	25/775–76
09/01/05	08/24/06	26/359
09/01/05	08/24/06	26/369
08/02/05	08/24/06	36/372
09/08/05	08/24/06	26/376
08/21/05	08/24/06	26/375
03/29/06	08/02/06	26/251
07/30/06	08/02/06	26/253
07/05/06	08/02/06	26/255
03/31/06	08/02/06	26/254
06/19/06	08/02/06	26/256

APPENDIX B—Continued

04/06/06	08/02/06	26/257
05/07/06	08/02/06	26/259
05/07/06	08/02/06	26/260
03/29/06	08/02/06	26/258
07/05/06	08/02/06	26/262
04/04/06	08/02/06	26/261
03/28/06	28/02/26	36/263
03/28/06	08/02/26	26/264
03/28/06	08/02/06	26/265
07/05/06	08/02/06	26/267
07/05/06	08/02/06	26/268
03/29/06	08/02/06	26/266
05/08/06	08/02/06	26/269
07/05/06	08/02/06	26/270
05/07/06	08/02/06	26/272
03/31/06	08/02/06	26/275
04/04/06	08/02/06	26/276
04/03/06	08/02/06	26/278
03/29/06	08/02/06	26/278
06/19/06	08/02/06	26/280
01/25/07	01/28/07	27/135–36
07/04/06	01/28/07	27/133/35
08/30/06	01/28/07	27/148–149
09/05/06	01/28/07	27/149–50
08/16/06	01/28/07	27/141–42
08/16/06	01/28/07	27/131–32
08/30/06	01/28/07	27/127–128
01/25/07	01/28/07	27/132
12/21/06	01/28/07	27/153
11/12/06	06/17/07	27/545–46
01/17/07	06/17/07	27/555–556
09/07/06	06/19/07	27/562
05/29/07	08/28/07	27/636
03/27/06	11/15/07	27/771–72
01/15/09	01/26/09	29/446
01/26/09	02/01/09	29/456–459
02/11/09	02/22/09	29/484
04/05/09	04/29/09	29/530
04/16/09	05/05/09	29/535–56
01/07/09	06/16/09	29/594
11/29/09	01/18/10	29/791–793
01/05/17	01/09/17	44/249
01/03/17	01/09/17	44/250
01/06/17	01/09/17	44/250
01/03/17	01/09/17	44/250–51
01/02/17	01/09/17	44/251
01/06/17	01/09/17	44/245–46
01/06/17	01/09/17	44/244
01/04/17	01/09/17	44/247
01/06/17	01/09/17	44/246
01/06/17	01/09/17	44/245
01/03/17	01/09/17	44/247–48
01/02/17	01/09/17	44/246
01/03/17	01/09/17	44/249
01/04/17	01/09/17	44/247
01/01/17	01/09/17	44/248
01/02/17	01/09/17	44/244
01/08/17	01/09/17	44/243
01/03/17	01/09/17	44/244–45
01/04/17	01/09/17	44/247
01/09/17	01/17/17	44/257

APPENDIX B—Continued

01/10/17	01/17/17	44/258
01/11/17	01/17/17	44/258
01/09/17	01/17/17	44/258
01/13/17	01/17/17	44/257
01/19/17	01/23/17	44/261
01/17/17	01/23/17	44/261
01/16/17	01/23/17	44/261
01/23/17	01/30/17	44/264
01/23/17	01/30/17	44/264
01/23/17	01/30/17	44/264
01/29/17	02/06/17	44/267
01/29/17	02/06/17	44/267–68
02/09/17	02/16/17	44/272–73
02/09/17	02/16/17	44/273
02/10/17	02/16/17	44/273
03/14/17	03/20/17	44/287
03/16/17	03/20/17	44/284
03/19/17	03/20/17	44/285
03/20/17	03/20/17	44/286
03/16/17	03/20/17	44/286
03/13/17	03/20/17	44/2854
02/09/17	03/20/17	44/286
03/29/17	04/02/17	44/292
03/29/17	04/10/17	44/296
05/22/17	06/05/17	44/311
05/22/17	06/05/17	44/311
05/23/17	06/15/17	44/312
05/24/17	06/05/17	44/315
05/13/17	06/15/17	44/319
06/19/17	06/22/17	44/321
06/28/17	06/29/17	44/322
09/19/17	09/25/17	44/341
09/11/17	09/25/17	44/341
10/10/17	10/18/17	44/348
02/27/07	06/17/07	27/550
09/04/06	01/28/07	27/146–47
05/03/07	06/17/07	27/547–48
02/27/07	06/17/07	27/554–55
10/20/06	06/17/07	27/544–45
02/25/07	06/17/07	27/543–44
02/25/07	06/17/07	27/542–43
05/18/07	06/17/07	27/556
01/18/07	02/27/07	27/338–339
01/12/17	01/23/17	44/262
07/20/17	07/31/17	44/331
04/21/17	04/27/17	44/303
04/23/17	05/09/17	44/305
04/04/17	06/22/17	44/322
03/30/23	04/04/23	54/298
03/28/23	04/04/23	54/297
04/05/23	04/10/23	54/303
04/04/23	04/10/23	54/303
04/04/23	04/10/23	54/304
03/07/23	04/10/23	54/305
04/07/23	04/10/23	54/304
04/05/23	04/17/23	54/308
04/12/23	04/17/23	54/314
04/05/23	04/19/23	54/314
04/19/23	04/24/23	54/317
04/20/23	04/24/23	54/319–20
04/21/23	04/24/23	54/315

APPENDIX B—Continued

04/21/23	04/24/23	54/316
04/20/23	04/24/23	54/319
04/11/23	04/24/23	54/316
04/20/23	04/24/23	54/318
04/19/23	04/24/23	54/317
04/19/23	04/24/23	54/318
04/20/23	04/24/23	54/319
04/12/23	05/01/23	54/324
04/25/23	05/01/23	54/326
05/24/23	06/01/23	54/347
04/26/23	05/01/23	54/325
04/26/23	05/01/23	54/323
04/04/23	05/01/23	54/327
04/26/23	05/01/23	54/323
04/27/23	05/01/23	54/325
04/27/23	05/01/23	54/324
05/05/23	05/08/23	54/328
05/12/23	05/16/23	54/334
05/04/23	05/16/23	54/333
05/12/23	05/23/23	54/338
05/25/23	05/29/23	54/342
05/24/23	05/29/23	54/346
05/25/23	05/29/23	54/344
05/23/23	05/29/23	54/344
05/24/23	05/29/23	54/345
05/24/23	05/29/23	54/345
05/29/23	06/06/23	54/354
05/26/23	06/06/23	54/351
04/21/23	06/06/23	54/352
05/04/23	06/06/23	54/351
05/04/23	06/06/23	54/353
05/04/23	06/06/23	54/353
05/04/23	06/13/23	54/363
05/04/12	06/13/23	54/361
06/01/23	06/19/23	54/364
06/04/23	06/19/23	54/363
05/04/23	07/06/23	54/373
05/25/23	01/15/24	54/460
01/28/36	01/28/26	79/603
09/24/24	09/24/24	54/620
09/30/24	10/07/24	54/632
09/30/24	10/07/24	54/633
10/02/24	10/07/24	54/633
10/03/24	10/07/24	54/634
10/04/24	10/07/24	54/631
10/04/24	10/07/24	54/631
10/04/24	10/07/24	54/634
10/01/24	10/14/24	54/644
10/01/24	10/07/24	54/632
10/31/24	11/11/24	54/661
11/07/24	11/11/24	54/662
12/05/24	12/09/24	54/671
12/10/24	12/24/24	54/680
12/30/24	01/01/25	54/684
12/30/24	01/01/25	54/684
12/19/25	12/22/25	65/57
02/11/26	02/16/26	65/87
06/13/26	07/02/26	65/130
06/13/26	07/02/26	65/130
05/12/59	07/01/59	264/531
06/30/59	07/14/59	265/207
06/29/59	07/14/59	265/203

APPENDIX B—Continued

02/18/25	02/20/25	54/722
10/15/29	10/22/29	74/149
11/08/29	11/12/29	74/156
12/11/33	12/27/33	79/165
12/01/31	01/16/32	74/479
09/28/34	09/29/34	79/242
10/22/34	10/24/34	79/296
05/23/44	09/26/44	114/48
05/25/44	09/26/44	114/47
10/25/44	10/31/44	114/71
09/14/50	10/19/50	163/493
09/27/50	10/19/50	163/494
07/30/52	08/07/52	184/219
09/27/55	09/30/55	18/408
03/13/58	03/27/58	249/232
12/03/57	03/27/58	249/234
03/11/58	03/27/58	249/236
01/29/58	03/27/58	249/238
02/20/58	03/27/58	249/240
03/21/58	03/27/58	249/242
02/25/58	03/27/58	249/244
12/11/57	03/27/58	249/246
12/03/57	03/27/58	249/248
03/19/58	03/27/58	249/250
02/19/58	03/27/58	249/252
05/09/58	06/10/58	251/360–61
05/15/58	06/10/58	251/362–63
05/09/58	06/10/58	251/364–65
05/05/58	06/24/58	252/22
02/17/59	03/03/59	260/220
09/16/58	09/23/58	255/96
07/01/59	08/13/59	266/112
06/26/59	08/13/59	266/142
06/26/59	08/13/59	266/132
06/29/59	08/13/59	266/118
06/29/59	08/13/59	266/120
06/26/59	08/13/59	266/122
07/07/59	08/13/59	266/124
07/02/59	08/13/59	266/126
06/29/59	08/13/59	266/134
07/01/59	08/13/59	166/114
08/05/59	08/13/59	266/144
08/18/59	08/24/59	266/285
07/01/59	08/13/59	266/116
06/26/59	08/13/59	266/128
07/02/59	08/13/59	266/136
07/02/59	08/13/59	266/138
07/26/60	07/28/60	276/547
05/17/65	05/17/65	337/234
05/17/65	05/17/65	337/240
05/17/65	05/20/65	337/320
05/17/65	05/20/65	337/323
05/26/65	06/02/65	338/28
06/02/65	06/24/65	338/480
05/20/65	06/24/65	338/492
07/01/65	07/06/65	339/157
07/01/65	07/06/65	339/163
07/16/65	07/20/65	339/484
07/29/65	08/03/65	340/232
07/06/65	08/09/65	340/349
09/20/65	10/01/64	342/208

APPENDIX B—Continued

01/04/65	01/14/65	332/431
02/04/65	02/11/65	333/468
06/29/65	07/01/65	339/327
06/29/65	07/14/65	339/343
06/29/65	07/14/65	339/340
06/29/65	07/14/65	339/336
06/29/65	09/25/65	342/95
10/09/65	10/13/65	342/449
09/29/66	10/17/66	356/267
08/13/57	09/03/57	243/247
08/12/57	09/03/57	243/249
08/12/57	09/03/57	242/251
08/12/57	09/03/57	243/253
08/16/57	09/03/57	243/255
08/08/57	09/03/57	243/257
09/04/57	09/06/57	243/318
09/04/57	09/06/57	243/320
02/02/59	03/26/59	261/149
02/17/59	03/26/59	261/153
12/01/67	12/01/67	370/482
01/25/68	02/01/68	372/437
02/07/68	03/07/68	374/9
02/08/68	03/07/68	374/13
09/28/67	10/13/67	369/48
02/12/67	12/18/67	371/265
12/13/67	12/18/67	371/2707
11/16/67	11/29/67	370/427
10/10/67	10/13/67	369/51
11/29/67	01/23/68	372/281
11/08/67	11/29/67	370/415
12/28/67	01/05/68	372/14
02/13/68	02/15/68	373/100
02/15/68	02/21/68	373/230
02/13/68	02/15/68	373/98
04/03/69	04/08/69	388/231
04/07/38	04/15/38	87/569
04/11/38	04/15/38	87/571
03/23/38	04/15/38	87/573
04/09/38	04/15/38	87/571
04/09/38	04/15/38	87/568
04/09/38	04/15/38	87/573
03/24/38	03/25/38	87/552
04/11/38	04/15/38	87/568
05/12/38	05/13/38	87/600
04/09/38	04/15/38	87/572
04/12/38	05/29/38	87/592
04/09/38	04/15/38	87/570
04/20/38	04/22/38	87/583
03/18/38	04/23/38	87/584
11/13/66	12/15/66	358/183
05/17/67	01/24/68	372/310
05/26/67	06/07/67	363/569
05/26/67	06/07/67	363/572
12/13/66	12/15/66	358/180
02/10/59	03/26/59	261/151
03/27/68	04/09/68	375/362
03/27/68	05/01/68	376/298
09/04/68	09/05/68	381/82
03/28/59	04/01/59	261/306
03/27/68	04/29/68	376/242
02/12/68	02/12/68	373/15

APPENDIX B—Continued

02/08/68	02/12/68	373/18
02/13/68	02/20/68	373/168
03/15/68	03/16/68	374/291
03/14/68	03/16/68	374/294
03/25/68	03/26/68	374/584
04/01/68	04/04/68	375/227
03/27/68	04/04/68	375/230
03/28/68	04/04/68	375/233
03/29/68	04/04/68	375/236
03/21/68	04/04/68	375/240
03/29/68	04/04/68	375/244
04/09/68	04/10/68	375/370
04/12/68	04/13/68	375/435
04/12/68	04/13/68	375/438
04/09/68	04/18/68	375/534
04/09/68	04/18/68	375/538
04/20/68	04/23/68	376/81
04/15/68	04/23/68	376/84
04/26/68	04/30/68	376/253
05/06/68	05/07/68	376/461
05/15/68	05/16/68	377/21
05/13/68	05/16/68	377/18
05/23/68	05/24/68	377/248
06/17/68	06/20/68	378/285
07/11/68	07/17/68	379/215
07/05/68	07/17/68	379/218
10/24/68	10/28/68	383/33
12/28/68	01/07/69	385/258
03/11/69	03/13/69	387/282
07/07/69	07/18/69	392/153
06/14/69	07/18/69	392/156
07/09/69	07/18/69	392/160
08/05/69	08/06/69	393/32
08/06/69	08/29/69	393/494
09/18/69	09/23/69	394/411
09/18/69	09/23/69	394/415
10/07/69	10/22/69	395/407
11/07/69	11/10/69	396/102
11/24/69	12/06/69	397/154
11/24/69	12/08/69	397/149
01/26/70	02/02/70	398/449
01/28/70	02/02/70	398/455
01/28/70	02/02/70	398/452
04/23/68	02/02/70	398/459
10/14/68	02/16/73	Judgment Roll No. 36800/ Box 939
04/04/70	04/14/70	401/209
07/30/69	08/18/69	393/245
02/14/71	02/23/71	98/476
07/29/70	02/23/71	98/477
01/21/29	02/21/30	74/159

Lancaster County, South Carolina

05/13/54	05/19/54	J4/29
07/20/55	08/02/55	MA/?
12/21/37	12/22/37	I-3/63
12/21/37	12/22/37	I-3/64
01/04/38	01/04/38	I-3/88

APPENDIX B—Continued

01/04/38	01/04/38	I-3/91
01/03/38	01/04/38	I-3/85
01/03/38	01/04/38	I-3/84
06/01/38	06/06/38	I-3/180
04/15/38	04/15/38	I-3/156
05/01/38	?	?
01/03/38	01/04/38	I-3/81-82
01/04/38	01/04/38	I-3/90
03/15/38	05/11/38	15/551
06/03/38	07/25/38	I-3/195-96
04/01/38	07/20/38	I-3/193-94
01/04/38	01/14/38	I-3/86-87
03/10/38	03/25/38	I-3/139-40
01/11/38	01/12/38	I-3/102
01/12/38	01/12/38	I-3/104
01/04/38	01/04/38	I-3/89
01/03/38	01/04/38	I-3/83
01/11/38	01/12/38	I-3/101
04/05/38	04/13/38	I-3/155
01/26/38	01/26/38	I-3/116-17
07/06/67	?	?
05/13/68	05/16/68	Z-5/245
05/03/68	05/17/68	Z-5/255
05/23/68	05/28/68	Z-5/335
05/25/68	05/28/68	Z-5/338
05/27/68	05/28/68	Z-5/336
05/27/68	05/28/68	Z-5/339
05/28/68	06/06/68	Z-5/391
05/25/68	07/09/68	Z-5/527
07/03/68	07/09/68	Z-5/523
06/11/68	07/09/68	Z-5/526
07/03/68	07/09/68	Z-5/524
07/31/68	08/13/68	Z-5/673
07/15/68	09/18/69	Z-5/2591
10/26/68	11/13/68	Z-5/1056
06/11/68	12/23/68	Z-5/1204
02/10/69	02/20/69	Z-5/1470
02/20/69	04/15/69	Z-5/1745
12/04/68	07/17/69	Z-5/2268
06/10/69	07/17/69	Z-5/2269
08/08/69	08/26/69	Z-5/2585
10/07/69	10/20/69	Z-5/2749
09/22/69	10/22/69	Z-5/2753
11/20/69	11/25/69	Z-5/2919
11/21/69	12/06/69	Z-5/2967
02/24/70	03/02/70	A-6/304
03/03/70	03/05/70	A-6/326
05/05/70	05/18/70	A-6/642

Chester County, South Carolina

01/04/17	01/09/17	167/64
02/13/34	02/13/34	269/215
02/13/34	02/19/34	269/217
02/06/34	02/19/34	269/218
02/12/34	02/19/34	269/218
01/30/34	02/21/34	269/219
02/21/34	02/23/34	269/221
03/07/34	02/31/34	269/228
07/31/34	09/17/34	269/259
09/21/49	10/21/49	357/200

APPENDIX B—Continued

11/26/53	12/10/53	375/141
01/28/54	02/11/54	379/91
10/07/53	03/12/54	375/199
10/18/51	12/21/51	D–4/302
02/22/68	04/30/68	Z–5/143

York County, South Carolina

09/28/68	10/15/68	382/321
07/03/68	07/05/68	378/548
07/08/15	07/12/15	43/327
07/25/60	07/28/60	276/550
03/28/59	04/01/59	261/302
04/15/69	04/16/69	388/369
10/11/24	10/14/24	54/641
07/27/23	01/15/24	59/311
10/11/24	10/14/24	54/640
05/02/67	05/12/67	363/45
11/22/66	12/01/66	357/505
11/19/29	11/27/29	74/159
10/23/67	10/25/67	369/308
01/13/69	01/17/69	385/403
11/16/67	11/20/67	370/260
07/13/68	08/13/68	380/217
04/12/65	04/20/65	336/168
03/27/68	04/29/68	376/239
01/03/36	01/29/36	86/135
08/13/66	08/23/66	354/355
01/31/56	02/10/56	223/394
10/16/41	10/21/41	98/516
01/31/56	02/10/56	223/399
11/19/29	11/26/29	74/158
04/06/68	04/08/68	375/343
06/15/68	06/17/68	378/194
02/16/68	02/19/68	373/152
03/07/68	03/07/68	374/1
02/13/68	02/15/68	373/88
12/16/67	12/18/67	371/273

Summary judgment is affirmed as to the following tracts for that portion of the land that is below 570 feet above mean sea level:

05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/08/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778–80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/14/04	08/13/04	24/187–88
12/16/25	01/15/26	66/166
10/14/24	10/18/24	62/36
03/17/25	03/24/25	63/128
07/31/24	08/09/24	61/183

APPENDIX B—Continued

07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599
08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773–76
03/19/09	01/07/10	29/776–78
05/11/00	06/13/00	19/621–33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303
09/01/25	12/05/25	65/48
	Amend., A & B, (1015–1018)	III (all tracts be low)

York County, South Carolina

05/11/00	06/13/00	19/621–633
09/01/25	12/05/25	65/48
09/01/25	12/05/25	65/53
12/19/27	12/21/27	65/303
05/10/32	06/01/32	74/540
08/05/36	08/05/36	87/138
05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/08/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778–80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/14/04	08/13/04	24/187–88
12/16/25	01/15/26	66/166
10/14/24	10/18/24	62/36
03/17/25	03/24/25	63/128
06/05/24	06/07/24	61/68
07/31/24	08/09/24	61/183
09/08/24	09/17/24	61/283
07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599
08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
03/19/26	04/09/26	2–P/19 Plat Book
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773–76
03/19/09	01/07/10	29/776–78
05/11/00	06/13/00	19/621–33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303

APPENDIX B—Continued

09/01/25	12/05/25	65/48
05/21/30	05/28/30	74/231
05/18/25	12/24/25	65/61
09/03/24	09/17/24	54/623
09/24/24	10/01/24	54/623
09/08/24	09/17/24	54/617
09/23/24	10/01/24	54/622
09/01/25	12/05/25	65/53
06/27/36	08/05/36	87/138

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*
11. Crescent Resources, Inc.	One, Q, (901) Land conveyed to Crescent by D.M. Creech and Margaret F. Creech by deed dated December 29, 1983, and recorded in the Office of the Clerk of the Court for York County, South Carolina, on December 29, 1983, in Deed Book 736 at page 298.	III, n. 5 (All tracts*)
	Two, B, (957–958)	IV–A, III, n. 5 (All tracts*)

Date of Deed	*Recordation Date*	*Book/Page*
03/27/70	03/27/70	400/466
05/22/70	05/22/70	402/527
03/27/70	03/27/70	400/463
03/27/70	03/27/70	400/470
03/27/70	03/27/70	400/468
05/22/70	05/27/70	402/521
05/14/70	05/18/70	402/309
06/03/70	06/09/70	403/259
05/22/70	05/27/70	402/524
06/03/70	08/10/70	405/369

12. State of South Carolina	One, R, (902–905)	III (All tracts*)

Date of Conveyance	*Book*	*Page*
06/02/1893	M13	1
06/31/05	25	157
12/30/1893	134	385
02/01/07	27	208
04/24/1897	20	655
03/05/29	73	153
02/??/29	65	548
02/??/29	65	546
02/25/29	73	155
06/03/19	50	6
10/06/20	48	189
10/04/20	53	205
04/15/19	50	4
07/06/20	53	17
02/19/41	103	198
06/04/30	76	455
06/04/30	76	457
02/26/29	73	154
07/02/20	48	736

APPENDIX B—Continued

Date of Conveyance	*Book*	*Page*
11/15/20	?	?
09/24/10	37	97
08/21/19	50	5
07/20/20	52	13
02/19/41	103	199
03/16/56	231	444
08/31/26	68	19
10/02/19	48	344
08/16/19	44	662
07/01/19	49	369
05/14/20	?	?
06/24/20	53	99
07/29/20	44	716
04/24/1897	20	653
02/20/06	26	172
07/12/06	26	649
01/31/06	25	595
02/23/06	26	174
01/20/22	56	155
01/11/26	66	181
01/11/26	65	73
02/22/22	56	128
07/01/07	28	186
03/12/19	44	569
11/27/05	26	173
04/24/1897	20	651
08/07/61	289	314
08/31/18	47	132
07/29/18	47	210
05/17/19	44	636
06/02/19	44	621
05/17/61	286	453
08/23/29	75	161
12/28/12	40	321
12/06/12	40	302
12/06/12	36	624
12/16/12	36	622
09/29/25	64	209
12/31/25	66	133
07/29/20	53	123
12/12/18	47	258
01/12/20	51	122
12/18/18	47	256
02/20/63	308	507
08/17/48	140	88
10/28/30	77	131
12/23/11	38	389
12/19/11	38	390
08/02/65	340	220
03/04/10	35	331
12/28/15	45	41
11/14/1893	M13	112
05/27/32	81	18
10/01/62	305	453
09/27/62	305	457
04/26/63	311	553

APPENDIX B—Continued

13. Southern Railway Company — One, S, (906–916) — III, n. 5 (All tracts*)

Date of Conveyance	*Book*	*Page*
9/22/1848	P	450
10/02/1848	O	366
09/23/1848	O	367
09/23/1848	O	367
03/01/1899	18	575
05/05/1853	Q	143
10/11/48	129	335
09/26/1848	O	365
09/22/1848	O	364
Deed from Dr. William Moore to C & S C.P. Railroad dated April 25, 1949		
11/21/02	22	541
11/21/02	22	541
Memorandum of Agreement Town of Fort Mill dated 07/17/24		
03/01/40	98	228
Ordinance from the Town of Fort Mill dated 03/06/40		
03/01/40	98	228
Agreement Deed Book 129 at page 335 dated 10/11/48		
Deed dated 9/21/56 from Springs Foundation, Inc.		
Deed from Dr. William Moore dated 4/25/1849		
Deed from J.L. Moore dated 7/24/1854		
Deed from William E. White dated 02/07/1856 and recorded in Deed Book R at page 37		
09/20/1848	O	460
06/13/01	21	736
04/8/20	44	783
1/15/1917	44	266
09/12/46	114	396
5/18/46	124	177
Deed from Eli Biggers dated 12/22/1847		
Condemnation Proceeding Robert Miller Spring term 1853		
Deed from James Moore by J.C. Moore dated 12/22/1848		
Jane McNair and Jane Henry dated 12/22/1847		
9/20/1848	O	459
9/19/1848	O	460
Deed from James Workman dated 12/22/1847		
Deed from J.C. Moore dated 12/12/1848		
9/20/1848	O	463
Deed P 450 dated 10/21/1851		
Deed 23 at page 68 dated 5/26/1903		
Deed 39 at Page 71 dated 12/19/1911		
Deed Q at Page 251 dated 2/14/53		
Deed 100 at Page 233 dated 6/30/43		
Deed 19 at page 472 dated 3/26/1900		
Deed 22 at page 473 dated 11/24/1902		
Deed 35 at page 563 dated 3/10/1911		
Deed 35 at page 567 dated 3/10/1911		
Agreement with Catawba Lumber Company dated 2/9/18		
Deed from Victoria Cotton Mills dated 6/1/1916		
11/21/1918	44	523
Deed 100 at page 233 dated 6/30/43		
Deed 176 at page 334 dated 10/16/51		
Deed from James Workman dated 12/22/1847		
9/19/1848 and 9/1/1848	O	462
9/18/1848	O	459
9/5/1848	O	575
7/22/65	341	446

APPENDIX B—Continued

9/5/1848	O	461
9/16/1848	O	463
Deed GG at page 495 dated 7/4/1849		
4/4/1850	GG	614
7/12/1849	GG	49G
5/10/1887	E–6	706
Deed E–6 at page 712–3 dated 6/16/1887		
Deed E–6 page 708–9/10 dated 6/16/1887		
6/16/1887	E–6	712–3
9/7/1888	F–7	712–13
6/15/1887	E–6	716
6/1/1887	E–6	712–3
6/11/1887	E–6	710–11
2/25/1900	29	514
6/15/1887	E–6	714
8/20/1918	44	479
11/1/1961	293	258
6/15/1887	E–6	714
10/1889	J–10	735
9/21/1888	F–7	673
9/21/1888	E–7	675
Deed from F.H. Barber dated 3/30/1906, Deed E–6, page 6 98–1 dated 5/9/1887		
5/8/1888	J–10	725–6
9/21/1888	F–7	676
9/21/1883	F–7	688
5/10/1890	E–6	692–3
5/1887	E–6	695
2/1/1886	J–10	723
5/9/1887	E–6	694
1880	E–6	686
Condemnation involving property of W.H. Cowan dated 7/5/1889		
Condemnation involving property of Mr. R.B. Cowan dated 2/10/1888		
Property of R.M. Cowan judgment dated 11/21/1889		
Condemnation R.H. Cowan 11/11/1889		
5/21/1887	E–6	704
9/4/1906	26	443
Condemnation involving property of W.I. Steele dated 4/30/1889		
9/10/1913	39	398
Condemnation involving property of Samuel L. Fewell dated 2/11/1888, Judgment Roll 1710		
10/30/1911	44	194
9/10/1913	39	398
Condemnation involving property of Mrs. Margaret S. Kimbrell dated 4/30/1888, Judgment Roll 1753		
1/23/1904	23	550–3
1/25/1904	23	550–3
Condemnation proceeding involving property of Larry W. White dated 5/18/1888, Judgment roll 1750		
Condemnation involving property of A.H. White, James S. White, Mary E. White, A.H. White and Mrs. A.R. Witherspoon dated 1/24/1888, Judgment rolls 1752 and 1751		
10/18/1901	29	666
Condemnation involving property of Isabella Wilson October term 1920		
10/18/09	29	666
Condemnation involving the property of J.S. White, et al. dated 1/24/1885, Judgment Roll 1751		
Ordinance City of Rock Hill, Minute Book 425 dated 8/20/45		
3/25/09	29	602
3/25/1908	29	259
Condemnation involving the property of Fewell, Judgment Roll 1900		
Deed from A.D. Holler dated 5/24/1896		

APPENDIX B—Continued

Condemnation involving property of Isabella H. Wilson, Executrix, October term 1920
Deed from A.D. Holler dated 3/22/1890

2/13/1905	24	732

Condemnation of property of Samuel A. Fewell dated 2/11/1888, Judgment roll 1720
Condemnation of property of W.A. Fewell dated 7/22/1887, Judgment roll 1716
Condemnation involving property of Robert Morrison, Judgment roll 1884

4/11/1887	E–6	700–1
4/11/1887	E–6	790–791
4/11/1887	E–6	758–9
4/9/1887	F–7	17

Condemnation of property of J.A. Rainey dated 4/16/1889, Judgment roll 1905

4/11/1887	E–6	770–1
9/22/1887	F–7	673
4/11/1887	E–6	798
9/22/1913	39	386
6/2/1888	F–7	565–6–7
3/26/1888	J–10	727
9/10/1901	21	466–7
10/5/1901	23	792–3

Deed from Yorkville Cotton Oil Co. dated 10/22/1915

8/4/11	38	169
3/26/1888	E–J–10	727
8/4/1911	38	189
6/23/1911	38	17
11/25/1907	38	779
7/24/1894	24	7

Condemnation of property of William C. Latimer dated 8/31/1887, Judgment roll 1717
Resolution Town Council of Yorkville dated 6/16/1887

4/11/1887	E–6	798
4/11/1887	E–6	770–1
4/9/1887	F–7	50
5/26/1887	F–7	1
6/2/1888	F–7	567–68
4/9/1887	F–7	52
4/9/1887	F–7	15

Condemnation involving property of A. Avery dated 6/18/1888, Judgment roll 1787

6/28/1887	F–7	337
7/4/1887	J–10	722

Condemnation involving property of D.S. Thornbury dated 6/18/1888, Judgment roll 1788

6/26/1867	F–7	339
6/24/1887	E–6	721
7/25/1887	F–7	335
6/21/1887	E–6	749
7/25/1887	F–7	335
6/7/1887	E–6	751
7/16/1887	E–6	756–57
5/10/1887	E–6	698
8/29/1887	F–7	334
8/29/1887	F–7	334
6/27/1887	F–7	563
6/1887	F–7	562
5/21/1887	E–6	706–7–8

Condemnation of property of B.D. Wheeler dated 8/25/1887, Judgment roll 1715

4/13/1887	E–6	788–9
5/27/1887	F–7	7
4/13/1887	E–6	788–9
4/12/1887	E–6	794–5
4/13/1887	E–6	788–9
4/12/1887	E–6	792
4/4/1887	F–7	25
3/8/1889	G–8	657

Decree involving property of Mrs. Eudora Plexico, et al dated 2/3/34

APPENDIX B—Continued

4/4/1887	F–7	25
3/8/1889	G–8	657
4/12/1887	F–7	3
3/4/1887	E–6	768–9
3/4/1887	E–6	766–7
3/4/1887	F–7	27
3/4/1887	F–7	13
3/4/1887	F–7	48
3/4/1887	F–7	13
6/27/56	230	280
3/4/1887	F–7	13
3/4/1887	F–7	11
4/12/1887	F–7	32
3/2/1887	F–7	498
5/3/1887	F–7	30
3/2/1887	E–6	764–5
5/6/1887	E–6	772–3
5/6/1887	E–6	772–3
5/6/1887	F–7	34
5/3/1887	F–7	30
3/1/1887	E–6	760–1
3/1/1887	E–6	778–9
4/7/1877	F–7	5
3/1/1887	E–6	796–7
3/1/1887	E–6	774–5
9/21/1889	G–8	655
3/4/1887	F–7	19–20
3/1/1887	E–6	786–7
9/21/1889	G–8	655
3/2/1887	F–7	46
3/1/1887	E–6	780–1
7/1/1890	71	613
8/10/1907	6	20
11/9/1887	Q	70
11/14/1877	Y	17
11/14/1896	U	138
6/12/1875	A–1	164
3/2/1887	Q	70
11/14/1871	Y	12
4/29/1910	37	57
2/15/1891	P	299
1/17/09	74	680
12/12/1854	Q	551
1/12/1903	72	549
10/30/09	23	163
7/17/1891	A–11	73
7/24/1891	A–11	34
8/5/1896	17	762
4/14/1904	33	393
4/10/1907	29	683
Agreement Victor Cotton Oil Co. 4/18/1902		
8/30/1907	22	307
5/19/1903	77	23
5/25/1903	29	377
Agreement Beverly Mfg. Co. dated 10/15/1903		
12/8/1906	66	87
12/4/1902	22	790
Deed from M.J. Brown dated 9/1/1903		
Deed from B.M. Smith, et al. dated 11/14/1901		
6/23/1901	96	470
7/8/1901	90	467

APPENDIX B—Continued

4/26/02	7	297	
4/8/1902	7	279	
4/21/1902	7	279	
4/17/09	29	3	
Agreement Hawthorne Spinning Mills 1/29/1906			
Agreement Clover Cotton Mills 7/10/1909			
Agreement W.D. Reynolds 11/15/1916			
Deed 27–656 dated 9/17/1907			
Deed 36–525 dated 2/20/1912			
1/27/1899	16	234	
4/26/1942	100	63	

14. Bowater, Inc. — One, T, (917-919) 547–00–00–045 — III (All tracts*) II (farm)

Date of Conveyance	*Book*	*Page*
6/22/62	300	146
6/22/62	300	144
6/22/62	100	142
8/30/56	231	63
10/17/56	232	443
8/31/56	231	108
8/29/56	231	85
8/29/56	231	87
9/1/56	231	111
8/23/56	232	129
11/2/56	233	124
8/23/56	233	122
8/29/56	231	60
8/29/56	231	66
8/29/56	231	73
8/29/56	231	76
8/29/56	231	79
8/29/56	231	82
8/29/56	231	54
8/29/56	231	51
8/27/56	231	60
6/20/56	233	102
8/9/56	233	112
8/18/56	233	114
8/31/56	233	120
9/7/56	233	117
8/29/56	232	293
10/13/56	232	296
8/31/56	231	120

Three, V, (995) — III (All tracts*)

Date of Conveyance	*Book*	*Page*	
9/20/60	279	44	II (dates)
9/1/60	278	158	II (dates)
11/14/61	294	61	II (dates)
8/1/85	838	205	n. 10 II (tree) VI
10/9/61	291	340	II (tree)
10/6/86	?	?	II (tree)
10/25/65	343	311	II (tree)
9/16/69	394	284	II (tree)
4/11/59	V4	221	II (tree)

APPENDIX B—Continued

Date of Conveyance	*Book*	*Page*	
12/21/84	798	276	II (tree)
2/14/86	904	111	II (tree)
7/31/86	898	7	II (tree)
8/86	899	296	II (tree)

Defendant	*Portion of Judgment Order Describing Parcel*[1]	*Section of this Opinion Addressing Objections*
15. Nisbet Properties	One, U, (920)	n. 5, n. 10, III, VII (All tracts*)
	Tax Map Number	
	22-00-01.00	IV-E, F II (tree) VI
	13-00-100.00	IV-F II (tree) VI
	19-00-01.00	II (tree)
	19	VI
16. John M. Spratt, Jr.	One, V, (921)	III (All tracts below)
	Tract 1 (Tax Map 20-01-22-12)	n. 5
	Tract 2 (922) (Tax Map 708-17; 21-01-21-02 and 20-06-01-50)	
	Tract 3, (924) (Part of Tax Map 708-17)	
	Tract 4, (925) (Part of Tax Map 708-17)	
	Tract 5, (925-926) (Part of Tax Map 708-17)	
	Tract 7, (927-930) (Part of Tax Map 708-17)	
	Tract 8, (930) (Part of Tax Map 708-17)	
	Tract 9, (930-931) (Part of Tax Map 708-17)	
	Tract 10, (931-932) (Part of Tax Map 708-17)	
	Tract 11, (932-933) (Part of Tax Map 708-17)	
	Tract 12, (933) (Part of Tax Map 708-17)	
	Tract 13, (933-934) (Part of Tax Map 708-17)	
	Tract 14, (934-935) (Tax Map 661-14)	
	Tract 15, (935-936) (Tax Map No. 708-18)	
	Tract 16, (936) (Tax Map 661-00-00-014)	
	Tract 17, (936-937) (Tax Map 020-02-01-006)	

APPENDIX B—Continued

17. Hiram Hutchison, Jr.	One, W, (938-940)	III, n. 5 (All tracts*)
Parcel 1—Tax Map 664-00-00-012 Parcel 2—Tax Map 664-00-00-011 Parcel 3—Tax Map 627-18-04-003		
18. J. Max Hinson	One, X, (941-946)	III (All tracts below)
	Tract 3—Tax Map 20-1.00 Tract 5—Tax Map 707-1 Tract 10—Tax Map 659-232 Tract 23—Tax Map 740-1 Tract 25—Tax Map 20-4-34-4	II (poss.)
	Three, W, (998)	III, n. 5 (All tracts below)
(All tracts in York County, except Tract 4, which is in Lancaster County)		
	Tract 1—Deed Book 132, page 26	
	Tract 2—Deed Book 165, page 183	
	Tract 4—Deed Book X-5, page 494	II (poss.)
	Tract 6—Deed Book 358, page 480	II (poss.)
	Tract 8—Deed Book 248, page 97	
	Tract 9—Deed Book 220, page 128	II (cont.)
	Tract 11—Deed Book 182, page 26	II (cont.)
	Tract 12—Deed Book 353, page 346	II (cont.)
	Tract 13—Deed Book 337, page 532	II (poss.)
	Tract 14—Deed Book 242, page 454	II (cont.)
	Tract 15—Deed Book 286, page 398	II (cont.)
	Tract 16—Deed Book 270, page 485	II (cont.), n. 5
	Tract 17—Deed Book 259, page 447	II (cont.), n. 5
	Tract 18—Deed Book 217, page 361	II (cont.), n. 5
	Tract 19—Deed Book 205, page 96	II (cont.), n. 5
19. Arnold F. Marshall	One, Y, (947)	III (All tracts below)
	Deed dated 1/18/66 recorded in Deed Book 222, page 152 on 1/28/66, York County Deed dated 3/30/51 recorded in Deed Book 169, page 303 on 4/3/51; and deed dated 8/18/51 recorded __/21/51 in Deed Book 174, page 166 Deed dated 4/13/54 recorded in Deed Book 203, page 184	
20. Ashe Farms	Three, F, (974)	III, n. 5 (All tracts*)
	Tax Map 14-25	II (dates)
	Tax Map 15-2.0	II (dates)
	Tax Map 15.33	II (dates)
	Tax Map 24-1.0	II (dates)
	Tax Map 25N-OA-2.0	II (dates)
	Tax Map 25-10	II (dates)
	Tax Map 25-10.01	II (dates)
	Tax Map 764.5	II (dates)
	Tax Map 15-20	II (dates) II (cont.)

APPENDIX B—Continued

21. Hugh White	Three, H, (976)	
	Tax Map 705–00–00–001	
22. T.W. Hutchison	Three, K, (979–980)	III, n. 5 (All tracts below)
	664–01–03–008	II (poss.)
	664–01–06–014	II (poss.)
	664–01–06–019	II (poss.)
	664–01–06–018	II (poss.)
	664–01–06–017	II (poss.)
	664–01–06–007	II (poss.)
	664–01–06–008	II (poss.)
	664–01–06–023	II (poss.)
	664–01–06–016	II (poss.)
	664–01–06–015	II (poss.)
	664–01–03–002	II (poss.)
	664–01–02–003	II (poss.)
	664–01–04–002	II (poss.)
	664–01–06–024	II (poss.)
	664–01–06–013	II (poss.)
	664–00–00–022	II (poss.)
		II (dates)
	634–07–01–021	II (poss.)
		II (dates)
	664–00–00–019	II (dates)
	664–01–02–002	
	627–14–02–002	
	664–06–06–025	II (dates)
	664–00–00–021	II (dates)
23. Robert A. Fewell	Three, L, (981)	III (All tracts*)
	Tax Map 617–00–00–026	
	Tax Map 616–00–00–032	
	Tax Map 680–00–00–022	
	Tax Map 608–00–00–024	
24. Francis M. Mack	Three, M, (982)	III (All tracts*)
	774–00–00–005	II (tree)
		II (farm)
		II (dates)
	020–06–06–016	
25. John S. Simpson	Three, N, (983)	n. 5, n. 10, II (poss.), III, VI (All tracts*)
	Tax Map 600–07–06–001	
	Tax Map 600–11–02–035	
	Tax Map 600–17–02–012	
	Tax Map 627–17–02–018	
	Tax Map 627–17–02–016	
26. Robert T. Simpson	Three, O, (984)	III, n. 5 (All tracts*)
	627–17–02–019	n. 10
		II (poss.)
		VI
	600–06–10–029	II (poss.)
	600–07–05–001	n. 10
		II (poss.)
		VI
	600–11–02–035	n. 10
		VI

APPENDIX B—Continued

	627-17-01-012	n. 10 II (poss.) VI
	627-17-02-018	n. 10 II (poss.) VI
	627-17-02-016	n. 10 II (poss.) VI
27. City of Rock Hill South Carolina	Three, Q, (987-989)	III, II (concl.) (All tracts*)
	Tax Map or Parcel	
	627-18-3-4	IV-A
	589-1-1-14	IV-G
	628-9-5-5	n. 10 VI VII
	628-9-5-6	n. 10 VI
	628-17-3-10	n. 10 VI
	628-4-1-2	n. 10 VI
	627-19-1-25 (W. White)	VII
	627-19-1-25 (H. White)	VII
	627-19-1-25 (Biggers)	VII
	627-19-1-25 (LaFar)	VII
	627-19-1-25 (Albright)	VII
	627-19-1-25 (Roddey)	VII
	627-18-4-11 & 13	
	627-19-1-23	
	627-18-1-9	
	630-10-03-010	
	627-18-4-6	
	630-10-3-14	
	630-10-4-6	
	630-10-4-5	
	630-10-4-4	
	596-7-2-2	
	630-10-3-12	
	630-10-03-008	
	630-10-3-13	
	630-10-4-7	
	630-10-4-3	
	630-10-01-002	
	628-4-1-1	
	627-19-1-23 (Friedheim)	
	627-19-1-23 (Johnston)	
	589-1-1-21	
	627-18-3-12	
	627-17-4-10	
	626-7-1-2	
	667-1-1-4	
	589-1-1-4	
	627-18-2-1	
	589-26-1-1	
	589-26-2-1 & 2	
	667-1-1-6	

APPENDIX B—Continued

28. Elizabeth Ardrey Grimball	Three, R, (990–991) *Tax Map or Parcel* 743–00–00–003 709–00–00–025 709–00–00–023 709–00–00–020 709–00–00–019 709–00–00–018 020–01–01–020	II (tree), II (farm), III (All tracts*)
29. John M. Belk	Three, S, (992) 963 acres described in Deed Book 53, page 403 dated 5/12/47; recorded 6/21/47	II (tree fm.) II (farm) II (dates) III
30. Annie F. Harris	Three, T, (993) Tax Map 742–00–00–002	III
31. William Oliver Nisbet	Three, U, (994)	III
	Tax Map 22–2	V
32. Springs Mills, Inc.	Three, X, (1000–1003)	II (sp. pc.), III (All tracts*)

Date of Conveyance	*Book*	*Page*
12/31/31	74	503
9/20/41	105	106
4/5/65	335	431
6/16/88	1033	16
1/30/75	507	1
3/1/84	747	170
10/20/65	343	540
6/4/70	406	505
4/14/83	700	14
1/22/81	626	499
9/29/41	105	196
3/15/74	481	62
9/30/66	357	172
6/20/50	159	290
9/27/41	105	198

33. Property Owned by the Close Family	Three, Y, (1004–1007)	II (sp. pc.) III (All tracts*)

Property which has been identified by deed book and page is as follows:

Book	*Page*	*Date of Record*
271	147	1/26/60
308	125	2/01/63
362	341	5/01/67
383	81	10/29/68
462	483	5/14/73
521	45	10/14/75
527	467	3/16/76
561	607	12/16/77
570	874	5/10/78

APPENDIX B—Continued

Book	*Page*	*Date of Record*
576	231	8/10/78
585	703	1/03/79
601	876	9/07/79
614	262	5/21/80

Property which has been described by tax map code is as follows:

Tax Map Code
020 0101 004
020 0102 001
020 0404 001
020 0406 010
020 0406 011
020 0408 022
020 0408 023
020 0408 024
020 0408 025
020 0408 026
020 0408 027
020 0408 028
020 0408 029
020 0408 030
020 0408 031
020 0408 032
020 0419 002
020 0419 013
020 0419 014
020 0420 002
020 0424 014
020 0429 001
020 0429 025
020 0429 026
020 0429 070
020 0435 062
020 0504 008
020 0901 003
655 0000 001
655 0000 003
655 0000 031
657 0000 001
706 0000 001
706 0000 012
710 0000 002
710 0000 005
710 0000 006
712 0000 001
713 0000 059
713 0000 103
713 0000 164
713 0000 165
713 0000 181
713 0000 191
713 0000 200
713 0000 214
713 0000 215
713 0000 216
714 0000 001
715 0000 001
717 0000 016
730 0000 001

APPENDIX B—Continued

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*
	Tax Map Code 730 0000 002 730 0000 006 732 0000 001 732 0000 002 734 0000 006	
34. Elliott S. Close	Three, Y, (1006) Tax Map 642–05 Tax Map 642–034 Tax Map 642–035	II II (tree) II (farm) II (poss.) II (tree) II (farm) II (poss.)
35. Archie B. Carroll	Three, Z, (1008)	III, VII (All tracts*)
Date of Conveyance	*Book* *Page*	
3/30/82 (Tax Map 745–00–00–001)	660 84	II (poss.) III
1/28/52 (65 ft. access right of way)	759 122	
36. W.R. Simpson	Three, AA, (1009) 600–07–05–001 600–11–02–035 600–01–01–012 627–17–02–018 627–17–02–016 772–00–00–001 772–00–00–002	III (All tracts*) n. 10 II (poss.) VI n. 10 VI n. 10 VI n. 10 II (poss.) VI n. 10 II (poss.) II (date) II (date)
37. C & S National Bank	Three, BB, (1010) *Tax Parcel Number* 659–227 719–15 20–6–1–47 653–13 627–20–2–3 626–141, 158, 159, 176, 177 & 178 736–092 546–65 598–10–01–001	II (concl.), III (All tracts*)

APPENDIX B—Continued

662-3-1-30
662-3-1-31

38. Mary A. and W.T. McCorkle — Three, CC, (1011) — III (All tracts*)

Tax Map 0013-00-037-00
Tax Map 0013-00-0037-00

39. Springs Industries, Inc. — Four, A, (1024-1029) — II (sp. pc.), III (All tracts*)

Date of Conveyance	*Book*	*Page*
12/31/31 (Tax Map 020 04 04 010)	74	503
9/29/41	105	196
7/12/66	353	327
4/24/70	402	404
7/29/70	408	450
8/25/70	406	500
8/27/70 (Tax Map 020 01 23 013)	406	503
12/31/31 (Tax Map Nos. 02 06 01 52, 02 06 01 53, 02 06 07 34)	74	503
1929	73	177
1929	73	178
1929 (Cutter)	65	559
1929 (Seital)	65	559
1934	79	231
1935	79	481
1938	94	267
1938	94	277
1938	94	279
1938	92	303
1938	92	318
1940	101	13
1940	102	83
1943	111	263
1943	111	264
1943	111	261
1943	111	262
1937	91	147
1937	91	148
1944	115	214
1945	116	276
1945	116	277
1945	116	275
1945	116	305
1945	117	1
1945	117	162
1950	159	290
1955	211	311
1960	274	42
1948	141	85
1953	191	95
Tax Map 598 04 01 001		

APPENDIX B—Continued

Tax Map 598 04
02 001
Tax Map 598 11
01 001
Tax Map 598 22
01 001
Tax Map 627 20
01 005

APPENDIX C

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section III of this opinion as to the following parcels of land. The affidavits supporting the defendants' motions for summary judgment as to these parcels set forth insufficient evidence that the statements therein are based on the personal knowledge of the affiant.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[3]
1. Arnold F. Marshall	One, Y, ¶ 4, (947) Property described in deed dated Jan. 9, 1959 and recorded Jan. 17, 1959, in deed book 258 at page 484, York County.	
2. C.H. Albright	Three, D, ¶ 3 (972)	
	620-00-00-005	
	620-00-00-008	
3. Ned M. Albright	Three, E, ¶¶ 1, 3-8 (973)	n. 5 (all)
	548-00-00-070	
	627-22-02-029	II (dates)
		II (cont.)
	593-02-01-002	
	598-02-01-002	II (dates)
		II (cont.)
	627-22-02-028	II (dates)
	625-12-03-004	II (dates)
		II (cont.)
	600-06-07-006	II (dates)
		II (cont.)
	623-00-00-006	II (tree)
		II (dates)
	623-02-01-005	
4. David G. Anderson	Three, G (975)	
	627-22-02-029	II (dates)
		II (cont.)
	598-02-01-001	II (dates)
		II (cont.)
	598-02-01-002	II (dates)
		II (cont.)
	627-22-02-028	II (dates)
	625-12-03-004	II (dates)
		II (cont.)

3. The Tribe has often raised more than one type of legal challenge to any given parcel. Because we have reviewed all such objections and found them to be without merit, the district court need not rehear those challenges on remand. In the interest of clarity we shall note, where applicable, the section of this opinion wherein any other challenge to such a parcel is considered and rejected.

APPENDIX C—Continued

	600-06-07-006	II (dates) II (cont.)
	604-03-01-011	II (dates)
	670-00-00-134	n. 10
5. F.S. Barnes, Jr.	Three, J (978) 639-00-00-025	II (dates)
6. J. Max Hinson	Three, W (998-999)	
	Tract No. 20, York County	II (poss.)
	deed book 986, p. 339	n. 5
	Tract No. 21, York County	n. 5
	deed book 969, p. 200	II (poss.) II (dates)
	Tract No. 22, York County	n. 5
	deed book 540, p. 129	II (poss.) II (dates)
	Tract No. 24, York County deed book 488, p. 98	II (dates) II (cont.)
	Tract No. 26, York County deed book 644, p. 72	
	Tract No. 28, York County deed book 529, p. 561	II (dates)
	Tract No. 30, York County deed book 467, p. 466	II (poss.)

APPENDIX D

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.B. of this opinion as to the following parcels.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[4]
1. Duke Power Co.	Two, A, (954-956)	

Summary judgment is vacated and remanded as to the following tracts for that portion of the land that is above 570 feet above mean sea level:

Date of Deed	*Recordation Date*	*Book/Page*
05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/28/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778/80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/??/04	08/13/04	24/187-88
12/16/25	01/15/26	66?/166
10/14/24	10/18/24	62/36

4. See *supra* Appendix C n. 3.

APPENDIX D—Continued

Date of Deed	*Recordation Date*	*Book/Page*
03/17/25	03/24/25	63/128
06/05/24	06/07/24	61/61
07/31/24	08/09/24	61/183
07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599
08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773–76
03/19/09	01/07/10	29/776–78
05/11/00	06/13/00	19/621–33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303
19/01/25	12/05/25	65/48
05/01/69	12/22/69	397/361
09/04/68	09/19/68	381/379
06/29/70	06/30/70	404/23
09/07/71	09/07/71	425/37
08/10/71	12/30/71	430/506
04/27/64		342/415
08/01/63	08/02/63	314/392

The following properties were transferred by Crescent Land and Timber Corporation (Crescent) to various grantees between July 1, 1972, and July 2, 1974:

Date of Deed	*Recordation Date*	*Book/Page*
03/05/73	03/09/73	458/232
12/11/73	02/28/74	479/347
05/28/74	07/04/74	486/113
02/01/73	02/02/73	456/60
12/11/73	01/28/74	477/575

2. C.H. Albright	One, E, (861) Deed dated 1/21/79; Deed Book 589, page 536	
3. T.W. Hutchison	Three, K, ¶ 24 (980) Tax Map Number 548–00–00–038	III, n. 5

APPENDIX E

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.C. of this opinion as to the following parcels.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[5]
1. Bowater Corp.	Three, V, (996) ¶ 8 (278 acres ±, conveyed to East Highlands Co. by deed recorded in York County Deed Book 394 at page 281)	III

5. See *supra* Appendix C n. 3.

APPENDIX F

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.D. of this opinion as to the following parcels.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[6]
1. John M. Spratt, Jr.	One, V, Tract No. 6 (926) (Tax Map No. 661-2)	III, n. 5

APPENDIX G

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with footnote 7 of this opinion as to the following parcels.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[7]
1. Close Family	Three, Y, (1004), parcel with Southern Appliances, Inc. as grantor, recorded in deed book 418 at page 382, dated 5/12/71.	II (sp. pc.) III
	Three, Y, (1004), parcel with Paul Gibson as grantor, recorded in deed book 481 at page 65, dated 3/21/74.	II (sp. pc.) III
	Three, Y, (1006), parcels identified by tax map numbers:	
	710 0000 003	II (sp. pc.) III
	732 0000 003	II (sp. pc.) III
	730 0000 009	II (sp. pc.) III
	731 0000 002	II (sp. pc.) III
	710 0000 004	II (sp. pc.) III

The judgment of the district court is VACATED pursuant to footnote 7 of this opinion as to the following parcel.

1. Close Family	Three, Y, (1004), parcel with Curt Siefart as grantor, recorded in deed book 448 at page 38, dated 9/20/72.	II (sp. pc.) III

APPENDIX H

The judgment of the district court is REVERSED and the cause REMANDED for further action not inconsistent with section VIII of this opinion. The following defendants were

6. See *supra* Appendix C n. 3.

7. See *supra* Appendix C n. 3.

APPENDIX H—Continued

erroneously dismissed in that they claim certain parcels not released by the judgment orders.

Defendant		*Parcels Remaining in this Case*[8]
1.	J. Max Hinson	J.A. 641, Exhibit A, Tract numbers 27, 29
2.	William O. Nisbet	J.A. 778, 53 acre tract
3.	Ashe Farms	J.A. 494 ¶ 2 J.A. 776 ¶¶ 5 through 8 J.A. 777 ¶ 2
4.	C.H. Albright	J.A. 731 ¶ 7

Myron BATTS, Plaintiff-Appellant,

v.

TOW-MOTOR FORKLIFT COMPANY and Caterpillar Industrial, Inc., Defendants-Appellees.

No. 91-1511.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1992.

Rehearing and Rehearing En Banc Denied Dec. 23, 1992.

Bystander brought action against forklift manufacturer to recover for injuries caused by forklift backing into him. The United States District Court for the Northern District of Mississippi, Glen H. Davidson, J., entered judgment on jury verdict for manufacturer. Bystander appealed. The Court of Appeals, Barksdale, Circuit Judge, held that open and obvious danger of forklift in reverse precluded bystander's recovery.

Affirmed.

E. Grady Jolly, Circuit Judge, specially concurred and filed opinion.

Bright, Senior Circuit Judge, sitting by designation, dissented and filed opinion.

1. Federal Courts ⇐776

District court's interpretation of state law is reviewed de novo.

2. Federal Courts ⇐390

In deciding unsettled point of Mississippi law, Court of Appeals is required to predict how Mississippi Supreme Court would interpret its law; role of Court of Appeals is not to create or modify state law.

3. Products Liability ⇐27

Open and obvious danger to ordinary user precludes recovery against product manufacturer under Mississippi law of negligence and strict liability.

4. Products Liability ⇐48

Open and obvious danger of forklift in reverse precluded bystander's recovery against manufacturer under Mississippi law of strict liability and negligence, regardless of whether bystander knew or should have known of danger.

5. Products Liability ⇐48

Bystander's alleged awareness of open and obvious danger of forklift in reverse would not simply reduce recovery against manufacturer under Mississippi's comparative negligence standard. Miss.Code 1972, § 11-7-15.

8. Of course, because summary judgment was not granted as to these parcels they do not appear in the district court's judgment orders. Accordingly, we refer to these parcels by their description in the materials supporting the respective defendant's motion for summary judgment. Each reference is to Joint Appendix page number and paragraph or tract number or description, as appropriate.

INDEX OF CATAWBA HISTORICAL DOCUMENTS

* * * * *

February 1990

INDEX

CATAWBA DOCUMENTS

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1887.1	8990-1908-052, Pt.I	12/27/87	**LETTER** from A.J. Willard	re request for aid for Chief Thomas Morrison to return to S.C. from D.C.
1889.1	8990-1908-052, Pt.I	11/28/89	**LETTER** to Sen. Teller from P.H. Head, Catawba Indian	(can't read)
1896.1	8990-1908-052, Pt.I	3/28/96	**LETTER** to R.V. Belt, Esq. from CIA D.M. Browning	transmits petition and memorial from Catawba Indian Assoc. seeking to ascertain: QUESTION: (1) do Catawbas have tribal lands in N.C. or S.C. to which title has not been ceded or extinguished; (2) any reason why can't take up lands in severalty on pub. domain pursuant to § 4 of Act of 1887? ANSWER: (1) lands held in S.C., no land in tribal capacity in eN.C.; (2) no reason individual Indians can't take up lands in severalty under § 4 of Act of 1887; not practical or wise to ask Pres. to withhold from pub. settlement lands ceded by Kiowa and Comanche until allotments taken

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1905.1	8990-1908-052, Pt.I	4/10/05	LETTER to CIA Francis E. Leupp from Dept. of Int., Board of Indian Commissioners	re intervention and consultation on part of U.S. Govt. (thru Sec. of Int. & BIA) to help Catawbas secure rights proved to have in S.C.; reference made to Dick opinion re Cherokees in N.C. (68 Fed.Rpt. 582); needs to be basis for legal theory & practical policy to carry allotted Indians thru 1st yrs. of citizenship in U.S.; difficulty in dealing with case so largely w/in jurisdiction of S.C.
1906.1	no number	1/23/06	LETTER to Chester Howe, Esq. from CIA F.E. Leupp	responds to Howe opinion: Congress didn't authorize appointment of agent for Catawbas; S.C. hasn't done all agreed to -- relief should 1st be sought from state; if no justice for Indians from state, proper to seek assistance from Int.; Howe's proposed bill probably unconstitutional -- judicial power doesn't extent to controversies between state & citizens or residents thereof

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1906.2	6087-1906	3/14/06	**LETTER** to Chester Howe, Esq. from Acting CIA C.F. Larrabee	acknowledging receipt of letter & newspaper clipping re 1840 treaty purchase of ceded lands -- purchase not satisfactorily arranged, therefore, Catawba's may sue state to recover lands; CIA refers Howe to 1/23/06 letter stating Dept. has no jurisdiction over contracts made by Catawbas
1907.1	8990-1908-052, Pt.I	12/20/07	**LETTER** to Sec. of Int. from Acting CIA Frank Pierce	re receipt of letter requesting opinion. QUESTION: any special or general protection given Catawbas under laws of U.S. and whether received and included in any treaty made between U.S. and Indians? ANSWER: historical evidence shows Catawbas owned large tract in S.C.; S.C. recognized title by entering into leases w/Catawbas; S.C. laws show recognition of Tribe as early as 1815. RECOMMENDATION: investigation to determine how lands reduced to 620 acres & how can repossess and re-lease to S.C. or persons or corporations occupying lands

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1908.1	8990-1908-052, Pt.IA	1/27/09	**LETTER** and **OPINION** of Atty. Gen. A. Fraser Lyon to Gov. Ansel	letter submits opinion and opinion states that: (1) treaty of 1840 between Catawbas and S.C. valid; (2) Catawbas have no right or title to lands surrendered under treaty; (3) moneys called for ($5000) in agreement have been paid to Catawbas
1908.2	OIA file # 35823	5/21/08	**PETITION** of Catawba Tribe to Sec. of Int. and CIA	requesting intervention and aid in securing land belonging to them or for compensation therefor; ask assistance of Dept. of Justice to cooperate w/tribal attorneys
1908.3	OIA file # 35823	5/28/08	**LETTER** to Sec. of Int. from Chester Howe	submitting contract with the Catawbas and requesting action thereof, attaching brief and requests of Catawbas (portion of the brief attached)
1909.1	8990-1908-052	3/08/09	**LETTER** to Sec. of Int. from W.W. Wright	advising of Chester Howe's death; requesting action on pending petition and advising him of decision
1909.2	OIA file # 11109	5/27/09	**LETTER** to CIA from W.W. Wright	requesting action and disposal of petition; Wright closing up partnership

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1909.3	8990-1908;41109-1909	6/29/09	LETTER to W.W. Wright from CIA Valentine	inadvisable for him to recommend to Int. that Justice cooperate w/legal action because U.S. never exercised control over Catawbas or their property; lands ceded under treaty and payment made; since no demand or claim made on U.S., no authority to approve or disapprove contracts; judicial power of U.S. doesn't extend to contracts between states and residents or citizens
1909.4	D-8903	9/09/09	LETTER to CIA from 1st Asst. Sec. Frank Pierce	approving action of CIA denying Catawba petition
1910.1	OIA file # 25331	3/25/10	LETTER to CIA from Supt. Frank Kyselka	agreeing w/opinion of John Francis, Jr. of Commissioner's office that U.S. should be doing more to assist Catawbas and protect their rights
1911.1	8990-1908-052, Pt.1	1/02/11	LETTER to Charles L. Davis from Chief Harris	thanking Davis for his visit and urging him to recommend to the CIA that it take the Catawbas' case should S.C. fail to do anything

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1911.2	8990-1908-052, Pt.1	1/05/11	LETTER REPORT to CIA from Special Indian Agent Charles Davis	REPORT: visit to reservation 11/12/10; gives tribal demographics; he expressed to tribal officers that they need not hope to recover old reservation of 15 sq. mi.; he gave them no opinion on legality of money claim under the 1840 Treaty, but discouraged them to hope for such. WHITNER (on Catawba Commission): expressed that Tribe had moral claim against state & state would recognize such claim if properly presented (annual appropriations evidence of state's attitude); he asked chief what they wanted -- allotment of 50 acres to each individual member & reasonable equipment to farm (Davis felt this implied Tribe would relinquish any claims against state if demands met); Whitner didn't think state would provide for Tribe so liberally (@ $25-$40/acre); Whitner disappointed in Tribe's unwise demand. RECOMMENDATION: Davis recommends that: (1) Tribe submit its claim by petition to Legislature, with the Tribe being willing to accept any reasonable offer; (2)

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
				U.S. assistance should be given Tribe in capacity of advisor if state approves; (3) should state ask for U.S. cooperation in carrying out any scheme of lands in severalty, it should be given; in all other respects, the matter should be left to the state
1911.3	8990-1908-052, Pt.I	1/10/11	LETTER to CIA from Special Indian Agent Charles David	transmitting copy of Asst. Atty. Gen.'s report. Report states that state has no obligation for legal claims by Tribe citing previous arguments re 1840 Treaty; Davis feels state has moral responsibility; doesn't change his recommendation
1929.1	12492-30-011	1/09/29	LETTER to CIA from Chief Sam T. Blue	requesting information on how U.S. has settled with other tribes -- are they given land w/houses, per head or per family; are stock & farm implements given or is money given? Wants information to know how to respond should state offer to settle their land claim

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1929.2	12492-1930-011, Pt.I	1/25/29	**LETTER** to Chief Blue from Asst. CIA E.B. Meritt	acknowledging receipt of letter and setting out how Indian claims against U.S. are handled; money judgments only, paid directly to individuals or thru U.S. govt; no land or farm implements
1930.1	12492-1930-011, Pt.I	1/06-30	**S. RES. 217**	Committee of Indian Affairs be authorized and requested to investigate conditions of Catawbas and make report and recommendation
1930.2	12492-1930-011, Pt.I	5/18/30	**MEMORANDUM FOR THE SECRETARY** from CIA Rhoads	referring to S.Res. 217 -- Catawbas not federal wards but state wards; efforts being made to obtain legislative authority to turn over various duties to states re Indians now under federal control so not appropriate to extend activities to "state" Indians; doesn't recommend passage of resolution
1932.1	12492-1930-011	2/10/32	**LETTER** to CIA Rhoads from Sen. Elmer Thomas	stating subcommittee on Indian Affairs toured Catawba reservation; land is barren rock and Indians starving; wants to know if any funds left from last year's appropriation to assist Catawbas

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1932.2	12492-1930-011	2/16/32	**LETTER** to Sen. James F. Byrnes from Chief Blue	acknowledging receipt of his letter and asking him to cooperate w/Senators Smith, Frazer, and Smoot in assisting Catawbas
1932.3	12492-1930-011	4/18/32	**LETTER** to CIA Rhoads from Sen. James F. Byrnes	enclosing letter from Chief Blue and asking for Bureau assistance for destitute Catawbas
1934.1	13061-1953-319	4/16/34	**JOHNSON-O'MALLEY ACT**	authorizing the Sec. of Int. to arrange with states or territories for education, medical attention, relief of distress, and social welfare of Indians
1934.2	13061-1953-319	no date	**MEMORANDUM** by Chief, Land Div. (no name)	referring to Johnson-O'Malley Act, and stating that Act doesn't contemplate transferring activities performed by state to federal government; doesn't know of any land acquisition by government for Catawbas under the Act or any other legislation

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1934.3	OIA 23713 (5/16/34)	no date but passed at 1934 session	**CONCURRENT RESOLUTION**	for transfer of title of 600 acres of land (Catawba Reservation) from State of S.C. to federal government; care & maintenance of Catawbas residing thereon to be transferred to federal government
1935.1	12492-1930-011	1/35	**REPORT OF THE CATAWBA INDIAN NATION** by F.T. Ritchie & Glenn S. Buie (Soil Erosion Survey, U.S. Dept. of Int.)	sets our acreage, cultivated land, type of housing cattle, slope, erosion, land use, stony & gravelly areas, soil types; report includes maps & pictures
1935.2	12492-1930-011	3/35	**REPORT ON THE CATAWBA NATION (an Attempt to Justify Rehabilitation)** by J.G. Lidell, P.D. Southworth	report gives general history, treaty land grand history, sets out location, soil & topography, racial traits, social, educational & religious practices, public relief, rehabilitation, possible alternatives, State Budget Commission & recommendations (recommendations pp. 14 & 15)
1935.3	12492-1930-011	3/07/35	**LETTER** to A.H. Ward, Rural Rehab. Advisor from Supervisor of Field Service Paul V. Maris	informing Mr. Ward of visit to area by Mr. Southworth to begin inquiries & work out rehab projects for the Catawbas

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1935.4	12492-1930-011	3/07/35	**LETTER** to P.D. Southworth from T.O. Flowers, State Financial Agent, Catawba Indians	indicating he has a suggestion to make to Mr. Southworth re rehabilitation for Catawbas
1935.5	12492-1930-011	3/08/35	**LETTER** to P.D. Southworth from D.W. Watkins, Dir. Cooperative Extension Work	offering assistance for rehab project
1935.6	12492-1930-011	3/09/35	**LETTER** to P.D. Southworth from CIA	advising Southworth of his duties re rehab project; reminding him it is to be a state project not a project of the Indian Office; he's to get state interested & have it presented to federal office for consideration
1935.7	12492-1930-011	3/15/35	**LETTER REPORT** to P.D. Southworth from J.F. Cole, Asst. Forester	on inspection of Catawba Reservation; soil badly eroded; fire protection should be installed; recommends planting; if work sponsored by Soil Erosion Service using Indians as laborers on part-time basis, extra income to raise standards

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1935.8	12492-1930-011	3/18/35	LETTER to B.L. Hummel from P.D. Southworth	discussing conversation w/State Forester H.A. Smith who proposes to move Catawbas to state-park-forest combination where they can farm, work on forest & make naval stores & timber products; discussions w/U.S. Forest Service rep & Mr. Smith; tract of land to be in timber country where there's excellent fishing & game; meeting between Southworth, U.S. Forest submarginal man (L.J. Leffelman) & State Forester -- since Catawbas state wards, want project that state will get benefit; must consider York County situation; possible development in York County w/King's Mtn. Nat'l Park as basis: (1) 2,000 acres around original battlefield; (2) 16,000 acres submarginal land for forest which would be turned over to state after development; (3) suggests purchase of 50,000 acres of additional submarginal land to add to forest & then move Indians in; IECW to develop forest project, perhaps while land still belongs to govt

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1935.9	12492-1930-011	3/19/35	**MEMO** to CIA John Collier from Vice-Director Lowdermilk	attaching correspondence file re erosion control and land rehab; difficulties have arisen re assisting Catawbas; asks for suggestions
1935.10	12492-1930-011	3/20/35	**MEMO CONCERNING A TENTATIVE PLAN FOR THE CARE & MANAGEMENT OF THE CATAWBA INDIANS IN SOUTH CAROLINA** by H.A. Smith	referring to promise by federal government to put up $200,000 if state expends $100,00 over 5 yrs. (Southworth adds note that no promises made); PLAN: (1) FERA Rural Rehab Corp. to acquire approximately 30,000 acres of coastal land for administration as state forest; (2) BIA to construct IEC camp in form of model Indian village for housing Tribe; (3) IECW to pay men for labor in developing project; (4) State Forestry Commission, assisted by S.C. Budget funds to be responsible for administration in cooperation w/BIA, of forest; (5) after development (approx. 2 yrs), State Forestry Comm. & FERA Rural Rehab Corp to administer; desire project be self-liquidating

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1935.11	12492-1930-011	3/20/35	**MEMO** to Hummel, Armstrong, Cooley, Monahan, Woehlke, Zimmerman from P.D. Southworth	advising State Legislature passed Indian appropriation & set to do business thru State Budget Committee; Rehab Corp. to be lined up; King's Mtn. land purchase sidetracked -- 30,000 acres on original Catawba hunting grounds being considered; permanent operation by state after IECW development completed; question regarding title -- land to be bought by Rehab Corp. w/govt. funds; above tentative suggestion not commitment
1935.12	12492-1930-011	4/02/35	**LETTER** to John Collier from R.A. Winston, Tech. Sec., Dept. of Int.	acknowledging receipt of 3/27/35 letter to Lowdermilk; S.C. Emergency Relief Administration unable to move on rehab due to reorganization; Indians on direct & work relief
1937.1	12492-1930-011	1/26/37	**LETTER** to CIA Collier from Frank G. Speck (Univ. of Pennsylvania)	requesting, on behalf of the Catawbas, Collier's advice on state offer of settlement -- $250,000 for 144,000 acres or $400 per capita the first 2 years and $230 per capita the 3d year; Catawbas feel the amount inadequate
1937.2	12492-1930-011, Pt.I	1/29/37	**LETTER** to A.A. Grorud from CIA	forwarding letter of Prof. Speck

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1937.3	no number	2/37	**MEMORANDUM** to the CIA by D'Arcy McNickle, Admin. Assistant	regarding Prof. Speck's letter to the Commissioner and his investigation of the proposed settlement; APPROPRIATION BILL: (1) state offering $100,000, payable in 4 annual installments; (2) if no cooperative agreement w/federal govt., State Budget Comm. authorized to negotiate permanent settlement; (3) Budget Comm. authorized to investigate & allocate funds for payment of delinquent debts of Catawbas. Report gives historical background; Heyward & 2 earlier governors attempted to get additional lands for Catawbas; Heyward felt Treaty of 1840 never fairly carried out. RECOMMENDATIONS: (1) Dept. enter into negotiations w/State Budget Committee for limited cooperative agreement so Catawbas can benefit from experience and knowledge of Dept. field personnel; (2) if Tribe moved to new lands, keep present reservation because of burial grounds; limited U.S. jurisdiction, defined by Congress; (4) aid to school; admin. and extension man to supervise resettlement and rehab

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1937.4	no number	2/03/37	**LETTER** to Chief Blue from Asst. CIA Zimmerman	acknowledging receipt of letter from Dr. Speck seeking advice on behalf of Catawbas re S.C. settlement offer; not in position to advise; representative to visit Tribe & obtain information re legal status, land holdings & economic situation; representative to discuss settlement plan w/state authorities then will advise
1937.5	no number	2/03/37	**LETTER** to J. Smith, State Auditor from Asst. Comm. Zimmerman	re visit by rep to gather information; rep will meet w/Smith to ascertain action proposed by state & how far plan has progressed
1937.6	no number	3/25/37	**H.R. 5938** (75th Congress, 1st Session)	Bill to provide relief for Catawbas (agricultural assistance, industrial advancement, social welfare relief); state to provide (at no cost to U.S.) suitable area of land in York or adjoining county; to transfer legal title to U.S. to be held in trust (free of state & local tax); Catawbas must be bona fide residents of S.C. within 4 years prior to approval of Act to receive benefits

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1937.7	12492-1930-011	4/22/37	LETTER to CIA Collier from Sen. James F. Byrnes	asking whether Catawbas can be made wards of U.S. govt. & receive assistance
1937.8	12492-1930-011	5/24/37	LETTER to CIA Collier from Rep. J.P. Richards	regarding General Appropriation Bill forwarded by Smith, State Auditor; requests Collier to expedite action by Bureau of the Budget re H.R. 5938 & forward report to House Indian Affairs Comm.; anxious to secure action this session

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1937.9	12492-1930-011, Pt.I	6/04/37	**MEMORANDUM** to Mr. Chapman from Asst. Comm. Zimmerman	H.R. 5938 -- proviso re education inserted; divided jurisdiction undesirable; substitute bill -- civil & criminal jurisdiction w/state except where inconsistent with proposed act; state officials have advised their intention to negotiate final settlement & then divest state of further liability even if pending legislation not enacted; under IRA, Commissioner's office could extend services to Indians more than 1/2 Indian blood but undesirable -- reason for proposed legislation; per capita payment would cease under federal jurisdiction, but equivalent amount would probably be spent in other ways
1937.10	12492-1930-011, Pt.I	6/29/37	**MEMORANDUM** to Acting Sec. West from Budget Officer E.K. Burlew	stating he hasn't signed letter to Bureau of the Budget because he doesn't believe government should adopt any more Indians; refers to McNickle's report; will transmit report to Bureau of Budget if so directed

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1937.11	OIA # 49269	7/31/37	**LETTER** to CIA Collier from Rep. J.P. Richards	requesting report from BIA to submit to Indian Affairs Committee to assist in getting his bill thru that session
1937.12	no number	8/03/37	**MEMORANDUM** to Sec. from Asst. Comm. Zimmerman	inquiring about whereabouts of letter to Bureau of Budget; embarrassed by delay
1937.13	12492-1930-011	8/10/37	**MEMORANDUM** to Asst. Comm. Zimmerman from E.K. Burlew	forwarding file re H.R. 5938 w/memo to Acting Sec. West of 6/29/37; report to be revised in line with his (Burlew's) memo
1937.14	no number	8/21/37	**MEMORANDUM** to Asst. Comm. Zimmerman from E.K. Burlew	returning file re H.R. 5938; too late for congressional action that session; bring up at conference later when not so rushed; any additional phases considered at that time
1937.15	12492-1930-011	11/23/37	**LETTER** to J.M. Stewart, Dir., Land Division, Office of Indian Affairs from Sen. E. Johnson	regarding Catawba Indians who left S.C. for Colorado; requests information on pending bill; Colorado Indians want to know if they must return to S.C. to secure their share of any settlement

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1937.16	12492-1930-011	11/30/37	**MEMO** to Mr. Stewart from F.H. Deiker, Asst. to Comm. & D'Arcy McNickle; Admin. Asst.	regarding letter from Sen. Johnson inquiring of status of H.R. 5938 & rights of Colorado Catawbas; response on 6/21/37 directly to Mr. Garcia (a Colorado Catawba) advising him to status of state negotiations and possible federal role
1937.17	OIA 784	12/20/37	**LETTER** Honorable Senator from Elbert Garcia	regarding H.R. 5938 and the fact that the Colorado Catawbas would be cut out of any settlement
1938.1	12492-1930-011	1/03/38	**LETTER** to CIA Collier from Sen. Johnson	requesting information and advice he should give to Colorado Catawbas concerning pending legislation (H.R. 5938)
1938.2	12492-1930-011, Pt.I	1/03/38	**MEMORANDUM** to Sec. of Int. from CIA Collier	advising that a favorable report was submitted to the Dept. re H.R. 5938; notes objection of Mr. Burlew & Under-Secretary West
1938.3	12492-1930-011, Pt.I	1/08/38	**MEMORANDUM** to Sec. Ickes from E.K. Burlew	stating his objection to H.R. 5938 & noting that Mr. Poole (by memorandum) agrees w/his objection

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1938.4	12492-1930-011, Pt.I	1/21/38	**MEMORANDUM** to Mr. McNickle from Joe Jennings, Indian Organization	attaching Catawba file referencing H.R. 5938; suggesting he prepare revised report per Zimmerman's request
1938.5	12492-1930-011	3/29/38	**LETTER** to Sec. Ickes from Mrs. Henry J. Munnerlyn, State Chairman, DAR	urging Sec. Ickes to give H.R. 5930 his undivided attention and to sign bill
1938.6	12492-1930-011	6/03/38	**LETTER** to CIA Collier from Sen. Dennis Chavez	requesting report on status of claims by Catawbas; western members of Tribe in N. Mex. don't feet their interests being protected

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1938.7	12492-1930-011, Pt.I	6/09/38	**LETTER REPORT** to Rep. Will Rogers, Chairman, Committee on Indian Affairs, from Acting Sec. of Int. Burlew	2 trends of thought responsibility for welfare of Catawbas; historical background presented for each perspective; Tribe too small (less than 200) to break up due to the fact some may not be more than one-half blood to fall under § 19 of IRA; text of bill unsatisfactory: (1) not an assumption of jurisdiction; (2) doesn't define where final responsibility for Tribe rests; (3) doesn't indicate who will have control over funds for credit of Tribe. Recommends amendments Acting Dir. of Bureau of the Budget has advised the bill in present, or if amended as "suggested by you" [not sure who "you" is] not in accord with program of the President
1939.1	no number	2/16/39	**H.R. 4240**	authorizing the Sec. of Interior to enter into contract(s) w/State of S.C. for agricultural assistance, industrial advancement & social welfare relief for Catawbas; State must: (1) provide same educational advantages to Indians as whites; (2) provide land for Catawbas in York or adjoining county at no cost to U.S.;

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				(3) transfer legal title to land to U.S. in trust for Tribe, free from state and local taxation; (4) Catawbas who have been residents of S.C. within 4 yrs. prior to approval shall receive benefits
1939.2	12492-1930-011, Pt.I	5/18/39	**LETTER** to CIA Collier from Sen. James Byrnes	enclosing copy of Concurrent Resolution from Clerk of S.C. Senate
1939.3	12492-1930-011, Pt.I	5/25/39	**LETTER** to Mrs. Franklin D. Roosevelt from Sen. J.E. Massey	enclosing Concurrent Resolution of S.C. legislature and requesting any influence she and the President might have in bettering living conditions for the Tribe in making them a government reservation
1939.4	12492-1930-011	6/02/39	**LETTER** to Martha Dresher from Fred H. Daiker, Asst. to the Commissioner	responding to her letter on conditions of Catawbas; not under federal jurisdiction and can't do anything for them without specific authority of Congress; informs her of H.R. 4240 & S.C.'s proposal for settlement -- $100,000 for rehabilitation

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1939.5	12492-1930-011, Pt.I	6/08/39	**LETTER** to James Fowles, Clerk, S.C. Senate, from CIA Collier	advising that copy of S.C. Concurrent Resolution referred to him; Department not asked to make report re H.R. 4240; can't do anything for Catawbas without Congressional authority
1939.6	no number	6/08/39	**LETTER** to Sen. James F. Byrnes from CIA Collier	acknowledging receipt of his letter & giving him same information regarding need for congressional authority
1939.7	12492-1930-011, Pt.I	7/19/39	**LETTER** to W. Barton Greenwood, Fin. Officer, Office of Indian Affairs, from Eleanor E.A. Herring, Chief, State Legislative Section	enclosing coy of Concurrent Resolution
1939.8	no number	8/11/39	**LETTER** to CIA Collier from Sen. Byrnes	requesting aid for Catawbas
1939.9	no number	9/02/39	**LETTER** to Sen. Byrnes from CIA Collier	replying to Byrnes' 8/11/39 letter; again stating no authority to help; S.C. aid generous to Catawbas (yearly grants); 2d page of letter missing

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1939.10	12492-1930-011, Pt.I	10/02/39	**MEMORANDUM** to CIA from Nathan R. Mangold, Solicitor	a proposed report on H.R. 4240; 4240 doesn't provide for clear assumption of jurisdiction by federal govt. or definition of final responsibility; substitute bill advanced but open to similar objections; substitute bill provides: (1) supervision over Catawbas by Sec. of Int. same as other Indians, except Catawbas to remain subject to civil and criminal laws of S.C.; (2) lands to be held in trust by U.S.; (3) funds for Catawbas to be held in U.S. Treasury; (4) preparation of roll of Indians by Sec. of Int. Needs following revisions: (1) Indians subject to state civil and criminal laws if not inconsistent w/federal laws & provided real and person property held in trust not subject to taxation; need to specify services to be provided; (2) specify lands to be recognized as Indian reservation; (3) delete repetition of how funds used; (4) provide for preparation of roll within definite period after approval of Act; should exclude from membership Catawbas not residents of S.C.

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1939.11	no number	11/03/39	**MEMORANDUM** to Zimmerman from Greenwood, Finance Officer	referring to Sen. Byrnes' letter and citing United States v. Senfert Bros. Co., 233 Fed. Rep. 579, for proposition that federal govt. has no obligation to furnish relief to Catawbas; relief a local obligation. (Case states that indigent Indians who are not wards of U.S., not living on reservation, etc. no different than any other citizen who is indigent.)
1940.1	12492-1930-011,Pt.II	1/02/40	**MEMORANDUM** to CIA Collier from 1st Asst. Sec. Burlew	declining to forward proposed bill and report to the Bureau of the Budget because he doesn't believe U.S. jurisdiction over Catawbas justified -- not a great enough showing of Indian blood; questions should be resolved beyond reasonable doubt before government incurs financial obligation

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1940.2	12492-1930-011,Pt.II	1/04/40	**MEMORANDUM** to 1st Asst. Sec. Burlew from Asst. Comm. Zimmerman	stating Sen. Byrnes & Rep. Richards insistent that Dept. has authority to help Catawbas and want to appear before Budget Bureau; funds appropriated to Indian Service could be legally expended for benefit of Catawbas regardless of degree of Indian blood
1940.3	12492-1930-011,Pt.II	1/08/40	**LETTER** to Dir., Bureau of Budget, from 1st Asst. Sec. Burlew	transmitting proposed report on H.R. 4240 & asking to advise if in accord with program of the President
1940.4	12492-1930-011,Pt.II	1/30/40	**LETTER** to Sec. of Int. from Harold D. Smith, Dir., Bureau of Budget	returning originals of proposed report & proposed substitute and advising enactment of H.R. 4240 or proposed substitute draft not in accord with program of the President
1940.5	34790-1943-360,Pt.IC	2/13/40	**REPORT OF REP. WILLIAM R. BRADFORD FOR COMMITTEE APPOINTED PURSUANT TO CONCURRENT RESOLUTION H. 281 OF STATUS OF CATAWBA INDIANS AND WITH REFERENCE TO EFFORT TO HAVE SAID INDIANS MAINTAINED BY THE FEDERAL GOVERNMENT**	report sets forth deplorable living conditions; states that S.C. General Assembly has agreed, by making a contribution to the Catawbas year after year, that their claim against the state is a valid one

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1940.6	12492-1930-011, Pt.I	2/24/40	LETTER to Rep. J.P. Richards from CIA Collier	answering his questions of whether enactment of H.R. 4240 would entail additional expenses for federal govt. ANSWER: (1) $15,000 annually for education facilities, medical and relief assistance; (2) $100,000 put up by state wouldn't be used for these purposes; (3) if state increases its contribution for sum necessary to purchase land for Tribe, federal government's contribution approximately $11,000 annually; (4) if 4240 enacted, services to Tribe dependent on appropriation of additional sum for that purpose

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1940.7	13297-40	4/40	**LETTER** to Sen. Elmer Thomas, Chairman, Committee on Indian Affairs, U.S. Senate, from Sec. of Int. Harold L. Ickes	regarding his request for report on S. 3413; due to absence of treaty between Tribe and U.S. and special direction from Congress, Dept. hasn't sought appropriations for Tribe; present bill unsatisfactory in his opinion -- recommends amending bill; attaches revised bill but states that neither H.R. 4240 or attached substitute draft would be in accord with program of President (per Budget Bureau)
1940.8	12492-1930-011,Pt.II	4/15/40	**LETTER** to Rep. Will Rogers, Chairman, Committee on Indian Affairs, House of Representatives, from Sec. of Int. Harold L. Ickes	same as letter to Sen. Elmer Thomas
1940.9	12492-1930-011,Pt.II	8/14/40	**MEMORANDUM** for Mr. Armstrong from D'Arcy McNickle, Indian Organization	setting out 2-part program for Catawbas: (1) things that can be done immediately; (2) things that should be studied immediately for future guidance; also should immediately take census & determine whether absentee members of Tribe in N.C., Okla. & Colo. should have rights on Catawba Reservation

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1940.10	12492-1930-011,Pt.II	8/16/40	**MEMORANDUM** to Messrs. Greenwood & Zimmerman from Asst. Finance Officer	regarding formulation of plans to expend, for assistance of Catawbas, sum now in 1941 appropriations under "Support of Indians & Administration of Indian Property, 1941"
1940.11	12492-1930-011,Pt.II	9/28/40	**LETTER** to Clyde M. Blair, Supt., Cherokee Agency, from CIA Collier	informing of assignment of Field Rep. Ward Shepard to undertake negotiations with State; 1940 appropriation of $7,500 to be used for support & education; if agreement reached, Catawbas would come under jurisdiction of Cherokee Agency; would like Blair involved in study & formulation of plans
1940.12	12492-1930-011,Pt.II	10/02/40	**NEWSPAPER CLIPPING**	regarding arrangements by Rep. Richards for U.S. official to inquire into status of Catawbas

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1940.13	34790-1943-360,Pt.IA	10/10/40	**REPORT** by Ward Shepard	stating Catawbas probably have legal claim against State; made claim some years ago for $14.5 million but didn't pursue; 1936 State Legislature adopted provision in general appropriations bill that if no cooperative agreement with federal govt., State Budget Committee authorized to negotiate permanent settlement with Catawbas; Office of Indian Affairs shouldn't be party to use of proposed State appropriations to quiet legitimate claim of Catawbas without proper judicial procedure to determine validity & amount of claim; recommends that federal govt. work toward an agreement with State under Johnson-O'Malley Act rather than assume direct federal jurisdiction

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1940.14	34790-1943-360,Pt.IA	10/22/40	**MEMORANDUM** to Ward Shepard from Acting Dir. of Extension & Industry R.S. Bristol	regarding proposed contract with State for care of Catawbas; Article 6 of contract -- needs to be agreement on need for cooperation & assistance in finances & supervision for rehabilitation if & when funds made available; Article 9 -- same as Article 6, but shortage of agricultural extension people would necessitate additional funds to furnish cooperative assistance
1940.15	12492-1930-011,Pt.II	10/31/40	**MEMORANDUM** for the Sec. from CIA Collier	recommending negotiation of contract with State under Johnson-O'Malley Act if: (1) State expends $100,000 for land purchase & rehab.; (2) State continues annual appropriation of $9,500; federal govt. to contribute $7,500 and offer limited advisory help to improve standards of State care of Indians; such a contract would help without assuming federal jurisdiction & would discourage future special legislation

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1940.16	12492-1930-011,Pt.II	12/04/40	**LETTER** to C.B. Baldwin, Administrator, Farm Security Administration, from CIA Collier	explaining situation of Catawbas and asking for the Farm Administration's assistance when selection of land and families made for rehabilitation aid
1940.17	12492-1930-011,Pt.II	12/09/40	**LETTER** to Gov. Maybank from CIA Collier	requesting renewal of appropriation by State of $100,000 for rehab and continuance of annual appropriation of $9,500 to facilitate a cooperative agreement between State and Dept. of Interior
1940.18	12492-1930-011,Pt.II	12/14/40	**LETTER** to C.M. Blair, Supt., Cherokee Agency, from CIA Collier	advising him that negotiations with State have progressed and there is a need to study current relief needs; asks him to attend mtg. with Shepard & Catawba Business Committee; Blair to be designated to represent Indian Affairs in carrying out proposed cooperative agreement
1940.19	39329-39	1940?	**MEMORANDUM OF INFORMATION RELATING TO A BILL TO PROVIDE FOR THE RELIEF OF THE CATAWBA INDIANS IN SC** (on Interior stationery)	report containing historical information, relations w/State & federal govt., & finding that some assistance could be provided by federal govt. under IRA w/out further legislation, but advisable to have an act of Congress

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1941.1	12492-1930-011, Pt.III	1/16/41	LETTER to CIA, Attn: Ward Shepard, from Supt. C.M. Blair	enclosing survey of all Catawbas in York County; recommends: (1) federal govt. take over $100,000 appropriated by State, purchase property & hold title in trust; (2) means govt. would have to assume responsibility for education & health, supervision & encouragement in farm operations & home conditions. For immediate relief for winter, suggests allotment of $5500 & per capita payment of $10 w/another payment in 30 days
1941.2	12492-1930-011,Pt.II	1/24/41	LETTER to Supt. C.M.Blair from Asst. Comm. Zimmerman	advising that Commissioner's office disinclined to accept recommendation for per capita distribution of money -- illegal; allotment of $2,000 for urgent relief cases okay; also not in favor of suggestion that Catawbas be completely under federal jurisdiction
1941.3	12492-1930-011,Pt.II	1/17/41	LETTER to CIA from Mrs. McConville	requesting information on whether Catawbas wards of U.S. & advising of necessity for assistance for them

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1941.4	12492-1930-011,Pt.II	2/13/41	**LETTER** to Supt. C.M. Blair from CIA Collier	Chastising him for making per capita distribution to Catawbas against Zimmerman's instructions; requests explanation
1941.5	12492-1930-011,Pt.II	2/17/41	**LETTER** to CIA Collier from Supt. C.M. Blair	explaining his actions in making per capita distribution -- chief said all should get aid, survey not accurate picture of income & needs; cites the fact that State distributions go to everyone
1941.6	12492-1930-011,Pt.II	2/24/41	**LETTER** to Mrs. P.B. McConville from Asst. Comm. Zimmerman	setting forth status of Catawbas and attempts to pass legislation to bring them under federal jurisdiction; also explains negotiations w/State to work out an agreement

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1941.7	12492-1930-011,Pt.II	3/12/41	**MEMORANDUM** for the Commissioner from WS (Ward Shepard?)	State has serious deficit; State attempting to: (1) get definite & continuing commitment as to what federal govt. will do; (2) bargain for complete future federal responsibility for contribution of $100,000. RESPONSE: (1) can't bind future sessions of Congress without special legislation; could turn over $7,500 to State for all purposes; FSA won't make contract w/State but could take care of practically whole tribe; (2) State contribution to Catawbas for many years is due to depriving them of 144,000 acres without compensation & in violation of treaty; Catawbas don't regard claim as dead & State contribution less costly than litigation. It is contrary to Indian Service policy & Johnson-O'Malley Act to relieve State of its responsibility

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1941.8	no number	3/17/41	**MINUTES OF CONFERENCE BETWEEN CIA, REP. JAMES P. RICHARDS, AND REPRESENTATIVES OF THE STATE OF SOUTH CAROLINA. Washington, D.C., March 17, 1941**	minutes of conference held to find out what federal govt. willing to do to aid Catawbas; suggested that State legislature appointment a commission to work w/Indian Office & FSA in locating land, determining price & how much acreage needed, put a special plan to legislature detailing what State & federal govt. would do and source & amounts of funds; State representatives indicated if State furnished land, Catawbas should release any claims they have against State
1941.9	12492-1930-011	4/07/41	**LETTER to Mr. Shepard from John Joel Culp**	regarding request for assistance in getting property he says he's entitled to since his ancestors were Catawbas

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1941.10	12492-1930-011,Pt.II	4/28/41	**LETTER** to Sen. J.M. Lyles, Chairman, Catawba Indian Committee, from CIA Collier	outlining specific proposal for cooperative program between State & federal govt. for rehabilitation of Catawbas; responds to request for information re basis for claim by Catawbas against State -- Catawbas have reasonable grounds for considerable claim against State; State failed to carry out terms of 1830 treat; subsequent appropriations for Catawbas apparently recognition of unfulfilled obligation; appropriations not adequate for loss of 144,000 acres
1941.11	12492-1930-011, Pt.III	4/29/41	**MEMORANDUM** for Rep. Richards from Ward Shepard	supplementing letter to Sen. Lyles re Catawba rehabilitation project; Sen. McCowan skeptical that Catawbas have claim against State but if they do State should pay whatever it owes them
1941.12	12492-1930-011	4/30/41	**LETTER** to Ward Shepard from T.J. Scott, Farm Agent	sending Cherokee Indian flour seed corn and advising he was happy to be associated w/Shepard re farm homes for Catawbas

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1941.13	12492-1930-011	5/02/41	LETTER to FSA State Dir. R.F. Kolb from Ward Shepard	enclosing copy of CIA's letter to Sen. Lyles & advising him that no commitment was made as to definite number of people FSA would help rehabilitate; also encloses appraisals
1941.14	12492-1930-011, Pt.III	5/12/41	LETTER to Gov. Burnett R. Maybank from CIA Collier	re fact Sen. Lyles' committee has recommended adoption by Finance Committee of Senate that State adopt plan & urges State to renew authorization for funds allocated in 1936
1941.15	12492-1930-011, Pt.III	5/27/41	LETTER to CIA Collier from J.M. Smith, State Auditor	advising that plan approved for agreement w/federal govt. & appropriation made of $75,000
1941.16	12492-1930-011	6/26/41	LETTER to J.M. Smith, State Auditor, from Ward Shepard	requesting notification of Supt. Blair of next meeting regarding quality of land to be purchased for Catawbas; wants land purchased before any of the options expire

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1941.17	12492-1930-011	6/26/41	**LETTER** to R.F. Kolb, State Dir. of the FSA, from Ward Shepard	informing him of Sen. Lyles' opposition to purchase of Jenkins & Peoples Trust tracts due to opposition he's encountered in Rock Hill; these tracts essential to success of project because of high grade of land; none other like it available; suggests meeting with opponents in Rock Hill to give details of project
1941.18	12492-1930-011	6/27/41	**MEMORANDUM** to Dr. McGibony from Ward Shepard	forwarding copy of proposed agreement w/State for assistance to Catawbas; would like to commence medical examinations of Tribe due to illness & malnutrition found among its members; even thought the contract not signed, proper to get started since there is congressional authorization to assist State w/this problem

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1941.19	12492-1930-011, Pt.III	8/14/41	**LETTER** to CIA Collier from J.M. Smith, State Auditor	informing Collier of resolution passed by Committee on Catawba Indians for an agreement w/the federal govt. along the following lines: (1) $75,000 appropriation be put at disposal of BIA; (2) BIA should work out w/FSA such plans which are in best interests of Tribe & State; (3) Committee should assent to & approve plans worked by between BIA & FSA & lend full cooperation to carrying out such plans; (4) State to continue to provide teachers for education & a school house if necessary; (5) agreement should provide for extinguishment of Catawba claims against the State
1941.20	12492-1930-011	8/25/41	**LETTER** to CIA Collier from J.M. Smith, State Auditor	since no response to his Aug. 14 letter, encloses a copy and requests Collier's opinion of the Committee actions

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1941.21	no number	8/28/41	**LETTER** to J.M. Smith, State Auditor, from Asst. Comm. Zimmerman	informing him that Dept. in basic agreement w/Committee resolution w/two safeguards: (1) there should be no action which gives impression Catawbas under federal jurisdiction thereby accomplishes indirectly what Congress refused to permit directly; and (2) Office not in position to pass upon justice of Catawba claims against State; therefore, can't be party to any action seeking to quiet the claims
1941.22	12492-1930-011	9/02/41	**LETTER** to J.M. Smith, State Auditor, from Ward Shepard	advising that there were 2 different drafts of Zimmerman's 8/28 letter; encloses official draft & requests return of other draft if he received the wrong one to avoid confusion in State records
1941.23	no number	9/03/41	**LETTER** to Ward Shepard from J.M. Smith, State Auditor	returning Zimmerman's 8/28 letter and reaffirming full cooperation in any plan agreed upon by the Dept. & FSA
1941.24	12492-1930-011	9/04/41	**TELEGRAM** to Supt. Blair from Asst. Comm. Zimmerman	asking that Scott assist Oates re FSA renewal of land purchase options for Catawbas

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1941.25	12492-1930-011	9/05/41	**LETTER** to CIA, Attn: Zimmerman, from Supt. C.M. Blair	responding to telegram & informing Zimmerman of compliance
1941.26	12492-1930-011	9/05/41	**LETTER** to Supt. Blair from Ward Shepard	follow-up letter to telegram; FSA enthusiastic about land & project; proceeding w/documentation for incorporation of Tribe & land purchase
1941.27	12492-1930-011	9/09/41	**LETTER** to Ward Shepard from Supt. C.M. Blair	informing Shepard that 2 requests have been made for allotments of funds for relief purposes but has received nothing; requests Shepard's assistance
1941.28	no number	9/11/41	**LETTER** to J.M. Smith, State Auditor, from Ward Shepard	informing Smith of status & advising that when agreement completed he will get in touch to arrange a meeting w/the Committee

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1941.29	no number	9/11/41	**MEMORANDUM** to Mr. Cornwall (no signature, cut off)	setting out plans for Catawba agricultural rehabilitation program; advises that due to distance between present reservation & new land, necessary to build new school & church; asks if possible to use church on present reservation as an Indian arts & crafts center; also asks church to seriously consider building new church on new home sit w/Indian labor; asks consideration by the church to contribute towards wages of a visiting nurse
1941.30	12492-1930-011	9/11/41	**LETTER** to Ward Shepard from Supt. C.M. Blair	enclosing Scott's report on visit to Catawba reservation to secure land options
1941.31	12492-1930-011	9/11/41	**LETTER REPORT** to C.M. Blair from T.J. Scott, Farm Agent	setting out the land option renewals for a period of 30 days, expiring 10/15/41
1941.32	12492-1930-011	9/12/41	**LETTER** to C.M. Blair from Ward Shepard	advising he has made arrangements for requested allotment & hopes it's not too late to start gardening project; also advises a 4-party agreement between the Departments of Interior & Agriculture, State of South Carolina & Catawba Indians is being drawn up

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1941.33	12492-1930-011	9/15/41	**LETTER** to Dr. James A. Haynes, Sec. & State Health Officer, from J.R. McGibony, Dir. of Health	informing him of request for physical exams on all of the Catawbas & asking if it is okay to work through Dr. Haynes' office & obtain any assistance available
1941.34	12492-1930-011	9/22/41	**LETTER** to Supt. C.M. Blair from Ward Shepard	thanking him for forwarding Scott's report on option renewals; hopes to take up options by middle of Oct
1941.35	12492-1930-011, Pt.III	10/09/41	**MEMORANDUM** by Ward Shepard	attaching draft of Catawba agreement by FSA; notes conference to be held soon to discuss needed revisions
1941.36	12492-1930-011	10/14/41	**TELEGRAM** to J.M. Smith, State Auditor, from Asst. Comm. Zimmerman	inquiring if his committee could meet in D.C. on 10/20 re FSA proposed agreement
1941.37	12492-1930-011	11/26/41	**LETTER** to Mr. Hiram Q. George from Ward Shepard	setting out rehab plan to purchase land, construct or repair houses & make other necessary improvements, & give Catawbas advice & help in farm operations
1941.38	no number	12/16/41	**MEMO** to Ward Shepard from Bryant H. Davis, Dept. of Agriculture	forwarding Memorandum of Understanding and advising it's acceptable to FSA in present form

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1941.39	no numbers	1941	**MEMORANDUM OF UNDERSTANDING** (various drafts)	1st draft: STATE: (1) $75,000 contribution; (2) at next General Assembly recommend: (a) $9,500 annual appropriation (beginning 1943) to be used as directed by FSA & Dept. of Agriculture; (b) extend to Catawbas all citizenship rights & obligations; (c) cede all lands within boundaries of present reservation to Catawba Indian Association; (3) continue to receive tribal members into public schools; (4) provide school & at least 2 teachers. CATAWBAS: (1) to organize cooperative organization to carry on program of rehab; (2) pay taxes & assume obligations of citizens; (3) execute a release & quitclaim in favor of State of all claims & actions against State. OFFICE OF INDIAN AFFAIRS: (1) contribute $7,500 annually pursuant to Johnson-O'Malley Act; (2) delegate members of staff, as requested by FSA, to assist in development of Indian arts & crafts; (3) Education Division to advise,

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				upon request of Association, re more adequate educational programs; (4) Medical Division to make complete medical exams & hospitalize, wherever possible, tubercular, psychiatric & other illness cases; (5) organize CCC camp for conservation work & employ & pay association members for their work; (6) be available to FSA & advise re general social welfare of Catawbas. FSA: (1) assist w/organization of cooperative association & make loans to Association for development & construction of real property acquired by Association & assume entire responsibility for management, operations & supervision of Association. Various revisions show changes in contribution by Indian Affairs to $7,000 & change in requirements for educational facilities by State

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1942.1	12492-1930-011, Pt.III	1942	**MEMORANDUM** to CIA from Nathan R. Margold, Dept. of Int. Solicitor	regarding MOU; 1941 appropriation of $7,500 for general support & administration of Indian property implies grant of jurisdiction to Dept. of Int. of Catawbas for purposes for which funds appropriated; elimination of release & quitclaim provision necessary since can't have a contract under the Johnson-O'Malley Act which deprives the Tribe of claims which it might be able to enforce in the courts
1942.2	12492-1930-011, Pt.III	1/17/42	**LETTER** to J.M. Smith, State Auditor, from Asst. Comm. Zimmerman	setting forth revisions by solicitor to agreement: (1) language changed to make clear a MOU rather than formal contract; (2) Catawbas can't waive constitutional right to petition legislature so language stricken; (3) language changed to "program initiated by MOU" since FSA can't take charge of the Association since it would be a corporation under state law. MOU should be signed by Governor as well as by Committee

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1942.3	12492-1930-011	3/03/42	**LETTER** to Rep. James P. Richards from CIA Collier	advising him of status of agreement & the fact that a revised agreement sent to State Committee in Jan. w/no word from it since then; informs him that federal assistance unlikely in foreseeable future if State approval not forthcoming
1942.4	12492-1930-011	3/06/42	**LETTER** to Rep. J.P. Richards from Sen. J.M. Lyles	advising that Senate resolution giving Committee authorization to proceed to close the Catawba project w/the Office of Indian Affairs expected to pass on 3/6/42 & that the signing of the contract is imminent; states that the signing of the contract would turn the Catawbas over to the federal government
1942.5	12492-1930-011	3/06/42	**LETTER** to CIA Collier from Sen. J.M. Lyles	advising the CIA of his letter to Rep. Richards & that the CIA would be hearing from him as soon as the concurrent resolution passed authorizing the signing of the contract
1942.6	12492-1930-011	3/09/42	**LETTER** to CIA Collier from Rep. J.P. Richards	enclosing a copy of Lyles' letter to him of 3/6/42

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1942.7	12492-1930-011	3/12/42	**TELEGRAM** to CIA from J.M. Smith, State Auditor	advising the State General Assembly had approved proposed agreement & willingness to come to D.C. the following week to sign
1942.8	12492-1930-011	3/13/42	**LETTER** to Rep. J.P. Richards from CIA Collier	acknowledging receipt of 3/9 letter & his hope that the project could be commenced soon
1942.9	12492-1930-011	3/14/42	**LETTER** to CIA Collier from Rep. J.P. Richards	acknowledging receipt of 3/13 letter & again informing him of the passage of the resolution
1942.10	12492-1930-011	3/16/42	**LETTER** to J.M. Smith, State Auditor, from CIA Collier	recommends discussion w/Catawbas before signing contract; meeting tentatively planned for following week
1942.11	no number	3/30/42	**LETTER** to Ward Shepard from Chief Robert L. Harris	concerning tribal meeting and nearly 100% approval to move to more productive lands
1942.12	12492-1930-011	3/31/42	**LETTER** to Ward Shepard from Mrs. Moore	expressing happiness that the Tribe had agreed to proposed project
1942.13	12492-1930-011	4/03/42	**LETTER** to R.F. Kolb, State FSA Dir., from Julian Brown, Asst. Regional Dir. in charge of RR	advising that funds not available that year except for usual rehabilitation assistance; doesn't know if funds will be available the following year either

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1942.14	12492-1930-011	4/09/42	**LETTER** to Ward Shepard from R.F. Kolb	enclosing the 4/3 letter from Julian Brown re lack of funds
1942.15	12492-1930-011	4/21/42	**TELEGRAM** to CIA Collier from John Thompson, Indian living on Redbanks Farm	requesting assistance so that FSA won't evict him from his home
1942.16	12492-1930-011	4/21/42	**TELEGRAM** to CIA Collier from James E. Chavis, Sec., General Council of Indians, Robeson Co.	requesting investigation of John Thompson eviction since no reason to remove him from his home except that FSA wants him off farm
1942.17	12492-1930-011	4/22/42	**LETTER** to James Chavis, Sec., General Council of Indians, from CIA Collier	informing him that FSA in D.C. has no record of John Thompson case but it will make inquiry
1942.18	12492-1930-011	4/25/42	**LETTER** to R.F. Kolb, State FSA Dir., from Ward Shepard	informing him that project still under consideration but no decision until WPB order on building materials clarified

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1942.19	12492-1930-011	4/25/42	LETTER to Chief Robert L. Harris from Ward Shepard	informing him that delays in project due to fact FSA under attack in Congress & uncertain if funds available until Senate action on Agricultural Appropriation Bill; also WPB order restricting use of building materials a problem
1942.20	12492-1930-011, Pt.III	4/24/42	LETTER to Mrs. D.B. Moore from Ward Shepard	advising of setbacks in Catawba project

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1943.1	no number	4/17/43	**SECTION 11 OF ACT NO. 212 OF THE ACTS OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA, 1943**	authorizing Committee to enter into contract w/federal govt. for bettering conditions of the Catawba Indian Tribe of South Carolina
1943.2	11273-1959-077, Acc. 67-A-721-103	7/01/43	**CATAWBA TRIAL ROLL**	listing the 294 members
1943.3	33851-43	10/02/43	**LETTER** to Asst. Comm. Zimmerman from Supt. C.M. Blair	discussing lands to be purchased for the Catawbas and the condition of the lands; told Catawbas adequate arrangements for schooling would be provided by State
1943.4	no number	10/22/43	**LETTER** to J.M. Smith, State Auditor, from Supt. C.M. Blair	approving purchase of lands selected by committee of Catawba Indians
1943.5	no number	10/22/43	**MEMORANDUM** to CIA from Fowler Harper, Solicitor, Dept. of Int.	approving the MOU w/2 changes: (1) changes in language re conveyance of lands to U.S. in trust; (2) jurisdiction State has over Catawbas should be determined apart from any express agreement

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1943.7	34790-1943-360,Pt.IC	11/03/43	**MEMORANDUM OF UNDERSTANDING** (executed copy)	FSA provisions deleted, thereby eliminating the agricultural rehab project; changes made in accordance with Solicitor recommendations; Office of Indian Affairs' contribution under Johnson-O'Malley Act not specified, only "such sums as are made available for this purpose"
1943.8	45012	11/08/43	**LETTER** to Asst. Comm. Zimmerman from Supt. C.M. Blair	informing Zimmerman of his visit w/Catawbas & finalizing signing of MOU; Catawbas enthusiastic about Friedheim tract but don't want Springstein farm at all; distribution of land essentially up to Tribe
1943.9	43800-43	11/24/43	**LETTER** to Supt. C.M. Blair from Asst. Comm. Zimmerman	recommending that roll used by State for distribution of per capita payments be recognized by the Indian Service; no permanent assignment of land until Tribe organized in accordance with Indian Reorganization Act

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1943.10	no number	12/11/43	**LETTER** to Asst. Comm. Zimmerman from Supt. C.M. Blair and concurred in by A.C. Cooley, Director of Extension & Industry & Joe Jennings, Supt. of Indian Schools	reporting on meeting w/Catawbas re decision on land purchase; entire $75,000 needed for land therefore nothing for land development, farm equipment or building & repairing of houses; drafting constitution and by-laws for approval
1943.11	34790-1943-360,Pt.IA	12/29/43	**TELEPHONE CONVERSATION** between A.C. Cooley & Clyde M. Blair, Supt. of Cherokee Agency	conversation regarding proposed land purchases and amounts to be paid for same
1943.12	34790-1943-360,Pt.IA	12/29/43	**TELEPHONE CONVERSATION** between A.C. Cooley, Dir. of Extension, Office of Indian Affairs, & James M. Smith, State Auditor	conversation regarding proposed land purchases and amounts to be paid for same
1944.1	34790-1943-360,Pt.IA	1/01/44	**LONG DISTANCE TELEPHONE CONVERSATION** between Clyde Blair, Supt. Cherokee, N.C. Indian Agency, and A.C. Cooley, Dir. of Extension, Chicago Office	discussing the fact that State Auditor Smith called and said land purchased for $69,000; thought $5,000 in rehab money possible & with $3,000 - $4,000 left from State funds, could get underway

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1944.2	no number	1/05/44	**LETTER** to Asst. Comm. Zimmerman from Supt. C.M. Blair	reporting his meeting w/State Committee on 12/30/43; 8 tracts purchased totaling 3,362.1 acres for $68,886.25; $1000 to $1500 needed to close out matter & remainder to be turned over to Indian Bureau; if constitution approved soon, could get agricultural improvements started in early spring
1944.3	no number	2/02/44	**LETTER** to Supt. Clyde M. Blair from Asst. Comm. Zimmerman	regarding possible employment of Kelley Underwood to work w/the Catawba Indian Tribe
1944.4	no number	2/24/44	**REPORT OF LAND CAPABILITIES AND USE, CATAWBA INDIAN RESERVATION, SOUTH CAROLINA**	sets out land purchased & condition of the land; several recommendations made to obtain basic information in order to finalize planning & execution of program
1944.5	no number	6/13/44	**LETTER** to Supt. C.M. Blair from Asst. Comm. Zimmerman	discussing how to assign the land to the 2 groups -- group that wants to work at the mill should probably get land close to town; other group more interested in agricultural projects
1944.6	34790-1943-360,Pt.IA	6/30/44	**CONSTITUTION AND BY-LAWS OF THE CATAWBA INDIAN TRIBE OF SOUTH CAROLINA**	

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1944.7	34790-1943-360,Pt.IA	6/30/44	LETTER to C.M. Blair from Asst. Sec. Oscar L. Chapman	regarding ratification of Catawba Constitution
1944.8	Acct. 67-A-721 Termination, File 064 Council Acts	7/01/44	MINUTES OF MEETING OF THE CATAWBA INDIAN COUNCIL, ROCK HILL, S.C.	regarding election and installation of officers
1944.9	34790-1943-360,Pt.IA	7/03/44	LETTER to Asst. Comm. Zimmerman from Supt. C.M. Blair	concerning election of officers; certain matters in need of immediate attention: (1) way clear for State to deed over to federal govt. all Indian lands to be held in trust; (2) when notified by Commissioner's office, State ready to turn over $9500; (3) matter of schooling needs to be taken up w/State authorities; (4) need decision on health facilities; (5) need to set up position for Kelley Underwood since part of State allotment to pay his salary; (6) Catawbas unanimous in requesting per capita payment & decision on this urgent

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1944.10	34790-1943-360,Pt.IA	7/10/44	**LETTER** to C.M. Blair from Asst. Comm. Zimmerman	advising of departmental approval of constitution; Blair & Underwood should take up matter of schooling w/State & local authorities; does not agree w/per capita payment; relief should be for any families actually destitute
1944.11	20824-44	7/14/44	**LETTER** to Asst. Comm. Zimmerman from Supt. C.M. Blair	stating that Catawbas not rehabilitated yet & per capita badly needed; if Zimmerman doesn't want to set a precedent, suggests that State make payment out of $9500 before transferring it
1944.12	28167-44	8/19/44	**LETTER** to C.M. Blair from Asst. Comm. Zimmerman	agreeing to allow per capita payment but it should be done by the State; should advise Indians that govt. doesn't favor a similar payment the next year & to plan accordingly
1944.13	28167-44	8/28/44	**LETTER** to C.M. Blair from Fred H. Daiker, for the Commissioner	requesting a revised estimate of current relief needs due to $20 per capita payment & an allotment of $750

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1945.1	Acc. 67-A-721 Termination, 064 Council Acts	2/05/45	TRIBAL COUNCIL RESOLUTION	adopting the standard form of application & land assignment as prescribed & recommended by OIA, Dept. of Int., w/addition of clause prohibiting ranging of livestock on any lands other than assigned to the owner of said livestock without permission from Tribal Council
1945.2	Acc. 67-A-721 Termination, 064 Council Acts	3/24/45	RESOLUTION	regarding procedure to assign land; assignments to be made on standard forms approved by Tribe & the CIA to the individual members of the Tribe
1945.3	no number	4/05/45	LETTER to Supt. C.M. Blair from R.B. Hildebrand, attorney at law	advising that agreement between State, federal govt. & Catawbas stated that all Indian lands would be transferred to federal govt. to be held in trust; State legislature only extended authority to transfer lands purchased pursuant to agreement & didn't include old Indian reservation; bill introduced to encompass the old reservation as well & deeds will be prepared & forwarded when bill has passed

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1945.4	no number	4/11/45	**LETTER** to CIA from Supt. C.M. Blair	forwarding a copy of Hildebrand's 4/5/45 letter
1945.5	34790-1943, Pt.ID	9/13/45	**LETTER** to James Smith, State Auditor, from Asst. Comm. Zimmerman	requesting a deed transferring the newly acquired Indian lands since legislature failed to pass bill to allow transfer of old reservation; old reservation to be transferred as soon as legislation passed
1945.6	455-47-43, 23713-34, 71328-08-312	10/06/45	**TITLE TO REAL ESTATE**	deed transferring lands purchased in York County pursuant to Catawba agreement
1945.7	45547-43, 23713-34, 71328-08-312	10/10/45	**LETTER** to Joe Jennings, Acting Supt., Cherokee Agency, from R. b. Hildebrand	forwarding deed to new lands purchased by State and transferred to U.S. in trust
1945.8	455-47-43, 23713-34, 71328-080312	10/31/45	**LETTER** to Harry Critchfield, Dir. of Land, from Joe Jennings, Acting Supt., Cherokee Indian Agency	forwarding 10/10/45 letter from Mr. R.B. Hildebrand & the deed from State to U.S. in trust; recommends newly acquired lands be declared a reservation
1945.9	no number	1945?	**PROCLAMATION** by Sec. of the Interior	3,434.3 acres purchased by State & transferred to U.S. in trust proclaimed an Indian reservation

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1946.1	no number	1/23/46	**OFFICE MEMORANDUM** to Mr. Critchfield, Welfare Div., from Fred H. Daiker, Dir. of Welfare	advising the proposed Catawba Reservation proclamation to be put off until: (1) State conveys old reservation to Secretary; (2) decision by Tribal Council as to whether it wants lands declared a reservation.
1946.2	Acc. 67-A-721 Termination, 064 Council Acts	2/06/46	**MINUTES OF GENERAL TRIBAL COUNCIL MEETING**	Albert Sanders given assignment of tract No. 51
1946.3	Acc. 67-A-721 Termination, 064 Council Acts	2/06/46	**RESOLUTION**	accepting the layout of assignments of 11/27/45 & 12/29/45
1946.4	Acc. 67-A-721 Termination, 064 Council Acts	2/06/46	**RESOLUTION OF GENERAL COUNCIL**	approving grants of standard assignments
1946.5	Acc. 67-A-721 Termination, 064 Council Acts	5/25/46	**MINUTES OF CATAWBA INDIAN TRIBAL MEETING**	regarding further assignments of land
1946.6	Acc. 67-A-721 Termination, 064 Council Acts	5/25/46	**RESOLUTION OF GENERAL COUNCIL**	approving grants of standard assignments
1946.7	no number	9/30/46	**LETTER** to Supt. Joe Jennings from H.M. Critchfield, Dir. of Lands	requesting status re proclaiming Catawba lands a reservation

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1946.8	Acc. 67-A-721 Termination, 064 Council Acts	11/21/46	**MINUTES OF EXECUTIVE COMMITTEE MEETING**	American Telephone & Telegraph given OK to proceed w/construction of underground telephone cable; Jennings told Committee of his plans for health program; discussion re cutting of timber; no white people to be allowed to rent tribal lands for hay or crops; complaints about teachers; complaints that Indians not being allowed to vote; lumber for shed to store tribal equipment to be given from tribal timber
1946.9	Acc. 67-A-721 Termination, 064 Council Acts	11/30/46	**MINUTES, SPECIAL SESSION, GENERAL TRIBAL MEETING**	re timber permits
1946.10	Acc. 67-A-721 Termination, 064 Council Acts	11/30/46	**RESOLUTION**	giving Executive Committee authority to expend tribal funds during the period between regular meetings of General Council; approving plan for timber permits, subject to approval of Supt. or his representative
1947.1	Acc. 67-A-721 Termination, 061 Negotiations	3/04/47	**LETTER** to Chief Raymond Harris from Supt. Joe Jennings	setting maximum timber for any one member at 6,000 feet

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1947.2	no number	4/15/47	**NEWSPAPER ARTICLE - "Catawbas Face Brighter Days"**	land free to tribal members, as well as 6,000 feet of lumber per house constructed, but other costs of new homes borne by the family; changes have come about since 1945 when State relinquished control of Tribe to federal govt.; tribal members can also receive medical care & farm management supervision services, otherwise they have same privileges and responsibilities as any other citizen
1947.3	**Acc. 67-A-721 Termination, 064 Council Acts**	8/02/47	**MINUTES OF TRIBAL COUNCIL MEETING**	items covered were land assignment applications, school problems, building of implement shed, and amount of timber assigned
1948.1	**Acc. 67-A-721 Termination, 064 Council Acts**	1/10/48	**MINUTES OF TRIBAL COUNCIL MEETING**	items covered were land assignment applications, sale of teacher cottage & vote on Asst. Chief
1948.2	**Acc. 67-A-721 Termination, 064 Council Acts**	1/10/48	**HANDWRITTEN NOTES** of Council Meeting (on Dept. of Interior letterhead)	setting forth same items as covered in 1948.1

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1948.3	Acc. 67-A-721 Termination, 064 Council Acts	3/06/48	**SPECIAL TRIBAL COUNCIL MEETING**	items covered were petition to be submitted to Attorney General (signed by all of the Leslie School District officials), sale of building next to school, AAA program, plowing project for gardens & row crops, & SMCO plans for coming year
1948.4	no number	4/06/48	**LETTER** to Miss Erma Hicks, OIA, from Supt. Joe Jennings	advising that Catawbas interested in adopting a charter under § 17 of the IRA & requesting copies of approved charters
1948.5	Acc. 67-A-721 Termination, 064 Council Acts	5/06/48	**SPECIAL TRIBAL COUNCIL MEETING**	items covered were the charter, credit set up for reservation, land allotments, and location of new school
1948.6	Acc. 67-A-721 Termination, 064 Council Acts	5/29/48	**LETTER** to Supt. Joe Jennings from Royal B. Hasrick, Corresponding Sec., National Congress of American Indians	requesting correct address for Chief Harris -- NCAI compiling list of tribal council chairmen
1948.7	Acc. 67-A-721 Termination, 064 Council Acts	7/03/48	**MINUTES OF MEETING OF CATAWBA TRIBAL COUNCIL**	nomination & election of new chief & council; Raymond Harris reelected as Chief

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1948.8	Acc. 67-A-721 Termination, 067 Business Committee Minutes	11/18/48	MINUTES OF EXECUTIVE COMMITTEE MEETING	items covered were removal of white tenants, approved method of keeping tribal accounts, assignment of pumps, tribal pasture project, filing cabinet, & the fact that the rest of the money might be paid over from State soon
1949.1	Acc. 67-A-721 Termination, 064 Council Acts	1/01/49	REGULAR JANUARY MEETING OF THE CATAWBA TRIBAL GENERAL COUNCIL	35 required official voters not present
1949.2	Acc. 67-A-721 Termination, File - Voting	3/07/49	LIST	those wanting [voter] registration certificates
1949.3	Acc. 67-A-721 Termination, File - Letters Answered	5/28/49	LETTER to the Governor of S.C. from Mrs. Daisy Dennis	an Oklahoma Catawba wanting to return to S.C. & requesting information on whether her family can have a home there & under what terms
1949.4	Acc. 67-A-721 Termination, File - Letters Answered	6/16/49	LETTER to Mrs. Daisy Dennis from W.O. Suiter, Extension Agent	explaining the situation on the reservation & the procedure for assignment of land; Indians have to build their own homes; her status up to Tribal Council w/sanction of Cherokee Agency Supt. & Sec. of Int.

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1949.5	Acc. 67-A-721 Termination, 064 Council Acts	6/29/49	ACCOUNTING	of moneys turned over to Treasurer
1949.6	Acc. 67-A-721 Termination, 064 Council Acts	7/02/49	MINUTES OF REGULAR JULY MEETING OF GENERAL COUNCIL	items covered were financial report, developments on the reservation of new lands; vote on land assignments
1949.7	Acc. 67-A-721 Termination, 064 Council Acts	1949?	STATEMENT OF CATAWBA FUNDS	shows amounts received from State, balance, including allotments, expenditures, amount allotted for relief purposes
1950.1	Acc. 67-A-721 Termination, 061 Negotiations	1/10/50	MINUTES OF EXECUTIVE COMMITTEE MEETING	items covered were old church property should be divided into 3 or 4 homesites; $2500 to be spent on addition to tribal machine shed; $4100 left from $75,000 State contribution should be used on beef cattle project; pines should be cleared for pasture land of 125 acres
1950.2	Acc. 67-A-721 Termination, 064 Council Acts	3/20/50	MINUTES OF CALLED MEETING CATAWBA TRIBAL COUNCIL	meeting called to take final action on 2 loans from the government; not enough qualified voters present
1050.3	Acc. 67-A-721 Termination, 064 Council Acts	3/26/50	MINUTES OF CALLED MEETING GEN. CATAWBA TRIBAL COUNCIL	for action on 2 loans -- commitment order for each loan & repayment charge for revolving cash loan fund unanimously approved

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1950.4	Acc. 67-A-721 Termination, 064 Council Acts	7/01/50	**MINUTES CATAWBA TRIBAL COUNCIL MEETING**	items covered were land assignments & election of officers; Nelson Blue elected Chief
1950-5	no number	10/15/50	**LETTER** to Chief, BIA, from Miss Kathleen Lewis	writing to get information for a story she's doing on Catawbas: (1) whether reservation in York County a federal reservation & if so, why Indians not enumerated as such in 17th Decennial Census; (2) whether agent appointed to live on post & administer Indian affairs; (3) whether there are any rehabilitation programs
1950.6	no number	11/13/50	**MEMORANDUM** to Mr. McNickle, Tribal Relations, from E.G. Hutchinson, Chief, Branch of Land	stating that new reservation lands purchased & deeded over to U.S. in trust are under federal jurisdiction; old reservation still under State jurisdiction
1950.7	19824-50	11/16/50	**LETTER** to Miss Kathleen Lewis from D'Arcy McNickle, Chief, Branch of Tribal Relations	informing her that new reservation under federal jurisdiction while old reservation under State jurisdiction; BIA assists the Catawbas thru the Cherokee Agency; Agency staff visits to assist w/soil conservation, agriculture & other activities

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1951.1	Acc. 67-A-721 Termination, File - Letters answered	2/09/51	LETTER to Mr. Suiter from Mrs. James Douglas Nisbet	regarding contribution for Catawba medical expenses by the DAR
1951.2	Acc. 67-A-721 Termination, 064 Council Acts	7/07/51	MINUTES OF REGULAR MEETING OF TRIBAL COUNCIL	items covered were discussion of cattle project, authorization for payment of bills, & moneys turned over to Treasurer
1951.3	Acc. 67-A-721 Termination, 064 Council Acts	7/15/51	MINUTES OF JULY COUNCIL MEETING	items covered were report of financial status, report on present condition of cattle project, land assignments, & release of church property back to Tribal Council
1951.4	Acc. 67-A-721 Termination, 064 Council Acts	12/01/51	EXECUTIVE COMMITTEE MINUTES	items covered were moneys paid in & paid out; payment for care of tribal cattle herd, agreement to enter into pasture improvement lease; grant of loan from revolving funds; use of tractor & charge; recommendation that no funeral expenses be paid out of treasury for members who can pay for own expenses

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1952.1	Acc. 67-A-721 Termination, 064 Council Acts	1/19/52	MINUTES OF TRIBAL MEETING	meeting held to approve resolution whereby the Executive Committee was authorized to approve amounts for damages to tribal lands, including certain assignments caused by construction of sewer line by City of Rock Hill
1952.2	Acc. 67-A-721 Termination, 064 Council Acts	2/16/52	MINUTES OF TRIBAL COUNCIL MEETING	purpose of meeting -- to vote on land assignments
1952.3	no number	7/01/52	HOUSE RESOLUTION 698	authorizing Committee on Interior & Insular Affairs to conduct an investigation of the BIA -- how it performs its functions & manner in which it has met its trust obligations
1952.4	Acc. 67-A-721 Termination, 064 Council Acts	7/05/52	COUNCIL MINUTES	items covered were election of officers -- E.D. George elected Chief; selection of 2 representatives for Leslie School Board; voting of land assignments & authorization of Executive Committee to represent Council re land assignments between regular meetings of Council

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1952.5	Acc. 67-A-721 Termination, 061 Negotiations	8/02/52	EXECUTIVE COMMITTEE MINUTES	items covered were swapping lumber, breeding practices, payment of cattle debt, bull lot, branding & dehorning, sale of seed, fertilizing pastures, outstanding bills & sale of surplus hay
1952.6	Acc. 67-A-721-138, 067 Business Committee Minutes	12/06/52	EXECUTIVE COMMITTEE MINUTES	items covered were number of cords of wood cut, ad in Herald re no trespassing, trading lumber, road markers & beef cattle project
1953.1	Acc. 67-A-721 Termination, 064 Council Acts	3/07/53	MINUTES OF GENERAL COUNCIL MEETING	items covered were land assignments & sale of old school house
1953.2	Acc. 67-A-721 Termination, 064 Council Acts	8/30/53	COUNCIL MINUTES	special meeting adopting resolution to ask CIA to transfer $1800 to revolving cattle enterprise for use by Executive Committee in handling project
1953.3	Acc. 67-A-721 Termination, 064 Council Acts	8/31/53	RESOLUTION, GENERAL TRIBAL COUNCIL	re $1800 loan to revolving cattle enterprise
1953.4	Acc. 67-A-721, File -Letters Answered	12/24/53	LETTER to Mr. W. H. Spencer from Chief E.D. George	expressing appreciation for work done on baseball diamond at Indian School

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1954.1	Acc. 67-A-721 Termination, 064 Council Acts	7/03/54	MINUTES, CATAWBA TRIBAL COUNCIL	items covered were election of officers -- Idle Sanders elected Chief, and land assignments
1954.2	no number	9/20/54	REPORT WITH RESPECT TO THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR & INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BIA	Catawba Tribe listed as qualified to handle own affairs immediately; therefore, BIA should be discontinued in South Carolina; criteria used: (1) acculturation of Tribe; (2) economic condition; (3) willingness of Tribe to dispense w/federal aid; & (4) willingness & ability of State to accept responsibilities
1955.1	Acc. 67-A-721-138, 130 Catawba Withdrawal Program	12/31/55	REVISED SUMMARY STATEMENT OF WITHDRAWAL	conclusion of statement is that the Catawbas are generally competent to manage own affairs without BIA assistance; assistance in management & conservation desirable until program well developed; Tribe a part of the surrounding community & actively participate in elections by voting
1956.1	Acc. 67-A-721 Termination, 003 Miscellaneous	3/15/56	LETTER to Chief John Idle Sanders from Andrew Wilson Lathem, Soil Conservationist	re date & notice for Tribal Council meeting

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1956.2	Acc. 67-A-721-138, 130 Catawba Withdrawal	3/21/56-3/31/56	**FIELD TRIP REPORT, CATAWBA RESERVATION, SOUTH CAROLINA** by George E. Hendrix	conclusions & recommendations of report: (1) most members have dependable incomes & capable of managing own affairs; (2) well integrated into community & treated same as other citizens; (3) tribal membership increasing, blood quantum decreasing; (4) some Catawbas want fee title to their land assignments; (5) BIA services mainly advisory in management of lands & cattle enterprise -- alternative plans should be looked at to see if Tribe can be self-supporting w/out BIA assistance; (6) need for larger & better constructed homes; (7) should be negotiations toward turning back trust responsibilities to State; (8) tax-free status of land may be maintained by State; (9) should be local BIA representative for 1 year or more for assistance & advice

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1956.3	34790-43, 12492-30, 13061-53	5/10/56	**REPORT** to Acting Chief, Program Coordination Staff, from F.G. Hutchinson, Chief, Branch of Realty	re authorization of federal govt. to take title to land conveyed by State to the U.S. in trust; deed recorded but no indication of whether abstract of title submitted or that Dept. examined & accepted title; if Tribe subject to IRA, still necessary to secure abstract & submit to Solicitor for examination & acceptance of title
1956.4	Acc. 67-A-721 Termination, 064 Council Acts	6/13/56	**LETTER** to Rep. J.P. Richards from CIA Glenn L. Emmons	referencing letter forwarded from Dr. Henry Dockery Brown requesting investigation (doesn't say investigation of what); essentially letter sets out findings of George E. Hendrix set forth in 1956.2 above; willing to facilitate change in lands status if that's what Indians want
1956.5	Acc. 67-A-721 Termination, 064 Council Acts	6/23/56	**MINUTES OF SPECIAL TRIBAL MEETING**	meeting held to give Executive Council authority to negotiate w/officials of Rock Hill on a right-of-way for a disposal plant

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1956.6	Acc. 67-A-721 Termination, 064 Council Acts	6/25/56	**PETITION**	setting forth members who do not approve of any member selling homes or tribal lumber to anyone not a member of the Tribe; 80 signatures gathered
1956.7	62-A-523-9, 5812-1956-375	6/28/56, 7/18/56	**H.R. 12027 & REPORT**	a bill to authorize the city of Rock Hill to acquire certain tribal lands on the Catawba Indian Reservation; would allow city to take by eminent domain if negotiated sale not effected
1956.8	Acc. 67-A-721 Termination, 064 Council Acts	7/07/56	**MINUTES OF TRIBAL COUNCIL MEETING**	items covered were selling of improvements of assignments; resolution adopted whereby members prohibited from selling their improvements to non-members; election held but meeting nullified due to irregularities in voting procedure
1956.9	Acc. 67-A-721 Termination, 064 Council Acts	7/23/56	**MEMORANDUM TO FILES** from Supt., Cherokee Agency, Richard D. Butts	attaching newspaper article re tribal activities -- Sam Blue Chief again

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1956.10	34790-43, 12492-30, 13061-33-319	7/27/56	**LETTER** to Supt. Richard D. Butts from M.H. Derdeyn for Chief, Branch of Realty	stating no indication abstract of title submitted to his office & requesting information on whether abstract in agency office or ever received at time deed obtained
1956.11	45547-43, 23713-34, 71328-08-312	7/31/56	**LETTER** to CIA from Supt. Richard D. Butts	informing CIA that he has been unable to locate abstract of title
1956.12	13061-53, Realty - Requirements	8/22/56	**LETTER** to Supt. Richard D. Butts from F.G. Hutchinson, Chief, Branch of Realty	requesting that he determine which state office concluded land transaction and obtain abstract
1956.13	Acc. 67-A-721 Termination, 064 Council Acts	9/15/56	**MINUTES OF TRIBAL COUNCIL MEETING**	items covered were talk by S.T. Blue on his trip to Columbia to try & get aid from federal govt.; election of officers -- S.T. Blue, Chief; & land assignments
1956.14	no number	9/17/56	**CERTIFICATE OF ELECTION**	certifying the members elected at the 9/15/56 meeting
1956.15	no number	9/17/56	**OFFICE MEMORANDUM** to files from Supt.	attaching newspaper article re Catawba election

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1956.16	no number	9/21/56	**PUBLIC LAW 86-322; 73 Stat. 592**	act to provide for division of tribal assets of the Catawba Indian Tribe of South Carolina among the members of the Tribe
1956.17	no number	9/21/56	**LETTER** to CIA from Supt. Butts	no knowledge of an existing abstract of title for Catawba lands; Rock Hill City Attorney informed him that the action of the State in acquiring these lands did not invalidate any adverse claims, but that there is a SC statute which invalidates any adverse claim after a period of ten years
1957.1	13061-1953-319	1/24/57	**LETTER** to Sen. Olin D. Johnson from CIA Emmons	responding to Olin's letter of 11/21/56 enclosing letter from Chief Blue; sets out terms of agreement transferring lands on Reservation to U.S. in trust & assignments of that land to tribal members for their use; is aware many members want fee title to their assignments; indicates desire to work out title problems & to readjust federal govt's relationship w/the Tribe

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1957.2	Acc. 67-A-721 Termination, 064 Council Acts	3/05/57	**H.R. 676**	an act to authorize the city of Rock Hill, to acquire certain tribal lands (49 acres for sewer right-of-way) on the Catawba Indian Reservation; negotiated sale by 1/1/58 or a taking by eminent domain
1957.3	Acc. 67-A-721-	5/16/57	**REVIEWING APPRAISER'S STATEMENT** by W.L. Jenkins	appraisal for 45.5 acres sold to Rock Hill
1957.4	F-57-1042-9	6/21/57	**LETTER** to Dr. Ray. H. Vanderhook Asst. Area Medical Dir., Indian Health Area Office, Oklahoma City, from Acting Commission H. Rex Lee	responding to Dr. Vanderhook's letter requesting information on Catawbas; encloses copy of MOU; gives demographic information; sets out Bureau responsibilities to Tribe; Bureau's policy, prior to transferring health services to Public Health Service, is to encourage Indians to seek medical attention from doctors of their choice; expresses desire to terminate any special relationship of Catawbas to the federal govt. under trusteeship
1957.5	Acc. 67-A-721, 310 Land Sales	6/26/57	**RESOLUTION** of Catawba Tribal General Council	regarding sale of 45.5 acres of land to Rock Hill for sewage disposal system

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1957.6	Acc. 67-A-721, 310 Land Sales	7/01/57	**LETTER** to T.M. Reid, Asst. Comm., BIA, from Supt. Richard D. Butts	enclosing copies of the resolution regarding the sale of 45.5 acres of land to Rock Hill
1957.7	Acc. 67-A-721, 310 Land Sale	8/17/57	**LETTER** to Supt. Richard D. Butts from W.M. Kennedy, City Manager	enclosing payment for the 45.5 acres purchased by Rock Hill
1957.8	Acc. 67-A-721 Termination, 064 Council Acts	9/02/57	**NEWSPAPER ARTICLES** from Evening Herald	one article informs that there weren't enough members present at tribal meeting to conduct business; unable to make land assignments; second article says that reason members are staying away is because Sam Beck unfair re land assignments & members will stay away until next elections held & Beck not retained on Executive Council
1957.9	Acc. 67-A-721, 310 Land Sales	9/12/67	**QUIT CLAIM DEED**	conveying 45.5 acres to the City of Rock Hill
1957.10	24316-46-339	9/21/57	**LETTER** to Commissioner Emmons, BIA, from Chief Sam Blue	regarding who has jurisdiction of "old reservation;" Chief Blue states that Mr. Emmons has told him that federal govt. has no jurisdiction there -- Mr. Butts has told him old & new reservations under same jurisdiction; Chief Blue wants Emmons to clarify the matter w/Butts

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1957.11	Acc. 67-A-721-138, File 130 Catawba Withdrawal	12/20/57	**MINUTES** of Public Meeting held in Rock Hill on 12/17/57 by Supt. Richard D. Butts	meeting held to seek solutions to problems of Tribe; under MOU very few services offered by BIA; Cherokee Agency only provides assistance w/supervision of SMC program, land assignments and timber management; responsibility for road maintenance discussed; tribal members discussed problem of inability to get credit due to fact title to land not held by them & the fact that timber can't be cut on their assignments any longer; aid from federal govt. requested for county schools attended by Indian children -- education responsibility of State under MOU; BIA may be able to give temporary assistance, but real solution is in community
1958.1	Acc. 67-A-721 Termination, 064 Council Acts	1/18/58	**RESOLUTION** passed by the Executive Committee	authorizing cancellation of a loan & request for govt. to transfer amount earned on the loan to their agency depository

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1958.2	Acc. 67-A-721 Termination, 064 Council Acts	1/20/58	**LETTER** to Commissioner, BIA, from Supt. Richard D. Butts	referencing Commissioner's comments on credit activities and copy of Executive Committee's resolution of 1/18/58; transfer of funds on canceled loan to be held in abeyance until review & approval by Commissioner
1958.3	no number	2/06/58	**NEWSPAPER ARTICLE** - Asheville Citizen	Rep. Harvey of York County states that since Catawbas didn't war w/whites they have no treaty w/govt. to protect them; bill requiring State Highway Dept. to maintain road from reservation to U.S. 21, but road not maintained so in bad weather can't travel on it except by foot; reservation land worst in York County; Indians treated like dirt; no rights & no one sticks up for them
1958.4	67-A-721-138, File 130 Catawba Withdrawal	3/27/58	**H. 2482 - A CONCURRENT RESOLUTION**	to provide for the appointment of a commission to study the operation of an agreement entered into between the State of South Carolina, the Catawba Indian Tribe & the Office of Indian Affairs of the U.S., Dept. of Interior, dated 4/3/43

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1958.5	Acc. 67-A-721 Termination, 064 Council Acts	3/28/58	**NEWSPAPER ARTICLE** - Evening Herald	re bill before Congress to allow federal govt. to divide reservation lands among the Catawbas; Catawbas voted in favor of the bill (40-17); land division to be as fair & equitable as possible
1958.6	Acc. 67-A-721 Termination, 064 Council Acts	3/31/58	**MINUTES OF TRIBAL COUNCIL MEETING**	items covered were right-of-way for filter plant; authorization for Executive Committee to negotiate w/city re right-of-way & report to Tribe for vote; pulpwood problem; renting of land to outsiders; cattle project; contract w/State, federal govt. -- not enough people in favor -- hold off
1958.7	Acc. 67-A-721 Termination, 064 Council Acts	6/12/58	**LETTER** to all members of the Tribal Executive Committee from Supt. Richard D. Butts	re setting of semi-annual meeting of Catawba General Tribal Council
1958.8	67-A-721-138, File 130 Catawba Withdrawal	6/13/58	**LETTER** to Rep. Robert W. Hemphill from Comm. Emmons	re legislative commission to study ways & means for final solution on status of Catawbas; will appoint "top-flight" program officer to work w/the commission

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1958.9	Acc. 67-A-721 Termination, 064 Council Acts	7/07/58	**RESOLUTION** of Catawba General Tribal Council (unsigned & not certified)	amending § 6 of the "Grant of Standard Assignment" to read that improvements constructed on an assignment w/the 6000 bd. ft. of timber allotted, can be sold only to tribal members & can't be removed unless relocated on another tribal assignment
1958.10	Acc. 67-A-721 Termination, 064 Council Acts	7/19/58	**MINUTES OF GENERAL TRIBAL COUNCIL MEETING**	election of officers - Nelson Blue elected Chief

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1958.11	67-A-721-138, File 130 Catawba Withdrawal	8/58	**REPORT ON THE CATAWBA INDIANS OF SOUTH CAROLINA**	Major items to be considered for inclusion in a terminal bill for the Catawbas: (1) provision for closed roll; (2) provision for disposition of tribal real estate - (a) fee patent to general homesite to all having & occupying an assignment; (b) sale for balance of land w/proceeds equaling the equity of entire tribal estate in the entire membership; (c) set aside areas for park & playground; (d) guardians for minors or adults needing supervision; (e) survey marking boundaries of final assignments & remaining lands; (3) provision made for disposition or future control or use of tribal personal property; (4) special agent to assist in carrying out purposes of act

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1958.12	Acc. 67-A-721 Termination, 067 Business Committee Minutes	8/04/58	**MEMORANDUM** to Supt. from Andrew L. Lathem	re applications to be submitted by Rock Hill for rights-of-way on reservation; sets forth items covered at Executive Committee meeting: cattle loan; disposition of timber located on tract sold to city; bond premium; monies received from sale of land to city -- would like to use to trade in old farm equipment & buy new equipment & for assistance w/burial expenses of members; use of & charge for tribal equipment; need for change in operation of tribal cattle herd
1958.13	67-A-721-138, File 130 Catawba Withdrawal	8/04/58	**OFFICE MEMORANDUM** to files from Supt. Butts	re meeting held w/Special Legislative Committee appointed by SC General Assembly; meeting held so committee could learn types of programs carried on at Cherokee by the govt. & by the Agency to determine what could be programmed for the benefit of the Catawbas
1958.14	67-A-721-138, File 130 Catawba Withdrawal	8/22/58	**LETTER** to Rep. Hemphill from H. Rex Lee, Acting Comm.	regarding assignment of Raymond Bitney, special program officer, to work out final plans for Catawba Indians

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1958.15	Acc. 67-A-721 Termination, 064 Council Acts	8/30/58	**MINUTES OF SPECIAL TRIBAL COUNCIL MEETING**	items covered were Chief Blue gave information on meeting held in Columbia -- suggestions made: (1) to sell handmade items & set up fund from proceeds to make individual loans for building & repair of homes; (2) to sell 75 head of cattle to pay off all outstanding debts; (3) to request $48,000 for repair of old machinery or purchase of new; not enough members to vote

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1958.16	67-A-721-138, File 130 Catawba Withdrawal	9/03/58	**INTER-OFFICE TRANSMITTAL** to Comm., BIA, from Supt. Butts	notes of special meeting of Legislative Committee; Rep. Hemphill suggested setting up an Indian Commission to survey existing conditions & problems confronting the Catawbas to enable a plan for a reorganization program & then submission of a special bill to Congress to provide authority & means to effect it; Catawba tribal delegates pointed out they weren't looking to federal govt. for additional assistance but to State for improvement of housing conditions, adequate medical facilities, roads, construction of sanitary wells, welfare assistance & development of arts & crafts program

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1958.17	Acc. 67-A-721 Termination, 067 Business Committee Minutes	9/03/58	**LETTER** to Comm., BIA, from Supt. Butts	reporting requested information on actions taken & progress thereof w/regard to the Catawbas -- little action due to split in Tribal Executive Committee, therefore didn't hold regular meetings; Agency has provided advice re Tribal Cattle Enterprise, liquidation of cattle loan, disposition of timber on tract purchased by Rock Hill, & matters pertaining to application for sewer right-of-way by Rock Hill
1958.18	Acc. 67-A-721 Termination, 065 Catawba Elections	10/14/58	**LETTER** to Comm., BIA, from Supt. Butts	advising of resignation of Nelson Blue as Chief due to personal reasons; pursuant to Constitution & By-Laws, Albert Blue now Acting Chief
1958.19	Acc. 67-A-721 Termination, 065 Catawba Elections	10/14/58	**MEMORANDUM** to all members of the Catawba Tribal Executive Committee from Supt. Butts	re resignation of Chief Blue & fact that Albert Sanders Acting Chief until election held
1958.20	no number	10/21/58	**TRANSCRIPT** - State and Federal Pow-Wow	

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1958.21	no number	10/22/58	**NEWSPAPER ARTICLE**	re hearing on recommendations to improve welfare of Catawbas; H. Rex Lee of BIA said MOU restricted use of reservation by Indians; reservation status outmoded vehicle to exploit advantages of tribal assets of $264,000; Catawbas have economic advantages beyond most tribes; Lee favors division of reservation among members; Sam Beck states not all in favor because loan repossession could destroy reservation as an entity of the Tribe
1958.22	67-A-721-138, File 130 Catawba Withdrawal	10/31/58	**REPORT** to Chief, Branch of Tribal Programs, from Raymond H. Bitney, Program Officer	detailing background information, early history of Tribe, the MOU, Tribal membership, rehab program, progress trends & adjustments since 1944

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1958.23	no number	1958?	**REPORT OF SPECIAL COMMITTEE ON THE CATAWBA INDIAN PROBLEM TO THE GENERAL ASSEMBLY**	containing historical background information, terms of 1943 MOU, constitution & by-laws of Tribe, portions of the transcript of 10/21/50 conference, information on assignments, demographic information, assets & liabilities of the Tribe, & recommendations for provisions to be included in termination act (630 acres/old reservation not to be disposed of
1959.1	Acc. 67-A-721 Termination, 064 Council Acts	1/03/59	**MINUTES** of General Tribal Council Meeting	meeting was held for election of officers -- Albert Sanders elected Chief; Raymond Bitney spoke about his assignment to study the situation at the reservation for Rep. Hemphill; Chief Sanders asked for vote of those who wanted to "get out from the federal government" -- 27-0 in favor; Garfield Harris questioned legality of vote since he said nonmembers voted and some people raised both of their hands

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1959.2	no number	1/03/59	**RESOLUTION**	seeking to request Rep. Hemphill to introduce legislation to remove federal restrictions against alienation of Catawba land so that members could receive patents, to provide for equitable distribution among members of tribal assets, to provide protection for minors and incompetents, and to provide that nothing in the legislation shall affect the status of any claim by the Tribe against the State
1959.3	no number	1/05/59	**NEWSPAPER ARTICLE -** Evening Herald	detailing resolution passed by Tribal Council on 1/3/59; division of property among Catawbas not to include 630 acres in the "old reservation"
1959.4	Acc. 67-A-721 Termination, 064 Council Acts	1/06/59	**NOTES** by Supt. Butts of telephone conversation w/Samuel Beck of 1/3/59	Samuel Beck called Supt. Butts to let him know that council meeting held 1/3/59 was not advertised and that he had found out about it when he noticed the lights on in the school house & went to investigate; he didn't believe there was a quorum present; Butts stated that he was not notified of meeting

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1959.5	Acc. 67-A-721 Termination, 064 Council Acts	1/07/59	**NOTES** by Supt. Butts of telephone conversation w/Garfield Harris, Sec.-Treas. & Albert Sanders, Chief	regarding dispute between Garfield Harris & Albert Sanders over writing up of minutes of 1/3/59 council meeting; Supt. Butts told Chief Sanders not to try & take over Garfield Harris' duties; also told Chief Sanders to notify him of council meetings if they wanted his help
1959.6	Acc. 67-A-721 Termination, 064 Council Acts	1/10/59	**NOTES** by Supt. Butts of telephone conversation w/Douglas Harris, member of Catawba Tribe	regarding fact that Garfield Harris had not written up minutes of 1/3/59 council meeting; Butts told him officers should work together and that Garfield Harris had told him that he would write up minutes so he was sure he would
1959.7	Acc. 67-A-721 Termination, 064 Council Acts	1/15/59	**LETTER** to Commissioner, BIA, from Supt. Butts	forwarding minutes of 1/3/59 council meeting; some question as to legality of vote; Bitney present so request information from him on situation
1959.8	no number	1/16/59	**NEWSPAPER ARTICLE** - Evening Herald	regarding dispute among tribal officers over legality of resolution passed at 1/3/59 council meeting

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1959.9	no number	1/21/59	**LETTER** to Rep. Wilbur G. Grant & Rep. L.C. Wright from Robert W. Hemphill	enclosing rough draft of Report on the Catawba Indian Problem; requests immediate response to report so it can be finalized; states that Indians fighting among themselves but he feels w/guidance of the Committee they can do them a lot of good; asks whether they are going to recommend to the General Assembly that a commission be appointed; if commission appointed, suggests that it include Indians, local people from Rock Hill & one person from upper section of Lancaster County
1959.10	Acc. 67-A-721-103, 1017-1959-013	1/26/59	**LETTER** to Commissioner, BIA, from Supt. Butts	attaching copy of resolution passed at the council meeting on 1/3/59; states that legislation to remove reservation lands from trust status to be at no cost to the Tribe or claims against their assets; Bureau should do everything possible in cooperation w/Rep. Hemphill to secure such legislation

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1959.11	no number	1/26/59	**LETTER** to H. Rex Lee from Rep. Robert W. Hemphill	requesting drafting service for preparation of introduction legislation to accomplish desire of resolution of 1/3/59
1959.12	Acc. 67-A-721-103, 1017-1959-013	1/01/59-1/24/59	**MEMORANDUM** to Chief, Branch of Tribal Programs, from Raymond H. Bitney, Program Officer	report of official visit to Rock Hill, SC & Catawba Indian lands in the vicinity to confer w/Catawba Indians, visit them in their homes & attend their regular General Council meeting held in January
1959.13	no number	2/05/59	**LETTER** to Raymond Bitney from Douglas Summers Brown (Mrs. H. Dockery Brown, Jr.) (author of history of the Catawbas published by Univ. of S.C. Press	setting out the history of the Catawbas and stating that she feels there has never been full payment to the Catawbas for their lands & that until this is done, no final settlement can be made

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1959.14	Acc. 67-A-721 Termination, 023 Proposed Legislation	2/09/59	**LETTER** to Supt. Butts from Assoc. Comm. H. Rex Lee	informing him that Bitney assisted the Catawbas in writing the resolution of 1/3/59; Hemphill had legislation drafted & will introduce it after he has met w/the General Council, gone over the terms of the proposed bill w/the Tribe & a majority indicate they are in favor of bill; pending action on bill, Bureau won't be involved in any way
1959.15	no number	3/06/59	**LETTER** to Asst. Sec. of Interior Roger Ernst from Rep. Hemphill	thanking him for his draft of the Catawba bill; meeting w/Catawbas scheduled for 3/28/59
1959.16	Acc. 67-A-721 Termination, 064 Council Acts	3/10/59	**PETITION**	disapproving the proposal made on 1/21/59 & requesting a special meeting 3/21/59 for a complete explanation of proposal sent to Hemphill & report to Legislative Committee (60 signatures)

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1959.17	Acc. 67-A-721 Termination, 064 Council Acts	3/16/59	**NOTES** by Supt. Butts of telephone conversation w/Sam Beck	re Catawba General Council meetings; Col. Harvey to be present 3/21/59 to make sure action taken at 1/3/59 Council meeting still the plan of the majority & to talk about "State part" of the action; Hemphill meeting to be 3/28/59 to discuss 1/3/59 resolution & proposed bill
1959.18	Acc. 67-A-721 Termination, 064 Council Acts	3/21/59	**MINUTES** of Special Tribal Council meeting	meeting called pursuant to a petition requesting Col. Bates Harvey to give answers re resolution passed 1/3/59; question regarding whether "old reservation" included in land division -- no
1959.19	Acc. 67-A-721 Termination, 064 Council Acts	3/28/59	**MINUTES** of Special Tribal Council meeting	Hemphill explained proposed bill & was asked questions; old reservation not to be included in division of tribal assets; vote taken -- 40-17 in favor

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1959.20	Acc. 67-A-721 Termination, 064 Council Acts	3/28/59	**MINUTES** of Special Meeting of the Catawba Council by Andrew W. Lathem, Asst. to Supt.	State Rep. Bates Harvey stated it was the intention of the State to carry out wishes of the Tribe insofar as possible; Rep. Hemphill present to explain to the Tribe what the federal govt. can do & will do for them; Hemphill stated that in his conversations w/Rex Lee (Assoc. Comm.), that Mr. Lee said the Bureau's opinion was that the Catawbas were not in as great a need of federal assistance as most other Indians; therefore, federal services to Catawbas could not be expanded; Hemphill discussed the 1/3/59 resolution and was asked what effect the resolution would have on the "old reservation" -- he stated there were no plans to change its status; cost of the division of assets to be borne by the federal govt. from appropriated funds; Hemphill stated the MOU had been of no advantage to the Tribe; he read the proposed bill and answered questions raised re tribal membership; he said he wouldn't introduce the bill unless a majority wanted it; vote taken -- 40 in favor, 17 opposed

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1959.21	Acc. 67-A-721-103, 1017-1959-013	3/31/59	**OFFICE MEMORANDUM** to H. Rex Lee from Homer B. Jenkins	re tribal meeting on 3/28/59; essentially same as Lathem's notes of meeting; stated that Hemphill made it very plain that he had no desire to influence tribal members one way or the other on the proposed bill; QUESTIONS: (1) can bill be amended to allow membership to children born of members in the service; (2) can bill be amended to permit those who wish to do so have their lands remain in trust status; and (3) if title to old reservation remains in trust w/State, can members reside on old reservation & participate in disposition of new reservation?
1959.22	Acc. 67-A-721-103, 1017-1959-013	3/59	**OFFICE MEMORANDUM** to files from N. Lasky	re excerpt from Cherokee Agency monthly report re 3/28/59 Council meeting re resolution & proposed bill

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1959.23	Acc. 67-A-721-103, 1017-1959-013	4/06/59	**LETTER** to Raymond H. Bitney from Asst. Comm. Thomas M. Rold	forwarding original & 7 copies of Bitney's reports on his trips to the Tribe which had been edited to delete any controversial statements w/the idea that if they were called for by the committee, a clean report, free of controversial issues would be available; advises that Hemphill will introduce bill after Easter recess; success of proposal due to Bitney's work w/the Catawbas
1959.24	no number	4/07/59	**CONGRESSIONAL RECORD - HOUSE**	Hemphill introduces legislation to terminate federal assistance so that Catawbas can own land & borrow against it & so they can have same privileges & responsibilities as other citizens

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1959.25	Acc. 67-A-721-103, 1017-1959-013	4/07/59	**OFFICE MEMORANDUM** to files from N. Lasky	re excerpt from monthly report for Cherokee Agency, February 1959; resolution passed at 1/3/59 meeting to provide for distribution of tribal assets to be at no cost to Tribe or claims against their assets; nothing in legislation to effect status of any claim against State of SC by the Tribe; resolution forwarded w/recommendation that it receive favorable consideration & active support by Bureau to carry out intentions of the Catawba General Council
1959.26	13061-1953-319	4/10/59	**LETTER** to Commissioner, BIA, from Supt. Richard Butts	forwarding copy of minutes of special meeting of the Catawba Council on 3/20/59, as well as a copy of the Catawba Tribal Roll for July 1, 1943

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1959.27	Acc. 67-A-721-103, 1017-1959-013	4/22/59	**ANALYSIS OF H.R. 6128**	Section 5 directs Secretary to revoke IRA constitution of the Tribe; upon revocation neither Tribe nor individual members entitled to any special services performed by the U.S. for Indians because of their status as Indians; relationship between Catawba Indians & federal govt. shall be terminated
1959.28	no number	4/22/59	**MEMORANDUM** to Legislative Counsel from Commissioner, BIA	recommending passage of the bill if § 3(f) amended to delete language re appropriated funds
1959.29	Acc. 67-A-721 Termination, 067 Business Committee Minutes	5/31/59	**LETTER** to Supt. Butts from Garfield C. Harris	tendering his resignation as Sec./Treas. of the Tribe, effective June 15, 1959
1959.30	Acc. 67-A-721, 130 Withdrawal	6/08/59	**LETTER** to Mr. Aspinall from Asst. Sec. of the Interior Roger Ernst	report on H.R. 6128, recommending enactment of the bill and setting forth an estimate of Catawba assets
1959.31	Acc. 67-A-721-103, 1017-1959-013	6/10/59	**PRESS RELEASE** by Dept. of Int. Information Service	favoring H.R. 6128, a bill permitting the Catawba Indians to divide their tribal property

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1959.32	Acc. 67-A-721 Termination, 003 Miscellaneous	6/16/59	**OFFICE MEMORANDUM** to Supt. from Andrew W. Lathem & Charles Dunn	re field trip to Catawba Reservation; met w/Garfield Harris, Chief Albert Sanders, Richard Harris & John Idle Sanders; discussed use of tribal funds, sale of tribal cattle, use of proceeds from sale of land to City & signing of revocable permit to the Catawba Asphalt Paving Company
1959.33	Acc. 67-A-721 Termination, 067 Business Committee Minutes	7/06/59	**MINUTES** of monthly Executive Committee meeting	items covered were cutting of timber, dinner for 4th of July & discontinuance of hay cutting
1959.34	Acc. 67-A-721 Termination, 064 Council Acts	7/11/59	**MINUTES** of Semi-Annual Catawba Tribal Council Meeting	items covered were resignation of Garfield Harris as Sec.-Treas., election of new Sec.-Treas., accounting of tribal funds, sale of cattle herd, delegation for termination bill and land assignments

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1959.35	Acc. 67-A-721-103, 1017-1959-013	7/17/59	**LETTER** to Roger Ernst, Asst. Sec. of Interior, from Samuel Beck	opposing termination bill; during Bitney's visit he didn't promise money or lands, Bitney's report on assets let people to believe they would get money & land, now people confused & don't understand; living standards below those of community; some can't afford to have the 6,000 bf. of timber sawed so would be worse off w/termination; many couldn't afford to pay for doctor bills
1959.36	Acc. 67-A-721 Termination, 065 Elections	7/22/59	**INTER-OFFICE TRANSMITTAL** to Alfred N. Harris, Sec.-Treas. of Catawba Tribe, from Supt. Cherokee Agency	transmitting minutes of Catawba Tribal General Council meeting of 7/11/59
1959.37	no number	8/11/59	**CONGRESSIONAL RECORD - HOUSE**	Rep. E.Y. Berry inserts statement of Mrs. Gladys Thomas into Congressional record in favor of termination and states it's the best speech on free enterprise he's heard in a long time

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1959.38	Catawba 130	8/17/59	**LETTER** to Samuel Beck from Roger Ernst, Asst. Sec. of Interior	thanking him for expressing his opinion; recommended that provision be inserted in the proposal requiring acceptance of legislation by majority of Tribe before provisions of the law became effective; if enacted, minority would be expected to recognize wishes of majority
1959.39	no number	8/27/59	**LETTER REPORT** to Sen. Murray from Roger Ernst, Asst. Sec. of Interior	reporting on Senate Bill 2596, which is identical in substance to report on H.R. 6128
1959.40	no number	8/29/59	**NEWSPAPER ARTICLE** - Washington Post	legislation approved by Senate subcommittee on Indian Affairs; majority of adult tribal members would have to approve termination for it to become effective
1959.41	no number	8/31/59	**SENATE REPORT 863**	providing for the division of the tribal assets of the Catawba Indian tribe of SC among the members of the Tribe; tribal assets about $254,000 or $1,500 per family; assets consist principally of tribal land

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1959.42	Acc. 67-A-721 Termination, 064 Council Acts	8/31/59	**MINUTES** of Catawba Executive Meeting	items covered were explanation by Charles Dunn, soil conservationist, of timber permit forms, bond proposal, accounting of money spent in 1958, sale of cattle and death of calf
1959.43	Catawba 130	8/59	**INDIAN AFFAIRS NEWSLETTER** article	gives background information on Catawba relationship w/State & federal govt. and details of proposed legislation; HR 6128 provides that distribution plan may include state trust assets (old reservation) if state legislature so authorizes; if bill enacted, final tribal membership rolls to be prepared, tribal assets appraised & shares of Indian estate distributed (from $250-$440 per capita)
1959.44	Acc. 67-A-721-103, 1017-1959-013	9/01/59	**NEWSPAPER ARTICLE** - Washington Post	House bill passed to allow Catawbas to vote on whether to divide tribal lands
1959.45	no number	9/01/59	**NEWSPAPER ARTICLE** - Greenville News	same as 1959.43, above

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1959.46	no number	9/01/59	**HOUSE REPORT NO. 910** to accompany H.R. 6128	as a part of the report there is a letter to Rep. Aspenwall, Chairman, Committee on Interior & Insular Affairs, from Roger Ernst -- Catawbas have relatively short relationship w/federal govt.; U.S. never had treaty w/Catawbas & Catawbas have no claims filed w/Indian Claim Commission; under MOU, federal govt. didn't assume guardianship of Catawbas & neither the Tribe nor SC claimed the Catawbas were wards of the federal govt.; lands purchased for the new reservation & accumulated assets from operating the reservation are what's to be conveyed under the bill
1959.47	no number	9/11/59	**LETTER REPORT** to Mr. Stans from Royce A. Hardy, Asst. Sec. of Interior	sets forth provisions of HR 6128 & recommends President's approval
1959.48	Acc. 67-A-721-142, 370 - Catawba Right-of-way Sewage Line	9/12/59	**LETTER** to the President from Mrs. Howard Thomas	expressing agreement w/division of assets but unhappiness about Tribe's dealings w/City of Rock Hill over land purchased for disposal plant

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1959.49	no number	9/21/59	**PUB.L. 86-322, 73 STAT. 592**	the Act for division of tribal assets & termination of Tribe's IRA status
1959.50	no number	9/21/59	**CONGRESSIONAL RECORD - HOUSE**	H.R. 6128 approved & signed by President
1959.51	no number	9/21/59	**EXPLANATION** of Pub. L. 86-322	a section-by-section explanation of the Act
1959.52	Acc. 67-A-721 Termination, 003 Miscellaneous	9/29/59	**LETTER** to Comm. Glenn Emmons from Red Thunder Cloud, Chief's Grand Council Authority, Federated Eastern Indian League	requesting detailed information on condition of the Catawbas & the particulars of the termination bill

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1959.53	Acc. 67-A-721-103, 11273-1959-077	10/07/59	**LETTER** to Rep. Hemphill from Roger Ernst, Asst. Sec. of Interior	steps to be taken in carrying out the Termination Act: (1) prepare tentative roll; (2) obtain written statements from those members who agree to distribution -- public meetings to hand out written explanation of Act & a paper to sign if in agreement; views of those not present to be obtained by mail; no prescribed time limit since not an election or referendum; whenever majority of members have agreed in writing, then remaining steps to be taken; "legislative history of Act clearly shows that this is the course of action to be followed;" (3) publication in Federal Register of notice that majority have agreed to distribution; (4) preparation of final roll of members living on date Federal Register notice published; (5) preparation of actual plan for distributing tribal assets; (6) program of education & training to prepare members for termination (this step to be carried out simultaneously with other steps)

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1959.54	Acc. 67-A-721-142, 370 Catawba Right-of-Way Sewer Line	10/15/59	**LETTER** to Mrs. Howard Thomas from Commissioner	in response to her letter to the President; Pub. L. 68-322 signed 9/21/59; money for land acquired by Rock Hill held at Cherokee Agency for disposition under the terms of the Act; has asked Supt of Cherokee Agency to provide a report on right-of-way arrangements on the land purchased
1959.55	Acc. 67-A-721-103, 11273-1959-077	11/05/59	**MEMORANDUM** to Commissioner, BIA, from Roger Ernst, Asst. Sec. for Public Land Management	approving procedure outlined in 10/22 memo; should instruct man who works w/Catawbas to avoid actions which could be interpreted as promoting or opposing termination; he should be as objective as possible in helping each adult member relate to the terms of the Act & BIA's plans; wants information on whether State plans to distribute the old reservation; individual explaining the proposal shouldn't accept signed forms, but should be given to the Chief or mailed to Supt.
1959.56	Acc. 67-A-721-103, 11273-1959-077	11/08/59	**LETTER** to Mr. Rich from Mrs. Howard Thomas	requesting information on money being held by the Cherokee Agency from sale of tribal lands to City of Rock Hill

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1959.57	no number	11/17/59	**LETTER** to Raymond Bitney, Program Officer, from Peter F. Walz, Program Officer	forwarding 300 copies of the explanation of the Termination Act, 300 copies of agreement form & return envelopes
1959.58	no number	11/19/59	**NEWSPAPER ARTICLE** - The Charlotte Observer	old reservation held in trust by State not to be turned over to the individual Indians any time soon (Rep. Bates Harvey); Raymond Bitney in Rock Hill educating Catawbas as to provisions of the Termination Act
1959.59	Acc. 67-A-721-138, 130 Catawba Withdrawal	11/23/59	**MINUTES** of Catawba Tribal Council	Raymond Bitney read his instructions from the Secretary & explained tne Act; Rep. Harvey stated, in response to questions about whether old reservation would be divided, that he didn't know what the State would do; questions about houses already on the places -- no explanation given; Miss Patterson from American Congress of American Indians told the members to think long & carefully before acting -- Minominee Tribe experienced lots of problems when terminated

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1959.60	no number	11/24/59	**NEWSPAPER ARTICLE** - The Charlotte Observer	Indian Bureau denies any attempt to pressure Catawbas into ending their tribal status; Bitney only to explain working of termination law by holding meetings & visiting individuals
1959.61	Acc. 67-A-721 Termination, 064 Council Acts	12/03/59	**MINUTES** of the Catawba Executive Committee Meeting	items covered were land assignments -- Lathem suggested waiting until vote in, but Bitney favored giving assignments, sale of cattle, obtaining money from Cherokee Agency held in trust for rec center
1959.62	Acc. 67-A-721-103, 11273-1959-077	12/16/59	**OFFICE MEMORANDUM** to Homer B. Jenkins from Raymond H. Bitney, Program Officer	economic status of Tribe about the same as a year ago; most people favor Act; small group of doubters will need pressure to swing them over; question of whether those in favor will get their votes on file
1959.63	Acc. 67-A-721 Termination, 064 Council Acts	12/22/59	**LETTER** to Mr. Fleming from Gladys Thomas	enclosing Executive Committee meeting minutes of 12/3; requesting map of land to aid in making assignments
1959.64	no number	12/23/59	**NEWSPAPER ARTICLE** - Evening Herald	regarding the 1943 MOU; Catawbas don't believe agreements made by State & federal govt. carried out

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1959.65	no number	12/24/59	**NEWSPAPER ARTICLE -** Evening Herald	history of how idea for Termination Act got started; Joint House - Senate Committee to study Catawbas
1959.66	no number	12/28/59	**NEWSPAPER ARTICLE -** Evening Herald	Bitney states that it has always been federal policy to help Indians become independent of reservations; some say Bitney's help insufficient -- people confused as to what benefits they will receive
1960.1	Acc. 67-A-721-103, 11273-1959-077	1/01/60	**LIST OF MEMBERS OF THE CATAWBA TRIBE OF SC ELIGIBLE TO VOTE ACCORDING TO AVAILABLE RECORDS**	221 eligible voters
1960.2	no number	1/60?	**AGREEMENT**	to be signed if individual tribal members if in agreement w/division of tribal assets
1960.3	Acc. 67-A-721 Termination, 064 Council Acts	1/02/60	**MINUTES** of General Tribal Council Meeting	items covered were report on cattle fund; why money city paid for tribal lands sent to Cherokee Agency; land assignments; vote on use for money at Cherokee Agency; vote on land division
1960.4	Acc. 67-A-721-103, 11273-1959-077	1/05/60	**LETTER** to Elder Ezra Taft Benson from Pres. Maurice A. Evensen	requesting assistance to make sure that certain Catawbas living in Colorado are listed on the final membership roll in order to share in

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				distribution of tribal assets pursuant to Pub. L. 86-322
1960.5	no number	1/13/60	**LETTER** to Asst. Sec. Roger C. Ernst from La Verne Madigan, Executive Dir., Association on American Indian Affairs, Inc.	informing of the services provided to the Catawbas by the organization -- impartial voter education program by house-to-house delivery of fact sheets, answering of questions, recommending no course; people completely confused; allegations that Bureau rep. definitely doing a selling job
1960.6	Acc. 67-A-721-103, 11273-1959-077	1/20/60	**MEMORANDUM FOR THE FILES** from Program Officer (Walz?)	re call from Gladys Thomas; requested 1943 roll to use as basis for final roll; wanted to know names of those who had voted for acceptance but list not being released at this time; she is meeting w/physical violence; told not to correspond w/absent Catawbas about being put on final roll until cleared w/tribal counsel re enrollment regulations & until notice published; 128 on file as accepting

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1960.7	no number	3/07/60	**LETTER** to Samuel Beck from Asst. Sec. Roger Ernst	wants no controversy concerning action of Tribe in determining whether to accept Pub. L. 86-322; Bureau rep instructed not to accept statements, but cannot stop members from encouraging a person to vote in a particular way or from collecting written decisions & delivery to the Chief or mailing to Supt.; agreements are to be valid & Dept. will take whatever steps necessary to establish validity; only when valid agreements received from a clear majority will notice be published
1960.8	Acc. 67-A-721-103, 11273-1959-077	4/60	**LETTER** to Elbert H. Garcia from Asst. Commission Thomas	responding to his letter for information on Catawba termination bill; advising Mr. Garcia that Catawbas will work out procedures to complete their membership roll & giving him Chief Sanders' address
1960.9	Acc. 67-A-721-103, 11273-1959-077	5/09/60	**TELEGRAM** to Chief Albert Sanders and Mrs. Gladys Thomas from Supt. Darrell Fleming	advising that Indian Office officials want a tribal meeting called for 5/21/60 to consider a resolution re membership of persons serving in the armed forces & their children

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1960.10	Acc. 67-A-721-103, 11273-1959-077	5/11/60	**TELEGRAM** to Chief Albert Sanders from Supt. Darrell Fleming	Mrs. Thomas informed him that there is a conflict between the proposed tribal meeting on 5/21 & a church meeting; Fleming suggests that the church meeting be cancelled so that there will be at least 35 voting members present
1960.11	Acc. 67-A-721-103, 11273-1959-077	5/11/60	**TELEGRAM** to Commissioner, BIA, Attn: H. Rex Lee, Deputy Commissioner	informing him of contacts w/Chief Sanders and Mrs. Thomas to schedule tribal meeting for 5/21/60
1960.12	Acc. 67-A-721-103, 11273-1959-077	5/21/60	**RESOLUTION**	to include on the final roll absent members in the armed forces whose names appeared on the roll 7/1/43, and their children
1960.13	no number	5/23/60	**NEWSPAPER ARTICLE** - Evening Herald	setting June 4 for tribal election to adopt certain members into the Tribe; Tribe authorized right-of-way to Highway Dept. to widen road on reservation; resolution of appreciation to individuals who acted on behalf of Tribe re enactment of state law recognizing marriages of tribal members & whites

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1960.14	Acc. 67-A-721-103, 11273-1959-077	5/24/60	**OFFICE MEMORANDUM** to Deputy Commissioner from Chief, Branch of Tribal Programs	informing him that Catawba Constitution amended to include members in armed forces & their children on final tribal roll; new members added probably won't affect the majority vote in favor of termination
1960.15	Acc. 67-A-721-138, File 130 Catawba Withdrawal	6/ ?/60	**MEMORANDUM** to Sec. of Interior from the Commissioner	informing him that majority of Catawbas eligible to vote have voted in favor of termination & recommending that the Secretary sign the notice & that it be published in the Federal Register
1960.16	no number	6/18/60	**NEWSPAPER ARTICLE** - Evening Herald	regarding amendment to tribal constitution to allow preparation of final membership roll

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1960.17	Acc. 67-A-721 Termination, 11273-1959-077, Pt.I	6/23/60	CONTRACT FOR A PLANNING REPORT GROSS APPRAISAL between BIA and Henry R. Bryant of Charlotte, NC	to derive sound conclusions of the property value in accordance w/rules of admissible trial evidence
1960.18	Acc. 67-A-721-138, File Catawba Withdrawal	6/27/60	NOTICE THAT THE PROVISIONS OF PUB.L. 86-322, ACT OF SEPT. 21, 1959 (73 STAT. 592) SHALL APPLY TO THE CATAWBA TRIBE AND ITS INDIVIDUAL MEMBERS	Notice published in the Federal Register
1960.19	Acc. 67-A-721-138, File 130 Catawba Withdrawal	6/30/60	PRESS RELEASE	re division of tribal assets; members who have an assignment can apply their distributive shares to acquiring assigned land; special administrator to be appointed by the Bureau to work directly w/Tribe in carrying out provisions of Pub.L. 86-322
1960.20	no number	7/18/60	MEMORANDUM to P.F. Walz from H.B. Jenkins	conference w/Rex Lee; decision to prepare letter to Gov. of South Carolina requesting decision on whether to include the land held by SC in trust for the Tribe in the distribution; majority accepted Act & on 7/2/60 notice published in Federal Register

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1960.21	F-60-1033-9	7/22/60	**MEMORANDUM** to Commissioner from The Solicitor	replying to request for advice as to whether there should be formal cancellation of the MOU; legislative history of the Act shows existence of MOU known to Congress & that Bureau services to be discontinued under Act were those covered by MOU & property to be distributed under the Act is that which was conveyed to U.S. in trust; formal cancellation not necessary but might be good idea to submit a concluding document to the State & Tribe prior to termination date withdrawing from & concluding Dept.'s responsibilities under the MOU effective upon revocation of the tribal constitution
1960.22	no number	8/06/60	**NEWSPAPER ARTICLE** - Evening Herald	Bitney turns down job of working w/Catawbas in distributing property; will be delay in getting someone else
1960.23	no number	8/09/60	**NEWSPAPER ARTICLE** - Evening Herald	re performance of drama about the early days of the Catawba Nation

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1960.24	no number	8/10/60	**NEWSPAPER ARTICLE -** Evening Herald	re fact FHA might broaden its insurance of mortgages to cover properties on tribal lands
1960.25	File 130 Catawba Withdrawal	8/17/60	**NEWSPAPER ARTICLE -** Evening Herald	Bitney to take job of terminating federal reservation
1960.26	no number	9/15/60	**COPY OF HANDWRITTEN ORIGINAL LETTER FROM RAYMOND H. BITNEY**	report on Bitney's activities at the Catawba Reservation -- items covered in report: sale of cattle herd for $6,000; applications for enrollment; controversy over fact that there was no authority to approve permits to cut timber after 7/2/60; remodeling of tribal office; areas to be set aside for church, playground, park & cemetery; tract for Historical Society on old reservation if not granted on the new reservation

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1960.27	no number	10/16/60	**LETTER** to Commissioner of Indian Affairs from Raymond H. Bitney	updating the situation at the reservation; a lot of discontent over various issues regarding timber & right-of-way given for road work; questions regarding land assignments; rumors that State has no intention of releasing restrictions on old reservation & if Catawbas refuse to give Historical Society any land on new reservation, that they will get it from the old reservation
1960.28	F-60-1033-9	11/ ?/60	**LETTER** to Raymond H. Bitney from Acting Comm. Leon V. Langan	re disposition of minors' shares in the distribution of the Catawba tribal estate
1960.29	no number	11/29/60	**LETTER** to Commissioner of Indian Affairs from Raymond H. Bitney	re appraisal report & controlling access to it; suggests enlarging report maps of the tracts as shown in the report in order to plot assignments & obtain a dollar figure
1960.30	no number	12/02/60	**LETTER** to Commissioner of Indian Affairs from Raymond H. Bitney	questions raised regarding priority rights of living assignees & the disposition of the estates & shares of deceased assignees who have died since July 2, 1960

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1960.31	no number	12/20/60	**LETTER** to Commissioner of Indian Affairs from Raymond H. Bitney	re type of use permit & the existence of a permit from the Tribe to the public school authorities for the use of tribal lands as a public school site
1960.32	no number	12/28/60	**LETTER** to Comm. of Indian Affairs from Raymond H. Bitney, Program Officer	referring to preparation of an actual plan for distribution of tribal assets; State legislature hasn't passed a bill to place state lands (old reservation) under the terms of the Act
1960.33	no number	12/31/60	**BALLOT**	to vote for or against setting aside for community purposes 97 acres of bottom land on the Springstein tract held in federal trust
1960.34	no number	12/31/60	**LETTER** to Comm. of Indian Affairs from Herbert Blue, Catawba Branch Pres.	making application under terms of Pub.L. 86-322 for a tract of tribal land to be deed to LDS church; land for place for religious & social gatherings & a burial place for dead

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1961.1	no number	1/12/61	**MEMORANDUM** to Reviewers from D.H. Bruce, Acting Chief, Branch of Realty	can't agree w/instructions to Bitney as presently drafted due to fact funds not available to underwrite the cost of the survey & mapping work; comments re preparation & execution of deeds and the priority of selection in the assignee to exclusion of spouse & children; if two members want same property, how should it be handled?
1961.2	A-61-1075.9	1/13/61	**LETTER** to Raymond H. Bitney from Acting Comm. Leon Langon	outline of policies to carry out provisions of Pub.L. 86-322; authority to carry out provisions of the Act have been delegated to the Commissioner and will not be redelegated
1961.3	no number	2/07/61	**NOTICE OF FINAL MEMBERSHIP ROLL**	final membership roll prepared pursuant to Pub.L. 86-322
1961.4	no number	2/09/61	**LETTER** to CIA from Raymond H. Bitney, BIA Rep.	enclosing newspaper article re approval of Catawba Indian Tribal Roll & requesting information re same; wants instructions for returning birth certificates & sending out notices to adult members as provided under § 3(d)

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1961.5	Acc. 68-A-2045 Cherokee, 12945-1961 Cherokee 259	2/10/61	**LETTER** to CIA from Raymond H. Bitney, BIA Rep.	asking advice on whether money earned from sale of cattle is unrestricted property that doesn't come under terms of Pub.L. 86-322 ($7,129.21)
1961.6	no number	2/10/61	**LETTER** to CIA from Raymond H. Bitney, BIA Rep.	requesting CIA to advise Chief Sanders of decision not to approve any leases on tribal lands since it would interfere w/withdrawal program & since present law doesn't provide for any leasing
1961.7	no number	2/16/61	**LETTER** to CIA from Raymond H. Bitney, BIA Rep.	requesting conveyances for tracts designated by Tribe for church, park, etc.; enclosing application from Herbert Blue & original minutes of 12/31/60 General Council meeting
1961.8	no number	3/01/61	**LETTER** to CIA from Raymond H. Bitney, BIA Rep.	re latest data on number of applications received as of 3/1/61 for shares of Catawba tribal assets: 71 applications from adults for 114 shares of land & 83 shares of money

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1961.9	Acc. 68-A-2045 Cherokee, 12945-1961 Cherokee 259	3/01/61	**LETTER** to Raymond H. Bitney from Asst. Comm.	stating that proceeds from sale of cattle subject to disposition authorized by the General Tribal Council pursuant to constitution & by-laws; per capita payment to be made subject of another letter
1961.10	no number	3/14/61	**LETTER** to Rep. Robert W. Hemphill from Grace B. Lewis	regarding tract worked by M.J. George; he wants to clean up, sell pulpwood now on land and plant in pine trees but doesn't want to do until he knows if he has the right
1961.11	no number	3/16/61	**PORTION OF APPRAISAL REPORT** dated 9/22/60	information for release to Catawba tribal members on the gross appraisal of the Catawba federal lands; notation in margin states that on 3/28/61 it was decided not to release the information to anyone - initialed by Peter Walz

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1961.12	no number	3/17/61	**MEMORANDUM** to Chief, Branch of Tribal Programs, from Appraiser John T. Ribble & Program Officer Peter F. Walz	recommendation as to best method of carrying out actions in the real estate area & estimate of schedule; recommends Tribe be informed of procedures & Bureau employee be stationed on reservation full-time to carry out procedures -- Tribe expects these actions by the federal govt.
1961.13	Acc. 68-A-2045 Cherokee, 12945-1961 Cherokee 259	4/61	**SAMPLE RESOLUTION**	for per capita payment of $10 from the $7,129.21 earned from the sale of the cattle herd
1961.14	no number	4/11/61	**LETTER** to CIA from Peter Walz, Program Officer	reporting on application returns for selections of assets; no applications from Sam Beck family & others antagonistic to the plan for division of assets; some reluctant to make selections until appraised pro rata share announced
1961.15	no number	4/24/61	**LETTER** to Herbert Blue, Branch Pres., from Peter F. Walz, Program Officer	informing him of approval by the Acting Comm. to set aside tribal lands for church, park, playground & cemetery purposes; land to be conveyed to LDS church, delineated by survey & deducted from acreage to be divided among tribal members

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1961.16	no number	4/25/61	**LETTER** to CIA from Peter F. Walz, Program Officer	regarding approval by Commissioner to set aside 135 acres of tribal land for community purposes
1961.17	no number	5/12/61	**RECOMMENDED BUDGET ARRANGEMENT & RELATED MATTERS FOR CARRYING OUT TERMINAL EDUCATION PROGRAM FOR CATAWBA INDIANS** by Selene Gifford, Asst. Comm. (approved 5/18/61 by John D. Crow)	under terms of termination act, Secretary authorized to conduct special program of education & training for members of the Tribe; same policy as for other terminated tribes
1961.18	no number	6/09/61	**APPRAISAL** by Henry E. Bryant	of Catawba Indian Reservation Land & 2 buildings set aside for community purposes
1961.19	12273-59-077 Cherokee, Pt. 2	6/20/61	**DISTRIBUTION OF CATAWBA TRIBAL ASSETS**	applications for settlement: land 395 shares, money 236 shares, share value $296.00
1961.20	Acc. 67-A-721-103, 11273-1959-077	7/11/61	**LETTER** to CIA from Arthur N. Arntson, [illegible]ogram Officer	forwarding 2/5/59 letter to Robert H. Bitney from Mrs. H. Dockery Brown, Jr.; letter references Catawba land claim; copy sent to Chief Sanders; Chief stated Tribe had no claim against federal govt. but State owed Catawbas for failure to meet its treaty obligations

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1962.1	no number	2/01/62	**DISTRIBUTION OF CATAWBA TRIBAL ASSETS**	application for settlement: land 395 shares, money 236 shares, share value $296.00; survey work to be completed no later that March 31st; payment to individual members upon completion of land sale
1962.2	Acc. 67-A-721-103, 11273-1960-077	4/01/62	**MEMORANDUM** to Assoc. Comm., BIA, from Chief Tribal Operations Officer R.W. Quinn	outline of actions undertaken to carry out provisions of Pub.L. 86-322; federal-tribal relationship not long & services extended by Cherokee Agency were token in land use & assignment programs; when Act passed, Washington office took over responsibility of carrying out provisions of Act
1962.3	Acc. 67-A-721-103, 11273-1959-077	4/03/62	**LETTER** to Arthur Arntson, Program Officer, from Gladys G. Thomas, Pres., Women's Relief Society	confirming their conversation regarding sending 2 women to an arts & crafts school; makes request pursuant to § 2 of the 12/14/43 MOU
1962.4	no number	4/11/62	**LETTER** to CIA from Arthur N. Arntson, Program Officer	forwarding Mrs. Thomas' letter for arts & crafts training
1962.5	Acc. 67-A-721-103, 11273-1959-077	4/19/62	**LETTER** to Arthur H. Arntson from the Comm.	stating that pottery training might be possible, but under the terms of § 8 of the termination act rather than the MOU

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1962.6	no number	5/09/62	**MEMORANDUM** to files from Peter F. Walz, Tribal Operations Officer	regarding validity of deeds conveying lands to the Catawbas
1962.7	Termination File, Pt. III	5/18/62	**NEWSPAPER ARTICLE** - Evening Herald	regarding auction of reservation lands (1,433 acres) not distributed under the Act
1962.8	11273-1959-077, Pt. III	5/29/62	**MEMORANDUM** to r.W. Quinn, Chief Tribal Affairs Officers, from F. Miller, Program Assistant	regarding the fact that land w/deeds that include minors as tenants-in-common can't be sold until minor reaches majority unless a guardian appointed thru probate court -- cost prohibitive; misunderstanding on this issue could have been easily avoided had the procedure been explained to the tribal members
1962.9	Acc. 67-A-7210103, 11273-1960-077	6/15/62	**LETTER** to Chief Albert Sanders from John A. Carver, Jr., Asst. Sec. of the Interior	declaring constitution and by-laws of the Tribe revoked as of 7/1/62 and terminating legal relationship between the Tribe, the individual members & the U.S. govt.; MOU rendered ineffectual insofar as federal govt. concerned

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1962.10	E-62-1139.9	6/15/62	**LETTER** to Gov. Ernest F. Hollings from Asst. Sec. of Interior John A. Carver, Jr.	giving notice of revocation of Catawba constitution and by-laws & withdrawal from responsibility under the MOU
1962.11	no number	7/01/62	**NOTICE** by John A. Carver, Jr.	of termination of tribal status & federal services
1962.12	Acc. 67-A-721-103, 11273-1959-011, Pt. I	7/17/62	**LETTER** to Peter Walz from Mrs. Ellen Canty	asking when those members who took money instead of land will get their money
1962.13	H-62-1041.9	8/09/62	**MEMORANDUM** to the Solicitor from the Commissioner	regarding money due to the estates of deceased Catawbas
1962.14	Catawaba 077	8/19/62	**NEWSPAPER ARTICLE** - The New York Times	regarding division of tribal assets
1962.15	H-62-1041.9	9/17/62	**MEMORANDUM** to CIA from the Solicitor	regarding moneys due heirs of deceased Catawbas; inheritance or bequests not to be subject to alienation or encumbrance pursuant to the Act
1962.16	H-62-1041.9	9/17/62	**MEMORANDUM** to Examiner of Inheritance Kent R. Blaine from Deputy Solicitor Edward W. Fisher	regarding determination of heirs of 3 deceased Catawbas

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1962.17	H-62-1041.9a	10/04/62	**MEMORANDUM** to CIA from Deputy Solicitor Edward W. Fisher	regarding data needed for determination of heirs
1962.18	H-62-1041.9a	10/04/62	**MEMORANDUM** to Examiner of Inheritance Kent R. Blaine from Deputy Solicitor Edward W. Fisher	notifying him that data has been requested for determination of heirs
1962.19	Acc. 67-A-721-103, 11273-1960-077	10/04/62	**LETTER** to Sen. Dennis Chaves from Paul r. Dillard	requesting information on the tribe as an attorney representing Catawbas in N.Mex. who want to share in distribution
1962.20	H-62-1041.9	12/05/62	**MEMORANDUM** to Examiner of Inheritance Kent R. Blaine from Assoc. Solicitor, Indian Affairs	pursuant to 1959 Act, funeral expenses not allowed as claim against a Catawba estate
1962.21	Acc. 67-A-721-103, 11273-1960-077	1962?	**LETTER** to Chief Albert Sanders from the Commissioner	outline of steps taken in distributing tribal assets
1963.1	L-62-1038.9	1/09/63	**MEMORANDUM** to CIA from Charles M. Soller, Asst. Solicitor	regarding proposed letter to Rep. Robert W. Hemphill; part of value of distributed tribal assets was the provision of ways of access to land

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1963.2	B-63-1006.9a	2/13/63	LETTER to Examiner of Inheritance Kent R. Blaine from Deputy Solicitor Edward W. Fisher	authorizing him to reopen probate proceedings in estate of Emma Harris Canty Brown
1963.3	Acc. 67-A-721-103, 11273-1960-077,Pt.I	7/24/63	LETTER to Mr. Jenkins from Gladys Thomas	regarding information on when Early Brown died
1966.1	F-2 Catawba, 928-66	3/29/66	LETTER to Charles E. Lee, Dir. of SC Archives, from Acting Deputy Comm.	responding to Mr. Lee's request for information on 1959 termination act
1971.1	F-2 Catawba Indian Land	9/13/71	REPORT ON THE STATUS OF THE CATAWBA INDIAN LAND	regarding controversy over the 630 acres comprising the "old reservation"; tract purchased by Joseph White, agent of the State, for Catawba Indians on 3/22/1843 & was not conveyed to U.S. pursuant to the 1943 MOU; Act to Except Mobile Homes on Catawba Indian Reservation & on certain other lands held in trust for Catawbas approved by Gov. West 7/7/71 also acknowledge the existence of State owned lands in York being held for the Catawbas

DOC. NO	AGENCY NO	DATE	DOCUMENT	SUMMARY
1981.1	no number	4/01/81	LIST of Indian Tribes terminated from federal supervision	Catawba Tribe listed

Suit of 1910

22146	OFFICE OF INDIAN AFFAIRS. Rec'd Mch 23	1905

Name, Merrill E Gates

Address, City

Date, Mch 22, 1905

SUBJECT:
Rel to the request of D. A. Harris that the rights of his people, the Catawbas, to certain lands in S.C. be investigated by some Competent Govt officer

E 32

File No 8990 - 1908 - 052
pt. I, RG 75, Nat. Arch

ACTION:
Sent to D A Harris
Mch 29 05 7446-1997
ans'd Mch 29. 1905
7446-1901
~~Sent to [illegible] April [illegible]~~ 1905
Land. ans to Gates Apl 7, 1905
71/182 7448-259
48-452

0

Exhibit F
July 2, 1993
House Hearings - H.R. 2399

DEPARTMENT OF THE INTERIOR,

UNITED STATES INDIAN SERVICE.

The Catawba Indians
of South Carolina.

Cherokee, N. C. March 25, 1910.

52 3/2 Land.

Hon. Commissioner of Indian Affairs,

Washington, D. C.

Sir:

While in Washington last December Mr. John Francis, Jr., of your Office made some inquiries of me regarding the Catawba Indians of South Carolina in whose condition he seemed to be particularly interested. He aroused my own interest and I have since my return to Cherokee endeavored to ascertain as much as I could regarding this Tribe, its conditions, needs, &c.

I believe that Mr. Francis is entirely right in the opinion he seemed to hold that these Indians should be looked after more closely by the General Government and protected in their rights. I do not wish to cast unnecessary reflections upon the people of the State of South Carolina, who I believe are willing and anxious for the Indians to be dealt with justly, but some of the residents in the vicinity of the Catawba reservation are evidently not as much inclined to be willing to give the Indians a square deal, which they do not seemed to have received in the past.

The Catawba Indians live mostly in York County, South Carolina there being about 95 members in the Tribe, divided into 15 or 20 families. A reservation of 600 acres or so has been given to them by the State which, for two or three years past, has also made an annual

appropriation of $3,200 for the Tribe of which sum $3,000 has been used for their support and$200 for school purposes. Most of these Indians are not very well off and in fact can be classed as poor and needy. The principal gainful occupation of the women is pottery making in which some of them are quite expert showing considerable artistic ability. The $200 appropriated for school purposes enables the Indians to maintain a school for not over six months yearly,and as far as I can learn not a very good school at that. There are two quite successful farmers on the reservation Sam Blue and Wesley Harris; the other Indians work here and there for white people at various occupations. Several,it is reported,do not do a thing but depend on the appropriation for a living and as this appropriation gives them only about $30 per capita annually there is considerable suffering among them at times. A few of the Indians are rather bad about drink, but most of them are not very bad that way. The general health of the Tribe is very good there being little, if any, tuberculosis among them. The Tribe has never received much assistance from the General Government-a few of the children of the Tribe however have been educated at Government expense. There are quite a number of children of the Tribe who should be in school somewhere. They would probably be sent more freely to Carlisle,and possibly some to this School, if it were not for a fear on the part of the Indians that they would not receive the per capita shares from the State for the absent children. If the per capita was paid just the same whether the children were on the reservation or elsewhere,no doubt the attitude of the parents regarding sending their children away to

be educated would undergo a change. There were four Catawba girls at Carlisle sometime ago but they returned home last summer and as far as I know none of the Catawba children are away at school at present, with the exception of one pupil here at Cherokee. This little girl has been adopted by one of our employees,Mr. Sampson Owl, whose wife is a Catawba Indian. Some of the Catawbas have large families with seven or eight children. The children themselves are said to be very bright and quick to learn.

The Catawba Indians have title to a large tract of land in York County, South Carolina, a portion of which was leased for a term of 99 years the lease having expired about three years ago. White people,through laws passed by the State Legislature by trickery, seem to have taken the land away from the Indians and deprived them of possession. The Indian holdings seem to have been of a size and character that would have made the members of the Tribe independent if properly handled and if it had not been taken from them as already stated. I do not think the taking was legal even though under an Act of the State Legislature,and am of the opinion that steps should be taken by the General Government to protect the interests of the Indians and to see that they get justice. I understand that a compromise of some sort was made or proposed and that this compromise, or some other legislation regarding the Catawbas was to come up before the Legislature which met in January of this year, but I have not been advised as to what laws have been passed,if any. If the matter is taken to the Courts the State will undoubtedly put up a strong fight as the Indian's lands are now worth many thousands of dollars. The town of Rock Hill which has several thousand population

is located on a portion of the old reservation which was leased as already stated for 99 years something over 100 years ago. The Indians have had two or three lawyers employed but all of them died before doing much if anything towards securing a just and equitable settlement of the land matter. I do not know whether or not the Business Committee of the Catawbas has a lawyer in their employ now or not. David A Harris is one of the leading men of the Tribe and I understanding is trying to push the case. The Business Committee consists of David A. Harris, Sam Blue and Ben P. Harris, the latter being the Secretary of the Nation. Ben P. Harris is a self-educated man and well informed, although I understand he has never had any school advantages either away from the reservation or on the reservation. He seems to have picked up what knowledge he has himself.

Most of the above information has been secured from Mr. Sampson Carl, a member of the Cherokee Tribe, who married a Catawba Indian, and from his daughter now married to William Wahyahnetah, Night Watchman at the School, a member of the Cherokee Tribe. Mrs. Wahyahnetah taught school at the Catawba reservation for six months in 1907-1908, and seems to be well posted in the affairs of the Catawbas.

The Catawba reservation is about 200 miles from Cherokee in York County, South Carolina, which county adjoins this State. The cost of transportation from here to the Catawba reservation would not be very great. I believe it would be advisable for you to authorize me to visit the reservation and also to go ~~the~~ to the State Capital, Columbia, South Carolina, if necessary in order to make a personal examination of the Tribe and its condition. The cost of railroad

fare from Cherokee to Columbia, S. C. would be about $7.00, or about $14.00 for the round trip.

Under date of March 20, 1907, Mr. Chester Howe attorney for the Catawba Tribe of Indians addressed a letter to Mr. Andrew John who had asked him for an opinion with relation to the rights of the Catawba Indians residing in the State of South Carolina. This letter has been published as a pamphlet of twenty pages, and Mr. Sampson Owl has loaned me a copy of it. For your information I respectfully quote the following extracts from Mr. Howe's letter.

"Chiefs and Head Men,

Catawba Indians,

Gentlemen:

I am in receipt of the request of Mr. Andrew John, for an opinion with relation to the rights of the Catawba Indians, residing in the State of South Carolina and a reference of the concurrent resolution of the Senate and House of Representatives of said State which reads as follows:

Be it resolved, By the Senate and House of Representatives, that the Governor be requested to call upon the Attorney-General to investigate the legal status of the Catawba Indians in this State, to investigate and report upon the legality of the treaty of 1840, made with said Indians, whether the same was valid according to the laws of the United States, and whether the State over paid to the Indians the amount called for by said treaty.

Also to report as to what is required under the laws of the United States to make a valid treaty with said Indian Tribe.

You ask me to give you as briefly as I can a statement of the facts and the law as applied to the facts, called for by said resolution for the purpose of submission to the Governor and Attorney-General. In reply, I have to say:

The Catawba tribe or nation of Indians, according to your census, consists of a little over one hundred persons, the remnant of a once powerful people. Under the investigations conducted by the Bureau of Ethnology, it is found that the original home of your people was in what is now Canada, and that in common with the Iriquois tribes, you gradually moved southward

crossing the boundary line west of the Iriquois country, and moving gradually to the headwaters of the Kentucky, migrating in a body sometime in the Seventeenth century, approximately the year 1650, to what is now the Catawba River, and were occupants of a large portion of the State of South Carolina at the date of its settlement."

× × × ×

"On December 15, 1815, the legislature made provisions for the ejectment of persons failing to pay rent to the Catawba Indians, or holding possession of lands without lease.

On December 15, 1838, the legislature passed an Act in which the reversionary right, title and interest of the State in these lands was vested in the persons who held the lands as lessees. This Act was apparently intended to confirm the lessees' title without prejudice to the Indian. It contains an acknowledgement of the Indian's right of occupancy through the provisions providing for the collection of rents. In law it passes to these parties as lessees, the pre-emption right of the State, providing the State at that time had that right.

The next year, in December 1839, the legislature by resolution appointed commissioners to treat with the Catawba Indians for the extinguishment of their(the Indian's)title, and, on March 15, 1840, a treaty was concluded under which the State purchased all of the lands of these people described as being fifteen miles square, or 225 square miles, and the State agreed to furnish them with a tract of land of the value of $5,000, $2,500 cash in hand, and $1,500 per year for nine years, and it is the validity of this treaty, the rights acquired thereunder, and the present rights of the Indian which are inquired into by the resolution submitted.

At this point, it is proper to refer to the position taken by the federal government with relation to treaties of this character. It has been the well-settled policy, not only under the Constitution, but also under the articles of confederation, of the federal government, to assert in itself the sovereign right of pre-emption, and of the regulation of trade and commerce, or, as it is commonly termed"Intercourse" with the Indian tribes."

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In 1782, the Catawba Nation of Indians, who are referred to as a"Nation," sent two deputies to Congress, asking that additional restrictions be placed upon their lands,that such laws be enacted as would prevent in any manner in the future,and, recognizing at that time the rights of the Colony and in pursuance of the policy of the government, not to bind future generations wherever it could be avoided, a committee reported as follows:

"That they have had a conference with the two deputies of the Catawba Nation of Indians; that their mission respects

certain tracts of lands reserved for their use, in the State of South Carolina, which they wish may be so secured to their tribe as not to be intruded into by force, nor alienated even with their own consent."

Whereupon it was resolved:

Resolved, "That it be recommended to the Legislature of the State of South Carolina, to take such measures for the satisfaction and security of the said tribe, as the said legislature shall, in their wisdom, think fit."

"In 1787, the Constitution was adopted by the State of South Carolina, and, by the Act of July 22, 1790, it was provided by Congress under Section 4 of that Act:

"That no sale of lands made by any Indians or any nation or tribe of Indians, within the United States shall be valid to any person or persons, or to any State, 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."

This was undoubtedly an assertion of federal power and control over treaties made with Indians who resided within the limits of the original Thirteen States, for at that time there was no other States, and the right of pre-emption existed only in the original Thirteen States in some few instances. It is further supported by the fact that the federal government proceeded to make treaties with Indian tribes and nations residing within the limits of the several States, and that the federal government asserted jurisdiction over the Indians who were then, as they are now, wards of the nation."

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The Catawba tribe or nation of Indians are referred to by the Congress of the federation as a "Nation." Their character as a tribe is settled from the fact that they then had and now have tribal government, living as an Indian community, and have been at all times dealt with as an Indian people holding communal property, modified as the same are to a certain extent by changed conditions. That they came within the prohibitions of the foregoing acts, in my opinion, cannot be questioned, and that the grants by the State of South Carolina of authority to lease and the subsequent grant or attempted grant of the ultimate fee to the land, or the right of pre-emption of the soil mx by the State of South Carolina to the individual lessees were in contravention of the laws of the United States can hardly be disputed. In relation to this question, however, Attorney-General Garland, on July 21, 1885, rendered an opinion, using the following language:

"Our Government has ever claimed the right, and from a very early period its settled policy has been to regulate and control the alienation or other disposition by Indians, and especially

by Indian Nations or Tribes, of their lands. This policy was originally adopted in view of their peculiar character and habits, which rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian thrown around them for their protection. (3 Kent Com.,38;Beecher v Wetherby, 95 U.S. 517, where most of the cases on this subject are cited and discussed.)

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By Section 4 of the Act of July 22, 1790, chapter 33; the Congress of the United States enacted:

"That no sale of lands made by any Indian, 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."

A similar provision was again enacted in Section 8 of the Act of March 1, 1793, chapter 19, which by its terms included "Any purchase or grant of lands, or of any title or claim thereto,from any Indians, or nation or tribe of Indians within the bounds of the United States." The provision was further extended by Section 12 of the Act of May 19, 1796,chapter 30, so as to embrace "Any purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto." As thus explained it was re-enacted by the Act of March 3, 1799, chapter 46,Section 12, and also by the Act of March 30, 1802,chapter 30,Section 12.

In the above legislation, the provision in the terms applied to purchases, grants, leases, &c.,from individual Indians as well as from Indian Tribes, or Nations; but by the twelfth Section of the Act of June 30, 1834, chapter 161, it was limited to such as eminated"from any Indian Nation or Tribe of Indians." And the provision of the Act of 1834, just referred to, has been reproduced in Section 2116, Revised Statutes, which is now in force.

The last named Section declares:

"No purchase, grant, lease, or other conveyance of lands,or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless made by treaty or convention entered into pursuant to the Constitution."

This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case, the statute applies. It is not,

therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservation held by the Indian Tribes or Nations respectively which claim them. Whatever the right or title may be, each of these Tribes or Nations is precluded, by the force and effect of the statute, from either alienation or leasing any of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States." 18th Attorney-General's opinion, 235-37. See also Opinion of Attorney-General Black, May 14, 1857, 9th Attorney-General's opinion, page 24.

Under the authorities above cited, I am of the opinion that the Catawba Indians still have a right of Indian occupation in the tract of land set aside at the Wiley survey, in 1764, that being "Indians not taxed,"and "non-citizens of the United States "wards of the Nation," the statutes of limitation and the provisions relating to prescriptive title do not apply.

There are, however, in addition to the foregoing, some facts which, from an equitable standpoint, should be referred to with relation to the treaty of 1840. To begin, the Catawba Indians were always friendly to the whites. Their numbers were probably exaggerated, but there are estimates upon which the number of souls have been placed as high as two thousand. They joined with the whites in the wars against the Cherokees, who were opposing white settlement, and the tribe was almost exterminated. They were with the colonists in the War of the Revolution, and their condition in 1826 is set forth by Robert Mills in his Statistics of South Carolina, published in that year at Charleston by Hurburt & Lloyd, in which he states:

× × × ×

In this same connection, the report of the Commissioners appointed to treat with the Catawba Indians under date of April 3, 1840, furnishes us some facts:

× × × ×

Gen. Hegg says he wants to marry his women to the Cherokees and then by the laws and customs they would all become Catawbas and in that way strengthen his Tribe.

There also seems to be some question with relation to the title to a particular tract of land known as the King's Bottom. Immediately following the treaty of 1840, the Catawbas went to the State of North Carolina, with a view of permanently locating in that State, with the Cherokees. This resulted in some correspondence between the Governors of the two States, in which the Governor of North Carolina seemed to resent the intrusion of the Catawbas within the limits of that State. They were gone from South Carolina about eighteen months, and they assert that while they were so absent a man by the name of Doty took possession of the King's Bottom, which had not at that time been leased, the

same being a tract of valuable land of about 750 acres, and that he afterwards transferred the same by deed, and that his transferees or parties claiming through him, have since remained in possession of the tract.

From the best information obtainable, which we cannot claim to be authenic, it appears that at the date of the treaty of 1840, the Catawba Indians were receiving, or, at least, were entitled to receive, under the terms of their leases, about $5,000 per annum in rents. That these rental values were fixed at a minimum is certain, when we note the fact that the leases had been made a long time prior thereto, and that there had been a large appreciation in the value of lease holdings, due to the settlement of the country, and the increased value of land holdings of all kinds.

On that date, a committee came to these people and secured from them a treaty, by and under which they agreed to accept a home of the value of $5,000-that is, the amount of one year's rental. That rental being permanent and perpetual, under their Indian rights. They further agreed to accept the sum of $5,500 cash, which is the equivalent of one-half one year's rental, and then to accept the sum of $1,500 for a period of nine years, at which time there would not be, and was not, under the treaty, any further liability on the part of the State. This treaty in itself emphasizes the necessity of some control exercised by someone in the making of treaties with an ignorant people. No one can question the fact that these people had a right to a fair rental value of the lands selected as their permanent home for the period of the leases, ninety-nine years, said leases expiring during the present year 1907, and during the years following, and that they then had the right of occupation under the terms of the lease to the rental thereof. Without making a treaty, they would have received an income far in advance of the one granted or guaranteed by the terms of this agreement. It was a case in which the guardian, if the State be the guardian, or the sovereign holding the pre-emption right, sought, by agreement to extinguish the Indian title, and, while it was undoubtedly their mistake unquestionably a gross error on the part of someone, there is no man who can examine the terms of that treaty, take the condition of your people and their title, and arrive at any conclusion other than the fact that if the treaty were in all respects valid, conforming to every requirement of law, the sovereign State of South Carolina could not afford, and would not in justice and might not allow the people compel a compliance with its terms.

In presenting this matter to the State, for the State has by resolution called for this investigation, you should remember that whatever errors have been committed have been committed by individuals and not by the State at large. The sense of justice entrusting the legislators will undoubtedly correct these errors. The treaty was not before the legislature as a document

when it was ratified. The ratification by the State was by an Act in which the terms of the treaty were not set forth. It is probable that interested persons presented this matter in such form that the law-making power was misled, and an appeal to the sense of justice and right of the people of the State of South Carolina will, in my opinion, result in immediate and proper relief.

You have asked me to suggest to you a remedy. That portion of your request does not properly apply to the matters referred to in the resolution submitted. For that reason, it is not included herein, but, as to that portion of the resolution asking how a legal treaty can be made, I desire to say that the Indian Office, by letter of January 23, 1896, indicated to me that any settlement arrived at between the Catawba Indians and the State of South Carolina, satisfactory to the Indians, would meet the approval of the officers of the Department of the Interior, and that being true, there is no question as to the fact that any properly executed agreement meeting your approval will, without opposition, be approved by Congress. You, of course, understand that this matter is addressed entirely to the discretion and sense of justice of the legislature for you as a dependent people, feeling that you have a grievance, apply to the sovereign power of the State for a remedy, and the statements made herein are submitted as suggestions only, in order that your position may be clearly understood and properly determined.

Respectfully,

Chester Howe,

Attorney for the Catawba Tribe of Indians

of South Carolina.

Andrew John,

Washington, D.C.,

March 20, 1907.

If you desire me to do so, I will have the entire pamphlet transcribed and will send you a copy; but it is probable that you have a copy of the pamphlet in your Office files or that you can secure a copy of same. My understanding is that Attorney Howe and Andrew John, as well as the other attorneys who have heretofore represented the Tribe are dead. Mr. Owl has also loaned me a clipping from "State" which I quote entire as follows:

"Stewart's Bill for Relief of Catawba."

___ o ___

Senator Stewart has introduced in the Senate and Mr. Glasscock will introduce in the House an important concurrent resolution which, if adopted, may have a decided bearing upon the future of the Catawba Indians, whose reservation of 600 acres is 8 miles below Rock Hill on the Catawba river. The resolution is in response to a petition signed by 51 of the Indians, requesting that they be made citizens of the State.

"Our present condition is deplorable", says the petition, it being impossible for us to make a support on our present reservation. We believe if made citizens and additional lands furnished us by the State upon which we can settle our condition will be greatly improved and we can take care of ourselves in the future."

The concurrent resolution, authorizes the Governor to appoint three commissioners, neither of whom shall be a member of the general assembly, to investigate the condition of the Indians, with the view of purchasing additional lands contiguous to their reservation to assist them to become self-supporting and useful citizens, if the plan is considered feasible. Should such action be taken it will mean that the Catawba Indians will no longer be wards of the State, but will be thrown upon their own resources to earn a livelihood. It is estimated that it would require an appropriation of between $15,000 and $20,000 to purchase the lands which the Catawbas think necessary to relieve their present condition. The State now appropriates annually to these Indians, $3,200, $3,000 of which is divided pro rata among them, the remaining $200 being used for school purposes."

In view of the foregoing I have the honor to request that

if possible you and Mr. Francis come down to Cherokee and from here go to South Carolina to investigate the condition of the Catawbas with the view of giving them the help in establishing and protecting their rights which they seem to greatly need. The best train out from Washington will be the one leaving there at 10.45 P. M.,reaching Salisbury at 9.A.M.,and Asheville 2.45 P. M.;leaving Asheville 8.30 the following morning reaching Ela Junction at 11.35 and Cherokee at 12.50 P.M. If you prefer to do so you could of course go direct to the Catawba reservation but it would be of considerable advantage to come by way of Cherokee,as Mrs. Owl and her daughter,who are Catawbas, are probably as well informed regarding the Catawbas affairs as anyone. If you will be unable to take the trip within the next few weeks, I respectfully request and recommend that I be authorized to make a personal investigation, the expense of such investigation, including traveling and incidental expenses, to be paid for from the fund "Contingences, Indian Department 1910," of which I have a balance of $45.35 ~~balance~~ now on hand, that amount being probably sufficient to pay the expenses of the trip.

Very respectfully,

Superintendent.

FK-EIC

CATAWBA INDIANS.

SUPPLEMENTAL BRIEF

GENTLEMEN:

I am in receipt of the opinion of the Hon. Attorney General of the State of South Carolina, replying to a resolution of the General Assembly adopted at its session in 1907, in which, on page 1, it is stated:

> Chester Howe, Esq., Attorney for these Indians, has furnished this office with a brief in support of the claim, in which he sets forth the facts and the law governing such matters, as viewed by the claimants. He refers to the agreement or treaty under which these lands were set apart to the Indians, the Acts passed by the Legislature on the subject prior to the treaty made in 1840, and the Acts of Congress concerning Indian affairs, and concludes that the treaty of 1840 was void, solely because not approved by the Federal Government through its agent.
>
> After making an examination of such records as are now obtainable, relating to this question, and the Acts of the Legislature of this State and of Congress, we are unable to agree with the conclusion reached by Mr. Howe.

The opinion then refers to certain records of the early history of the Catawba Indians, the several acts of the legislature of the State of South Carolina relative to said Indians, prior to 1840, and concludes as follows:

> "I think we may conclude from the acts of the Legislature cited above,
>
> "1. That the legislature at all times claimed and exercised the right to enact such laws regulating the

control and disposition of these lands as in its judgment was for the best interest of the Indians and of the State."

"2. That the title of the Indians to these lands was never regarded as more than a right of occupancy subject to the control of the Legislature, and that after making the leases for ninety-nine years, their right in the leased lands was only the right to have the annual rents for their support and this right would be eventually extinguished by lapse of time."

The conclusions of the Hon. Attorney General of the State are at all times entitled to great persuasive force. He is the legal adviser of the Governor and his opinion should have great weight with the legislators. But this opinion sets forth the reasoning upon which it is based, and if by inadvertence, some matters pertinent to the subject under consideration have been omitted, or misapprehended, it will not, we hope, be deemed improper to direct attention thereto to the end that a correct conclusion may be arrived at.

The Hon. Attorney General seems to be in doubt as to the Indian title to the tract of land included in the Wyly Survey, that doubt being expressed after reference to the map of survey and the references made to the Provincial treaty, in the following words:

"Neither of these papers show the nature of the title of the Indians to the land in question, but there can be little doubt that they had only the right to occupy the lands and use them for their support until their right should be extinguished."

The nature of Indian title to lands which were occupied by them at the date of the colonization of this country, has been definitely settled by the highest judicial authority in this country. It has been so clearly defined that when once

the fact is established that certain lands defined by fixed boundaries were by the colonial authorities and by treaty with the Indians, set apart for their sole use and benefit, based upon the Indian's primary occupancy of the soil, and his original right thereto unextinguished by the white men who claimed the right of preemption or purchase through discovery, that the title cannot in the light of these numerous decisions be questioned.

There are many such decisions. It is sufficient, however, to refer to Chief Justice Marshall's opinion in Worcester *vs.* State of Georgia, 6 Peters, 515. The most cursory examination of this opinion, so often cited in later decisions, will settle this question.

The title having been established in the Indians subject only to the right of preemption of the colony or the state, we should next consider the act of 1808 under which leases were authorized as referred to in the opinion of the Hon. Attorney General. Due weight is not given to the legislative declaration of title in the Indians by virtue of said act, nor to the provisions of the leases themselves under which possession was obtained by the lessors.

By the passage of an act authorizing these Indians to lease their lands for ninety-nine years, or three lives, an estate greater than that granted was admitted in the Indians, and that clause of the enactment providing that said lease

> "shall be, and he same is hereby declared to be, a qualification equivalent to a free-hold, in all cases where a free-hold is not required by the Constitution of this State or of the United States."

was intended to vest in said lessees for the term of the lease such qualifications and estate as would allow them to fully protect their possessions thereunder. But the estate so conveyed was subject to the leases, and these leases without exception contained the covenants and agreements admitting the title of the Indians and providing for re-

entry into possession thereunder. Certified copies of the same show that they were executed for the term of ninety-nine years, and contained the following clause:

> "and if it should so happen That the rents above mentioned or any part thereof Shall remain unpaid for the Space of Twelve months, That after it becomes due and in case no property can be found upon the premises Whereon be distress, or other lawful prosess Can be levied Sufficient to discharge Such rent remaining due as aforesaid then and from Thence it shall and may be lawful To and for the Catawba Indians or Their successors or Superintendants Reenter into Sd premises and the same to have Repossess and enjoy, as their first former estate Right and title, anything herein contained to the contrary Notwithstanding."

Similar covenants are contained in other leases. Some provide that the payments shall become due within six months, and it can hardly be alleged that under a lease drawn in this form, under the provisions of the act of the legislature, that the Catawba Indians retained only a right to the rent and no interest in the property. Nor can it be alleged that the right to the property enjoyed by them was one of which they could be deprived by legislative enactment without just compensation.

It would seem to be the conclusion of the Hon. Attorney General that the act of the legislature of 1838 referred to in said opinion, extinguished the title of the Indians to these lands. But the act itself in terms renders such a conclusion impossible. The proviso in Section 1 of this act is as follows:

> "Provided that nothing herein contained shall be so construed as to impair the interest and the right of the Catawba Indians in and to the said lands."

This wording would seem to prohibit the construction now

sought to be placed upon the act itself and brings us to the year 1840 at which time the lands had been leased under terms which were definitely understood and the state sought by the treaty to extinguish the Indian title thereto.

At this time the Catawba Indians were living in tribal relations, as they are to-day. They constituted a community with local self-government, crude in form, but satisfactory to themselves. It was identical with that of other Indian tribes resulting from the same conditions as other Indian governments, managed in the same manner, and transacting its business in the same way. Its property was held as communal property belonging to the tribe. A right to share in tribal property came by birth within the tribe. They were not citizens of the state of South Carolina, nor citizens of the United States; not subject to taxation nor entitled to the privileges and immunities arising therefrom. It was not their location which fixed their status, but their race, their community holdings and their method of life, and the laws not only of the State but of the United States.

Their position was admitted by the State in its method of seeking to extinguish this title by a treaty or agreement in conformity with the long established customs of self-governing Indian communities; in the recognition of chiefs, and the method of negotiation with the tribe as a tribe; and the opinion of the Hon. Attorney General as to the application of the several commonly called "Indian Intercourse Acts" misapprehends the position taken in the brief first filed in this case.

Powers assumed by Congress under the Constitution were not lodged within the State and among those powers was that of regulating "commerce" with Indian tribes. In the brief first filed in this case, reference was made to the early acts of Congress relative to Indian treaties. These acts specifically provided that they should expire by limitation and this accounts for the re-enactment of the Indian Intercourse Acts at various times, up to and including the year 1834. But the acts were cited for the purpose of showing

that Congress had assumed and exercised the *authority* and was in fact regulating the commerce with Indian tribes to the extent of the provisions therein set forth. It was a legislative construction of the powers of Congress under this clause of the Constitution and it definitely related to lands within the State whether the State had the right of preemption or not, the terms being so plain that no controversy could arise thereunder, and the assertion of counsel was based upon the fact that if Congress had that power, which could not be disputed, if it asserted that power, which could not be denied, it was not within the power of the State to make a valid legal treaty with an Indian tribe while that tribe was living in tribal relations as a local self-governed Indian community provided the legality of the treaty was questioned. Let us see how far this has been sustained by the Courts. In thee opinion of Justice M'Lean in the case of Worcester *vs.* the State of Georgia, 6 Peters, on page 570, the subject of the powers under the Constitution of Congress and of the States, is discussed. On pages 579 and 580, the general policy toward Indians and reference is there made to the exceptions which were intended to be covered in the clause of the Indian Intercourse Act referring to remnants of tribes surrounded by white settlement and lying within the jurisdiction of the States. On the last line of page 588 the question is asked:

> "Does the intercourse law of 1802 apply to the Indians who live within the limits of Georgia? The 19th section of that act provides that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states. This provision, it has been supposed excepts from the operation of the law the Indian lands which lie within any State. A moment's re-

flection shows that this construction is most clearly erroneous."

Then follows an opinion upon this matter holding that the clause referred to does not exempt an Indian tribe holding tribal relations and being a self-governing community from the operation of the Indian Intercourse Act And referring to this subject on page 592, the Court states:

> "Why may not these powers be exercised by the respective States? The answer is because they have parted with them expressly for the general good. Why may not a State coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the Federal Government."
>
> "Has not the power been as expressly conferred on the Federal Government to regulate intercourse with the Indians, and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government; and, consequently, include those who reside within the limits of a State as well as others. Such has been the uniform construction of this power by the Federal Government, and of every State Government, until the question was raised by the State of Georgia."

The learned Justice further states that up until that date, (1832,) no State had attempted to make a treaty with an Indian tribe, to the Court's knowledge.

The Indian Intercourse Act of 1834 was a substantial reenactment of the act of 1802. This act was in force in 1840, when the treaty was made between the State of South Carolina and the Catawba Indians; and whether or not these Indians were within what may be termed, for the

purposes of this presentation, the protection of the United States, can perhaps be better ascertained by an examination of some later adjudicated cases. The most prominent one is that of the Cherokees of North Carolina. These people were part of the Cherokee Nation who refused to emigrate after the treaty of New Echota of 1835. They preferred to stay in the State of North Carolina, take their lands in fee, and become citizens of the State, which they did. But while enjoying the position of citizens of the State the Courts of the State were not open to them as individuals, and in 1889, they were incorporated by a State enactment with the right to sue, and be sued, and all other privileges and immunities granted under that act. In the beginning, their status as Indians had not been questioned. In after years it was, and in the report of the Comr. of Indian Affairs under date of June 30, 1903, the question of the status of these Indians being raised, several decisions were cited, and he held:

> "Being governed by the above decisions and legislation, this office in its *administrative* capacity holds that this band of Cherokee Indians holding their lands in fee, can alienate the same, but the contract is reviewable by the Government for one purpose only, to protect them from fraud and wrong, and having been incorporated as a body politic, with the power of sueing and being sued, the acts of this band are reviewable only to protect them from fraud and wrong."

It will be noted that this assertion of power was limited to the administrative capacity of the Indian Office, but it is based upon the decisions of the Courts in which the status of these Indians and the powers of the United States are fully set forth. This power of protection has been conceded by the State Courts whenever the same has been invoked. In an action on contract the Supreme Court of

North Carolina in the case of Rollins *vs.* the Cherokees, 87 N. C., 229, held:

> The Cherokee Indians in this State have been placed upon the same footing as other tribes by an act of Congress passed in pursuance of the power granted by the Constitution in reference to regulating commerce with foreign nations, among the several States, and with the Indian tribes, and their contracts made with the plaintiff to prosecute and collect claims alleged to be due them, cannot be enforced against them in a state court without the consent of Congress. The jurisdiction to determine such matters is lodged in the Interior Department
>
> It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safeguards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenceless of a race rapidly diminishing in numbers, and deemed incapable of self-protetction. This policy finds expression in the legislation of Congress in reference to the tribes and the superintending control assumed over them for their benefit.

In the case of the U. S. et al *vs.* Boyd et al, 68 Fed. Rep. 577, in a suit brought in the Circuit Court of the Western District Court of N. C., to set aside a contract made by the Cherokee Indians for the sale of timber on their lands, the bill asserting the paramount authority of the guardianship of the United States over the Indians, the judge in that opinion, on pages 579 and 580, held:

> "But it is urged with great force that the state of North Carolina recognizes these Cherokees as citizens; that they vote, pay taxes, work roads, and perform all the duties of citizens. But a citizen of the United States takes this privilege as the gift of the general

government. It can be acquired only under its laws, and in the mode prescribed by it. City of Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31. "Neither the constitution of a state nor any act of its legislature however formal or solemn, whatever rights it may confer on these Indians or withhold from them, can withddraw them from the influence of an act of congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislature of the state the supreme law of the land, instead of the constitution of the United States, and the laws and treaties made in pursuance thereof." U. S. v. Holliday, 3 Wall., at page 419. But it must not be understood that these Cherokee Indians, although not citizens of the United States, and still under pupilage, are independent of the state of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are in daily contact with her people. They are not a nation nor a tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian reservations apply to them. All that is decided is that the government of the United States has not yet ceased its guardian care over them, nor released them from pupilage. The federal courts can, still, in the name of the United States, adjudicate their rights. Nor is this without precedent. The American seaman, born a citizen of the United States, or naturalized as such, has extended over him the guardian care of the government, and is a ward of the nation. The statute books abound with acts requiring his contracts to be looked into by officers appointed for that purpose, and every precaution is taken to guard him against fraud, oppression, and wrong. Rev. St. U. S. 4554 *et seq.*

* * * * * * *

There is another consideration. In determining the attitude of the government toward the Indians, —all Indians,—the courts follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. U. S. *v.* Holliday, supra. Now, congress has repeatedly recognized the distinctive character of these Cherokees as a body,—the Eastern Band Cherokee Indians. It has legislated for their benefit, and has always treated this band as a distinct unit. They are not dealt with as individuals, who gradually are absorbed into the body of the community, but as a band isolated from, cared for apart from, other inhabitants. See 9 Stat., c. 118; 10 Stat., 291, 700; 16 Stat., 362; 18 Stat., 213; 19 Stat., 176; 22 Stat., 302; 27 Stat., 120.

In July, 1868, congress transferred the care of the Indians from the treasury department to that of the interior; and section 3 of this act expressly includes the Eastern or North Carolina Cherokees. The original condition of all the Indians in this country was that of pupilage under the government (Cherokee Nation *v.* Georgia, 5 Pet. 3); its pupilage continuing until released by the government. The statutes quoted show that it has never been released. The supreme court of North Carolina, in Rollins *v.* Cherokees, 87 N. C. 229, distinctly recognizes and clearly and forcibly sustains the position taken above. The case of the Cherokee Trust Funds, 117 U. S., 288, 6 Sup. Ct. 718, does not conflict with these views. That case decides that this Eastern Band of Cherokee Indians is not a part of the Nation of Cherokees with which this government treats, and that they have no recognized separate political existence; but, at the same time, their distinct unity is recognized, and the fostering care of the government over them

as such distinct unit. This being so, the United States have the right in their own courts to bring such suits as may be necessary to protect these Indians.

The district judge, concurring in the above opinion (68 Fed. Rep., 580,) said (581, 2, 3, 4):

The preliminary question presented for our determination is whether the United States have such supervisory authority and power over the North Carolina Cherokees as to become a party plaintiff in a suit in equity in this court, instituted under the direction of the executive departments of the government, for the purpose of annulling or modifying a contract made by the council of such Indians in relation to their lands purchased by their agent with the per per capita money and removal and subsistence money to which they were entitled under the treaty of New Echota, upon the alleged grounds that such contract was induced and procured by means of circumventive, undue influence and fraud, or that the contract was grossly injudicious and unconscionable, and without the approval of the secretary of the interior, having supervisiory charge of these Indians under an act of congress. In the suit before us the United States do not claim any right that encroaches upon any of the sovereign powers, duties and obligations of this state. They claim no police power over the Indians as citizens of the United States, or right to punish for crime committed within the territorial limits of this state. They only insist upon the right to appear as a plaintiff in a suit in equity instituted in their circuit court to invoke the jurisdiction of such court in behalf of their wards,—to obtain such relief as may be granted upon the well recognized principles of equity jurisprudence. They appear as sovereign of this independent Indian community, as

parens patriae of this helpless and injured race, not yet invested with the full rights of American citizenship, and as guardian, by treaty obligations, of these ignorant and injudicious wards, to control their transactions about lands acquired by the treaty money, and the charitable trust funds bestowed by congress upon a political department of the government to be applied for the benefit of these Indian *cestuis que trustent*.

The United States claim that, under their constitutional power to regulate commerce with Indian tribes, the word "commerce" embraces trade and traffic, and all contracts with the tribes or individuals composing such tribes; that so long as Indians remain a distinct people, with an existing tribal or quasi tribal organization, recognized by the political departments of the government, congress has the power to say with whom and on what terms they shall deal, and can place them under the supervisory control of an executive department. U. S. *v.* Holliday, 3 Wall. 407; The Kansas Indians, 5 Wall. 737; U. S. *v.* 43 Gallons of Whiskey, 93, U. S., 188. It is further insisted by the district attorney that by the act of July 27, 1868, congress authorized and directed the secretary of the interior and the commissioner of Indian affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians; and there is a necessary implication of power that if, in the exercise of such supervisory charge, it becomes necessary to resort to a court of equity for remedy and relief, a suit may be properly instituted by such supervisory department in the name of the United States to obtain adequate redress. He cites as a precedent a suit in equity in this court, now pending on further directions, in which the bill was filed by Attorney General Garland, in the name of the United States as plain-

tiff, for he purpose of enforcing an award made by arbitrators appointed under a decretal order of this court in relation to the rights and title of the North Carolina Cherokees to the lands embraced within the Qualla Boundary,—the lands which are the subject of controversy in the present suit. I am of opinion that, wherever a power is conferred and a duty imposed by statute, everything necessary to accomplish the legislative purpose is given by implication. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." U. S. *v.* Freeman, 3 How., 556-565.

The suit in equity now before us was instituted by the district attorney under the direction of the secretary of the interior and the attorney general, for the purpose of seeking investigation as to the fairness, justice, and expediency of a contract made by the Indian council disposing of timber on the Indian lands in this state without the approval of the secretary of the interior. It seems to me that the only question for the court now to determine is whether the political departments of the government have clearly and distinctly recognized the North Carolina Indians as a tribal organization under the supervisory care and guardianship of the United States, for the court must be governed upon such subject by the action of such departments. I have read with some care the case of the Cherokee Trust Funds, 117 U. S., 288, 6 Sup. Ct. 718, cited and relied upon by counsel for defendants. That case gives an interesting and instructive history of the dealings of the United States with the Cherokee Indians, but only decides that the North Carolina Cherokees had dissolved their connection with the Cherokee Nation, and were not entitled, while they remain residents and citizens of North Carolina to

a proportionate share of the funds held in trust by the United States for the benefit of the Cherokee Nation. It is true that the North Carolina Cherokees are citizens of this state, and have not been recognized as a separate nation or tribe, with treaty-making power; but it seems to me that the mere fact that they are citizens of this state does not necessarily deprive them of the legitimate guardianship and care of the United States where there is no state or national legislation indicating such a purpose. Their forefathers availed themselves of a provision in the treaty of New Echota, and remained in the state of North Carolina; and the civil laws of the state were extended over them from the period of the removal of the Cherokee Nation to their territory west of the Mississippi river. The North Carolina Cherokees, by reason of their birth and residence, became citizens under the general provisions of the state constitution, and not by any special law conferring the rights of citizenship. The policy of state legislation seems to have recognized their quasi tribal organization, and regarded them as a peculiar class of citizens, worthy of and needing the kindly supervision and care of the state and national governments. For the purpose of securing them against the evil consequences of injudicious contracts with more intelligent and designing white men, a state statute was enacted requiring all contracts, equal to $10 or more, with Cherokee Indians, to be in writing, signed in the presence of two witnesses, who shall subscribe the same. 1 Code N. C., 1553. This law of the state imposed upon them a restriction which was not imposed upon other citizens, except as to transactions coming within the statute of frauds and a few other cases. On the 2d day of January, 1847, "An act in favor of the Cherokee Chief Junaluska" was duly enacted and ratified by

the legislature of this state, conferring upon him all the rights of citizenship, and directing the secretary of state to issue a grant conveying to him in fee simple a valuable tract of land in Cherokee county, without the power of alienation by deed; and it was held in this court that such restriction upon the power of alienation was not inconsistent with the rights of citizenship. Smythe *v.* Henry, 41 Fed. 705. See, also, Eells *v.* Ross, 64 Fed. 417, 12 C. C. A. 205. The political departments of the federal government have certainly recognized and treated the Eastern Band of Cherokees as a quasi tribal organization for social and business purposes, and have made liberal appropriations of money, appointed Indian agents to reside among them and employed efficient means to enlighten their minds, increase their comforts, and guard them against the injurious consequences of their own ignorance and indiscretion, and the frauds, aggressions, and wrongs of unscrupulous white men. The act of congress of July 27, 1868, in express terms placed them in the same situation towards the government as other tribes of Indians. I am strongly inclined to the opinion that the act of congress restored them to their former tribal relations as wards of the United States, subject to their control, and entitled to their care and protection. The relations of the United States to all Indian tribes are now regulated by acts of congress, and not, as formerly by treaties. U. S. *v.* Kagama, 118 U. S., 375-382, 6 Sup. Ct. 1109.

By numerous acts of congress, the legislative department of the government has recognized the Eastern Band of Cherokee Indians residing in North Carolina as being under the supervisory care of the United States.

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> I will say, further, that I am strongly inclined to the opinion that the action of the secretary of the interior, the attorney general, and district attorney in procuring, by procedure in this court, execution of the new deed under which the Eastern Band of Cherokees now hold their lands in fee simple as a corporation, neither expressly nor by implication relieved the United States from any obligation of duty imposed, or waived any power conferred by the constitution, treaties, or acts of congress. Eells *v.* Ross, *supra*.
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> * * * * * * *

In an opinion rendered by the circuit court of appeals, fourth circuit, in the same case, it was said (83 Fed. Rep., 547, 553-4, 556-6):

> The effort to show that the Eastern Band of Cherokee Indians, in disposing of the timber in controversy, and in making the contract with Boyd, acted as a corporation created by the laws of the state of North Carolina, is without force; for it is well settled that neither the constitution of a state, nor an act of its legislature, can prevent the application of an act of congress to the Indian tribes residing in the states, but subject to the control of the general government. To hold otherwise would be to make the constitution of a state, and the laws of the same, the supreme law of the land, instead of the constitution of the United States, and the laws and treaties made in pursuance thereof. City of Minneapolis *v.* Reum, 6 C. C. A. 31, 56 Fed. 576; U. S. *v.* Holliday, 3 Wall., 419; Worcester *v.* State of Georgia, 6 Pet. 515; Rollins *v.* Cherokee Indians, 87 N. C. 229. The congress of the United States has repeatedly, since the treaty of New Echota, recognized the Eastern Band of Cherokee Indians as a distinct portion of the Cherokee race, and has dealt with them, not as individuals, but as a band distinctive in char-

acter, dependent on the United States, and entitled to the aid and protection of the general government. 9. Stat. c. 118; 10 Stat., 291, 700; 15 Stat., 228; 16 Stat., 362; 18 Stat., 213, 412; 19 Stat., 139, 176; 22 Stat., 328; 27 Stat., 122. The act of July 29, 1848 (cited above in 9 Stat.), treated said Indians as under he care of the United Sates, and provided that the sum of money due them under the treaty of New Echota should be held in the United States treasury indefinitely, and that interest thereon should be paid them.

* * * * * * *

This shows that the original condition of the Indians in this country—that of pupilage under the government—has not been released, so far as this Eastern Band of Cherokees is concerned. It thus appears that the political departments of the government have recognized these Indians as constituting a tribe,—at least, within the meaning of that word as it is used in the constitution of the United States; and it is a rule of the courts, in matters of this kind, to follow the action of the executive and the departments whose duty it is to determine such affairs. U. S. v. Holliday, 3 Wall., 407.

We are unable to agree with the court below that, because the United States sought the aid of a court of equity concerning the alleged contract said to have been made by Boyd with the Eastern Band of Cherokee Indians, it was the duty of the court in the absence of fraud or unfair dealings in the making of the contract, to hold the same valid if the consideration paid for the timber mentioned therein was a fair and adequate price for the same. It must be kept in mind that the complainants below insisted in their bill that the United States had refused to assent to the arrangements made by the council of the Eastern Band of Cherokees with Boyd, and that,

therefore, no contract had, in fact, been made for the sale of the timber mentioned in the bill. Finding this to be true, we think it follows that the defendants were removing said timber unlawfully, and that, therefore, they should have been restrained from so doing, and perpetually enjoined from further interfering with the same. It will not do to say that the Indian tribes subject to the control of the department of the interior may be permitted to dispose of their property, real or personal, without the approval of that department, or over its protest, as in this case, and that the courts of the United States will sanction such proceedings, and decree them to be valid contracts, in the absence of fraud or unfair dealing. We must presume that the department had good reasons for declining to approve said sale, and we think that, in the absence of fraud on the part of those representing it, its refusal to sanction negotiations of the character here involved is conclusive of the matter. To hold otherwise would produce great confusion, and would transfer from that department to the courts most of the controversies relating to Indian affairs now properly disposed of by it; thereby fostering litigation, and producing continuous strife among the different Indian tribes. The conclusion we reach is altogether independent of the questions raised concerning the power of the Eastern Band of Cherokees to sell and transfer the land conveyed to it by William Johnstone and wife, as, either with or without the restrictive clause in the deed from Johnstone and wife before mentioned, we find that the United States have the power to supervise and control the affairs of those Indians, so far as said land is concerned.

As to the general questions involving the right of departmental control and the status of Indians thereunder, we refer to

Johnson *vs.* McIntosh, 8 Wheat, 543.
Cherokee Nation *vs.* Georgia, 5 Peters 1.
Worcester vs. Georgia, 6 Peters 575.
United States *vs.* Holliday, 3 Wall. 407.
The Kansas Indians, 5 Wall. 737.
U. S. *vs.* Forty-three Gallons of Whiskey 93. U. S. 188.
United States *vs.* Kagama, 118 U. S. 375.
Choctaw Nation *vs.* U. S., 119 U. S. 1.

This brings us to the sole quesion of whether or not the absence of definite action by the federal authorities with relation to the Catawba Indians, places those Indians in a position where the same cannot at this time be invoked, or whether it was not necessary to invoke the same at the time of the treaty made in 1840.

If these claimants had been citizens of the United States if the question involved acquiescence in a judicial or legislative determination between citizens of the United States, the question presented would have been entirely different from the one now before us. But we have upon the one hand, a dependent, illiterate, unlettered people, clothed with none of the powers and but few of the rights of citizens; a people to be protected not only from the greed of the white man, but from themselves. Over such a people the government has seen fit to throw her mantle of protection and the mere fact that the Catawba Indians have been peaceful, that they attempted to comply with every state law, that they have not appealed to the federal government for protection in specific instances, that they have not been guilty of such acts as demanded the interference of federal troops and thereby the making of federal treaties, does not in any way change the law itself or their rights in the premises. It increases their equities but does not withdraw them from the protection of the law itself, and this law, provided as a prerequisite to the transfer of the title of their lands the approval of the general government prior

to the transfer, or at the time it was made. Such is the construction of the Courts, as we see it.

The opinion of the Hon. Attorney General refers to a request made by his office to the Secretary of the Interior and to the reply reeeived thereto, and among other things, sets forth a portion of a letter written by the Commissioner of Indian Affairs to Chester Howe under date January 23, 1906. This letter or the portion quoted would seem to indicate that the Commissioner of Indian Affairs had decided and determined the legal status of these Indians to be what may be termed State Indians, but a consideration of the circumstances attending the writing of a letter coupled with a knowledge of the method of transacting business before the Indian Office will explain the same.

The Secretary of the Interior exercises both administrative and judicial power. The administrative officer in Indian matters is the Commissioner of Indian Affairs. Judicial questions are referred to trained lawyers who comprise a portion of the force working under the direction of the Secretary of the Interior but who are really carried upon the Department of Justice rolls, and constitute the force of the Assistant Attorney General's Office for the Department of the Interior.

The letter referred to did not pass through this office, and in order that no misapprehension may exist as to the meaning or understanding of the same on the 31st ultimo, a letter was addressed to the Hon. Secretary of the Interior directing attention to the report referred to by the Hon. Attorney-General of the State a reply to which having been received is set forth below.

F. B. J. W. H.

DEPARTMENT OF THE INTERIOR. W. C. P.

WASHINGTON. F. W. C.

D-2259 *February* 5, 1908.

Mr. Chester Howe,
Attorney at Law,
Loan and Trust Building,
Washington, D. C.

SIR:—The Department is in receipt of your letter of the 31st ultimo, in which, as Attorney for the Catawba Indians, you request certain information relative to a report concerning said Indians rendered December 20, 1907, by the Acting Commissioner of Indian Affairs.

In reply, you are advised that the report of the Indian Office referred to above was rendered with reference to a letter dated December 16, 1907, from the Hon. J. Fraser Lyon, Attorney General for the State of South Carolina, which reads in part as follows:

> I desire some information in regard to the legal status of the Catawba Indians in this State, as viewed by the United States Government. I am desirous of learning whether there is any special protection, or general protection given these Indians under the laws of the United States, and whether they have received any aid therefrom. I would also like to know whether they were ever included in any treaty made between the United States Government and the Indians. For some years past, this State has made appropriations to these Indians for their maintenance, and it seems has dealt directly with them for more than a century. The Indians are presenting some claim against this State at this time, and it is my desire to familiarize myself with their legal status before I advise the legislature on the subject.

It will be observed that no reference is made in Mr. Fraser's letter to any specific claim. The Department was not advised as to the nature of the claim, if any, which was being asserted by the Catawba Indians. It was not understood that such a claim had been submitted to the Secretary of the Interior nor was there an appearance of the parties in connection therewith, either in person or by attorneys. Under the circumstances when said report was received from the Indian Office, it was forwarded to the Attorney General for the State of South Carolina merely as a matter of historical and general information and not with the intention of passing judicially upon the rights of the parties or of expressing any legal opinion concerning the same. This information is furnished you in order that no misunderstanding may arise in respect to the action of the Department in connection with said report.

Very respectfully,

JESSE E. WILSON,

Assistant Secretary.

Through the Commissioner of Indian Affairs. G. W. W.

The foregoing letter bears the initials and approval of the Assistant Attorney-General and his assistants.

With regard to the compliance of the terms of the Treaty of 1840 by the State, the records before the Attorney General in rendering his opinion ought to be conclusive, but there is one fact to which attention should be directed.

After the passage of the Act of 1838, a number of leases were executed by the Catawba Indians for the remnants of their lands then in their possession at very low rental, approximately one cent per acre per year. These are the only leases on printed forms which we have been able to find and cover a very limited area and are few in number. They do not contain the covenants set forth in the original leases, nor do they include cultivated or improved lands,

but cover a very small area of broken country, not susceptible of profitable cultivation.

After the negotiation of the Treaty of 1840, the Catawba Indians were without a home until about 1842-3 when it appears that the $5,000 provided for in the Treaty was used to purchase the leasehold rights upon a piece of this rough or broken land.

There is no direct showing that the money was paid in full, but the presumption is fair that it was, but it was the duty of the State to conserve this fund and to expend it in a provident manner. The indications are that the 620 acres purchased was land which was held under an annual rental of approximately $6 per annum. It was wholly unimproved at that time, therefore no portion of the $5,000 could have been figured as paid for improvements. At six per cent. based on the rental, the value of the lease so purchased was $100. The expenditure of this $5,000 for this purpose does not indicate that the care and judgment exercised was that which would appeal strongly to the Legislature of the State in dealing with its incompetent wards.

This is not stated in the spirit of criticism, but for the purpose of bringing attention to a fact, which, in connection with the others stated, are worthy of consideration in this matter.

There should be a record of the proceedings of the Commissioners under the Act of 1808, but we are unable to find any such record. It may be among the unindexed records in the custody of the State, but there are records showing transfers of the lease hold rights showing the consideration therefor and indicating the values at which these were held from 1815 to 1840—and it is apparent that at the date of the treaty of 1840 the Indians had a yearly income which would amount in five years to more than the full consideration promised in the treaty.

We have endeavored in the foregoing brief to support the contentions originally presented, not with any idea of

invoking federal interference in the protection of your people, but on the contrary, for the purpose of presenting the question clearly to the authorities of the State, to the end that if they deem it wise, either the courts might be given authority to adjudicate the matters by the State Legislature, or such other appropriate remedy as in the wisdom of the state officials might be deemed proper. The people of South Carolina have been for many years your friends. You have given to that state an allegiance based upon a high regard for it and for its people. The solicitation of any federal interference would, in our opinion, be unfortunate, and we have carefully refrained from any suggestion as to remedy, because our position was stated at the time of our employment as that of an attorney only, and in no other way could we efficiently serve you. While we are compelled to disagree with the conclusions of the Hon. Attorney General of the State, this is merely the lawyers' disagreement. If the subject is one which should be judicially determined, the legislature will undoubtedly grant that privilege. In our opinion it should do so. A complete adjudication of this question will result in settling all disputes greatly to the benefit of everyone concerned, and the opinions expressed herein are intended as argumentative and for the consideration of the proper committees in the preparation of such legislation as they may deem proper.

Respectfully submitted,

CHESTER HOWE,

Attorney for the Catawba Indians.

Land
Contracts
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DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN SERVICE

Catawba Indians of
South Carolina.

Cherokee, North Carolina, 1910

January 3, 1911.

The Commissioner of Indian Affairs,

Washington, D. C.

Sir:

I visited the little Catawba reservation December 29-31, 1910, and made investigation as directed by office letter of Nov. 30, 1910.

Location. The reservation, about 630 acres, lies on the west bank of the Catawba river, which is the east boundary of York county, and 3 or 4 miles north of Catawba Junction of the Southern railway, and almost due east of the station known as Leslie. A rural mail route from Roddy runs across the reservation, hence Roddy is the post office. The reservation is best reached by team from Rock Hill, as that is the nearest point where teams, hotel accommodations, etc., can be had.

Population. (See exhibit A). The list of persons constituting the tribe furnished by the officers of the tribe shows 31 heads of families, 97 persons descending from Indian mothers, and 13 additional individuals descending from white mothers - making 110 in all which they feel should have tribal recognition. These are all residents of South Carolina, on or near the reservation, but the official recognition on which the State appropriation is distributed is confined to the 97 individuals descending from Indian mothers.

Exhibit G
July 2, 1993
House Hearings - H.R. 2399

2.

It has long been the rule to give recognition only to children of Indian mothers, and the State has rather adopted the rule. The explanation is that such a rule is about necessary to protect the enrollment from having illegitimate whites charged to it. From what I know of conditions in connection with the Eastern Cherokee enrollment I must say the rule is not unreasonably founded.

As the State naturally objects to distributing what it terms gratuities to residents of other states, the official roll includes no Catawbas living in other states. This rule has been enforced as against pupils in Carlisle school, as well as real nonresidents.

There are a few Catawbas among the Eastern Cherokees, but all are of part Cherokee blood but one and have been recognized and enrolled here. Some others live in Oklahoma, and so far as I could learn they are not admitted to rights there. A few live in other states. The Secretary agreed to work up a list of nonresidents and send me later, but I was careful to advise them that such nonresidents should expect nothing by reason of the list being thus made up and submitted.

I inquired as to the family of P. H. Head, of Farmington, N. M. whose letter of January 27, 1909, 8820-1909, is found in the file. This family is well known to the tribe, but have been absent over 20 years. It was claimed that both Head and his wife are part Catawba blood, doubtless something less than one-half degree.

Blood: This little band claim to be very largely Indian blood, and point out several families as being full blood. It is probable, however, that there are very few real full blood Catawbas left. On the otherhand this is not an aggregation of mixed

3.

bloods trying to maintain a tribal organization for the benefits to come thereby. The large majority are so nearly full blood as to retain the Indian characteristics, and by reason thereof they have retained their tribal life and organization as a matter of choice, even through the hundred years of tribulations. In considering their petitions the government should regard them much as if they were full bloods.

The band claims to have no admixture of colored blood. This may not be exact, judging merely from the complexion of one or two families, but if there is colored blood it dates many years back, and is quite limited in scope. It is really remarkable to what extent they have kept themselves aloof the colored population. They are wholly surrounded by a colored population, but have seemingly nothing to do with them. This is not by reason of any friction, for all seems pleasant enough. It seems to be simply the resolution of the little band to keep clear of the colored population for their own welbeing. This one thing has done much to retain the respect and sympathy of the white population of the vicinity.

I hear of numerous instances of a worthless class of whites mixing with the band, and there is ample evidence that many members of the tribe marry whites. In fact, it is about necessary for them to marry outside the tribe by reason of its limited numbers, and all left is the low class of whites with which they seem to affiliate somewhat. On the whole they have maintained a rather high level, considering isolation and environment.

Health: The general health of this band is remarkably good. I found no indication of tuberculosis, though there may be some

as my opportunities for observation were limited. Neither could I learn of any much eye trouble, so common to most Indian communities. A physician is employed from the state appropriation, but on what terms I did not learn. The locality is a heathful one, and I could learn of no ailments except those common to all classes.

I saw a few individuals showing unusual sallowness, and asked if hookworm was known among them. The explanation was offerred that these individuals were adicted to the use of morphine, and no hookworm was known. It is probable there may be hookworm, however. I observed no indication of loathsome diseases frequent with Indian communities.

Morals: It is said the men drink whenever they can get liquor. As most of South Carolina is now within the "dry" belt, and as it is doubtless difficult to get liquor, I am of the opinion drinking is not practiced to any great extent.

Sexually, they have doubtless been given to lapses common with Indian communities exposed to the other races. But I could learn of nothing that would class them as much worse then the lower class of whites of the vicinity.

Language: These people have all but lost their own language. The older ones still can use the Catawba, but the younger ones can not, and it has entirely gone out of use, the English taking its place. This is not so much the result of schooling as that the band is too limited to keep up its language in the midst of English speaking neighbors.

Religion: In religion these people are very largely Mormon, but accept and abide by the Woodruff "revalation" of 1890, and are not poligamists. The Presbyterian church once held quite a follow-

ing, and does somewhat yet, but it has about succumbed to the Mormon. It seems the Mormmon church sent missionaries to these Indians some 20 or 30 years ago, and have maintained a mission there most ever since. The mission was closed a few months ago, but whether permanently I could not learn.

The community have a little church on their reservation which is generally regarded as a Mormon church, but is open to all denominations.

Integrity: In the matter of general integrity, observing the law, and peacefulness of the community, it ranks very high. It is said that only about one of their community has ever been before the courts on a criminal charge, and that was only as an accessory to a crime.

It is probable these people are as carefull of their good name in matter of credit as can well be found. They go in debt, and doubtless needlessly, but they manage some way to discharge these debts. They quite pride themselves on such virtue.

Legal status: The Catawba Indians are not citizens of South Carolina or the United States. The state of South Carolina has assumed sovereign rights over the tribe and its former landed rights, and the Federal government has never interposed objection, and in such way the State has exercised guardianship over the band, and the tribe has been in the position of wards of the State.

The individuals are amenable to the criminal laws of the State, but so far as I can determine it is probable they have no standing or status in the civil courts, either individually or as a tribe. There seems to have been only one case as far back as I can learn where any individual got into the civil courts, and that

was in the lower court, in a controversy over a horse. The white man doubtless recognized he had no right to the animal, and the case may have been settled outside. At any rate the question of the Indians civil rights was not brought out. As a tribe there has never been any thing to cause discussion of the legal rights except the matter of their reservation claims now being urged.

It seems to have been their sole purpose at all times to so demean themselves as to give rise to no litigation, and being a peace-loving people, there has been no occasion to test their rights.

About 1830 to 1840 several of the southern states disqualified all Indians as holdees of real estate, or of acquiring such under the state laws. I am not sure as to South Carolina, but I am rather of the opinion such would be found the case with these Indians now. But like other legal questions, there has never been any case calling such in question, hence no one knows definitely. None of the band has ever held real estate individually.

Tribal organization: This tribe has maintained a tribal organization for all time, so far as can be ascertained now. And the Satate has seemingly always recognized their tribal character. Before the so-called treaty of 1840 the State at all times legislated for them as a tribe, and while there may have been one or two lapses of annual appropriations, the State has always legislated for them as a tribe where legislation occurred.

For many years the State has maintained a state Agent for the tribe, his duties for many years being confined, wholly or about so, to that of mere disbursing agent.

The present organization consists of a chief, assistant chief,

secretary, and various committees. I did not understand there was any legislative body, but there really has been nothing concerning which to legislate. This organization seems to control their internal affairs, furnish the Agent a list of individuals on which the distribution of funds is made, and various other duties. The last election was some six years ago, when D. A. Harris was named as chief, and as I understand there will be no other election until the tribe become dissatisfied, or until a vacancy occurs through some cause.

Schooling: For the last 20 years, or about that, the State has made a small appropriation for maintaining a school. The amount is now $200 per anum, and it keeps the school open about six months of the year. The average runs from about 20 to 25 pupils, or about the entire school population. From the best I could learn this is rather an inferior school, but they seem to profit greatly by it, and seem staisfied and grateful. Most of the younger generation read and write, but the older ones do not.

Some years ago a few of the children were brought to this school, and about seven years ago five went to Carlisle. Now there are none in any government school. Those going to Carlisle speak well of the school, and the people generally speak well of it, but they have the Indian reluctancy to send their children away from home. I also realized that they fear of losing their girls when sent away to school, as they some times fail to return - marrying elsewhere, or take up occupations which keep them away from the tribe. As the tribe stands in danger of becoming extinct through decrease of Indian mothers, they naturally oppose any thing that would increase this danger.

2.

The only recommendation I can make as to the future of the school work would be that the effort to get some in Carlisle should be resumed, and that the local school should be raised in efficiency. No more children should be put in here, and if Carlisle makes any further attempt caution should be exercised to limit the effort, and acceptance, to the real Indians of the tribe. It would be easy enough to pick straggling enrollment from among white families with a strain of Indian blood.

I can not recommend that the Government establish one of the regulation Indian day schools for this band. The efficiency of the school might be raised in some particulars, but in other respects too great danger exists.

In other portions of this report it is shown that an excellent relation exists between the Indians and the white population. It is on the white population in the vicinity of the reservation the band must depend for whatever the State does for it. The part of the state where the reservation lies is in the very heart of the South. This means Southern institutions, Southern social customs, sympathies, ideals,-and if one may say such of any particular locality,-prejudices and general characteristics. Each section of the country has its peculiarities, and it is in this sense, and not in way of criticism, I refer to those of the section where the Catawbas live. The Catawbas are a part of all this, as much so as it is possible for an Indian community . . . . to become a part of what exists around and about it. To disturb the amicable relations between the races would be about the worst could be done for the Catawbas.

Teachers selected from the classified list are very largely

from other sections of the country, and of different sympathies and characteristics. As will be seen from other sections of this report, the band is making some rather extensive claims against the State. Taken on its face as shown by the old records the Indians present a rather strong case. Few teachers would be able to analyze these claims, and would doubtless give much greater credence to them than the law justifies. In my judgement it would take but little to create quite a feeling amongst the Indians as against the State, and the white population. Or instead of creating such a feeling, it would take but little fanning of the flame to bring about quite an estrangement. The possibilities are too great to endanger if such can be avoided.

In industrial matters the Indians need some assistance. They need a man to advise them in cotton growing, particularly in the matter of conserving the soil. Out of a hundred men the Office might be able to choose from it is doubtful if one of the proper kind could be found. Cotton is the one money crop of the section, and the soil calls for local experts. The land needs terracing, and should be fertilized, but the Indians have no funds with which to procure fertilizers. A local man, accustomed to the locality and familiar with the people, could render great service to the little community by giving to them four or five days out of each month of the crop season. They very much need this.

If the State could be induced to use a larger portion of the appropriation for the school, thus providing a good, energetic teacher, and another small portion to employ an instructor for the farm work, I am of the opinion it would give greater returns than any thing the government could now institute.

What the State is doing: I learned that the Attorney General for the State had, about two years ago, rendered an opinion in the Catawba case, which opinion doubtless rehearses the several state statutes and appropriations. I wrote the Attorney General's office for a copy of such opinion, but it has not reached me. If it comes later it will be forwarded, with a note of explanation.

From such other sources as I was able to command I learned that the State claims to owe the Catawbas nothing, but on the other-hand has been making gratuity appropriations to it for some years. It was said such appropriations have been made almost every year since 1840, except a short period during the "reconstruction period" following the Civil war. This annual appropriation was doubtless $1000 to $2000 until within recent years, since which it has been increased from time to time until the last was $2500 for general support and $200 for the school.

It maintains an Agent, who pays the teacher, physician, and any other drafts on the funds, and once each year disburses to each individual such cash portion as the appropriation will admit of. The appropriation is not used for purchase of supplies, but is paid direct to the Indians. The Agent is paid a commission on disbursements and not a salary.

While on this topic it should be noted that the Indians spoke very highly of the financial integrity of the state Agents. In one instance I think there was some dislike to one Agent, but they all claimed the disburements had been honestly done. It was stated with much earnestness that they believed every penny had been properly accounted for since about the year 1876. Before that time this claim of honesty does not apply.

11.

The Catawba Commission: By reference to exhibit B it will be seen that the last general assembly for the State provided for a commission to report on the lands occupied by the band; what other lands they need; take options on additional lands; all with a view of providing them more lands instead of the annual appropriations.

It will also be seen that the Governor has made the appointments, two of such commissioners being from Rock Hill, the nearest large town, and the third from Yorkville, the county seat of York county, where the Indians reside.

I went to the reservation on December 29, 1910, arriving unannounced. I found the tribal officers gathered at the little meeting house awaiting this commission, which was the first I had heard of it. I waited until late afternoon, and no one came. The Indians said that was the second date set and no one came. They were quite disappointed, and, Indian way, felt nothing ever would be done. They asked me to see the members of the Commission, and also State Senator Stuart, who lived at Rock Hill. I returned to Rock Hill and the next day had a conference with Senator Stuart, and commissioners Spencer and Whitner. It was decided that we would all go to the reservation on Saturday, December 31st, and Mr. Lewis was asked to meet us at Rock Hill before starting.

When the time came to go Mr. Lewis did not arrive, and Mr. Spencer was too busy in his office to get away. Mr. Whitner evidenced great willingness, and in company of a planter whose name I do not recall we went to the reservation and conferred at some length with the tribal officers. The Indians made known their wants, and at their request I advised them, guardedly, as to what they might best do, all in presence of Mr. Whitner. They wanted to know what

their prospects were of collecting from the State, or of recovering their old reservation of 15 miles square. I told them I felt they need not hope to recover the old reservation (they had previously entertained such hope, but not with great faith). I refrained from expressing any opinion on the legality of a money claim from the State based on the so-called treaty of 1840, but rather discouraged any such hope. I explained to them that the Department had declined to take up their case in court, as shown by the file sent me from the Office.

Senator Stuart and Mr. Whitner had expressed themselves to the effect that the tribe doubtless held a moral claim against the State, and they expressed the belief the State would recognize such moral claim if properly presented. Mr. Whitner made such expression at the meeting, and the annual appropriations are evidence of the State's attitude. I advised them first to fully co-operate with the Commission, and to press their claim for a reasonable assistance from that source, and attempted to give encouragement to their flagging spirits, the result of numerous disappointments. I explained that whatever the State might do would have to be the act of a large number of legislators who really knew nothing of the case, or probably nothing of the Catawbas themselves. I found them very ready to accept any suggestion I made, and had to exercise great care. I stated with great care that they must expect nothing of me except that I would faithfully and fully set forth their conditions and wants in my report. I explained that the Government was now assuming no part whatever in the controversy, and might decide never to take part. In general I urged that they must look to the State, and any interference on the part of the Government might be unwise.

13.

After the meeting closed the entire party went with Mr. Whitner to view some lands adjoining the reservation, which lands the planter with us was offering to the Commission under the provisions of the concurrent resolution.

At the request of Mr. Whitner Chief Harris gave expression as to what the tribe asked of the State, which was sufficient additional lands to give to each individual member an allotment of 50 acres, and then a reasonable equipment with which to begin farming. While there was no expression to that particular end, it was meant that in such event the tribe would relinquish any claims it may hold against the State.

Mr. Whitner reckoned it would cost from $25 to $40 per acre for such lands as the State might provide, and expressed himself to the effect that he did not think the State would ever provide for them so liberally.

The lands offered by the planter, about 900 acres at $25, as I understood, are mostly timbered, and are not very desirable. Mr. Whitner doubtless felt it would be more advisable to buy improved lands, that the Indians might at once get down to farming, instead of eking out an existence by marketing wood from the timber lands. In these deliberations I took no part, more than to encourage the Indians to hold faith in the State doing something.

Mr. Whitner was rather disappointed at what he felt was an unwise demand on the part of the Indians, fearing the size of the demand might operate to defeat the whole proposition. I was very confident, however, that the Indians were asking more than they hoped to obtain, and would readily consent to a more reasonable proposition. In this the Government can doubtless render great

service to both Tribe and State, for I found them quite inclined to act on what they felt the Government would recommend.

I desire to express my high regard for Mr. Whitner as a member of the commission. He was at one time an attorney, but now an extensive planter. He is a man of unusual good judgement, and I believe his integrity and good purpose is of an equally high character. He sympathizes with the Indians and seems to clearly recognize a moral obligation on the part of the state to do something for them. He feels it would be much wiser to put them on farming lands instead of doling out a yearly appropriation. In my judgement he is the ideal man for the commission. He had not given the matter much thought before our going out, and asked many pertanent questions of me as to the plans and policies of the government in dealing with Indians, and particularly as to the plan of lands in severalty.

I met Mr. Spencer, but not Mr. Lewis. Mr. Spencer is an attorney, as is also Mr. Lewis, as I was told. So far as I could see Mr. Spencer would be a good man for the commission, except that he is too busy to do the work. He had not studied the case, and evidenced no material interest. Were he not so busy I feel he would conscienciously and industriously take up the burden as the resolution calls for. The same doubtless applies to Mr. Lewis in equal manner.

Really it looked as though the commission would do nothing at all and make no report, and the Indians, and Senator Stuart too, had about lost all hope. My coming may prove opportune, for it may result in a report being made. I insisted on Mr. Whitner proceeding to do the work called for by the legislature of himself, the

other members to join in the report and recommendations if they agree, and in this Senator Stuart agreed to join me. In this way I have hopes a report will be made, and my confidence in Mr. Whitner is such that I hope for a reasonable recommendation.

Attention is called to exhibit C, a letter received from the Chief after my return here. This shows several things: It sets forth what the tribe would like the government to do; the effect of my visit; the lack of confidence in the state doing any thing; and something as to their capacity to do business. It is explained that while the letter bears the Chief's name, it is doubtless written by the Secretary. The Chief is quite intelligent, but somewhat illiterate.

In my judgement all efforts should be directed to secure such action on the part of the state as can be accomplished, and that no other procedure should be entertained until the state has had an opportunity. I urged this on the Indians.

State Senator Stuart: I feel Senator Stuart is entitled to special consideration in this report, for while the Indians are losing confidence, or may be only becoming impatient, I feel that what has been done is due to Mr. Stuart, and what may be accomplished must be largely the results of his efforts. He lives at Rock Hill, ten miles away from the Indians, and has evidently labored earnestly in getting the appropriation raised, and in having the concurrent resolution passed. He feels the State is under moral obligation to the Indians, and further that they are now something of a burden to be carried by the state until they can be placed in more selfsustaining condition. He recognizes the 620 acres of land they now occupy is insufficient, and believes it better that

the state lump its appropriations and thereby put the Indians where they can do something for themselves and then stop all further aid. I feel he is honest in what he has done, and can be relied upon to do right by them. He needs support.

In talking with him, when it looked as though the Commission would do nothing, he suggested that may be the Federal government could be induced to take over the Catawbas, appropriate for them as for other tribes, and thus relieve the State. I explained that it had long been the policy of the Government to fit the Indians for selfsupport, and then to turn them over to the states as fast as could be. And further, that as the State had taken over about all the Catawbas once owned, his suggestion might meet with some opposition. He said the matter had been presented to some of the delgation from South Carolina, but that nothing definite had yet been determined upon.

In later conferences with him, as in my talks with Mr. Whitner, it was suggested that may be the state would make some provision for the relief of the Catawbas, and that the Government would join. In all this I could give no part or promise, simply explaining the government methods for their information. Each of these men were anxious to get as much information as to how was the best way to handle the proposed aid, and in this I gave the benefit if my observations so far as I could, particularly as to the method of holding the lands in trust, etc. They each asked to be furnished with copies of the laws governing lands in severalty, which I hope to have sent them. These men seemed to welcome co-operation on the part of the Government in aiding the State to take wise action.

Attorneys: The tribe had arranged with Mr. Chester Howe, an attorney of Washington, D. C, to represent them, on just what terms I do not know. In preparing their case he sent at different times Andrew Johns, a New York Indian and an attorney, and also a man by name of Partlow. Since then all these men have died. From the file I see that W. M. Wright, a former partner of Mr. Howe's, claims to have some right as attorney, but the tribe does not so recognize him. They now have no one regularly employed, but there is a local attorney at Rock Hill, whose name I do not recall, to whom they frequently go for advice. I do not understand he is in any way employed in these matters, however.

From the file it appears Mr. Howe doubtless expended considerable money in expenses, estimated by Mr. Wright at about $600, which may rest somewhat as an obligation against the band.

They do not care to employ an attorney, but hope the Department will undertake to serve somewhat as adviser in lieu of an attorney. If the Office sees it way to extending any aid to this little band it can doubtless best serve them by thus aiding them. They are quite a simple-minded people, unused to handling affairs of this kind, and in some states or communities I could name they would soon be "taken in hand" by some unscrupulous man posing as attorney for them, and who would doubtless do their chances much greater harm than good. Again attention is called to exhibit C.

It should be borne in mind this tribe has never had a tribal patrimony on which a few could fatten and become powerful, or some mixed blood could manipulate so as to wield vast influence in the community. This little band is delightfully free of such individuals and influences.

Catawba claims against the State: One of the things I was directed to do was to ascertain what claims the band holds or urges against the State. This is probably better presented in the briefs submitted by Mr. Howe than the Indians could present it themselves. (See the file returned herewith.) In fact, the Indians doubtless had only a confused idea of what they claimed against the State until Mr. Howe worked it up and presented it, copies of which they have among them. They have doubtless obtained an exagerated idea as to the probability of recovery, as will be noted from other portions of this report, (see page 13).

Mr. Howe makes out a very clear case, interpreting the statutes literally, and applying present-day ideals and standards to the work of 1840. They had about brought themselves to believe they had right to the old reservation of about 15 square miles, which would now be rated as worth millions, including the town of Rock Hill and suburbs with its 10,000 or 12,000 people, manufactories and thousands of well improved farms and homes. This afforded very pleasant dreams, and I could plainly note disappointment when I advised not to entertain hope of any such final result.

But they still entertain the belief, I feel, that they have a legal claim against the state, which could they get into court they could realize on. It is rather a sore disappointment to them to know they can not even ask a legal hearing except that the legislature, or congress, grant such by legislative enactment. I feel they hope for some such permission in the end, but with wise advice they will submit their claim to the state legislature, and be content with a reasonable grant.

The legal and constitutional problems arising in the sugges-

tions of action in either State or Federal court to determine their rights are far too much for a mere layman, and I have in no way seriously considered such. Whether the State or the Federal government was the sovereign power in 1840 may not matter so much as the fact that for 70 years the State has without molestation acted on the presumption it was such sovereign power.

In my judgement this is a case to be handled by administrative and legislative powers of the State and Federal governments. Even if the claims of the band could be carried into court by the Federal government, and could a finding against the State be had, it is of too little consequence to justify such if a reasonable settlement can be arranged otherwise. As will be seen by my former remarks, I strongly recommend submitting the case to the mercy of the State, to be determined by the legislature.

The tribe really much needs some one to aid them during the coming session of the legislature, which convenes in a few days. Could the Office be assured the legislature would not resent it I feel much aid might be extended. But it is rather a delicate matter, and the Government can not afford to assume what might be interpreted as attempting to control or influence state legislation.

If the State does act in the matter of procuring more land it would doubtless be with the purpose of distributing it as lands in severalty patterning after the government system. In this the Office might be able to render valuable service, as the State has no official machinery whereby to carry out such purpose, nor has it experienced workers. If the State should extend an invitation to the Department to co-operate I recommend it receive careful attention.

As this whole proposition is in the way of tribal treaties or agreements, and as the letter of the law calls for federal supervision, I am of the opinion it would be wise for all concerned if whatever action is determined upon should be so conducted that in the end it could receive formal approval of the Department, thus removing all cause for raising such questions later. It would be somewhat to the State's advantage that this be done.

As congress can doubtless alone extend full citizenship to these Indians, some action should be recommended looking to such grant at the proper time. This is not the proper time, however, and such grant now might complicate some of the pending questions.

These Indians are quite ready to receive most of the rights of citizenship, if not to undertake the obligations. I feel the State might very properly extend to them full civil rights in the courts, and if called to their attention I doubt not the legislature would be glad to do so.

The tribe is inclined to urge the unfairness, and as it regards the procedure, the illegality of the so-called treaty of 1840. What purports to be a copy of this treaty is found in the file returned herewith. Whatever claim they have is based on this, and on the legislation just prior to 1840 whereby their leases were virtually legislated into transfers of their realty. I refrained from offering any thing that might be regarded as an opinion on these problems, though they frequently asked questions calling for such. I rather discouraged reliance on a legal presentation of

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such claims, and I was unable to secure any thing that would present the State's contention. Unless I can secure a copy of the opinion of the Attorney General's office I will be unable to furnish the Office with the State's contention.

In the event the State declines to do nothing, the question would then arise, what else can be done? That is what is now worrying the band, and it crops out very clearly in exhibit C. I feel the Office and Department would then have a delicate problem to decide what action the Government should take, or whether it should act at all. I offer no suggestion in this matter, further than to urge that the Indians are entitled to a very full consideration of their requests.

My recommendation is that the tribe submit its claim in way of a petition to the Legislature that it proceed along the lines forecasted in the concurrent resolution, with the purpose on the part of the tribe to accept any reasonable proposition the State may thus make. In this the tribe needs assistance, and if the State would accept such I feel the Office might very properly extend its aid. In fact, the legislature could hardly object to the government appearing somewhat in the capacity of adviser to the band, and it would doubtless be well that overtures to that end be made. In case the State should ask the co-operation of the government in carrying out any scheme of lands in severalty the Office and Department should accept the invitation if no legal obstacles exist. In fact, congress might properly be asked to authorize such co-operation. Further than as recommended above I feel the matter should be left to the State.

Very respectfully,

Special Indian Agent.

Pl. Ex. 36

Memorandum to the Commissioner:

Subject: Catawba Indians.

On January 26, 1937, Professor Speck of the University of Pennsylvania addressed a letter to the Commissioner relating the information that the state of South Carolina was proposing a "final settlement" with the Catawba Indians. As he understood the situation, the State was offering $50,000, payable in two per capita payments, and was urging the tribe to take immediate action on its offer.

The first thing I learned on arriving at Rock Hill, S. C., on February 3 was that Professor Speck had been misinformed, or misunderstood, the terms of the State's proposal, which are exactly as stated in section 54 of the General Appropriation Bill now before the State Assembly. That is, the settlement calls for a payment of $100,000 and the State Budget Commission is directed to negotiate with the Federal Government with a view to securing its cooperation in working out a program for the Indians, or, that failing, arriving at an independent course of action. I am attaching a copy of the State Appropriation Bill.

After a three day stay in Rock Hill, I proceeded to Columbia, S. C., to interview Mr. J. M. Smith, State Auditor, and to gather information in the State Historical Commission Library.

The talk with Mr. Smith brought out the essential contradiction in the State's position — a contradiction which has been apparent for a number of years in its dealings with the tribe. The State declares, on the one hand, that it has no obligation to the tribe, that it has long ago discharged any indebtedness it ever owed by reason of its having taken title to the Catawba lands in the Treaty of 1840; and on the other hand it has appropriated money —haphazardly, it is true— for the support of the tribe, and at the same time has sought to fortify its legal position by reiterating the justice of its acts—for example, in the opinion handed down by the State Attorney General in 1909, to which reference will be made later. And almost a hundred years after the treaty which was to have settled forever the question of ownership of the Indian lands, it is now proposing a "final settlement."

The history of this State-tribal relationship is an interesting one, much of it a matter of public record.

Exhibit H
July 2, 1993
House Hearings - H.R. 2399

There was a time when the Colony and later the State of South Carolina acknowledged great indebtedness to the Catawba tribe. The history of those Indians recites a long record of aid and comfort which the white men received from the Catawbas, and from quite an early date the Catawbas began making efforts to insure the permenency of their tenure of lands which they had always occupied, or at any rate, if they had to give up their traditional territory, to secure other land in its place. One of the earliest suggestions that such negotiations had been going on is to be gathered from the letter of instructions which Gov. Dinwiddie of Virginia in February 1756 directed to his Commissioners, when the latter were about to meet the Catawbas and get a committment from them to aid the colonies in the struggle with the French. After instructing the Commissioners to "endeavor to get them to mention the number of warriors they may agree to supply us with", and to promise "reasonable" compensation for any assistance rendered, the Governor concludes: "The Catawbas, I hear, have long complained of being much confined by the English settling on their land, that they wanted to sell their land, and go further to the westward; if they mention anything of this, you may assure them I shall do everything in my power with the neighboring governments for their service."

The sequel of this promise of intercession, if it was ever acted on, was probably the Treaty of 1763 which the four colonies, Virginia, South and North Carolina and Georgia, negotiated with a number of southeastern tribes, the formal signing of which took place at Augusta, Ga., November 10, 1763. The fourth Article of that treaty deals specifically with the Catawba tribe, the article reading:

> "And we, the Catawba headmen and warriors, in confirmation of an agreement heretofore entered into with the white people, declare that we will remain satisfied with the tract of land of 15 miles square, a survey of which by our consent, and at our request, has already begun; and the respective governors and superintendents, on their part, promise and engage that the aforesaid survey shall be completed, and that the Catawba 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."

This excerpt is quoted from Jones' "History of Georgia," Vol. 2, p. 41-45, as the original treaty seems to have disappeared.

There is nothing in the language quoted to indicate how title to the land reserved for the Catawbas was to be held. The State Attorney General held in his Opinion of 1909 that "There can be little doubt that they (the Indians) had only the right to occupy the lands and use them for their support until their right should be extinguished. This may be safely inferred from the Acts of the

General Assembly, passed from time to time, regulating the affairs of these Indians, and dealing with the lands in question."

Whether this inference is true or not, there was originally some notion, evidently, that the Catawba Indians did not own the land in fee simple. In other words, there must have been some inhibition to their selling the land, otherwise it seems unlikely that the practice of giving 99-year leases would have grown up.

It is not known exactly when the practice of leasing for 99 years began. There was much uncertainty concerning this subject, I discovered. No one in recent years had seen copies of such leases, and there was some question as to whether or not written leases were even made and recorded. No one was able to say whether the trite had leased its land in one piece and at one time to the State or to private lessees, or whether individual Indians had made such leases to individual white men. This question can now be answered definitely. Written leases for 99-year terms were actually made and a number of the original documents can be examined at the Historical Commission in Columbia, where they have only recently come to light. The earliest one that I saw was dated 1770, but I imagine that some go back before that time. I had photostats made of several, and also of the map of the original 15 square mile tract, which are attached.

It is clear that within twenty years after the Treaty of 1763 the Catawbas were finding their lands slipping out of their grasp. In 1782, while the Articles of Confederation were still in force, a delegation of Catawba Indians appeared before a committee of Congress and the committee reported, under date of Nov. 2, 1782, that "they have had a conference with the two deputies of the Catawba Nation of Indians; that their mission respects certain tracts of land reserved for their use in the State of South Carolina, which they wish may be so secured to their tribe as not to be intruded into by force, nor alieneted even with their own consent." One gathers from the phrasiology at the end of this quotation that, willingly or unwillingly, the tribe was losing its land.

Leasing became so prevalent that pressure must have been brought upon the South Carolina Legislature to give it official recognition. Accordingly, in December 1800 it was made lawful "for the Catawba Indians to grant and make to any person or persons, any lease or leases, for life or lives or term of years, of any of the lands vested in them by the laws of this state". (S. C. Stat., Vol. 5 p. 576)

This law also set up a board of five commissioners to superintend leasing, and it was provided that no lease would be valid unless witnessed by a majority of these commissioners and by at least four of the headmen or chiefs of the tribe.

Four years after the above act was passed the State went the whole way in alienating title to these lands from the Catawba tribe. The law accomplishing this (S. C. Stat. Vol. p. 678) provided "that a lease for three lives, or 99 years, of the said Catawba lands shall be and the same is hereby declared to be a qualification equivalent to a freehold in all cases where a freehold is not required by the constitution of this state or of the United States."

Leasing probably increased at a great rate after the passage of the above laws, as most of the original leases on file at the South Carolina Historical Commission were made towards the last years of the first quarter of that century. It is also pretty clear from what Robert Mills wrote in "His Statistics of South Carolina", published in 1826, that at the time his book was compiled the Catawba Indians were practically landless. He wrote: "The remains of the Catawba nation now occupy a territory 15 miles square, laid out on both sides of the Catawba River, and including part of York and Lancaster districts. This tract embraces a body of fine lands timbered with oak, etc. These lands are almost all leased out to white settlers, for 99 years, renewable at the rate of from $15 to $20 per annum for each plantation, of about 300 acres. The annual income from these lands is estimated to amount to about $5,000. This sum prudently managed would suffice to support the whole nation (now composed of about 30 families) comfortably. Yet these wretched Indians live in a state of abject poverty, the consequence of their indolence and dissipated habits. They dun for their rent before it is due, and the $10 or $20 received are frequently spent in a debauch; poverty, beggary and misery follow for a year."

The misery and beggary described by Mills may very likely have been true, but it is questionable whether the Catawbas had anywhere near the amount of money to dissipate as he states. In one of the leases attached to this report, between the Catawba tribe and one Jacob H. Clawson and signed on May 20, 1831, the terms provided for the payment of $1.50 per year as the annual rental on 103 acres of land. Incidentally, this lease was sold a few months later by Clawson for a cash consideration of $828. Other leases show that rentals of $10 were paid for 794 acres, $8.50 for 402, etc. These rentals were all payable in cash or its equivalent in goods, which quite likely meant a payment in whiskey--hence the debauch, and hence the "poverty, beggary and misery."

There is contemporary evidence pointing to such practices. In Finley's "American Topography" published in 1793, the author remarks that the Catawbas are greatly reduced in numbers and attributes the cause of their decline to the encouragement of drinking among them by white men. Ramsay's "History of South Carolina" (1809) leaves a similar implication. The Commissioners appointed to negotiate a treaty with the tribe in 1840 make a frank admission of the manner in which Catawba lease money had been paid. They reported as follows: "It is not easy to ascertain with accuracy the amount of annual rents their lands have heretofore

yielded. If their original survey is correct, their boundary contains 225 sections (15 square miles), which, at $10 each, would produce $2250. Some of the lands have been leased at a much higher rate, and some not so high, but the foregoing is as near the amount as we have means of ascertaining, and their income has been rather a nominal one, having in a great many instances been badly paid in articles at high prices that often answered them but little purpose. It is believed that one-third the amount judiciously managed might have been made to do them more good."

The state quite evidently was unsure of the course it had followed in arbitrarily converting a 99-year lease into a freehold. Therefore, it took the trouble to make a treaty with the tribe in 1840. This treaty (see copy attached in appendix) had three articles:

1. The Catawba Indians agreed to convey title to their land to the state of South Carolina.

2. The state agreed to furnish the Catawba Indians a tract of land of the value of $3,000, 300 acres of which was to be arable lands fit for cultivation, "to be purchased in Haywood County in North Carolina or in some other mountainous or thinly populated region.".

3. The state further agreed to pay the Catawba Indians $2500 at the time of their removal and $1500 annually over a period of 9 years.

Land was not bought in North Carolina, although the State seems to have made some effort in that direction, as was specified in the treaty. How it happened that 652 acres within the borders of the old reserve were secured for the tribe is not clear, neither is it known how much was paid for the land or of whom it was purchased. Evidently it was purchased and was not a remnant of the old holding. There is no record of the State having paid the tribe $2500 at the time of settling on the land, and as for the annual payment of $1500, that evidently was reduced to $800 after the first year.

In other words, the State carried out the terms of the treaty pretty much as it pleased. Appropriations for the tribe in later years have varied greatly. During the 70-year period, 1840-1910, a total of $56,000 was paid to the tribe by the State, according to figures compiled by J. Frazier Lyon, Attorney General for the State. In recent years appropriations have been more consistent and larger in amount. At the present time about $2,500 is being voted annually

for support and education. Incidentally, these appropriations, except for money used for school purposes, have never been wisely administered. The money is usually doled out in small per capita payments, at the present time of less than $30 each, and no investment has been made in stock or equipment. The result has been that the Indians have never had the means of cultivating what little land they own.

Congress at one time was willing to move the tribe to Indian Territory, and if it had done this I suppose there is no question but what the tribe today would have been under Federal jurisdiction. In the Appropriation Act of July 29, 1848 (9 Stat. 264), authorization was given for the expenditure of $[illegible],000 to move the tribe west of the Mississippi. Expenditure of this money was conditioned upon the President's first securing a home for the tribe in Indian Territory, and the government was not empowered to spend money for a home-site. Both the Chickasaw and Choctaw Tribes were approached by Indian Office Agents, and both tribes showed a willingness to adopt the Catawbas. The Choctaw Council on November 3, 1853, passed a law permitting the naturalization of a small group of Catawbas who had settled among them, and this Act was later enlarged to grant more privileges to the newcomers (Choctaw Law, 1869, p. 34, and Choctaw Laws, 1869, p. 103).

Congress reauthorized the fund for removing the Catawbas in the Appropriation Act of July 31, 1854 (10 Stat. 315), but the matter was again allowed to go by default. The Choctaw Tribe had evidently expected to be reimbursed by the Government for the land which it was willing to surrender to the Indian immigrants. An agent reporting to the Indian Office on the situation wrote; "As these Catawbas were invested with the full privileges of the citizens of the Choctaw Nation, and became equal participants in the distribution of their annuities, etc., it seems not unreasonable that any fund set apart for the use of these Catawbas should have become a portion of the common stock for the common good, and such I learn was the general expectation of all parties when the (Choctaw) Act of 1853 was passed."

At various times since then the Indian Office has received appeals for assistance in moving the Catawbas to western lands. In 1872, Representative J. C. Harper of Georgia made such an appeal on behalf of the tribe, but no action was taken. In 1896, the Office was informed that a group of Catawbas who had gone to Indian Territory at the middle of the century were still living there, without land or economic resources. This information came from the "Catawba Indian Association", the headquarters of which was evidently at Fort Smith, Ark. It seems that there were a total of 254 Catawbas then living in the States of Arkansas and Oklahoma. Presumably, they are still there, and there must be in the Choctaw Tribe today descendants of the few who were adopted by that tribe in 1853.

In 1896 also a Catawba Indian living at Sanford, Colo. wrote informing the Office that 25 members of the Catawba Tribe were living at that locality and were seeking permission to be adopted into the Ute Tribe on the Uintah Reservation. These Indians were evidently some who had adopted Mormonism and had gone west, probably with the assistance of the Mormon Church.

Various citizens and public officials of the State of South Carolina, at different times, have had an uneasy conscience about the treatment which the tribe received at the hands of the State. In 1906 Governor Heyward in his message to the legislature referred to the lands formerly held by the tribe and which "until 1840 were recognized by the State as their property". It was the Governor's opinion that the Treaty of 1840 was never fairly carried out. He stated: "The matter was not satisfactory arranged, however, and has been in an incomplete form ever since. The Indians are now threatening to sue the State for the recovery of these lands and have employed council for the purpose of presenting the matter to this body and for bringing action in the courts in case no satisfactory arrangement is made".

At least two earlier Governors alluded to the matter in their annual messages and made unsuccessful efforts to get additional land for the tribe.

Heyward's successor, Governor Ansel, had his Attorney General look into the question, instructing him specifically "to investigate and report upon the legality of the Treaty of 1840 * * * whether the same was void according to the law of the United States, and whether the State ever paid to the Indians the amount called for by said Treaty".

The Attorney General, Mr. J. Frazier Lyon, in the report already referred to, reviewed the legislation dealing with the tribe and the history of the treaty settlement. His conclusion has already been quoted in part, to the effect that the tribe's title to the land was a limited one, and that the State had full power to regulate the tribe's affairs and to deal with the tribal lands. He further concluded: "there is no doubt that the treaty made by the State with said Indians in 1840 is valid, and that the Indians have now no right or title to the lands surrendered to the State under that treaty. I am of the opinion also that the money called for by said agreement has been paid to the Indians".

Positive as was the conclusion, it did not settle the matter. South Carolinians who speak officially are strongly of the Attorney General's opinion. They assert that the tribe has been paid off many times over and that it is now trading on sentimentality to get favors to which it is not entitled. But there are others of the State's citizens, not sentimentalists but practical-minded bank officials,

mill supervisors, etc., who are equally positive in denouncing a state policy which seems to them to have been devoted to justifying and validating the larcenous practices of an earlier generation. The influence of this latter group has been active enough to get increasing appropriations in recent years, and to bring before the legislature "settlement" bills, in 1934, 1935, and in the present session. It was active enough also to bring about a hearing by the Subcommittee of the Senate Committee on Indian Affairs in March, 1930.

The economic conditions under which these Indians exist are about as hopeless as they could possibly be. Their pocket-size reservation is infertile, rough, for most part uncultivated and unfit for cultivation. And there is not enough equipment to work even the few patches which could be utilized. There are, for example, only two scrub mules on the place, and one of these has a bad foot and when he is worked an extra man has to be along to help lift him up when he falls. Practically speaking, there are no hogs, chickens or other stock on the place. Some little income is earned at day labor, but the group is so badly demoralized by its spiritless existence that the individuals do not always make reliable workers. Unfortunately, the impression has grown up that shiftlessness and beggary are inborn traits which will never change. As a matter of fact, there are some individuals among them whose energy and perserverance belie such loose generalizations.

The amount of Indian blood still remaining in the group is probably sufficiently high, in average, to entitle the group to consideration as Indians. This is an impression only and is a subject which might be investigated further. Tribal government evidently has never ceased to function. As far as I have been able to make out the tribe has never been without its head chief and sub-chiefs. Its language (of Siouan stock), is fading rapidly and for practical purposes may be said to be extinct. Professor Speck has been able to record fragmentary legends and allied material in the native tongue and has published a thin volume on the subject. Earlier workers compiled limited vocabularies. Pottery making also represents a fading art, which, judging from certain crude but recognizable traits, must have behind it a long history of cultural development, and decline.

Recommendation: In view of the foregoing historical and social-economic facts, it is my recommendation that the Department enter into negotiations with the State Budget Commission to learn if some limited, cooperative arrangement can not be worked out whereby the Catawba tribe will benefit from the experience and knowledge of our field personnel. The State is prepared to spend at least $100,000 for the purchase of land and for the rehabilitation of the tribe. The tribe on its part expresses a willingness to go on new land either in the immediate vicinity or further away if necessary. If they should be removed, they would like to keep their present reservation, since it has been the burying place

of their people for many generations now.

While it is true that the Federal Government never entered into a treaty with the tribe, it has recognized the tribal status of these Indians, in appropriating money for their removal to Oklahoma. There may be legal distinctions which escape me, but it does appear that the Catawbas occupy a position identical with that of the Alabama and Coushatta Indians in Texas, who for years were refused government aid because they were not Federal Indians. Eventually, however, we were prevailed upon to cooperate with the State in helping those Indians, and last June they were permitted to vote on acceptance of the Indian Reorganization Act. Their status is still being investigated at the present time.

I believe that the Catawba Indians are entitled to serious consideration by the Office. Any jurisdiction we assume over them should, however, be limited and made a matter of definition by Congressional action. The tribe has a school now which need only be strengthened. Health conditions seem to be good. What the tribe will need most of all will be a combination administrative and extension man, who will be able to supervise the resettlement of the Indians on the new land which the State is to buy them, and then will begin the critical job of rehabilitating these people, morally as well as economically.

(Sgd) D'Arcy McNickle,
Administrative Assistant.

EXCERPT FROM GENERAL APPROPRIATIONS BILL
SECTION 54

Provided, That the State Budget Commission is hereby authorized and empowered to negotiate and enter into an agreement with the Federal Government having as its objective the rehabilitation of the Catawba Indians and a final settlement with them so that the State may be relieved of their support. In the event that a co-operative agreement with the Federal Government can be effected, the said State Budget Commission is hereby empowered to pledge on behalf of the State a sum not to exceed One Hundred Thousand ($100,000.00) Dollars to be provided in not less than five (5) annual installments for the carrying out of such agreement. Provided, further, That in the event a co-operative agreement cannot be reached with the Federal Government, the State Budget Commission is hereby authorized to negotiate with the Catawba Indians with the view of making a permanent settlement with them, and to submit any proposition of such settlement which may be agreed upon to the next session of the General Assembly for acceptance or rejection. Provided, further, That the State Budget Commission is authorized to investigate as to the personal indebtedness of families and members of the tribe, and to direct the allocation of funds herein appropriated in such manner as may appear wise and expedient to it in cases of such families of individuals which are found to be delinquent in the payment of their just debts.

TREATY

"A treaty entered into at the Nation Ford, Catawba, between the chiefs and headmen of the Catawba Indians of the one part and the commissioners appointed under a resolution of the legislature, passed December, 1839, and acting under commissions from His Excellency Patrick Noble, Esqu., governor of the State of South Carolina, of the other part:

"Article first, The chiefs and headmen of the Catawba Indians, for themselves and the entire nation, hereby agree to cede, sell, transfer, and convey to the State of South Carolina, all their right, title, and interest to their boundary of land lying on both sides of the Catawba Rivers, situated in the districts of York and Lancaster, and which are represented in a plat of survey of 15 miles square, made by Samual Wiley and dated the twenty-second day of February, one thousand seven hundred and sixty-four, and now on the file in the office of Secretary of State.

"Article second, The commissioners on their part engage in behalf of the State to furnish the Catawba Indians with a tract of land of the value of $5,000.00, 300 acres of which is to be good arable lands fit for cultivation, to be purchased in Haywood County, North Carolina, or in some other mountainous or thinly populated region, where the said Indians may desire, and if no such tract can be procured to their satisfaction, they shall be entitled to receive the foregoing amount in cash from the State.

Article third, The commissioners further engage that the State shall pay the said Catawba Indians $2,500.00 at or immediately after the time of their removal, and $1,500.00 each year thereafter, for the space of nine years. In witness whereof the contracting parties have hereunto set their hands and affixed their seals this thirteenth day of March, Anno Domini one thousand eight hundred forty, and in the sixty-fourth year of American independence.

(Signed) John Springs (L.S.), signed D. Hutchinson (L.S.), (Signed) E. Avery (L.S.), (signed) B. L. Massey (L.S.), (signed Allen Morrow (L.S.), (signed) James Kegg, Gen. (L.S.), (his x mark), (signed) David Harris, Col. (L.S.) (his x mark), (signed) John Joe, Major (L.S.) (his x mark), (signed Wm. George, Capt. (L.S.) (his x Mark), (signed) Philip Kegg, Lieut. (L.S.) his x mark), J. D. P. Currence for Sam Scott, Saml. Scott, Col. (L.S.) (his x mark), H. T. Massey for Allen Harris, Allen Harris, Lieu. (L.S.).

"Witness of those two signatures."
Recorded 21st December, 1843.

(*It is interesting to note, in passing, that in early Colonial days the Catawba Tribe took over from European culture the practice of assuming titles of royalty for its tribal leaders. After the Revolutionary War, the Tribe expressed its patriotic Americanism by dropping all royal titles and assuming military ones).

ANNEX

State of South Carolina
York District

Know all men by these presents that I, Jacob M. Clawson for and in consideration of the sum of $826 to me in hand paid receipt whereof is hereby acknowledged have this day granted, bargained and sold to Cadwallader Jones, his heirs and assigns the within mentioned tract of land containing one hundred three acres and a half leased to me by the chiefs and commissioners of the Catawba Indians and I do hereby covenent with the said Cadwallader Jones, his heirs and assignees that I, the said Jacob M. Clawson have good title and power to grant and assign the said tract of land to the said Cadwallader Jones, his heirs and assigns for the residue of the ninety-nine years not yet expired and I do furthermore warrant that the said tract contains the said quantity of one hundred three acres and a half according to the within or annexed plat. In testimony whereof I have here unto affixed my hand and seal this the sixth day of October, one thousand eight hundred and thirty one.

(Sgd) J. M. Clawson

Signed seal and delivered in
presence of: Thomas Ellis

LEASES

South Carolina,
York District

Know all men by these presents that we the head men of the Catawba Nation with and by the consent of our Nation on in and for the annual rent of $1.50 or the value thereof in trade to us paid or to someone of our Nation by Jacob H. Clawson, his heirs, or administrators or assigns, do lease, grant and confirm unto the said J. H. Clawson, his heirs or assigns a certain tract or parcel of land lying and being in our claim in the State and District aforesaid, containing one hundred three acres and one-half two poles, be the same more or less, for the term and to the end of ninety-nine years from the date of these presents and to a fully ended, beginning at (here follows a description of metes and bounds), to have and to hold said message or tenament of land and premises above granted and every part and parcel thereof, with the appurtenances thereonto belonging, unto the said Jacob H. Clawson, his heirs or assigns to the full end of the above defined ninety-nine years; said J. H. Clawson, his heirs, or administrators or assigns, yielding and paying the above defined rent yearly and annually, if not beforehand paid; we do warrant and defend the above defined premises unto the said J. H. Clawson, his heirs or assigns, from us, our heirs or any person or persons claiming the same or any part thereof lawfully; nevertheless reserving for ourselves and our Nation on failure of non-payment of the above rent six months after it becomes due and no distress of property to be found on said premises that we will then reenter said premises and repossess them as our right and title, notwithstanding anything herein mentioned. In witness whereof we have hereunto set our hands and seals this twentieth day of May, One thousand eight hundred and thirty one and the fifty-fifth year of Independence of the United States of America. Be it understood by both the contracting parties at the time of signing of these presents that in case of any difference or obligation arising between two or more persons either by interlocking of liens or otherwise that the Indian chiefs or heirs, successors or legal representatives and superintendents shall be liable to no cash or damages that may arise by such a difference of obligation. In witness whereof we have set our names and affixed our seals, etc.

Done in the presence of
Superintendents commissioned
according to law:

Joshua Garrison
William White
John Massey

Head men and Acting Chiefs:

*General Jacob Ayers (his mark)
Colonel William Ayers " "
Major Jess Ayers " "
Captain James Patterson " "

Jacob H. Clawson

Office of Secretary of State,
Columbia, S.C., Jan. 25, 1896.

I, D. H. Tompkins, secretary of state, certify the foregoing to be a true copy of a treaty made with the Catawba Indians, and recorded in this office in Vol. II of Miscellaneous Records, page 234.

Witness my hand to the great seal of State.

D. H. Tompkins, Secretary of State.

not include the names of any of those members who may have been more than one-half Indian blood but less than one-half Osage Indian blood. The list prepared in 1929 was used as the basis for making the payments required to be made by section 3 of the 1929 act. The practical construction of section 3 of the act was, therefore, that the section required payment only to enrolled members of the Osage Tribe of less than one-half Indian blood and not to require payment to persons of more than one-half Indian blood but less than one-half Osage Indian blood.

I understand that several enrolled Indians in this latter category were not issued certificates of competency in 1939. I understand further that when Indians falling within this category have died, their funds have been handled, during the course of administration of their estates, under the first provision of section 4 of the 1929 act.

Thus, it may be said that the Department has, for a period of 15 years, consistently construed sections 3 and 4 of the 1929 act in a manner which retains control over the funds of members of the Osage tribe of one-half or more Indian blood, regardless of their quantum of Osage Indian blood.

In my opinion, the Department's practice of considering Indians such as Andrew Baconrind as coming within the first provision of section 4 of the act of March 2, 1929, *supra*, has been proper and I see no reason why the Secretary should not continue to exercise his discretion in the matter of turning their funds over to administrators or executors.

However, it seems unfortunate to me that you did not adopt my suggestion that you recommend to the Secretary that he exercise his discretion in this case and turn the money over to the administrator of the Andrew Baconrind estate in view of the fact that none of Andrew Baconrind's probable heirs is a restricted Indian. You state that the Superintendent of the Osage Agency raised the question of whether or not such action in this case would set a precedent which might affect estates in which restricted Indians might be interested. I can see no such danger. Every time the Secretary exercises his discretion as to whether or not he will turn over to an administrator or an executor the funds of a deceased Osage Indian of more than one-half Indian blood that discretion is based on the facts and circumstances of the case in which he is exercising his discretion. Since the facts and circumstances vary with each case, no case becomes a precedent for another.

Solicitor.

FOWLER HARPER,

QUESTIONS OF THE CATAWBAS' IDENTITY AND ORGANIZATION AS A TRIBE AND RIGHT TO ADOPT IRA CONSTITUTION

April 11, 1944.

Memorandum for
Assistant Secretary Chapman:

The attached letter which Commissioner Collier recommends that you sign would authorize the Catawba Indian tribe of South Carolina to organize and adopt a constitution under the act of June 18, 1934. I concur in this recommendation.

I am somewhat disturbed by a statement in Commissioner Collier's letter of transmittal. He states that "The Federal Government has not considered these Indians as Federal wards." If by this statement the Commissioner implies that the Catawba tribe has not been recognized by the Federal Government, I must disagree. Indeed if such were the case, the tribe could not now take advantag of the act of June 18, 1934. I find, however, that the tribe has received Federal recognition. The problem can be broken down into two questions. In the first place, is there a political organization which can properly be characterized as a tribe in the commonly accepted meaning of that term? In the second place, has there been Federal recognition of tribal existence? The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. The Indians have done business as a tribe and the relationship between the tribal organization and its members conforms to the usual tribal pattern. There can be no doubt that the Catawba Indians now exist as a tribe and have had a known tribal existence for almost a century.

The Congress has recognized the existence of the Catawba Indian Tribe in two enactments, the act of July 29, 1848 (9 Stat. 252, 264), and the act of July 31, 1854 (10 Stat. 315, 316). These acts appropriated funds for the removal of these Indians west of the Mississippi River, apparently for settlement among the Choctaw and Chickasaw tribes in the Indian Territory. The monies thus appropriated were never used. Had the plan been carried out, it might well have been that the Catawba Indians would have lost their identity as a tribe by becoming adopted or amalgamated with other tribes. As it turned out, however, they did not lose their identity and have retained their tribal organization ever since. It is to be observed that the act of July 29, 1848, makes specific reference to the Catawba *Tribe* of Indians. And al-

though the act of July 31, 1854, referred only to the "Catawba Indians," it seems that at that time it was a practice of legislative draftsmen to refer to almost all tribes in such terms, a practice which is occasionally followed to this day.

I am persuaded, therefore, that the Catawba Indian Tribe exists, as such, and that it has received recognition by the Federal Government. The Catawba Indians are therefore entitled to vote on the constitution which would be submitted to them by the attached letter of transmittal.

FOWLER HARPER,
Solicitor.

RAILROAD RIGHTS-OF-WAY—LIABILITY FOR DAMAGES

April 25, 1944.

Memorandum for the Commissioner of Indian Affairs:

I am returning herewith for your further consideration papers relating to a claim on behalf of C. B. Suzen Timentoe, an Indian of the Colville Reservation, which you forwarded for transmittal to the Attorney General.

It appears from the attached materials that on March 24, 1942, Mr. Timentoe's seven-year-old milk cow was struck and killed by Train 254 of the Great Northern Railway Company at a point adjacent to the railroad's stock corrals at Malott, Washington. At this point the right-of-way property is fenced along the west boundary line. The railroad is reported to have acquired extra land at this location and installed two tracks thereon to provide facilities for loading livestock at the yards and fruit from the warehouse and packing sheds also located on land owned by the company. There is no fence along the east boundary of the extended property which runs approximately one-half mile before narrowing into the standard right-of-way. Further details of the accident are not set forth.

Mr. Timentoe presented his claim December 12, 1942, and it was declined by the railroad January 21, 1943. Thereafter, the matter was referred to the Superintendent of the Colville Indian Agency who wrote the District Claim Agent of the Great Northern Railway Company September 18, 1943, that the value of the cow had been reliably fixed at $100, and making demand for payment of such sum. In that letter the Superintendent, after referring to a stipulation executed by the company and implying that the company's liability under it is governed by Federal law, pointed out that "State laws are not applicable to Indian land." In response to this letter, counsel for the railroad construed the stipulation to require the company's liability for damages to be measured by the law of the State of Washington and concluded: "As the animal was killed at station grounds, there is no liability under the state law." Subsequent discussion of this matter has seemingly proceeded on the assumption that counsel had correctly stated the extent of the railroad's liability under the law of Washington.

On the basis of the facts disclosed, this assumption may not be justified. Under sections 10507–10509 of Remington's Revised Statutes of Washington,[1] common law rules of tort liability have been modified only in so far as railroads have been affirmatively required to fence certain portions of their rights-of-way, the failure to fence being made prima facie evidence of the railroad's negligence in actions for killing livestock. These statutes, the court said in *Hansen* v. *Northern Pacific Railway Company*, 90 Wash. 516, 517, 156 Pac. 553 (1916), do no more "than make the killing of stock upon an unfenced right of way *prima facie* evidence of negligence. The object of the statute is twofold, to put the burden of proof upon the railroad company where stock is killed upon its right of way, and to protect those who operate and travel upon trains from the hazard of derailment and other accidents." See also *Jolliffe* v. *Brown*, 14 Wash. 156, 161, 44 Pac. 149 (1896), where, in construing an earlier but similar statute, the court said that "Where the fact of the killing has been proven, it shifts the burden of proof as to negligence upon the defendant."[2]

Section 10507 specifically imposes upon every railroad "outside of any corporate city or town, and outside the limits of any sidetrack or switch," the duty of constructing and maintaining in good repair "on each side of said railroad, along the line of said right of way . . . a substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, and on each end of such sidetrack or switch, outside of any incorporated city or town, a sufficient cattleguard . . ." In *Benn* v. *Chicago, Milwaukee & St. Paul Railway Company*, 89 Wash. 522, 154 Pac. 1082 (1916), three colts were killed by a train on a "side or passing track" along which the railroad

[1] These sections codify the provisions of an act of 1903, amended to include electric railroad companies, in 1907.

[2] This earlier statute was held to have been repealed by implication when the 1903 act was passed. *Huffman* v. *Oregon Railroad & Navigation Company*, 57 Wash. 494, 207 Pac. 362 (1910).

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

Honorable James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This letter constitutes a request for your Department to institute legal action on behalf of the Catawba Indian Tribe to recover its reservation in South Carolina. The issue in this litigation is whether South Carolina's attempt to acquire title to the Catawba reservation by virtue of an 1840 Treaty was valid under the Non-Intercourse Act, 25 U.S.C. § 177. We conclude that the Tribe can establish a prima facie case under the Non-Intercourse Act, that the 1840 Treaty was void, and that the Tribe is therefore entitled to recovery of its reservation.

The Catawba claim is for approximately 140,000 acres (or 15 miles square) to which they have had a vested property right since 1763. Prior to that date, the Tribe occupied and controlled a much larger area by aboriginal title. However, in 1763, the Tribe relinquished their claim to the larger area in return for Great Britain's assurance that they would have unmolested possession of the 15 mile square reservation. When the United States succeeded to Great Britain's sovereignty in 1783, our new government did not abrogate the 1763 Catawba Treaty. Therefore, according to settled rules of international law, which are acknowledged by the U.S. Supreme Court, the Catawba retained a vested right in their reservation, as sacred as the fee simple of a non-Indian, which the United States Government was bound to respect. See Mitchel v. United States, 9 Pet. (34 U.S.) 711, 733 (1835).

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

Exhibit J
July 2, 1993
House Hearings - H.R. 2399

The successive Non-Intercourse Acts, enacted to protect Indian property by requiring federal consent to the attempted conveyance of any Indian lands, were as applicable to the Catawba reservation as to any other kind of tribally held land. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (C.A. 1 1975). By 1840, the Catawba's treaty reservation was overrun by non-Indians who continually ignored the Tribe's protests; non-Indians also occupied the reservation lands under a state instituted leasing system whereby the lessees owed rent to the Catawba but often did not pay it. In 1840, the Tribe finally purported to convey their remaining title and interest in the 140,000 acres to the State of South Carolina by treaty. The federal government was in no way involved in the negotiations and never subsequently gave its consent. The 1840 conveyance was therefore void under the Non-Intercourse Act. Shortly after the 1840 Treaty, the Tribe sought return of the reservation stating the Treaty was procured by duress, that the terms were unfair and that the State wasn't meeting its obligations under the Treaty. Under the Non-Intercourse Act, the United States, as protector of Indian held lands, had the duty to protect the Catawba reservation, to set aside the 1840 Treaty if it didn't consent to it, and to assist the Catawba in recovering their lands. Passamaquoddy, supra.

The United States has never taken any action to fulfill its duty to help the Catawba recover the land. In fact, the Department of the Interior has twice refused, in 1906 and 1908, to take action when the Tribe's lawyers pointed out the Tribe's claims under the Non-Intercourse Act. But mere lapse of time and failure of the federal government to act cannot eradicate either the Catawba's rights to their land or the federal government's continuing duty to help them get it back. The Act of September 21, 1959, which terminated federal services to the Catawba and the applicability of federal Indian statutes similarly did not extinguish the 1840 Treaty claim or the government's duty of protection. The termination language in that 1959 statute is prospective and does not affect pre-existing legal rights. Moreover, the Supreme Court in Menominee Tribe v. U.S., 391 U.S. 404 (1968), and in many other Indian land cases, required clear evidence of Congressional intent before finding an abrogation of Indian rights. The legislative history of the 1959 Act shows that Congress, as well as the administering

agency, believed the Act was passed for one reason--to liquidate a 3400 acre reservation and to terminate limited federal benefits both of which were created by a 1943 agreement between the Tribe, the State of South Carolina, and the Department of the Interior. In short, the 1959 Act was a means of dissolving the legal relationship set up by that 1943 agreement. In fact, Congress was unaware of the status of the 1763 treaty reservation, of the Non-Intercourse claim pertaining to it, and finally of its own duty under the Non-Intercourse Act to protect the reservation. The Tribe itself certainly did not contemplate the 1959 Act as a means of cutting off their legal claims to the 1763 reservation because they stipulated, in the petition which gave rise to the 1959 legislation, that those claims should not be affected.

The action we hereby recommend is that the United States finally act upon its long neglected duty under the Non-Intercourse Act to nullify the 1840 Treaty with South Carolina and restore possession of the 1763 Treaty reservation to the Catawba Tribe.

An alternative source of the United States' duty to bring this suit to quiet title to the 1763 reservation arises from the 1959 Act itself. Since 25 U.S.C. § 935 did not abrogate the Catawba's Non-Intercourse Act claim, the 1763 reservation might be a tribal asset subject to the distribution provisions of 25 U.S.C. § 933, as was the known 3400 acre reservation. It would therefore be incumbent upon the Secretary, under § 933, to bring legal action to settle ownership of the 15 mile square reservation so that he could later determine whether that reservation should be conveyed to tribal members under § 933(d) or sold pursuant to § 933(f).

We recommend that the appropriate cause 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 attached materials include legal research by our staff attorneys and historical materials that should aid in your preparation of the case.

We recommend that you meet with us as soon as possible, and with the Tribe's representatives, to discuss the handling of the claim. The Tribe has already held several meetings with the South Carolina Governor and Attorney General to discuss settlement of the claim. We understand that discussions have reflected a mutual intent to resolve the matter in a way that would satisfy the parties without endangering the State's economy or interfering with the orderly development of residential and industrial real estate. Since we agree with that approach, we should inform all concerned parties that we concur in the validity of the Catawba claim, that we would prefer an amicable, orderly settlement to lengthy, disruptive litigation, and that we will lend immediate assistanc in negotiations for a just and model settlement.

Sincerely,

Solicitor

Attachments

Litigation Report Regarding The Catawba Land Claim

Introduction

The Catawba Tribe has asked this Department to recommend legal action on its behalf against the State of South Carolina and individual titleholders to recover approximately 140,000 acres of their original reservation. After independent research and review of historical materials, we conclude that the Tribe has a cause of action under the federal Indian Non-Intercourse Act (25 U.S.C. § 177), in line with the decisions in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (C.A. 1 1975), and Narragansett Tribe v. Southern Rhode Island Development Corp., 418 F. Supp. 798 (1976), for the recovery of its tribal lands which were alienated in an 1840 Treaty with South Carolina without the consent of the United States Congress. We further conclude that the United States has an obligation to bring an action on behalf of the Tribe to obtain return of their lands to tribal ownership.

The Catawba claim that the Tribe had recognized title to a 15-mile square 144,000 acre reservation in South Carolina. This title was confirmed by a 1763 Treaty with Great Britain. The United States has never abrogated the 1763 Treaty, either in the treaty of cession from Great Britain or in any subsequent action. By 1800, the major part of the reservation was illegally settled by non-Indians in spite of federal, tribal, and colonial efforts to stop such trespass. In the early 1800's, South Carolina attempted to regulate settlement on the reservation by enacting leasing laws under which the settlers had to sign leases with the Tribe for 99 year terms. These leases noted the Tribe's reversionary interest. In 1840, South Carolina concluded a treaty with the Tribe (Treaty of Nation Ford) for the remaining interest the Tribe held in the leased reservation. Federal consent to the Treaty was never obtained. Following the 1840 Treaty, the State purchased a 630 acre tract which it still holds in trust for the Catawba Tribe.

Exhibit K
July 2, 1993
House Hearings - H.R. 2399

The Tribe has argued to both the State and this Department since the late 1800's, that the 1840 Treaty with South Carolina is void for lack of federal consent, that the terms of the Treaty are unconscionable and that South Carolina failed to adhere to the terms of the treaty; in short, the Tribe has maintained that it is entitled to return of the 15-mile square reservation the State illegally attempted to acquire by the 1840 Treaty. Their claim against the State under the Indian Non-Intercourse Act has not been abrogated by any Congressional action, including a 1959 statute which terminated a 3,434 acre reservation set up for the Catawba in 1943 pursuant to an agreement between this Department, the Tribe, and South Carolina. The Tribe, therefore, seeks recovery of the original 144,000 acre reservation less the 3,434 acres terminated in 1959; the Tribe also seeks money damages.

The following litigation report contains a factual summary and following that, a discussion of the relevant law.

Factual Background

The litigation request submitted by Native American Rights Fund (NARF) contains a well-documented history of the Catawba Nation and its relations with the various governments. This factual summary highlights significant historical facts with page references to historical documents and to lengthier discussions contained in the NARF litigation request.

The claimed 15-mile square reservation is part of a larger area that had been occupied by bands of the Catawba Nation since at least the mid-16th century (pages 14-18). During the 1700's, the Catawba Nation became a strong ally of Great Britain and of the province of South Carolina, acting as a buffer against other more hostile tribes and providing a safe trade route for the colony. Good relations thus prevailed between the Tribe, South Carolina and Great Britain, and documents from this period attest to recognition by Great Britain and South Carolina of Catawba occupancy of the area (pages 25-26). In 1754, the Governor of South Carolina, who had been receiving complaints from the Catawba about non-Indians encroaching on their lands, drew a protective area of a 30 mile radius around the Catawba Town as reserved for the Indians and ordered North Carolina to keep its settlers off that land. (Vol. I, Attach. B-2, B-3) However, non-Indians continued to move onto Catawba land in defiance of the Governor's order. The continuing encroachment stemmed in part from an ongoing boundary dispute between North and South Carolina. Therefore, in an attempt to settle the boundary dispute and instill order in the colonial settlements, Great Britain sought a treaty with the Catawba. The British Superintendent of Indian Affairs reported concluding a treaty with the Tribe in 1760 (Treaty of Pine Hill). While the treaty has not been located, its terms, as described in a message to the South Carolina legislature, settled the Catawba on the currently claimed 15-mile square reservation, in return for their relinquishment of claims to the larger area (Vol. II, Attach. EE). Shortly thereafter, with the conclusion of the French and

Indian War, the Indian tribes were greatly concerned about how Great Britain would treat their occupancy rights. In order to quell uprisings by the Indians, the King issued a Royal Proclamation in 1763 asserting sovereignty over Indian lands and prohibiting alienation of those Indian lands not ceded to or purchased by Great Britain except with its consent. (Page 33) In the same year, the British Superintendent and Colonial Governors were directed by the King to meet with several tribes to allay their fears and assure them that Great Britain would protect their lands. As a result of that meeting, the Crown concluded a second treaty with the Catawba, in 1763, specifically confirming the 15-mile square reservation and assuring the Tribe that they would not be molested in their possession of the area. (Page 36)

Nonetheless, non-Indians continued to move onto Catawba land without tribal or government permission. While government efforts to prevent the encroachment were futile, they at least evidenced continued recognition by South Carolina and the British Government that the Catawba held title to the land. 1/

1/ E.g., in 1771, following numerous complaints by the Catawba, the Governor of South Carolina issued a proclamation ordering all colonial officials to be diligent in protecting the Indians' treaty rights confirmed in the 1763 Treaty of Augusta (Vol I. Attach. T). In 1772, a plan was proposed to the South Carolina legislature for a non-Indian (Drayton) to lease the entire reservation so that he could then better control the non-Indian settlers. The British Superintendent learned of the plan and opposed it as being an alienation of Indian land without British consent, and thus a violation of the 1763 Royal Proclamation. The King approved the Superintendent's action (Vol. II, Attach. II). In 1773, the Catawba met with the South Carolina Lieutenant Governor concerning continuing encroachment on the lands. The record of the meeting indicates the following understanding on the part of the Tribe and South Carolina:

In 1782, the Catawba Nation petitioned the Continental Congress for protection of their 15 mile tract. They had fought on the side of the colonies during the revolution, had fled to Virginia to escape the British--their former ally--and had then returned to their reservation to find even increasing settlement by non-Indians. Congress responded to the Catawba petition in 1783 by directing South Carolina to take whatever measure it thought suitable for the satisfaction and security of the Tribe in the lands reserved for their use.

Despite the enactment of the Non-Intercourse Act in 1790, which reserved federal jurisdiction over Indian land transactions, South Carolina began regulating the leasing of the Catawba Reservation pursuant to a series of statutes enacted from 1808 through 1838. While one of those statutes actually declared the 99 year leases to be the equivalent of a freehold, these statutes, as well as the form leases commonly used, (Vol. II, F-89, G-20) explicitly recognized the Catawba's interest in the reservation. (See Dept. of Interior Memo, Vol. I, G-13 et seq.)

By this time, the strength of the Catawbas was greatly reduced by disease and war; their land base was eroded against their protests, first by unauthorized settlement and then under a State leasing system. Even when the Catawba agreed to rent, rents were often never paid or were paid in whiskey or relatively worthless household goods. In 1840, the State concluded a treaty with the

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(Footnote 1 cont'd.)

> . . . it was no such thing for [the Catawbas] would not part with their lands to any people whatsoever, that as long as any Indian remained the Land was to belong to them but if they were Dead the Land should belong to the King. . .
> (Vol. I, Attach. R).

Tribe for cession of all the Catawba's remaining right, title and interest in the 15 mile square reservation (Vol. II, Attach. KK and LL). The Treaty, as discussed infra in Part B, was never consented to or ratified by Congress. Under the terms of the Treaty, the State agreed to pay $5,000 for a new reservation in North Carolina, to pay the Catawba $2,500 at the time of the removal and $1,500 annually for a term of nine years. The consideration offered by the State was considerably less than the rental money due the Catawbas under the remainder of the 99 year leases. The Catawba Nation has continually asserted that such terms were unconscionable and that they were procured by duress. Furthermore, the Catawba argue that the terms of the Treaty have not been met because the State never purchased a reservation in North Carolina. Instead, the State purchased a 630 acre tract in the midst of the ceded 15-mile square reservation for the sum of $2,500. This tract is still considered the State reservation.

The strength of the Tribe declined further after the 1840 Treaty, with some tribal members seeking refuge outside South Carolina. In 1848, and again in 1854, the United States authorized appropriation of funds to remove the remaining Catawba west of the Mississippi. 9 Stat. 264; 10 Stat. 316. However, the funds were never appropriated and no official removal program ever took place. This is discussed in Part B, infra.

In 1904, the Tribe retained an attorney, Chester Howe, to press their Treaty claims. Howe petitioned the Department of the Interior to institute action on behalf of the Catawba for return of the 15 mile square reservation on the grounds that the 1840 Treaty was void under the Non-Intercourse Act and that the State failed to adhere to the terms of the Treaty (Vol. I, Attach. G-19). The Department denied any obligation to represent the Tribe and advised Howe to press the claims against the State (Vol. I, Attach. G-95). The Tribe presented its argument to the South Carolina legislature which ordered the State Attorney General to examine the legality of the

1840 Treaty. In 1907, the Attorney General concluded that the 1840 Treaty was valid because tribal members were State Indians with no more than a right of occupancy on the lands. (Vol. I, G-1) In 1908, the Tribe again petitioned Interior to institute action on their behalf for the recovery of their reservation. They were denied (Vol. I, F-103, F-104) again on the grounds that no relationship existed between the Federal government and the Tribe, and on the grounds that the Tribe's claims were against the State and the Federal government should not become involved. (Vol. I, F-101)

During the 1930's, the Catawba and the State joined in efforts to secure an agreement whereby the Federal government would undertake rehabilitation of the Tribe. Two bills were introduced in Congress to secure a fiduciary relationship between the Tribe and the government, but the bills were never reported out of the appropriations committee, due perhaps to Interior Department opposition. (Report of South Carolina Representative Richards, Vol. I, H-1) The Department continued to deny a fiduciary relationship and declined to provide assistance to the Tribe without specific Congressional direction. (Bradford Report, Vol. 1, G-42) However, an agreement between the Department, the State, and the Tribe was negotiated in 1943 pursuant to which the State purchased lands and conveyed them to the Federal government in trust for the Tribe. The Catawba were also permitted to organize a tribal government under the Indian Reorganization Act (IRA), and the Department agreed to provide limited federal services (Vol. 1, G-71). The agreement was designed only to effect a limited rehabilitation program and the Department claimed not to recognize or undertake any general trust relationship with the Tribe by virtue of the agreement. Significantly, the Department refused, on the advice of the Solicitor (Attach. TT, Vol. II), to include a provision in the agreement extinguishing the Tribe's treaty claims against the State, even though the State wanted such a condition inserted in the agreement. (Vol. I, G-60, G-61)

The relationship created by the 1943 agreement lasted only 16 years. In 1959, the Catawba Tribe petitioned for removal of federal restrictions on its land and for division of its assets (consisting primarily of the 3,434 acre reservation). Significantly, in its petition, the Tribe specified that it wanted this done without jeopardizing its treaty claims against the State. (Vol. II, Attach. UU) In response, the Interior Department drafted a bill which was enacted in substantially the same form (25 U.S.C. § 931 et seq.). The act provided for distribution of tribal assets, removal of restrictions on marketability of the 3,434 acre reservation, and cessation of federal services, but it preserved the rights of the Tribe and its members under South Carolina law. This is discussed in Part C, infra.

Discussion

There are four elements of a prima facie case under the Indian Non-Intercourse Act which are suggested in the Narragansett opinion:

(1) the claimant is a "tribe of Indians" within the meaning of the act;

(2) the land claimed is covered by the Act as tribal land;

(3) the United States has never consented to its alienation; and

(4) the protection of the Non-Intercourse Act, including the Federal government's duty under the Non-Intercourse Act to protect reservation land, has never been terminated. 418 F. Supp. 798 at 802.

The first element requires little discussion. The Catawba Nation was an important Eastern tribe dominating much of South Carolina for at least a century prior to the Treaty

of 1763. It was treated as such by the British and colonial government, and the State of South Carolina has continually recognized and treated the Catawba as a tribe from the 18th century through the present day. In fact, the State still holds a 630-acre reservation for them.

A. The Land Claimed is Covered by the Act as Tribal Land.

The protection of the Non-Intercourse Act applies to Indian land whether the title thereto rests on aboriginal ownership or formal government recognition thereof by treaty or statute. U.S. v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941). The extensive and well-documented history of the Catawba establishes that the Catawba Nation had both aboriginal and recognized title to the area, and its lands are therefore clearly within Non-Intercourse Act protection. The Catawba's claim to the land is based on recognized title acquired by virtue of the 1763 Treaty in which Great Britain confirmed the Catawba's exclusive right to the area which they had occupied since the early 1600's. (See letter written in 1772 by the British Superintendent who negotiated the 1763 Treaty (Vol. II, Attach. HH).)

The legal significance of Indian title which is confirmed by treaty with Great Britain was discussed by the United States Supreme Court in Mitchel v. United States:

> By thus holding treaties with these Indians, accepting of cessions from them with reservations and establishing boundaries with them, the King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged That the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such and such only as were stipulated by these treaties. 34 U.S. (9 Pet.) 711, 745 (1835).

Furthermore, such Indian title survived the American Revolution and the resulting change in sovereigns:

> "That by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed." Mitchel v. U.S., supra at 733.

> "When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants of whatever description whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have vested in Great Britain or Spain; for they had been solemnly renounced, new relations established between them by solemn treaties; nor did they take possession on any such assumption of right; on the contrary, it was done under the guarantee of Congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection. Mitchel v. U.S., supra at 753. See also Worcester v. Georgia, 6 Pet., 515, 560 (1832).

The Catawba's treaty title also survived the unsettled period immediately following the Treaty of Paris and prior to the ratification of the Constitution, when the Federal government was in its formative stages. Even if South Carolina could have extinguished Indian title to the treaty reservation during that period, an arguable point, it did not do so. In fact, the state legislature enacted a series of statutes during the period from 1808 to 1838 to control the leasing of the Catawba's 15-mile square reservation and in so doing recognized the Tribe's interest in the reservation. More significantly, the Treaty of 1840 itself shows that South Carolina believed it had to purchase the Catawba title to the 15-mile square tract. 2/

2/ It should be noted that our conclusion that Catawba lands recognized by the Treaty of 1763 are protected by the Non-Intercourse Act is contrary to the views of this Department in 1904 and those of the Attorney General of South Carolina in 1907. The 1907 opinion was based on the premises that the Catawba were so-called "state Indians" with a mere right of occupancy, that their reservation was reserved in a 1763 Treaty with the State, and that no federal treaty right existed. He, therefore, concluded the Non-Intercourse Act did not apply to the Catawba reservation and that the State always had the authority to deal with the Catawba reservation as it wished. The South Carolina Attorney General obviously did not understand that the 1763 Treaty was concluded under the authority of the British Government, nor did he appreciate the legal significance of that fact. And, as to the "state Indian" concept, the Passamaquoddy and Oneida decisions have made it clear that the Non-Intercourse Act did apply to Indian lands within the boundaries of the 13 colonies.

B. The United States Has Never Consented to Alienation of the Catawba Treaty Reservation of 1763.

Section 12 of the 1834 Non-Intercourse Act, in effect at the time of the 1840 Treaty of Nation Ford, required federal consent to validate any purported transfers of Indian title. But, Congress did not ever consent to or ratify the 1840 Treaty. The only federal legislation passed during the period, concerning the Catawba, consisted of two statutes authorizing the appropriation of funds for removal of the Catawba west of the Mississippi:

> Catawba Indians.--For the removal of the Catawba Tribe of Indians, now in the limits of the State of North Carolina, to the Indian country west of the Mississippi, with the consent of said tribe, under the direction of the President of the United States, a sum not exceeding five thousand dollars: Provided, No portion of this sum shall be expended, for the purpose of removing said Indians, until the President shall first obtain a home for them among some of the tribes west of the Mississippi River, with their consent, and without any charge upon the government. 9 Stat. 264 (1848).
>
> For the reappropriation for expenses of the removal of the Catawba Indians to west of the Mississippi River, and of settling and subsisting them one year in their new homes, provided that a home shall first be obtained for them, and that they shall be removed only with their own consent, five thousand dollars. 10 Stat. 316 (1854).

No removal program was ever carried out.

The question is whether these two statutes constitute Congressional ratification of the Treaty of 1840. We conclude not. First, neither the language of the acts nor the meager legislative history refer to the 1840 Treaty of Nation Ford. Secondly, an 1854 report written by the South Carolina Indian Agent shows that by this time the Catawba were homeless and nomadic and suggests that the removal of the Catawba might serve to reunite and rehabilitate them. (Vol. II, Attach. Z)

In U.S. ex rel Walapai Tribe v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941), the Supreme Court considered whether Congress had intended to extinguish the aboriginal title of the Walapai Tribe to certain lands when it set up a new reservation for them elsewhere:

> That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in Choate v. Trapp, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith . . . . " 314 U.S. 339, 354.

One of the statutes examined by the Supreme Court in that case was an 1865 statute creating a new reservation further west for the Indians, including the Walapai. Legislative history indicates that Congress had been informed that this new reservation was being proposed as a substitute for other lands being claimed by the Indians. Still the

Supreme Court refused to read into this removal statute Congressional intention to abolish Indian title to those other claimed lands without more specific evidence of extinguishment:

> "We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home." 314 U.S. 339, 353.

The Catawba removal statutes certainly offer less evidence of a Congressional intent to extinguish title than was apparent in Walapai Tribe. There is no evidence in Catawba that removal was offered as part of a land exchange. Without more specific reference to the prior 1763 Treaty reservation or to the 1840 Treaty with the State, it would be a flagrant violation of settled case law to infer that Congress intended the removal statutes as ratification of the 1840 Treaty and extinguishment of Catawba title to the 1763 reservation.

A minor question is whether the 1943 Agreement signed by the Department, the State and the Tribe, providing for creation of a new federal reservation constituted U.S. consent to the 1840 Treaty. But, case law establishes that executive action alone, such as this 1943 agreement, is insufficient to extinguish Indian title. Walapai Tribe, supra. Moreover as discussed at page 8 infra, the Solicitor advised the Department to exclude from the 1943 Agreement a provision which was requested by the State to extinguish any of the Tribe's treaty claims against the State.

A second but related question is whether the failure of Congress to take any other action outside of the removal statutes concerning the Catawba amounted to federal acquiescence sufficient to extinguish title. We think the strong position taken by the Supreme Court in U.S. v. Santa Fe Pacific R. Co., as discussed above, is sufficient indication that certainly federal silence or failure to act cannot be equated with consent to the extinguishment of Indian title. See also Turtle Mountain Band of Chippewa v. United States, 490 F.2d 935 (1974). Nor does Congressional failure to act indicate that Congress believed the Catawba lands were not ever within the federal Non-Intercourse Act protections:

> Similarly, Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Non-Intercourse Act should not apply. Passamaquoddy v. Morton, supra, 528 F.2d at 378.

Finally, the voluntary and sporadic assumption of responsibility for the Catawba by the State of South Carolina and any constructive knowledge of that fact on the part of the federal government has no bearing on whether Congress ratified the 1840 Treaty. A similar proposition was treated in the Passamaquoddy decision:

> But as the district court recognized, Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed. Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection. . . 528 F.2d at 378.

Thus, there is no Congressional action which can be equated with the federal consent necessary to validate the 1840 Treaty.

C. Non-Intercourse Act Protections of the 1763 Treaty Reservation Have Not Been Terminated

The critical issue with respect to the Catawba claim is whether Congress terminated the Non-Intercourse Act protection of the 1763 treaty reservation and thereby abrogated the 1840 treaty claim when it enacted the Act of September 21, 1959 (25 U.S.C. §§ 931-938). A variation of this issue is whether Congress preserved the 1840 claim but terminated the federal obligation to assist the Catawba in the prosecution of their claims. The act authorized the preparation of a final roll of the members of the tribe (Section 1; 25 U.S.C. § 931), a division of tribal assets among its members (Section 3; 25 U.S.C. § 933), and the execution of the conveyancing instruments necessary to convey marketable, recordable, and unrestricted titles to tribal property disposed of pursuant to the act (Section 4; 25 U.S.C. § 934). It is commonly referred to in this Department as the Catawba Termination Act, though Congress did not give the legislation that name; nor is there any reference to "termination" in the committee reports or in statements in the Congressional Record prepared or made in connection with the consideration and enactment of the legislation. Nevertheless, there are marked similarities between this act and other enactments of Congress during the 1950's which explicitly terminated federal supervision over certain Indian tribes.

The provision of the act which concerns us is section 5 (25 U.S.C. § 935) which states:

> "The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be

> inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title, however, shall affect the status of such persons as citizens of the United States."

This language, especially the second sentence, is boilerplate in the termination acts of that era. The clause "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them," raises the question whether Congress terminated coverage of the Non-Intercourse Act, leaving the Catawba without federal protection of their 1763 reservation and essentially therefore abrogating the 1763 treaty reservation. An alternative question is whether the prospective language of that clause left the 1840 Non-Intercourse Act claim unaffected but terminated the concomitant, unfulfilled federal obligation to assist the Catawba in the prosecution of that claim.

We conclude that § 935 did not alter in any way Non-Intercourse Act protections of the 1763 treaty reservation, including the federal responsibility to assist the Catawba in quieting title to the reservation. We rely strongly on the Supreme Court's interpretation of the Menominee Termination Act in the case of Menominee Tribe v. United States, 391 U.S, 404 (1968). That act (25 U.S.C. § 899 (1970), repealed by § 3(b) of the act of December 22, 1973, 25 U.S.C. § 930 a(b)) contains language virtually identical to that in § 935 of the Catawba legislation. The issue was whether that provision abrogated hunting and fishing rights under an 1854 treaty. The Supreme Court ruled that those treaty rights remained intact, stating:

> "While the power to abrogate those rights exists (see Lone Wolf v. Hitchcock, 187 U.S. 553, 564-567. . .) 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Pigeon River Co. v. Cox Co., 291 U.S. 138. . . ." 391 U.S. at 412-413.

We shall demonstrate that the want of Congressional intent to abrogate treaty rights, the practical effect of inferring termination of the Non-Intercourse Act coverage, is more clear in the case of the Catawba than it was with regard to the Menominees.

The rule is: "A congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. 481, 505 (1973). And, "In all cases, 'the face of the Act,' 'the surrounding circumstances,' and the 'legislative history,' are to be examined with an eye towards determining what congressional intent was." Rosebud Sioux Tribe v. Kneip, U.S. Supreme Ct., Docket No. 75-562, decided April 4, 1977, slip opinion at p. 3. Moreover, "any withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975). The face of the Catawba act does not state termination as its purpose. By contrast, Section 1 of the Menominee act states: "The purpose of [this act] is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." 25 U.S.C. § 891 (1970). Thus, only five years earlier Congress had used express language terminating all federal supervision, but did not do so with respect to the Catawba. See also Klamath Termination Act, 25 U.S.C. § 564, et seq. Another anomaly raised by the language of the act is whether the sentence in § 935 where Congress declared Indian statutes inapplicable to the Catawba should be read as including the Non-Intercourse Act since the preceding section, § 934, had already removed the effects of that act, namely restrictions on marketability of property to be distributed under the Act. In light of these ambiguities in the act itself, we must go beyond the language of the Catawba legislation and examine its legislative history. 3/

3/ Apart from the rather clear Indian law precedent, common principles of statutory construction permit us to look behind the wording of the statute. We observe that there is another

The legislative history of the Catawba Act demonstrates that Congress did not regard rights under the 1763 treaty, as well as any protective relationship relating to the 1763 treaty land, as affected by the enactment of the 1959 act. Rather, the focus of the act was distribution of the 3,400 acre reservation purchased and taken in trust by the United States pursuant to the 1943 agreement. Interior Department records reveal a copy of a January 3, 1959, resolution of the Catawba General Council (attached as Appendix A) which states in pertinent part:

> "Whereas, Catawba tribal members have sought aid on complaint that under Federal trusteeship, members held no title to the property upon which they could obtain credit to build homes, or could claim ownership of the property, if they did build them. . . , and
>
> "Whereas the Catawba tribal members desire the division of the 3388.88 acre reservation in York County, South Carolina and its property and assets among the individual members of the tribe on an equitable basis and,
>
> ". . .

(Footnote 3 cont'd.)
latent ambiguity in the subject provision in its application to the Catawba claim. A view of the entire 1959 act indicates that the purpose was to promote Catawba welfare by dividing up tribal assets among the members of the tribe and then subjecting the members to state law. Nothing in the act suggests an intention to abrogate vested Indian rights toward the ultimate benefit of non-Indians, and indeed, that would be contrary to the evident purpose of the legislation. Courts have felt free to examine legislative history in such circumstances, even in the presence of what might be regarded as an otherwise unambiguous statute. E.g., United States v. Schultheis, 486 F.2d 1331, 1333 (4th Cir. 1973); Rosebud Sioux v. Kneip, supra.

> "Now therefore, BE IT RESOLVED that . . . its General Council assembled in regular meeting hereby formally request the Honorable Robert W. Hemphill . . . to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land in York County, South Carolina, so that it can be patented . . . and do all things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claim against their assets, and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." [Emphasis added.]

Thus, the Tribe requested the legislation so that they could finance home construction on the existing federal reservation. See also 105 Cong. Rec. 5462 (April 7, 1959), 105 Cong. Rec. 15583 (August 11, 1959). In accordance with the Tribe's request, the Interior Department drafted legislation (Vol. II, Attach. VV, WW) which was later introduced by Congressman Hemphill and enacted in substantially the same form.

Other Department materials make it clear that the Interior Department interpreted the purpose and effect of the 1959 Act as terminating the federal reservation and services provided to the Catawba pursuant to the 1943 memorandum.

> "The legislative history of the Act of September 21, 1959, 73 Stat. 592 clearly shows that the existence of such agreement was known to the Congress and that the Bureau services to be discontinued under the act were those covered by the subject Memorandum of Understanding. . ."
>
> Memorandum from Solicitor to Commissioner, July 22, 1960.
>
> [emphasis ours]

In the June, 1962 letter informing the Catawba Tribe that their constitution and government were revoked, effective July 1, 1962, the Secretary incorporated a Notice that was suggested by the Solicitor and which reflected the foregoing legislative interpretation:

N O T I C E

"Whereas, the Bureau of Indian Affairs has performed services to the Catawba Indians pursuant to a Memorandum of Understanding entered into with the Tribe and the State of South Carolina on December 14, 1943; and

Whereas such Memorandum of Understanding is to be rendered ineffectual by the Act of September 21, 1959, supra, and since no term was agreed upon in the Memorandum of Understanding,

Now therefore, the Secretary of the United States Department of the Interior hereby gives notice of intention to withdraw from and conclude the Department's responsibilities under the agreement approved December 14, 1943.

The effective date of withdrawal shall be July 1, 1962."

There are no references to the Non-Intercourse Act in the legislative history. And while there are references to the 1763 Treaty, they are inaccurate. Both the House and Senate reports refer to the 15 mile square reservation as "set aside for them by treaty with South Carolina in 1763." H. Rep. 910 at p. 2, S. Rep. 863 at p. 1 (86th Cong., 1st Sess).

This inaccuracy was apparently precipitated by the Interior Department letter to the Committee on Interior and Insular Affairs, reprinted in the committee reports, which contain the same mistake, namely that the treaty was with South Carolina, rather than with the Crown. This error may have led the legislators, as well as the Department of the Interior employees drafting the bill, 4/ to regard any

4/ See 1909 Department of Interior letter, Vol. I, F 101 as discussed infra at page 7.

Catawba claims under that treaty as arising under South Carolina law, for Section 6 of the act provides: Nothing in sections 931-938 of this title shall affect the rights, privileges, or obligations of the tribes and its members under the laws of South Carolina." 25 U.S.C. § 936. This provision would also apply to Catawba rights arising under the 1840 treaty with the State, and it was no doubt regarded as protection in general of the Tribe's claim against the State as requested in the General Council resolution. 5/

If it is concluded that § 935 did not terminate the Catawba's 1840 claim under the Non-Intercourse Act, we further believe that § 935 should not be read as terminating federal responsibility arising from the Non-Intercourse Act to prosecute the treaty claim on the Catawba's behalf. First, the legislative history contains no reference to terminating federal responsibility pertaining to the 1763 treaty reservation. In fact, the House and Senate reports once again contain inaccurate information, based on Department letters to the Committee, stating that no federal trust relationship existed between the federal government and the Catawba. S. Rep. 863, 86th Cong., 1st Sess. This inaccuracy, which is consistent with the Department's views up through 1972, was rejected by Passamaquoddy where the court held that the Non-Intercourse Act itself gave rise to a limited fiduciary duty concerning the tribe's lands.

Secondly, to infer preservation of the Non-Intercourse Act claim but termination of the federal obligation pertaining to the claim one must dissect the Non-Intercourse Act to separate one legal effect of the Act, land protection, from another, the duty of protection.

5/ In fact, the Department of Interior Program Officer, responsible for implementing the Distribution of Assets Act, wrote a memo to the Commissioner of Indian Affairs in which he described § 936 as preserving the Tribe's treaty claims against the State. (Vol. I, Attach. I-13).

> "The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy. . . .and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances. . . .the trust relationship [we affirm] pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act." Passamaquoddy, 528 F.2d 370 at 379.

We do not question the ability of Congress to so alter the impact of the Non-Intercourse Act. But, such alteration of a prior statute, analogous to a repeal by implication, cannot be inferred. Rather, it must be clear. Morton v. Mancari, 417 U.S. 535 (1974). There is no language indicating such alteration of Non-Intercourse Act coverage. And, since Congress did not know (indeed, no one understood before the Passamaquoddy opinion), that the Non-Intercourse Act entailed a specific fiduciary duty, it would be unreasonable to conclude that Congress intended to single out that duty from the other legal effects of the Non-Intercourse Act and terminate it while leaving the statute's coverage otherwise intact. Even if Congress knew in 1959 the Non-Intercourse Act entailed a duty with respect to the protected lands, it is still so unusual for Congress to preserve a federal right while terminating the corresponding federal duty, that there should be clear and substantial indication of such intention. Here both the 1959 Act on its face and the legislative history are utterly devoid of any such suggestion.

Reading this legislative history, it is fair to say that Congress had no idea that the Catawba had any claim under the 1763 treaty by virtue of the Non-Intercourse Act. Nor did Congress realize that any fiduciary relationship existed between the federal government and the Catawba. It must therefore be concluded that Congress did not intend to abrogate any Catawba treaty rights protected by the Non-Intercourse Act or any federal relationship mandating federal protection of these treaty lands. As stated by

the D.C. Circuit in a case examining whether the 1956 Lumbee Act, a statute nearly identical in its language to § 935, implicitly terminated rights previously certified by the Department of the Interior,

> ". . . Congress, being oblivious of these people and their rights, certainly cannot be supposed to have intended to deprive them of those rights without mention of the subject." Maynor v. Morton, 510 F.2d 1254 (C.A.D.C. 1975).

Indeed, all available evidence indicates that Congress intended to leave tribal claims against South Carolina untouched, as the Tribe had requested. The committee reports refer to the Tribe's January 3 resolution and to the fact that the legislation was requested by the Tribe. In circumstances where legislation has been enacted at the request of an Indian tribe, the Supreme Court has placed considerable reliance on the terms of the Tribe's request as indicative of Congressional intent. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 656-58 (1976). Moreover, statutes reflecting agreements with Indians should be construed in a non-technical sense and never to the Indian's prejudice. Antoine v. Washington, 420 U.S. 194, 199-200 (1975). To conclude that the 1959 act abrogated Catawba rights under the 1763 treaty and federal protection thereof would be inconsistent with the legislative history, violate settled rules of construction and would effect the same backhanded diminishment of Indian rights disapproved of in Menominee Tribe v. United States, supra. See also Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974). Therefore, it is our conclusion that the 1959 Act was not intended to have any effect on the Non-Intercourse Act claims to the 1763 lands.

It is worth noting that in contrast to the foregoing legislative history of the Catawba Act, the history of the Menominee Termination Act is much more indicative of a Congressional intent to abrogate treaty rights. There, Congress had a choice of several bills, including one which

expressly preserved the Tribe's hunting and fishing rights. Congress chose instead to pass a bill which made no mention of such rights. Counsel for the Tribe testified against enactment of the chosen bill, arguing that its silence would abrogate those rights by implication. 391 U.S. at 408. The Supreme Court noted Congress' failure to act upon this suggestion, but still declined to find clear evidence of Congressional intent to extinguish treaty rights. 6/

One possibly unfavorable distinction between this case and Menominee Tribe is the Supreme Court's reliance on the language of the termination provision that "all statutes" relating to Indians are no longer applicable to the Menominees. This was viewed as evidence that Congress did not have treaties in mind. 391 U.S. at 412. In this case, the continuing applicability of a statute, the Non-Intercourse Act, is critical. But, the effect would be the same as the effect rejected by the Menominee Court: the abrogation of treaty rights. Moreover, the Menominee Court indicated that it was not inclined to infer a Fifth Amendment taking:

> We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations towards the Indians.

Extinguishment of the Catawba's 1763 Treaty claims which are based on their vested property right, would constitute a Fifth Amendment taking and thus, one the Court would not be willing to imply easily. Tee-Hit-Ton v. United States, 348 U.S. 272 (1955). If the 1959 Act did extinguish the

6/ See discussion of U.S. v. Santa Fe Pacific R. Co., supra at page 13.

Catawba's ownership rights in the 1763 reservation, the tribe well might have a claim if not barred by an applicable statute of limitations, against the federal government for the fair market value of their 140,000 acre reservation.

D. The Act of September 21, 1959, May Be An Alternative Source of the Government's Duty to Confirm Ownership of the 1763 Reservation In the Catawba Tribe

Argument can be made that the 1959 Act itself is a source of the United States' continuing duty to restore the 1763 reservation to Indian ownership.

Section 2 of the 1959 Act provides that each member of the Tribe is entitled to share in "the tribe's assets that are held in trust by the United States. . ." 25 U.S.C. § 932. Section 3 then states the manner in which this distribution of assets shall be implemented. Paragraph (d) provides in pertinent part:

> (d) Subject to the provisions of this subsection, each member who is an adult under the laws of the State and who has an assignment shall be given the option of selecting and receiving title to any part of his assignment that has an appraised value not in excess of his share of the tribe's assets.

And paragraph (f) further provides:

> "All assets of the tribe that are not selected and conveyed to members pursuant to subsections (d) and (e) of this section shall be sold and the proceeds distributed to the members . . . . Any tribal assets that are not sold by the Secretary

> within two years from the date of the notice provided for in section 931 of this title shall be conveyed to a trustee selected by the Secretary for disposition in accordance with this subsection, and the fees and expenses of such trustee shall be paid out of funds appropriated for the purposes of [this act.]"

Section 4 also authorizes the Secretary "to execute such conveyancing instruments as he deems necessary to convey marketable and recordable titles to the tribal assets . . . ."

Assuming that the 1840 Treaty of Nation Ford did not validly extinguish Catawba rights to the 1763 treaty reservation, the Tribe retained Indian title to those lands in 1959. If the reservation lands were assets held in trust within the meaning of section 2 of the 1959 Act, then the Secretary is authorized to distribute them among tribal members or to convey them to a trustee who would in turn be charged with selling them and distributing the proceeds to tribal members pursuant to section 3(f). To do this however, the Secretary would first need to quiet the Tribe's title to those lands since they are hardly in salable form, and the statute requires that the highest price be obtained at the distribution sale. It would certainly be incumbent on the Secretary to recommend to the Justice Department that the Tribe's title to its assets be quieted so that the distribution could be completed. Thus, the distribution scheme of the 1959 Act can be argued as providing adequate authority for the bringing of a suit on behalf of the Catawba to quiet title to the 1763 treaty lands.

There are difficulties with this reasoning, however, stemming from the legislative history of the 1959 Act itself. Because of these difficulties, it is our legal opinion that this trust assets theory is a weaker argument. Moreover, it is clearly alternative rather than additional to the Non-Intercourse argument because it is based on an opposite interpretation of the 1959 Act and its legislative history.

The trust assets theory holds up only if the 1763 reservation is considered an asset held in trust by the United States within the meaning of Section 2. But the 1763 reservation was probably not owned in fee by the United States in trust for the Catawba, as are most reservations established by direct treaty with the United States. Furthermore, the legislative history offers little evidence that Congress considered the 1763 reservation, or the claim pertaining to it, to be a tribal asset that should be appraised and distributed. As already pointed out, the legislative history of the 1959 Act indicates Congress was only concerned with the 1943 agreement and the reservation created pursuant to it and that Congress was in fact unaware of the 1763 treaty claims. Senate Report No. 863 (86th Cong. 1st Sess.) states (at page 2): "The tribal assets are valued at about $254,000 or about $1,500 per family. The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina." Thus, a persuasive argument can be made that the 1763 treaty lands were not regarded by Congress as an asset designated for per capita distribution.

Moreover, basing the U.S.' duty to bring suit on the 1959 Act itself also involves an opposite reading of that part of the legislative history concerning the government's obligations toward the tribe. As mentioned, Congress was wholly unaware of any federal obligations to the Catawba existing prior to or outside of the 1943 Memorandum of Understanding:

> "The Catawba Indians' relations with the Federal Government date back only to the 1940's. Their original reservation was set aside for them by treaty with South Carolina in 1763. In 1840 they agreed to cede this reservation to the State except for a single square mile of land which is still held in trust for them by the State. In return the State agreed to furnish essential services to them.

> "Since 1943 the State, the Bureau of Indian Affairs, and the tribe have been working together to improve the economic conditions of the members. . . ." Id. at pp. 1-2.

An August 27, 1959, letter from the Interior Department to the Senate Interior Committee states: "The [1943] agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government." Id. at p. 2. The letter also lists the limited types of costs which had been incurred by the Bureau of Indian Affairs on behalf of the Catawbas. Id. at p. 3.

In short, it appears that Congress had no knowledge of any 1763 treaty claim, no understanding of the applicability of the Non-Intercourse Act, and no perception of any federal duty to sue on behalf of the Tribe to secure its land claims. These apparent facts of the legislative history clearly militate in favor of the argument that the 1959 Act was not intended to affect the 1763 reservation in any way. And, they render difficult the alternative argument that the 1959 Act was intended to affect a distribution of the 1763 reservation.

But, either the 1959 Act was passed for a limited purpose (as we have argued), or it was intended to dispose finally of all the Tribe's assets. A reading of section 2 which would exclude the 1763 lands from the reference to "trust assets," along with a reading of section 5 which would prevent the United States from asserting the Tribe's claim to those lands, would allow this valuable claim to drop between the cracks of the legislation. Such statutory construction is unfair by any standard, and certainly falls far short of the type of construction demanded for legislation enacted at the request of an Indian tribe.

Thus, if a court finds that the 1959 Act cut off the federal government's interest and duty to bring action on the Non-Intercourse Act claim, strong argument can and should be

made that such an interpretation of the 1959 Act necessitates the further finding that the Act was intended to dispose of all remaining assets including the 1763 reservation. The fact that Congress was unaware of all of the assets to be distributed does not diminish the force of the legislation or the Secretary's duty thereunder to seek out, appraise and distribute all the tribe's assets. Nor, under such a legislative interpretation, has the Secretary's failure to recognize and distribute the 1763 reservation lessened his legislative obligation to appraise and distribute what was clearly the tribe's most valuable asset.

Recommendation

In summary, we feel that the Catawba's claim to their 15 mile square reservation is a valid one under the Non-Intercourse Act and they can readily establish a prima facie case. The claim is based on recognized title and therefore does not present certain problems of aboriginal title, e.g., establishing continued occupancy of the entire tract up until 1840 when the Treaty with South Carolina was concluded. Thus, their dwindling numbers and precise location at the time of the 1840 Treaty is not a legally significant problem. Furthermore, the Catawba have protested continually that this is their land and that they are entitled not to be molested in their possession of it. With the single exception of the 1840 Treaty itself, they have shown amazing tenacity and resourcefulness in attempting to maintain title to their 15 mile square reservation.

We conclude that the United States has had a duty under the Non-Intercourse Act, since the treaty claim accrued in 1840, to take action to protect the Catawba's rightful ownership of the 1763 reservation. This duty, along with the actual claim itself, was not affected by the 1959 Distribution of Assets Act. However, were a court to find that the 1959 Act terminated the U.S.' interest in pursuing the claim on behalf of the Catawba, we feel it can then be argued that the 1763 reservation should be treated as a trust asset to be distributed under the 1959 Act, in which case the Secretary would be first obligated to quiet title to the reservation.

The claim calls for vigorous advocacy because this Department has been requested by the Tribe's attorneys two times in the past to initiate legal action, has been carefully briefed on the applicability of the Non-Intercourse Act by the Tribes' attorney, and yet has twice refused to take action for reasons that have been shown in Oneida and Passamaquoddy to be legally incorrect. Thus, the case is a particularly inviting one for a negligence claim against the United States should this Department fail to advocate relief for the Catawba.

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Native American Rights Fund

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CATAWBA TRIBE APPROVES SETTLEMENT WITH SOUTH CAROLINA

I feel like we're on the edge of a new day for the Catawba people. Nothing will replace the loss of our lands but this settlement is a tool that will allow us to create a better way of life for our children.
Chief Gilbert Blue
Catawba Tribe

On February 20, 1993, the Catawba Indian Tribe of South Carolina met and approved, by a vote of 289 to 42, an Agreement in Principle to settle the Tribe's 150-year old land claim. If the proposed settlement is enacted into law, the Tribe will be restored as a federally recognized Indian tribe, the existing state reservation may be expanded to a 4,200-acre federal reservation, economic development and other trust funds will be created, and per capita payments totalling $7.5 million will be made. The Tribe and its members will become eligible for Federal Indian services, including education, health, social services and housing. The settlement is modeled after the Maine Indian Land Claims Settlement Act that settled the land claims of the Passamaquoddy and Penobscot Tribes in 1980.

The total value of the proposed settlement is estimated to be between $80 and $90 million dollars, $50 million of which will be paid over a period of 5 years by the Federal Government ($32 million) and state, local, and private sources ($18 million). The remainder of the $80 to $90 million lies in the estimated value of services and in-kind contributions from Federal agencies and state and local governments over a long period of years. In exchange, the Tribe agrees that its land claim arising out of the 1840 Treaty of Nation Ford will be forever extinguished, together with any other rights arising out of the 1760 and 1763 Treaties or aboriginal title.

While the proposed settlement has the support of the South Carolina Congressional delegation, the Governor and local governments, it must still be enacted into law by Congress and the State of South Carolina. If the settlement is not approved by Congress, the Tribe will be forced to sue 61,767 persons individually who presently claim ownership of the Tribe's 144,000-acre Treaty Reservation.

SUMMARY OF THE AGREEMENT IN PRINCIPLE TO SETTLE THE LAND CLAIM OF THE CATAWBA TRIBE OF SOUTH CAROLINA

Restoration. The trust relationship between the Tribe and the United States will be restored, the Tribe will become a federally-recognized Indian Tribe and it and its members will be eligible for Federal Indian services, including education, health, social services, and housing. The 1959 Termination Act will be repealed.

Tribal Trust Funds. Over a five-year period, the Federal Government and State of South Carolina will contribute $50 million to be placed into five trust funds: a Land Acquisition Trust, an Economic Development Trust, a Social Services and Elderly Assistance Trust, an Education Trust, and a Per Capita Payment Trust. The Secretary of the Interior will manage and invest the trust funds unless the Tribe chooses to use private sector investment managers with proven competence and expe-

Contents:

TRIBAL SOVEREIGNTY

"I believe that the rights of tribes ... are inherent, and that when we talk about our rights as tribal people, we should be talking about the rights we have had since time immemorial ..."

Wilma Mankiller, Principle Chief, Cherokee Nation, 1991

NARF LEGAL REVIEW

rience. Generally, the Tribe will determine how much money will be placed in each trust fund, except that the Agreement requires $7.5 million to go to the per capita payment fund and $6 million to go to the Education Trust. Except for the per-capita payment fund, the trust funds are set up to be permanent funds. With some limitations, the Tribe may transfer money among trust funds and the Secretary or private investment manager is required to provide the Tribe an accounting at least annually.

Expanded Reservation. The existing reservation may be expanded to 3,000 acres, plus an additional 600 acres of undevelopable land (flood plains or wetlands, for example). Another 600 acres could be added to the reservation with the approval of the Secretary of the Interior, county councils and the State Legislature, bringing the maximum reservation size to 4,200 acres.

The additional land must be purchased from willing sellers within two defined areas close to the existing reservation, and will be bought by the Tribe from money in the Land Acquisition Trust. The Secretary of the Interior and a professional land planning firm will assist the Tribe in developing a reservation development and land acquisition plan. The Tribe is required to make every effort to buy land that borders the existing reservation, but if that is not possible, the Tribe may buy lands in up to three non-contiguous tracts if they are reasonably close to the existing reservation, within the two defined zones, and the county councils and the Governor approve the Tribe's plan for such a configuration. If land cannot be purchased within the two defined zones, the Tribe may buy reservation land in an undefined third zone to be proposed by the Tribe if the Secretary and the State and local governments approve.

The Tribe will coordinate its planning activities with the City of Rock Hill, York and Lancaster Counties, and the State of South Carolina to ensure that the expanded reservation has access to roads and sewage treatment. Major land purchases for the reservation must be completed within 10 years of the final settlement payment; some minor purchases to round out or connect non-contiguous reservation tracts may be made for 20

years after the final settlement payment. The Tribe may buy and sell non-reservation land without restriction. Such land would have the same tax and legal status as any other land in the State, but would be eligible for federal grants and other Indian services and benefits.

Tribal Government, Jurisdiction and Governance. The Tribe may organize its government under the Indian Reorganization Act if it chooses and the Indian Civil Rights Act will apply. The governmental powers of the Tribe will be those that are expressly set out in the Agreement in Principle, and powers not set out for the Tribe will reside in the State. The Tribe will have jurisdiction over internal tribal matters including the powers: 1) to zone and regulate the use and disposition of tribal property; 2) to define laws, petty crimes and rules of conduct applicable to members of the Tribe while on the reservation, supplementing but not supplanting criminal laws of the State of South Carolina; 3) to regulate the conduct of businesses located on the reservation; 4) to levy taxes; 5) to grant exemptions or waivers from any tribal laws, tribal regulations or tribal taxes, except the Tribal Sales and Use Taxes, otherwise applicable on the reservation, including waivers of the jurisdiction of any tribal court; 6) to adopt its own form of government; 7) to determine its own membership; 8) to charter tribally-owned economic development corporations and enterprises; and 9) to exclude non-members from its membership rolls and from the reservation, except on public roads, the Catawba River, and public or private easements. The Tribe will possess the same immunity from suit as cities and counties possess in South Carolina and will be required to carry the same level of liability insurance as cities and counties are required to carry.

The State will continue to exercise criminal jurisdiction over Indians and non-Indians on the Tribe's reservation. If the Tribe desires, it may provide in its Constitution for a tribal court with concurrent criminal jurisdiction over tribal members only that is limited to the same jurisdiction exercised by a state magistrate's court over misdemeanors and petty offenses that would be specified in ordinances adopted by the Tribe. The Tribe has the option of employing tribal police officers if they receive the same training as Sheriff's deputies and are cross-deputized by the York and Lancaster County Sheriffs Departments.

The Tribe may also elect to establish a civil court. The tribal court's civil jurisdiction would be limited to matters arising on the reservation and would be concurrent with the civil jurisdiction of the State in most circumstances. With some limitations, the tribal court would have jurisdiction over cases involving the Tribe or its members in the following areas: 1) contracts made or to be performed on the reservation; 2) cases involving injury caused by negligence (non-Indians could have their cases removed to State court); 3) internal matters of the Tribe; 4) domestic relations where both spouses to the marriage are tribal members; 5) enforcement of tribal laws regulating conduct on the reservation; and 6) cases arising under the Indian Child Welfare Act. Most tribal court cases would be appealable to state court and the Tribe would have the ability to waive the authority of the tribal court.

The State will have environmental regulatory jurisdiction and state health codes will apply on the new reservation. The Tribe agrees to adopt local building codes and hunting, fishing, and water rights will be subject to state regulation.

Taxation. The Tribe, the tribal trust funds, and tribally owned enterprises will be non-taxable for federal income tax purposes like other federal tribes, and its income will be non-taxable by the State for 99 years. Federal trust lands will be exempt from real property taxes, and improvements on the land will be exempt from real property taxes for 99 years. The Tribe will make substitute payments to support its children in the public schools. The State will

not tax any sales occurring on the reservation, but the Tribe agrees to impose and collect a sales tax equal to the State's sales tax. Purchases by the Tribe in its governmental capacity will be exempt from State sales and use taxes for 99 years. The Tribe will have the same Federal tax treatment as other Federal tribes under the Indian Tribal Government Tax Status Act and will be able to issue bonds to finance certain projects.

Members of the Tribe, like members of other Federal tribes, will pay Federal tax on income earned on the reservation. Unlike members of other Federal tribes, they will also pay state income taxes on income earned on the reservation, unless they work for the Tribe performing governmental functions, in which case they will not pay state income taxes for 99 years. Per capita payments will be exempt from state and federal income taxes. Income from the sale of pottery and artifacts made by members of the Tribe on or off the reservation will be exempt from Federal, state and local income taxes, and the sale itself will be exempt from sales and use taxes. Members' homes will be exempt from property taxes for 99 years. Members' personal property, such as cars and boats, will be subject to state tax.

Games of Chance.

The Agreement in Principle gives the Tribe the option of having bingo and video machines. Generally, state law would govern any gaming on the reservation and only those gaming activities that are permitted by State law would be permitted on the Reservation. However, the Tribe would be permitted to sponsor much higher stakes bingo games ($100,000) more frequently (unlimited number of games, six days a week) than is permitted other bingo operators in the State. The State would tax tribal bingo proceeds at a rate of 10% of gross — a tax rate slightly lower than that paid by other bingo operators in the State. The Indian Gaming Regulatory Act would not apply on the Catawba Reservation.

Tribal Membership.

The Tribe's membership will be determined by the Tribe, and the settlement legislation will incorporate the Tribe's own membership requirements, that is, descendency from someone listed on the 1961 Federal roll. The minimal state services and tax exemptions for individuals and the Tribe that will cease after 99 years will have no effect on the Tribe's membership, its federal relationship, or its eligibility for federal services.

CATAWBA TRIBE V. SOUTH CAROLINA

A History of Perseverance

by Don B. Miller

> Too often we neglect the past. Even more than other domains of law, the intricacies and peculiarities of Indian law demand an appreciation of history.' Justice Harry A. Blackmun, dissenting from the Supreme Court majority's opinion in *South Carolina v. Catawba Indian Tribe*, June 2, 1986, *quoting* Justice Felix Frankfurter.

On November 10, 1763, in a Treaty at Augusta, Georgia, the Catawba Tribe sought and was guaranteed protection from the onslaught of white settlement. In return for a solemn agreement by the King of England and the Governors of the Southern Colonies that the Tribe would be forever protected in possession of its lands, the Tribe reserved a 144,000-acre tract and ceded its aboriginal territory (comprising much of the present state of North and South Carolina) to the King. But in 1840, the State of South Carolina took the Tribe's lands, attempting to extinguish forever the Catawba Tribe's title to the 144,000 acre Reservation through a "treaty" in which the United States did not participate. The State did not honor the terms of the "treaty." And because federal law has, since 1790, plainly stated that only Congress may extinguish Indian title to land, the Tribe's dispossession by the State of South Carolina has precipitated a political and legal struggle that has spanned a century and a half.

Lately, that struggle has been waged in the federal courts, in the halls of Congress and the South Carolina Legislature and in several federal agencies. Over the last decade, it has escalated into an expensive high-stakes struggle for all concerned. In 1980, following the failure of a four-year effort to settle the claim without resorting to litigation, the Catawba Tribe sued 76 individuals and corporations seeking a return of the Treaty Reservation and trespass damages. The defendants were sued as representatives of the tens of thousands of non-Indians who currently occupied the Tribe's Treaty Reservation. At the time of this writing, the case has been heard once by the United States Supreme Court and five times by the United States Court of Appeals for the Fourth Circuit. On two other occasions, the Supreme Court has been asked to hear an appeal in the case and has declined. Later this month, the Supreme Court will be asked to hear a related claim by the Tribe against the United States which was dismissed by the Court of Appeals for the Federal Circuit on statute of limitations grounds.

The recent progress toward settlement was generated by the threat of a dramatic escalation in the scope and impact of the litigation. While resumed settlement talks had been ongoing since early 1990, progress had been slow and the extent of state and local support for a legislative (political) resolution was unclear. But in 1992, the federal courts refused to allow the case to proceed as a class action. This refusal started the running of a statute of limitations and left the Tribe no choice but to sue each occupant of the Treaty Reservation individually. In the Spring and Summer of 1992, as the Tribe finalized its preparations to sue 61,767 individuals for possession of the land they occupied before the October 18, 1992 deadline, the need for a legislative solution became more apparent to both the Indian and non-Indian communities

in and around Rock Hill. The filing of such a massive lawsuit would have placed a cloud on virtually all land titles in the area and would have devastated the regional economy. It would have paralyzed the federal courts and would likely have created substantial social unrest. To give the settlement process more time, Congress, in July, 1992, extended the statute of limitations until October 1, 1993. In August, 1992, the Tribe, Congressman Spratt and state negotiators made substantial progress toward an agreement to settle the claim. Based on the hope that a just settlement might at last be possible, the Tribe voted unanimously to rely on the Congressional statute of limitations extension and postpone filing suit against the 61,767 occupants. Settlement talks aimed at finalizing the agreement continued, and in the early morning hours of January 12, the negotiators finalized an Agreement in Principle. On February 20, 1993, the Catawba Tribe met in General Council and overwhelmingly approved the proposed agreement.

This protracted and expensive legal war is the modern legacy of official refusal, over the course of more than two centuries, to heed Catawba complaints and to enforce applicable laws protecting Indian lands — laws that predate even this Nation's existence. At least nine generations of tribal leaders have sought to obtain a settlement of the Tribe's claim that would restore at least some measure of the promise of self-sufficiency held out by the 1763 Treaty. Their appeals have, until recently, met with little success. This article is a history of the Tribe's centuries-long battle to regain possession of its lands.

The Colonial Period: The Reservation Established

The Catawbas' struggle to protect their lands from white settlers began well before the Treaty between the King and the Tribe at Augusta in 1763. Prompted largely by Catawba complaints of invading whites, the Provincial Council of the Royal Colony of South Carolina in 1739 passed "An Act to Restrain the Purchasing of Lands from Indians." Because of the Catawbas' importance to the Colony of South Carolina as a buffer from hostile tribes to the West, South Carolina actively sought to protect the Tribe's lands throughout most of the eighteenth century. North Carolina, however, repeatedly ignored South Carolina's warnings and protests and refused to restrain its surveyors and settlers from entering Catawba lands, leading South Carolina in 1754 to recognize all lands within a 30-mile radius of the Catawba towns as Catawba lands. North Carolina and her settlers persisted, however, and the resulting dispute between North and South Carolina, coupled with a severe smallpox epidemic in 1759 that greatly weakened the Tribe, led to a major cession of tribal land in 1760.

> We understand that ye Indians have made Complaints that some of or People incroach upon them: wee hope yu Adjusted that Business to there Satisfaction ... if it bee not allready done pray come to an agreement with ye Indians to there Satisfaction about there bounds and Left none of or People Incroach upon you for ye future. ...
>
> British Lord Proprietors to the Governor and Council at Ashley River, April 10, 1677.

In that year, the King's Indian Agent met with the Catawbas and negotiated the Treaty of Pine Tree Hill, in which the Catawba Nation agreed to cede to the King its 60-mile diameter tract (2,826 square miles) in return for being permanently settled on a tract 15 miles square (225 square miles). Although the Treaty promised that the tract would be surveyed, a fort would be built for the Indians' protection, and white incursion would not be permitted, North Carolina predictably refused to abide by the Treaty, and the Crown did little to fulfill its obligations.

Following the end of the French and Indian War in 1763, the Crown sought to ensure that peace would, in fact, come to the southern frontier. To this end it arranged a treaty with the five major southeastern tribes, all of which, except the Catawba, had been allied with the French. The governors of the southern colonies were directed to invite the chiefs of the Creeks, Choctaws, Cherokees, Chickasaws, and Catawbas to Augusta, and "to use every Means to quiet their Apprehensions and gain their good Opinion." To further assure the Indians of the Crown's good intentions, King George III issued the Proclamation of 1763, forbidding any purchase of Indian lands without the Crown's consent. This predecessor of the federal Indian Nonintercourse Act formed the backdrop for the negotiations in Augusta later that year.

> He informed the Governors his Land was spoiled, he had lost a great deal both by Scarcity of Buffalos and Deers, they have spoiled him 100 Miles every way, and never paid him. His Hunting Lands formerly extended to Pedee, Broad River etc. but now is driven quite to the Catawba Nation. If he could kill any deer he would carry the meat to his Family and the Skins to the White People but no Deer are now to be had, he wants 15 Miles on each side his Town free from any encroachments of the White People who will not suffer him to cut Trees to build withal but keep all to themselves.
>
> Col. Ayres, Catawba Chief at Augusta, Nov. 9, 1763.

At Augusta, the Catawbas renewed their claim to the larger 60-mile diameter tract, but were told by the governors:

> If you stand by your former Agreement your lands shall be immediately surveyed and marked out for your use but if you do not your claim must be undecided till our Great King's Pleasure is known on the other side of the Waters.

The next day the Catawbas and the King formally renewed the agreement reached at Pine Tree Hill three years earlier.

Despite the 1763 Treaty of Augusta, white encroachment continued. During the years that followed, South Carolina became less protective of the Tribe's lands and settlers began taking long-term leases from the Indians in violation of the Treaty and the Proclamation of 1763. Re-

newed Catawba complaints resulted in official proclamations, but no action was taken to remove the intruders.

The Treaty of Nation Ford: Possession Lost

Following the Revolutionary War, in which the Tribe fought on the side of the Colonies, the Catawbas appealed to the Continental Congress and, on at least two occasions, directly to President Washington to ask that the 1763 Treaty be enforced and their lands protected. In 1790, the First Congress enacted the Indian Nonintercourse Act, continuing the policy of the English Crown by strictly prohibiting purchases or leases of Indian lands without the consent and participation of the government. Nonetheless, neither Congress nor the President took any steps to protect the Tribe's lands.

> At Mair. Crawford's I was met by some of the Chiefs of the Catawba nation who seemed to be under apprehension that some attempts were making, or would be made to deprive them of part of the 40,000 Acres wch. was secured them by Treaty and wch. is bounded by this Road.
>
> Washington diary, Feb. 27, 1791

Beginning in the early nineteenth century, South Carolina enacted a series of laws purporting to legalize and regulate the leasing of Catawba lands to non-Indians. By the 1830's, virtually the entire Reservation had been leased to non-Indians under the state system and several state commissions were appointed to negotiate a cession of the Reservation. These early commissions were unsuccessful due to tribal opposition, but at the Treaty of Nation Ford in 1840, the Tribe agreed to cede its lands in return for promises by the State to purchase a new reservation for the Tribe either close to the Cherokees in North Carolina or in an unpopulated area of South Carolina.

The State, however, failed to abide by the Treaty of Nation Ford and did not purchase a new reservation for the Tribe. Instead, in 1845, it purchased a one-square-mile tract of land located squarely in the middle of the 1763 Treaty Reservation that the Tribe had ceded almost three years earlier. It was not until 1853-54 that one of the commissioners who had negotiated the 1840 Treaty convinced the majority of the Tribe to settle on the tract.

In 1848 and again in 1854, Congress appropriated funds for the removal of the Catawba Tribe to the Indian territory west of the Mississippi, but the funds were not used due in part to Catawba opposition and in part to inability to find a host reservation.

> They were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men. This state of things went on til the whites got King's Bottom, the last spot of the reservation. The poor Indians then felt their distress beginning, and run from house to house for the rents of their lands, which they had leased out to the white people, which was generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken. This brought on a state of starvation and distress.
>
> Under this state of things, they wandered from place to place, begging, till 1839, when they proposed a treaty with the State, and relinquished all their rights and interest of this domain to the State of South Carolina. There were many efforts made previous to this, by former Governors, to effect a treaty with the Catawba Indians, but always failed. They were then driven to it by being surrounded by white men, cheating them out of their rights, and partaking of the vices of the whites and but few of their virtues, which is a distress to me."
>
> Report to the Governor of South Carolina on the Catawba Indians by B. S. Massey, Indian Agent, December 12, 1853.

Early Efforts to Regain the Land

By the 1880's the Tribe had retained lawyers to investigate its claims and in 1905, represented by Washington D.C. lawyer, Chester Howe, it submitted a formal request for assistance to the Bureau of Indian Affairs (BIA). Basing its claim on the Indian Nonintercourse Act, the Tribe argued that the 1840 State Treaty was void and that it was entitled to rentals from the 1763 Treaty Reservation or to a recovery of possession of the land. Relying on the theory that the Catawbas were "State Indians" and thus not subject to the protection of federal law, the BIA rejected the Tribe's request and referred it to the State.

The Tribe then petitioned the South Carolina Legislature, which referred the matter to the State Attorney General for investigation. In a 1908 opinion, the Attorney General concluded that the 1840 Treaty was valid and that its terms had been fulfilled. The Tribe then renewed its request to the Interior Department, which denied it again in 1909 for the same reason.

Once again the Tribe petitioned the State and, in 1910, a State commission was formed to investigate the Catawbas and make recommendations to the legislature regarding what additional lands were needed. The Commission submitted its report to the Governor in January 1911, recommending, among other things, the purchase of an additional 1800 acres of land. The State took no action on this recommendation and newspaper accounts from 1916 reveal that at that time the Tribe was still seeking relief through lawyers and the courts.

This situation led to the establishment by the Legislature of yet another commission, appointed by the Governor, to "confer with . . . the Tribe . . . on terms of a full and final settlement of all their claims against the State." On January 11, 1921, the Commission's report was submitted to the South Carolina House of Representatives by the Governor. Like the 1910 Commission, it recommended the purchase of additional lands for the Tribe.

The Legislature took no action on the Commission's report, but the Business Men's Evangelical

Club of Rock Hill took over the work of the Commission and developed a bill which would have, if enacted, provided for the purchase of farmland and a house for each Catawba family plus small per capita payments. On February 19, 1924, Governor McLeod endorsed the proposal, noting that "[a] proper and satisfactory settlement of our relationship with the Catawba Indians has long been a problem in South Carolina." Once again the Legislature failed to act.

> Two Washington lawyers who were conducting the case died shortly after taking charge of it. A lawyer in Hamlet met the same fate while investigating the possibilities of the suit. A. R. McPhail, of Charlotte, succumbed six months after taking the case. Now comes Oscar M. Abernethy, a young lawyer with no superstition in his hard-boiled make-up, who declares he will push the matter on to the supreme court of the United States in an effort to secure justice for these "vanishing Americans," who have been the consistent friend of the whites and will have been mistreated by the people they befriended.
>
> *The Charlotte Observer*, "Last Appeal for Justice for Vanishing Catawba Indians; Charlotte Lawyer to Take Case to Highest Court and to Halls of Congress," August 12, 1928.

The following year, Catawba Chief David A. Harris, appeared before the South Carolina Legislature, without counsel, and asked that his people be given farms, homes, and citizenship. The General Assembly took no action on the Chief's appeal and by the late 1920's the Catawba Tribe was again looking to the courts and the United States for relief. This effort, as well as two subsequent appeals in 1929, were unsuccessful.

The Federal Period

South Carolina's persistent refusal to deal with the 1840 Treaty issue, together with the severe poverty of the Tribe, led to increased efforts to secure federal assistance. On March 28, 1930, a subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill to investigate the conditions of the Catawba Indians. In its 1934 session, the South Carolina Assembly enacted a concurrent resolution which resolved that the Catawba Reservation and the care and maintenance of the Catawba Indians should be transferred to the Federal Government upon proper legislation being enacted by Congress. Investigation into the needs of the Catawba Indians was undertaken by the BIA and other federal agencies in 1935 in an attempt to establish a rehabilitation program in cooperation with the State of South Carolina.

These efforts at securing federal assistance through administrative action were unsuccessful. Thus, in 1937, legislation was introduced that would have provided authority for the Secretary of the Interior to enter into contracts with the State for the welfare of the Catawba Tribe, provided that the State purchased lands which would be conveyed to the Federal Government in trust as an Indian Reservation.

During this period, the State was attempting to convince the Tribe to settle its reservation claim for $250,000, to be distributed among the Tribe on a per capita basis. As the State had not informed the BIA that it desired a final settlement of the land claim as a condition to its participation in the rehabilitation program, the BIA acted quickly to forestall further action on the State's proposal until it could investigate the matter.

In February 1937, the BIA sent Administrative Assistant, D'Arcy McNickle, to South Carolina to investigate the "final settlement" issue. He discovered that the amount the State was discussing was $100,000 rather than $250,000 and conducted a thorough investigation of the history of the Tribe's 1763 Treaty Reservation. Noting that "the State carried out the terms of the [1840] Treaty pretty much as it pleased," McNickle made no recommendation regarding the "final settlement" question.

The 1937 legislation was not reported out of Committee because of disagreement in the Interior Department over whether the Government should "adopt any more Indians." On June 9, 1938, the Interior Department reported unfavorably on the bill, but noted that the "State did not procure for the Tribe a reservation in ... North Carolina but reserved 652 acres of the lands they had surrendered by the treaty of 1840."

In the next Congress, similar legislation was introduced and in 1939 the South Carolina Legislature adopted a concurrent resolution again requesting the federal government to provide aid for the Catawba Indians. The State's 1939 General Appropriations Bill reauthorized the State Budget Commission to negotiate and enter into an agreement "having as its objective the rehabilitation of the Catawba Indians and a final settlement with them so that the State may be relieved of their support."

On April 29, 1940, the Interior Department again submitted an unfavorable report on the Catawba legislation. With the failure of the legislative approach, the State and the BIA began anew to devise a relief program which could be implemented without legislation. This effort first centered around a program through the Farm Security Administration with the BIA providing limited technical assistance. The State of South Carolina would provide up to $75,000 for the purchase of lands, provided that the agreement between the federal agencies and the State

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They occupy 652 acres which were allotted to them by the State of South Carolina. There are 172 souls living on that reservation. The condition of their houses is such that I would say, not over three or four of them afford even proper shelter. They are just roughly built with no ceiling lumber on the ceiling or the sides inside, and they are mostly 1-room houses with nothing above them except a shingle roof, with holes in the roof, sometimes with a family of six or eight living in the one little room. They cook on the fireplace in that room and they all sleep in that one little room. They depend almost entirely on what they get from the State. The State has been appropriating $9,000 for their support.

The Chairman. Annually?

Mr. Flowers. Yes, sir. Well, the appropriation is $9,450. The $450 goes to the agent and they get $9,000. Of this $9,000 there is $1,500 set aside to run the school. They set aside so much for doctors' fees, funeral expenses, and so on, because they haven't any other way to pay a doctor or pay funeral expenses when one dies. That reduces the amount of the $9,000 appropriation considerably. Then what is left of that is apportioned pro rata among the Indians of the tribe. This last year they got $38.17, I believe, per capita. They have to depend on that almost entirely, for the reason that it is very hard for them to get work from the white people. Unfortunately, white people can't control them just like they would like to control a laborer because the Indian considers himself the equal of the white man and a white man is likely to get into trouble if he curses an Indian. Therefore a white man, rather than take that chance of getting into trouble, will seldom hire an Indian. That is an unfortunate condition, of course. Then the only other thing open to him is his farm on the 652 acres, and if there is any poorer land left in the county I wouldn't know where to go to find it. We are going to leave that to you Senators to determine when you go over there to see it. Most of them are not even able to have gardens. Now, you might say that they are indolent and won't work, but the fact is they haven't anything to work with and no place to make a garden."

Statement of Mr. Flowers, South Carolina Indian Financial Agent, before a sub-committee of the Senate Committee on Indian Affairs, March 28, 1930.

would "provide for the extinguishment of any existing claims for support which the Indians may have against the State of South Carolina."

In 1941, however, the Interior Department formally refused to permit the rehabilitation program to be used as a means for extinguishing the Reservation claim. The State agreed and, in 1943, the Secretary of the Interior approved a Memorandum of Understanding between the Tribe, the State, and the Department of the Interior. It contained no language concerning extinguishment of the Tribe's claim.

Pursuant to the Memorandum, the State of South Carolina acquired 3,434 acres of farmland close to the existing 630-acre State Reservation at a cost of $70,000 and conveyed it in trust to the Secretary of the Interior. However, the 630-acre Reservation was not conveyed to the Secretary. The Tribe adopted a constitution under the Indian Reorganization Act and the BIA administered Catawba affairs out of the Cherokee Agency in North Carolina.

The Termination Period

The hope created by the purchase of the new lands and eligibility for federal services soon turned to frustration as federal Indian policy took an abrupt about-face. In the early 1950s, Congress directed that the trust relationship between all Indian tribes and the United States should end as soon as possible.

The Bureau of Indian Affairs was directed to identify tribes that could be "terminated," and during the period from 1954 to 1962, Congress passed into law 13 termination acts. Under these acts, federal restrictions

on tribal lands were removed and the land was either distributed to individual members or sold with the proceeds being distributed to tribal members. Federal services were cut off and the state law was declared to apply to tribal members as it did to other citizens.

For the Catawba Tribe, the termination era meant that their new reservation lands could not be used productively. Congress made fewer funds available to tribes generally and, in the mid-1950s, federal services for the entire Catawba Tribe amounted to only about $5,000 per year. Tribal members were poor and there was no federal assistance for either housing or farming operations. And because of its federally restricted status, the Reservation lands could not be used for security to borrow money. The Tribe complained to the State and the Federal Government.

In response, the BIA and the State approached the Tribe in 1958 with a proposal for termination. Federal restrictions could be removed from the land by an act of Congress and the land acquired in 1943 could be distributed to individual members or sold to provide a small cash payment to Tribal members.

The Tribe, which had no lawyer, resisted, telling the BIA agent that its claim against the State would have to be resolved before it would agree to a distribution of the new federal Reservation. However, the BIA assured the Tribe that it's long-standing claim would be unaffected by the distribution. Relying on that assurance, the Tribe agreed to the distribution, conditioning its consent on its understanding that its land claim would be protected. The BIA drafted a resolution for the Tribe consenting to division of the federal assets and, consistent with its assurances, included a provision conditioning tribal consent on leaving the treaty claim unaffected.

After securing the Tribe's resolution, the BIA and Congressman Hemphill assumed the role of speaking for the Tribe in the legislative process and throughout the entire legislative process, there was not another mention of the land claim. While the Congressmen and the BIA purported throughout the process to be acting only in accord with tribal wishes, the legislation they drafted did not expressly preserve the claim. However, the BIA, which drafted the bill, repeatedly told the Tribe and emphasized to Congress that it had been drafted to conform to tribal desires as expressed in the resolution. No tribal officials appeared at the hearings on the bill nor did the Tribe submit written testimony.

Based largely on the BIA's and the sponsor's assurances of Tribal support, the bill breezed quickly through both Houses of Congress. On September 21, 1959, the Catawba Division of Assets Act became law. But apparently because the Tribe's initial approval of the termination/distribution had occurred at a hastily called and sparsely attended meeting, Congress had amended the Act to require a second Tribal vote of approval before the 1959 Act would become effective. Once again the BIA dispatched agents to the Reservation to collect signatures of approval and those federal agents again assured tribal members that their land claim was protected. By June, 1961, the BIA had collected the signatures of over half the tribal members and, on July 1, 1962, the Secretary of the Interior proclaimed the termination of the federal trust responsibility. Pursuant to the 1959 Act, the 3,434-acre federal Reservation acquired 18 years earlier was distributed among tribal members and all federal Indian services ceased. The 640-acre State Reservation acquired in 1842 had not been included in the federal Reservation and, thus, was unaffected by the 1959 Act. The State of South Carolina continues to hold that tract in trust for the Tribe to this day.

Settlement Efforts: 1975 - 1980

In 1975, encouraged by legal victories of other Eastern Indian tribes, the Catawba Tribe requested the Native American Rights Fund (NARF) to evaluate its claim. NARF attorneys conducted legal and historical research for more than a year and, in 1976, concluded that the Tribe possessed a strong claim. But because of the potentially disruptive effect of a lawsuit, as well as the belief that a claim of this magnitude would ultimately be settled by Congress, the Tribe determined that it would first explore whether a satisfactory settlement of its claim could be achieved.

Hoping to establish the legal validity of the claim, the Tribe submitted a litigation request to the Department of the Interior in 1976 asking the United States to undertake legal action to recover the lands of the 1763 Treaty Reservation. The Interior Department Solicitor reviewed the request for more than one year, and on August 30, 1977, asked the Justice Department to institute litigation on the Tribe's behalf, but not before settlement options had been exhausted.

As a result, in 1977, a federal task force was formed comprised of the Assistant Attorney General for Lands and Natural Resources, the Solicitor of the Department of the Interior, and an Associate Director of the Office of Management and Budget. That same year South Carolina Governor James Edwards had directed the State's Attorney General, Dan McLeod, to represent the State in discussions with the Tribe. The South Carolina congressional delegation determined that it would follow local Congressman Ken Holland's lead, and the complex process of attempting to fashion a satisfactory settlement had begun.

The United States has never taken any action to fulfill its duty to help the Catawba recover the land. In fact, the Department of the Interior has twice refused, in 1906 and 1908, to take action when the Tribe's lawyers pointed out the Tribe's claims under the Non-Intercourse Act. But mere lapse of time and failure of the federal government to act cannot eradicate either the Catawba's rights to their land or the federal government's continuing duty to help them get it back. The Act of September 21, 1959, which terminated federal services to the Catawba and the applicability of federal Indian statutes similarly did not extinguish the 1840 Treaty claim or the government's duty of protection. The termination language in that 1959 statute is prospective and does not affect preexisting legal rights. Moreover, the Supreme Court in Menominee Tribe v. U.S., 391 U.S. 404 (1969), and in many other Indian land cases, required clear evidence of Congressional intent before finding an abrogation of Indian rights. The legislative history of the 1959 Act shows that Congress, as well as the administering agent believed the Act was passed for one reason — to liquidate a 3400-acre reservation and to terminate limited federal benefits both of which were created by a 1943 agreement between the Tribe, the State of South Carolina, and the Department of the Interior. In short, the 1959 Act was a means of dissolving the legal relationship set up by that 1943 agreement. In fact, Congress was unaware of the status of the 1763 treaty reservation, of the Non-Intercourse claim pertaining to it, and finally of its own duty under the Non-Intercourse Act to protect the reservation. The Tribe itself certainly did not contemplate the 1959 Act as a means of cutting off their legal claims to the 1763 reservation because they stipulated in the petition which gave rise to the 1959 legislation, that those claims should not be affected.

The action we hereby recommend is that the United States finally act upon its long-neglected duty under the Non-Intercourse Act to nullify the 1840 Treaty with South Carolina and restore possession of the 1763 Treaty reservation to the Catawba Tribe.

Leo Krulitz, Solicitor, United States Department of the Interior to Assistant Attorney General Moorman, August 30, 1977

In late 1977, the Tribe and Attorney General McLeod agreed in principle that the Tribe would consent to a Congressional extinguishment of its claim in return for creation of a federal Indian reservation, eligibility for federal Indian services, and a tribal development fund. While they could not agree on the amount of land to be included in the proposed reservation, the apparent commitment of the State and Federal parties to a negotiated settlement was encouraging to the Tribe.

Any hope of a speedy resolution was dashed, however, by two events in December 1977. First, the local newspaper obtained and published tribal maps that identified the specific parcels of land the Tribe and the State had been considering. As a result, threatened landowners organized and formed the Tri-County Landowners' Association. Second, the increased publicity led to much wider participation by tribal members, many of whom no longer lived on the Reservation. As a result, it was necessary for the Tribe to reconsider its settlement position in order to accommodate those members who wished to participate in a settlement on an individual, or per capita, basis.

In 1978, the South Carolina General Assembly enacted legislation creating a commission to investigate the Catawba claim and make recommendations to the Legislature. The Commission, composed of four members of the state Legislature whose districts include the claim area, two non-Indian landowners and the President of a local bank, all appointed by Governor Edwards, had no Indian members.

In 1979, Congressman Ken Holland, frustrated by the parties' lack of progress and his constituents' lack of concern over the threat of litigation, introduced "settlement" legislation that did not have the support of the Tribe, the State, or the Administration. It was hoped that the bill would serve as a catalyst for intensified settlement efforts, but instead the House Interior Committee's hearings only revealed the seriousness of the obstacles to settlement. The Tri-County Landowners' Association and the State Commission urged Congress to simply extinguish the Tribe's claim to possession of its Reservation and substitute in its place a claim against the United States for money damages only — valued as of the time the Tribe lost possession in 1840. The State Commission, in arriving at its proposal, had simply adopted the proposal of the Tri-County Landowners' Association without consulting the Tribe and without holding public hearings.

> Chester County land, as part of the claim is deleted, giving a suspicion that the ultimate aim [of the settlement bill] is the takeover of the Catawba

River Valley by the Interior Department.

Testimony of Tri-County Landowner Association Member Robert Yoder before the House Interior Committee, June 12,1979.

The South Carolina Attorney General continued to support the modest settlement package he had endorsed earlier and believed the federal government should pay for it. The Administration favored settlement, but did not believe that the federal government should bear the cost. The Tribe proposed a new federal reservation of no less than 10,000 acres, plus federal services, a tribal development fund, and per capita payments.

The impasse continued through 1979, and in 1980, faced with decreasing interest in settlement and an approaching federal law deadline for filing the trespass damages portion of the claim, the Tribe notified the State and the Congressional delegation of its intention to file suit. Hoping to avoid litigation, South Carolina Governor Richard Riley and Congressman Holland asked the Tribe to participate in one last round of negotiation.

The Tribe agreed and Governor Riley formed an informal work group comprised of representatives from the offices of the Governor, the Attorney General, the Congressman, various units of local government, and the Tri-County Landowners Association. Lengthy negotiations continued through much of 1980, resulting in a detailed draft of settlement legislation, both State and Federal. The settlement proposal called for establishment of a federal reservation not to exceed 4,000 acres, with civil and criminal jurisdiction remaining in the State. The land was to be acquired voluntarily from willing sellers with numerous purchase and use restrictions to protect non-selling landowners in the area. The Tribe would become eligible for federal Indian services and the remainder of the settlement fund would be used for establishment of a tribal development fund and per capita payments to tribal members. An equally detailed proposal was developed setting forth a proposed State contribution of almost ten million dollars. The Tri-County Landowners Association did not support the work group's proposal and filed a minority report.

However, before the work group's proposal could be submitted to the State Legislature, it had to be approved by the State Study Commission. After holding public hearings on the proposal, the Commission refused to endorse the establishment of a federal Indian reservation, no matter how small, and rejected the proposal.

The Litigation Period: 1980 - 1992

Having thus exhausted settlement possibilities, the Tribe filed suit in Federal District court seeking to recover possession of its 1763 Treaty Reservation, as well as historic trespass damages. The value of the Tribe's claim was estimated at the time of filing to be more than two billion dollars. The complaint named 76 defendants, including the State of South Carolina and a number of corporate and large private landowners as representatives of a defendant class, then estimated to number 30,000 people who claimed title to the Reservation lands.

Presumably because of conflicts of interest, all of the Federal District Court judges for the District of South Carolina disqualified themselves. As a result, Senior Judge Joseph P. Willson of the Western District of Pennsylvania was appointed to hear the case.

The State and landowners decided to defend the suit initially on the grounds that the 1959 Division of Assets Act made state law statutes of limitations apply to the Tribe's claim and, in addition, destroyed whatever standing the Tribe may have had to bring the suit by extinguishing the Tribe's existence and terminating federal protection for the lands.

In June 1982, Judge Willson granted the State's motion to dismiss all the Tribe's claims by simply signing an order prepared by the defendants' lawyers. The Tribe appealed the decision to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. In October 1983, a three-judge panel of that Court reversed the lower court. The Fourth Circuit ruled that the 1959 Act was intended only to permit distribution of the 1943 federal reservation, thereby returning the State and the Tribe to their pre-1943 status and allowing the Tribe to pursue its claim to possession of the lands of its 1763 Reservation. The case was re-argued, and in 1984, the Court of Appeals affirmed its decision in the Tribe's favor.

The defendants sought and were granted review in the United States Supreme Court. Rejecting the earlier views expressed by the Interior Solicitor, the United States Department of Justice reversed the Government's position on the Catawba claim. It filed a friend of the court brief on behalf of the United States urging the Supreme Court to rule against the Tribe and hold that the Tribe's land claim, contrary to the Federal Agent's promises in 1960-61, had been affected by the 1959 Act. Following the Justice Department's recommendations, the Supreme Court refused to follow its earlier cases setting out the rules for interpreting statutes affecting Indians and on June 2, 1986, reversed the Court of Appeals. The Court held, in essence, that the Federal agents' assurances that the 1959 Act would not affect the Tribe's land claim and Congress' reliance on tribal consent were irrelevant to determining the intent of Congress. Because the 1959 Act said nothing about preserving the claim and because Congress had plainly said that State law was to apply to the Tribe, it simply did not matter what the Tribe had been promised. The Supreme Court, therefore, ruled that the 1959 Act requires the application of the state statute of limitations to the Tribe's claim. The Supreme Court did not decide whether application of state statute of limitations would defeat the Tribe's claim. Rather, it sent the case back to the Court of Appeals to decide what effect their application would have on the claim.

> When an Indian Tribe has been assimilated and dispersed to this extent — and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, the Tribe's claim to that land may seem ethereal and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive. Or, Because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.
>
> Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th century treaty lands, and because I agree with Justice Black that Tribest nations, like great men, should keep their word," I do not join the judgment of the Court.
>
> Justice Blackmun, joined by Justices Marshall and O'Connor, dissenting in South Carolina v Catawba Indian Tribe, 476 U.S. 498, 515.

In December 1986, attorneys again argued before the 4th Circuit Court of Appeals in Richmond on the statute of limitations issue. In 1987, the Court of Appeals asked the South Carolina Supreme Court to help interpret state law in the case. The State Supreme Court refused and sent the case back to the 4th Circuit. Finally, in January 1989, the 4th Circuit Court of Appeals ruled that South Carolina's statute of limitations did not completely bar the Catawbas' claim and sent the suit back to the Federal District Court in South Carolina.

On remand from the Court of Appeals, Judge Willson released 29 of the 76 defendants and tens of thousands of acres from the Catawba claim in July, 1990. Judge Willson released every defendant and every parcel of land that sought dismissal based on the state statute of limitations defense. Once again, the Tribe appealed Judge Willson's ruling to the Fourth Circuit Court of Appeals. In September, 1992, the Court of Appeals reversed Judge Willson on some issues and parcels of land, but affirmed his decision on many others. The Tribe petitioned the United States Supreme Court to review the Court of Appeals' decision, but in March 1993, the Supreme Court denied the Tribe's petition.

Following his dismissal of numerous tracts, Judge Willson finally agreed to consider for the first time the Tribe's Motion to Certify a Defendant Class. The Tribe had filed its motion for class action status with the complaint in 1980, but the named defendants had opposed a class action and, despite the Tribe's repeated efforts to get a ruling on its motion, Judge Willson had postponed consideration of the issue for eleven years. Once again, Judge Willson ruled against the Tribe and in 1991 adopted verbatim the defendants' proposed order denying the class action. Orders denying class action are not appealable without the court's approval, and Judge Willson also refused to permit the Tribe to appeal the denial. The Tribe then attempted to secure review by the Court of Appeals through a seldom used device call a Writ of Mandamus. But because such a Writ calls into question the lower court's ability to properly handle a case, such a Writ is rarely issued. In 1992, the Court of Appeals denied the Tribe's petition. The Tribe did not seek review in the Supreme Court.

In a related lawsuit, the Tribe sued the United States in 1990, seeking damages for the Government's breach of its promise to protect the Tribe's land claim from the effects of the 1959 Termination Act. The Government had done nothing to protect the claim when it had promised that it would. In addition, the Tribe had not been represented by legal counsel and was wholly reliant on its trustee's assurances. Therefore, the Tribe sought to hold the Federal Government liable for that portion of its land claim that had been or would be in the future lost as a result of the Government's breach of promise. The Government asked that the Tribe's claim be dismissed because the Tribe had waited too long to sue the United States, arguing that the Tribe was required to sue the United States by 1951 or, alternatively, 1968. The United States Claims Court agreed with the Government and in 1991 dismissed the Tribe's claim. The Tribe appealed to the Court of Appeals for the Federal Circuit and in January 1993, the Court of Appeals upheld the dismissal. In April of 1993, the Tribe will ask the Supreme Court to review the case and reinstate its claim against the Government.

Settlement Efforts: 1990-1993

Following the 1989 Court of Appeals decision confirming that a substantial portion of the Tribe's claim remained alive despite the Supreme Court's decision that state statutes of limitations applied, State and local governments and private "landowners" renewed their interest in a negotiated settlement. Congressman John Spratt and Governor Carrol Campbell announced their preference for a legislative resolution and accepted Chief Blue's offer to resume negotiations. The Governor appointed an advisory task force on the claim and named State Tax Commissioner Crawford Clarkson to head the task force and participate in the settlement talks. Secretary of the Interior Manuel Lujan, at Governor Campbell's request, announced his support for a negotiated settlement and designated

his counsel, Timothy Glidden, as the Federal representative to the talks.

Talks began in February 1990 and continued sporadically through July, 1991. While considerable progress toward agreement was made on a number of issues, the parties remained far apart on other key issues such as the amount of self-governmental powers the Tribe would possess and the dollar amount required to settle the case. The urgency that underlay the parties' early efforts had dissipated somewhat with Judge Willson's ruling in July, 1990, that 29 defendants and thousands of acres would be dismissed from the Tribe's claim.

By July, 1991, when the Tribe conveyed a counter-offer to state negotiators, public support for any settlement that would require further concessions appeared to be minimal. Many landowners and local officials apparently felt they could prevail in court. The Tribe received no response to its July counter-offer. After waiting several months, attorneys for the Tribe inquired of the state negotiators whether a more modest counter-offer might generate greater interest in settlement. The Tribe was told that it would and prepared a reduced settlement offer that was submitted to state negotiators in February, 1992. Also in February, the Fourth Circuit Court of Appeals heard oral argument in the Tribe's appeal of Judge Willson's July, 1990 ruling. For the first time, all judges on the Court of Appeals appeared to be hostile to the Tribe's position. Predictably, the Tribe received no response to its modified counter-offer.

With hopes for a legislative settlement dimming, the Tribe and its attorneys were forced to turn their attention once again to the lawsuit. Judge Willson's ruling in February, 1990, denying certification of a defendant class, had the effect of restarting the running of a 20-year statute of limitations "clock" that had been stopped when the Tribe filed its lawsuit in October, 1980. Thus, when Judge Willson denied class action status in February, 1991, the Tribe had approximately 20 months to either finally settle the claim or sue individually each of the tens of thousands of occupants of the claim area.

In April, 1992, with only six months left before the 20-month deadline, NARF attorneys began preparations for suing and serving process on the 61,767 occupants of the claim area individually before the statute of limitations expired on October 19, 1992. NARF retained the services of a major litigation support firm and assembled a team of computer and direct mail experts to work with the team of attorneys and paralegals. Using the Tax Assessors' computerized records from York, Lancaster and Chester Counties, the team prepared the list of names, addresses and property descriptions for 61,767 defendants. From that list, individualized summonses, complaints, lis pendens (notice of claim of title), and notices and acceptances of service by mail were printed. NARF kept the public apprised of the progress of preparation for suit.

These preparations had the effect of generating renewed interest in settlement. To give the parties additional time to reach a settlement, Congress, in July, 1992, enacted legislation extending the statute of limitations until October 1, 1993. Meanwhile, the Tribe's preparations for filing one of the largest suits of its kind in Federal Court history continued. The Tribe set September 2, 1993 as the latest date it could file and complete service before the October 18 deadline. When the public learned of the full extent of the Tribe's preparations and saw the completed summons, complaint, lis pendens (documents 16 inches thick) and the 1.4 million pages of individualized pleadings ready for service by mail, the climate for settlement was better than it had been in 150 years. But whether an agreement could be reached before the September 2, 1993 filing date was doubtful.

In a last minute effort to avoid filing of the massive lawsuit, the parties resumed negotiations in late August. Day and night, from August 21 to August 29, the Tribe, represented by its full Executive Committee and its attorneys, bargained over the terms of a proposed agreement in principle. It was critical for the Tribe to determine whether enough progress toward settlement could be made to permit the Tribe to postpone filing suit against the 61,767 individuals. If it appeared likely that a settlement could become final before the Congressional extension expired on October 1, 1993, then the Tribe could rely on that extension and postpone suit. If, on the other hand, there appeared to be little chance that a settlement could be reached, there would be no point in delaying suit and thereby risking a possible future court ruling that the congressional extension was ineffective to suspend the running of the statute of limitations.

At 2:00 a.m. August 29, 1992, the negotiators for the Tribe concluded that settlement was likely. Later that day, they presented the outlines of the Agreement in Principle to the Tribe meeting in General Council. The Tribe voted unanimously to postpone filing suit and directed its negotiators to bring back any final agreement for its approval.

Negotiations continued and on January 12, 1993, the negotiators reached an agreement in principle to settle the claim. On February 20, 1993, following a series of educational workshops on the Reservation, the Tribe again met in General Council to consider the proposed Agreement in Principle. After three hours of discussion, the Tribe voted 289 to 42 to accept the settlement agreement. In the near future, settlement legislation will be introduced in the United States Congress and the South Carolina General Assembly.

Conclusion

Until the Tribe took its claim to court in 1980, the efforts at resolving this dispute had followed a predictable pattern established more than two centuries ago. Faced with either the impending loss of their lands or, later, the abject poverty resulting from its loss, the Catawbas appealed time after time to the State of South Carolina for protection and assistance. The State, somewhat sympathetic and somewhat aware of its past failures to abide by its promises, would "investigate" by commission and formulate recommendations, but ultimately would take no action. Subsequent appeals to the Federal Government would be answered by referring the Tribe back to the State on the premise that the Catawbas were "State Indians." Both State and Federal officials supported settlement but argued that the other party should bear the cost. The 1943 Memorandum of Understanding offered temporary hope that the pattern of passing the buck between State and Federal Governments had finally come to an end, but no sooner did the United States accept responsibility than it renounced it.

It is generally agreed that underlying all parties' reluctance to support a fair settlement was the suspicion that the Tribe had no real leverage; that is, it could not win its case in court. But for the Catawba Tribe there appeared to be few options. More than two centuries of relying on the good will and promises of the State and Federal Governments had resulted only in the loss of their ancestral lands and severe poverty among tribal members. It now appears that a just settlement is possible. And while the proposed settlement can never fully compensate the Tribe for the loss of its lands and economic self sufficiency, it is hoped that the settlement will, as Chief Blue stated, provide the Tribe and its members with the tools to work toward a brighter future. *(Don B. Miller is a senior staff attorney at the NARF Boulder office and has represented the Catawba Tribe since 1975.)*

CASE UPDATES

Northern Cheyenne Tribe Water Rights

After years of research and negotiation, the Northern Cheyenne Tribe and the State of Montana entered into an important and historic Indian water rights compact. The Compact resolves all issues concerning the nature, extent and administration of the Tribe's water rights in Montana. The Northern Cheyenne-Montana Compact was passed in Congress and signed by President Bush on September 30, 1992. The Compact confirms tribal water rights to 12,500 acre-feet of direct flow water and 27,500 acre-feet of storage water from the Tongue River; 30,000 acre-feet from the Yellowtail Reservoir; and 1,800 acre-feet from Rosebud Creek, plus an additional 19,530 acre-feet provided certain water users upstream and downstream are not impacted. The Compact further provides that all Tribal water uses will be administered by the tribe and that the Tribe has the right to market water off the reservation. The legislation also provides for the establishment of a tribal development fund of $21.5 million to be used for land and natural resource development. NARF represents the Tribe.

Fort McDowell Indian Community Water Rights

On January 13, 1993, the Secretary of the Interior signed an agreement implementing legislation to resolve the long standing dispute over the water rights of the Fort McDowell Indian Community in Arizona. In accordance with the Fort McDowell Indian Community Water Rights Settlement Act of 1990, the Tribe will receive a maximum annual diversion right of 36,500 acre-feet of water from the Verde River. The Community may lease a portion of its water, and the federal government will also provide the Community a development fund of $31 million and a Small Reclamation Project Act loan of $13 million for irrigation development on the reservation. NARF represented the Fort McDowell Indian Community.

Chippewa-Cree Water Rights

The Chippewa-Cree Tribe of the Rocky Boys Reservation in Montana presented its water rights settlement proposal, in the form of a proposed compact between the Tribe and the State of Montana, to the Montana Reserved Water Rights Compact Commission and to the Federal Negotiating Team. The proposal calls for the construction of new or enlarged water supply facilities on the Reservation. The Tribe's proposal will provide for the administration of the Tribe's water rights by the Tribe and the right to unlimited use of all groundwater within the Reservation. It also provides for the establishment of a tribal economic development fund needed to finance the many improvements that are called for by the proposal. NARF and the Tribe will negotiate this proposal with the State and Federal governments and work towards finalizing a settlement agreement, having it ratified by Congress and ultimately having it incorporated in a final decree issued by the Montana Water Court.

NARF RESOURCES AND PUBLICATIONS

THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials such as law review materials, court opinions, and legal treaties, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain that are non-copyrighted are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

continued

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ANNUAL REPORT. This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

THE NARF LEGAL REVIEW is published by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor. There is no charge for subscriptions.

Tax Status. The Native American Rights Fund is a nonprofit, 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 Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

Main Office: Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 (303-447-8760).

D.C. Office: Native American Rights Fund, 1712 N Street, N.W., Washington,D.C. 20036 (202-785-4166).

Alaska Office: Native American Rights Fund, 310 K Street, Suite 708, Anchorage, Alaska 99501 (907-276-0680).

NARF RECEIVES HUMAN RIGHTS AWARD

The Native American Rights Fund was awarded the prestigious Carter-Menil Human Rights Foundation Prize on December 10, 1992, along with the Haitian Refugee Center of Miami. NARF was selected to receive this renowned award for their unswerving efforts to stand up for American Indian religious and cultural rights. The prize, awarded in Washington, D.C. on the 44th Anniversary of the adoption of the United Nations Universal Declaration of Human Rights, stated that "The Carter-Menil Human Rights Foundation recognizes the exceptional courage and leadership of individuals and groups who further the cause of human rights around the world. . . . In recognition of the recipient's profound commitment to human decency and the protection of human rights." The Carter-Menil Human Rights Foundation was established in 1986 by Dominique de Menil and former President Jimmy Carter to promote the protection of human rights throughout the world.

Yvonne Knight
NARF Attorney

NARF ATTORNEY

Yvonne T. Knight, a staff attorney from NARF's Boulder office, is one of three members of NARF's Litigation Management Committee which is responsible for general management of the legal services provided by NARF. Yvonne is of Ponca-Creek descent and a member of the Ponca Tribe of Oklahoma. While in law school, she was a founding member of the American Indian Law Students Association (now the Native American Law Students Association), and served on the first board of directors of that organization. Yvonne was the first Indian woman law graduate from the University of New Mexico's Indian Law Scholarship Program. She joined NARF as a staff attorney in 1971 and has represented several tribes and individuals in cases involving a variety of Indian law issues. Yvonne served as a member of a task force of the American Indian Policy Review Commission responsible for recommending changes in federal statutes affecting Indians. She was actively involved in the passage of the Menominee Restoration Act. She has also had extensive lawyering experience in such areas of Indian law as drafting tribal constitutions; defining and enforcing the federal trust responsibility to Indians; litigating tribal claims to land, water, and other natural resources; enforcing Indian education rights; and defining and enforcing tribal court jurisdiction. Currently, Yvonne is concentrating much of her effort in the area of establishing tribal reserved water rights. B.S., University of Kansas (1965); J.D., University of New Mexico (1971); Reginald Heber Smith Fellow (August 1971 to July 1974); Native American Rights Fund (1971 to present); admitted to practice law in certain tribal courts, in the federal and state courts of Colorado, and in other federal court jurisdictions, including several district courts, the Eighth, Ninth, and Tenth Circuit Courts of Appeals, the United States Claims Court, and the United States Supreme Court. *(Photo credit, Thorney Lieberman)*

Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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Public Law 102-339
102d Congress

An Act

To provide additional time to negotiate settlement of a land dispute in South Carolina.

Aug. 11, 1992
[H.R. 5566]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Indians.

SECTION 1. FINDINGS.

The Congress finds the following:

(1) Suits on possessory land claims may be commenced against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, within the area claimed in the suit Catawba Indian Tribe of South Carolina against State of South Carolina, et al., Civil Action No. 80-2050 (D.S.C.).

(2) Tens of thousands of such suits would be costly to all parties, including the Federal judicial system, and would create a burden upon interstate commerce.

(3) The filing of such suits may be averted by settlement if additional time is made available for the parties to negotiate and implement the terms of settlement.

(4) The Congress has authority to enact this legislation under the Indian Commerce Clause and the Interstate Commerce Clause of the Constitution; and the Department of Justice concurs in this construction of Article I of the Constitution.

SEC. 2. PURPOSE.

The purpose of this Act is to prevent the social, economic, and judicial disruption that would result from the commencement of law suits against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, and the burden on interstate commerce that such suits would impose. The parties to the above referenced suit require additional time in which to negotiate and implement the terms of settlement; and if such time is made available, it may avert the necessity of thousands of law suits. The purpose of this Act is not to revive, renew, or extend any claim barred by any period of limitation, repose, or time bar as of the effective date of this Act.

SEC. 3. STATUTE OF LIMITATION.

(a) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, bars any claim brought by or on behalf of any Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester Counties, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or any treaty, as of the date of enactment of this Act, such period of limitation or repose, or other defense based wholly or partly on passage

Exhibit M
July 2, 1993
House Hearings - H.R. 2399

of time, shall bar any such claim, without regard to whether such claim has already been filed.

(b) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, has not barred any claim, filed or unfiled, by or on behalf of an Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester County, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or treaty, as of the date of the enactment of this Act, the running of any such period of limitation or repose, or any other defense based wholly or partly on the passage of time, shall be suspended as of the date of the enactment of this Act until October 1, 1993. On October 1, 1993, the time upon which any such defenses are based shall resume running. The period of time remaining for any time-related defense to become a bar to any such claim shall be the same on October 1, 1993, as it was immediately prior to the date of the enactment of this Act. Nothing in this subsection shall be construed to affect the application of any period of limitation, repose, or time bar to the claim of any individual Indian which is pursued under any Federal or State law generally applicable to non-Indians as well as Indians.

Approved August 11, 1992.

LEGISLATIVE HISTORY—H.R. 5666:

CONGRESSIONAL RECORD, Vol. 138 (1992):
July 27, considered and passed House.
July 30, considered and passed Senate.

88-139 O - 92 (330)

O

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issue and provide us some sound recommendations.

Finally, Mr. Speaker, the legislation authorizes the Government to insure the ground support operations necessary to service those flights operated on behalf of the Government. Presently, the program is authorized only to insure flights.

Mr. Speaker, I reserve the balance of my time.

Mr. HAMMERSCHMIDT. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the War Risk Insurance Program is a little-known, but potentially very important, Federal program. It was first authorized in 1951 and has been used only sparingly since. However, it did play an important role during the Persian Gulf conflict. It was used to insure flights carrying troops and supplies to the Middle East.

In the past, the reauthorization of the War Risk Program had been handled routinely. Frequently we accomplished it without even the need to hold a hearing. However, experience gained during the Persian Gulf war justified a closer look at the program this time.

Our hearings on this subject focused on the issue of extending war risk coverage to domestic flights. Currently, war risk policies cover only international flights, but the airlines urged us to extend the program to domestic flights as well.

I am pleased that the bill addresses this issue, at least in part. It would extend the War Risk Insurance Program to some domestic flights, primarily those flights that carry troops and supplies for the Defense Department.

Another source of complaints about the War Risk Program concerned the bureaucracy and the redtape that airlines had to endure to get insurance coverage for specific flights. While the bill does not address this problem directly, it does require the General Accounting Office to study the matter and make some recommendations. This will give us a chance to revisit this issue once we have the benefit of GAO's analysis.

Mr. Speaker, the Public Works and Transportation Committee undertook a thorough review of the War Risk Insurance Program. I appreciate the time that the subcommittee chairman, Mr. OBERSTAR, and the ranking member, Mr. CLINGER, spent becoming familiar with the details of this highly technical program. I support this bill that is the result of those efforts, and commend Chairman ROE for moving it expeditiously through the full committee.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. OBERSTAR. Mr. Speaker, I want to again offer my compliments to my ranking member of the subcommittee, the gentleman from Pennsylvania [Mr. CLINGER], for his participation throughout the several hours of hearings we held on this issue and for the time he has devoted to shaping the legislation and bringing about the support we needed in committee to bring this bill to the House floor.

I want to offer my compliments especially to the staffs on both sides of the subcommittee who have labored long and hard, listening to the many interests and concerns on the side of both the military and the Department of Transportation, as well as the carriers involved, and who have done a splendid job in shaping this legislation.

Mr. ROE. Mr. Speaker, I rise in strong support of H.R. 5465, a bill to reauthorize for 5 years the Aviation Insurance Program in title XIII of the Federal Aviation Act. This program provides commercial air carriers with Government-sponsored insurance when commercial insurance is unavailable or is available at unreasonable rates due to world events.

The War Risk Insurance Program provided vital to the country's national interest during the Persian Gulf conflict when our Nation's carriers operated flights on behalf of the military. During the conflict, commercial insurance for flights to the Middle East increased so dramatically that operations to the area would have been prohibitively expensive if the Government had not been able to provide insurance. The kind of civil airlift that proved so necessary to our country's success in Desert Shield and Desert Storm would not have been available if air carriers were not assured that adequate insurance was being provided for their operations.

Desert Shield and Desert Storm exemplify the need to reauthorize this program without delay. Prior to the Persian Gulf conflict, this program had been used only a handful of times. Yet, when the need arose for this program to be implemented on a large-scale basis, on relatively short notice, the program succeeded in providing the necessary insurance and effectively assisting in the military effort.

In addition to reauthorizing the Aviation Insurance Program for 5 years, H.R. 5465 expands the existing program to authorize the Government to insure domestic flights being operated by commercial carriers on behalf of the Government. The present program authorizes insurance for international flights only. The committee considers that this expansion is necessary to ensure that there is no gap in insurance coverage when carriers are operating flights on behalf of the Government. Without the assurance that adequate insurance is available, carriers may choose not to operate flights on behalf of the Government, which would seriously reduce the Government's airlift capability.

The bill also requires the General Accounting Office to study how the Aviation Insurance Program operated during Desert Shield and Desert Storm. The GAO report will make recommendations to Congress about how the program could be improved.

Mr. Speaker, I urge my colleagues to support this very important legislation.

Mr. OBERSTAR. Mr. Speaker, I yield back the balance of my time.

GENERAL LEAVE

Mr. OBERSTAR. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the pending bill, H.R. 5465.

The SPEAKER, pro tempore Mr. MCDERMOTT, is there objection to the request of the gentleman from Minnesota?

There was no objection.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Minnesota [Mr. OBERSTAR] that the House suspend the rules and pass the bill, H.R. 5465, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

PROVIDING ADDITIONAL TIME TO NEGOTIATE A LAND DISPUTE IN SOUTH CAROLINA

Mr. VENTO. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 5560) to provide additional time to negotiate settlement of a land dispute in South Carolina.

The Clerk read as follows:

H.R. 5560

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

The Congress finds the following:

(1) Suits on possessory land claims may be commenced against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, within the area claimed in the suit Catawba Indian Tribe of South Carolina against State of South Carolina, et al., Civil Action No. 82-2050 (D.S.C.).

(2) Tens of thousands of such suits would be costly to all parties, including the Federal judicial system, and would create a burden upon interstate commerce.

(3) The filing of such suits may be averted by settlement if additional time is made available for the parties to negotiate and implement the terms of settlement.

(4) The Congress has authority, to enact this legislation under the Indian Commerce Clause and the Interstate Commerce Clause of the Constitution; and the Department of Justice concurs in this construction of Article I of the Constitution.

SEC. 2 PURPOSE.

The purpose of this Act is to prevent the social, economic, and judicial disruption that would result from the commencement of law suits against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, and the burden on interstate commerce that such suits would impose. The parties to the above reference suit require additional time in which to negotiate and implement the terms of settlement; and if such time is made available, it may avert the necessity of thousands of law

suits. The purpose of this Act is not to revive, renew, or extend any claim barred by any period of limitation, repose, or time bar as of the effective date of this Act.

SEC. 5 STATUTE OF LIMITATION.

(a) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, bars any claim brought by or on behalf of any Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester Counties, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or any treaty, as of the date of enactment of this Act, such period of limitation or repose, or other defense based wholly or partly on passage of time, shall bar any such claim, without regard to whether such claim has already been filed.

(b) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, has not barred any claim, filed or unfiled, by or on behalf of an Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester County, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or treaty, as of the date of the enactment of this Act, the running of any such period of limitation or repose, or any other defense based wholly or partly on the passage of time, shall be suspended as of the date of the enactment of this Act until October 1, 1993. On October 1, 1993, the time upon which any such defenses are based shall resume running. The period of time remaining for any time-related defense to become a bar to any such claim shall be the same on October 1, 1993, as it was immediately prior to the date of the enactment of this Act. Nothing in this subsection shall be construed to affect the application of any period of limitation, repose, or time bar to the claim of any individual Indian which is pursued under any Federal or State law generally applicable to non-Indians as well as Indians.

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Minnesota [Mr. VENTO] will be recognized for 20 minutes, and the gentleman from Wyoming [Mr. THOMAS] will be recognized for 20 minutes.

The Chair recognizes the gentleman from Minnesota [Mr. VENTO].

GENERAL LEAVE

Mr. VENTO. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the measure before us, H.R. 5566.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

Mr. VENTO. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, H.R. 5566 sponsored by Mr. SPRATT, preserves the legal status of the land claims of the Catawba Tribe of Indians of South Carolina 1 year. Unless this bill passes, the tribe is prepared to sue approximately 27,500 landowners in the State of South Carolina, and will do so to meet the statute of limitations deadline which the tribe asserts falls on October 19 of this year. The tribe would be serving the defendant landowners at the end of this month to meet this deadline unless this legislation is passed immediately. Mere service of process in this case would result in great expense to both the tribe and the defendants.

This is an urgent matter and the committee has expedited its procedures to accommodate the tribe, the landowners and the State because the parties are engaged in negotiations which will hopefully result in a fair and equitable settlement of the Catawba claims.

This measure has the support of the administration, the tribe, the State, and the South Carolina delegation. I urge my colleagues to support it.

H.R. 5566

PURPOSE

The purpose of H.R. 5566 is to suspend the running of the limitations periods applicable to an Indian claim for damages and possession of land in York and Lancaster Counties, South Carolina. This bill is not intended to affect in any way the substantive claims or defenses either side may assert in the litigation of this claim. The bill does not address or affect litigation of this claim. The bill does not address or affect the substance of the land claim, or reflect any congressional intent to modify the claim or any defenses land holders may have to such claim, other than to suspend for a stated time statutory and common law periods of limitation and repose that may apply to the claim. In particular, H.R. 5566 does not state or imply whether the claimants, the Catawba Indian Tribe of South Carolina, are an Indian tribe today or were a tribe at any time relevant to their claim. Nor does the bill state whether any trust relationship ever existed between the Catawbas and the federal government. These are issues for a court to resolve if this claim is litigated. Congress does not speak to these or any other such issues in this legislation.

BACKGROUND

On October 28, 1980, a suit was filed in the U.S. District Court for South Carolina entitled *Catawba Indian Tribe of South Carolina* v. *State of South Carolina, et al.* The plaintiff, (the "Catawbas") alleges that in treaties made with the British Government in 1760 and 1763, a tract of 144,000 acres in South Carolina was reserved to the Catawbas; and that in return for guarantees of quiet possession, the Catawbas ceded the remainder of their lands held under aboriginal title. The Catawbas further allege that in 1840, the State of South Carolina, without federal participation or approval, negotiated a "treaty" with the Catawbas, attempting to extinguish Indian title so that the lands could be conveyed to non-Indians. The Catawbas allege that South Carolina failed to honor its promise to acquire a new reservation for the Catawbas. The Catawbas further allege that the 1840 "treaty" was void under federal law and thus conveyed no interest in the reservation lands to the non-Indian occupants. On December 14, 1943, the State of South Carolina, the Catawbas, and the federal Office of Indian Affairs entered into a "Memorandum of Understanding," providing for the extension of federal benefits to the Catawbas. The Catawbas contend that this MOU established a federal trust relationship. On July 1, 1962, by virtue of the "Catawba Division of Assets Act," 25 U.S.C. Section 931-938, the Catawbas' relationship with the federal government was terminated.

After a three-year effort to settle the claim without disruptive litigation failed, the Catawbas on October 28, 1980, filed suit in the U.S. District Court to regain possession of 140,000 acres in the U.S. District Court to regain possession of 140,000 acres purportedly ceded by the 1840 treaty. The suit was filed as a defendant class action naming 76 defendants as representatives of a defendant class then estimated to number 27,500. The Catawbas sought immediate certification of the defendant class, but the District Court, over their objection, postponed consideration of class action status in favor of first considering the named defendants' motion to dismiss based on the effects of the Catawba Division of Assets Act ("Act"). The court then dismissed the case, holding that the Catawba Division of Assets Act ratified the 1840 treaty, extinguished the Catawbas existence as a tribe and the federal trust responsibility for the land claim, and made state statutes of limitations applicable to the claim in such a way as to bar the claim. In 1984, the United States Court of Appeals for the Fourth Circuit reversed the District Court. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, 740 F.2d 305 (4th Cir. 1984) (en banc, per curiam); (adopting panel opinion, 718 F2d 1291, 4th Cir. 1983). In 1985, the United States Supreme Court, reviewing only the question of whether the Catawba Division of Assets Act resulted in the application of South Carolina statutes of limitations to the claim, reversed the Fourth Circuit and held that state statutes of limitations should be borrowed and applied to the claim as a result of the Act. However, the court did not decide what effects their application would have on the claim. The Supreme Court instead remanded that question to the Fourth Circuit Court of Appeals. *State of South Carolina* v. *Catawba Indian Tribe of South Carolina*, 476 U.S. 498 (1986).

In, 1989, the Fourth Circuit ruled that because of South Carolina's prohibition against tacking (adding together) successive periods of adverse possession to achieve 10 years under the statute of limitations, the Catawbas' claim would be barred against only those named defendants who had possessed the land for 10 continuous years between July 1, 1962, which was the effective date of the Catawba Division of Assets Act, when state law became applicable to the Catawbas, and October 28, 1980, when the law suit was filed. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, 865 F. 2d 1444 (4th Cir. 1989, en banc), cert. denied, 491 U.S. 906 (1989).

The case was remained to the District Court and over the Catawbas' objection, the court postponed consideration of the plaintiff's class action motion in order to determine which of the seventy-six named defendants could establish ten continuous years of adverse possession and thus be dismissed from the case. The court dismissed twenty-nine named defendants and thousands of acres from the claim. The court then took up the plaintiff's motion for class certification, and on February 19, 1991, the court ruled (1) that if the Catawbas were to prevail against the remaining named defendants, that would not affect the value and marketability of the lands of the absent class members, because many of them would have a statute of limitations defense, and (2) that no defendant class exists because the filing of the complaint and class action motion in 1980 did not toll the running of the applicable statutes of limitations. The court held that because of South Carolina's 20-year presumption of a grant, under which tacking is permitted, time continued to run against unnamed defendants after the claim was filed in 1980, and this common law presumption operated to bar the remainder of the claim. In addition, the District Court held that the 20-year limitations doctrine did not require an af-

firmative showing by each defendant that the land claimed by them had been adversely possessed for the twenty-year period. Both issues (dismissal based on adverse possession and denial of class certification) are currently before the Fourth Circuit on appeal and on mandamus petition respectively. Case Nos. 90-3466 and 91-2341.

By calculation of the Catawbas' attorneys, there was approximately 30 months left in the 20-year limitation period when the Catawbas filed their suit on October 28, 1980; or in other words, the Catawbas filed suit 18 years and 4 months after July 1, 1962. Because the District Court's ruling on February 19, 1991, on tolling and on the operation of the 20-year doctrine are not yet final, the Catawbas contend that in order to protect their claim, they must assume that the District Court will be reversed. They assume (1) that the running of state limitations periods was tolled by the filing of the complaint in 1980, and (2) that South Carolina law does not require an affirmative factual showing that each parcel of land has been possessed adversely for the requisite period before the Catawbas' land claim can be barred. Thus, under these assumptions, as of February 19, 1991, when the District Court denied class certification, the statute of limitations began running again. As a result, the Catawbas believe that they now have less than 3 months in which to file suits against individual land holders before the 20-year limitations period expires on or about October 19, 1992. Unless the Fourth Circuit issues a Writ of Mandamus directing the District Court to certify a defendant class, or if no decision is issued soon by the Fourth Circuit, the Catawbas believe that they have no choice but to proceed against the current occupants of the land in question, now estimated to number about 40,000. The Catawbas' attorneys have informed the Committee that they must file their suits by September 2, 1992 in order to fulfill the requirements for service by the deadline of October 19, 1992.

ANALYSIS

The Supreme Court has recognized that the Catawbas assert a federal cause of action. *State of South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 507 (1982); see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (Oneida I). The Court of Appeals for the Fourth Circuit, on remand from the Supreme Court, held that the Catawba land claim arises under federal law for purposes of federal court jurisdiction under 28 U.S.C. Sections 1331, 1337, and 1362. *Catawba Indian Tribe v. South Carolina*, 865 F. 2d 1444, 1455-56 (4th Cir. 1989) (en banc); cert. denied, 491 U.S. 905 (1989). While the applicable periods of limitations derive from state statutory and common law, they have been made applicable to the Catawbas' cause of action by virtue of Congressional enactment—the Catawba Division of Assets Act. In the absence of this Act, there would be no statute of limitations, state or federal, applicable to the Catawbas' possessory claim. *State of South Carolina v. Catawba Indian Tribe of South Carolina*, 476 U.S. 498, 507-508 (1986); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-244 (1985) (Oneida II: "In the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim."). Thus, the Catawba Division of Assets Act applied the normal rule that state law limitations periods would be borrowed and applied to the Catawbas' federal claim as a matter of federal law. See 476 U.S. at 513: "These are federal claims, [citing Oneida I] and the statute of limitations is thus a matter of federal law [citing Oneida II]." Justice Blackmun dissenting.

Because Congress, in the exercise of its plenary power over Indian affairs, permitted the borrowing of state law limitations periods for application to the Catawbas' claim, Congress may, through the exercise of that same power, preempt the application of the state limitations periods and suspend their applicability and operation for a period of time. It is not the intent of Congress to dictate or direct how state law is to be interpreted. The Department of Justice, in a June 24, 1982, letter to Senator J. Strom Thurmond, Senator Ernest F. Hollings, and Congressman John M. Spratt, Jr. concurred in this conclusion:

That Congress for a time may have permitted the federal courts to borrow South Carolina's analogous limitations periods and apply them to this land claim is no impediment to Congress' reassertion of the federal power in an area over which Congress has plenary authority. Many cases recognize federal power to insulate Indians form state power even after state power has attached. *United States v. John*, 437 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938) (land in Nevada purchased after statehood by the federal government and held in trust for Indians was Indian country); *Winters v. United States*, 207 U.S. 564 (1908); *Eastern Band of Cherokee Indians v. Lynch*, 833 F. 2d 273 (4th Cir. 1980). The last case is especially instructive. The Eastern Band of Cherokees was similar in its history to the Mississippi Choctaw involved in *United States v. John*, supra, in that they stayed in the east while others of the tribe were removed to the west. They became citizens of the State, bought some land for a reservation, and became incorporated under state law. The state taxed their lands and those lands were lost for nonpayment of taxes. The federal government redeemed those lands, took them in trust, and passed a statute in 1924, allowing state taxation of one additional year after which time it was no longer allowed. The state attempted to tax income earned on the reservation and to tax personal property thereon, but the court held that federal law preempted such authority.

CONCLUSION

Congress does not seek to revive any tribal claims that have already been barred. However, Congress may direct that the statute of limitations applicable to Indian claims be extended, as it did repeatedly in amending 28 U.S.C. Section 2415.

□ 1420

Mr. THOMAS of Wyoming. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the gentleman from Minnesota has already addressed the provisions of the bill in detail, and the need for its swift passage, so I will simply note that I add my support of H.R. 5566 to that of the tribe, the landowners, and the State of South Carolina.

I hope that the parties to Catawba Indian Tribe versus South Carolina will use the opportunity afforded by this bill to reach a fair and equitable settlement of the tribe's land claim.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. VENTO. Mr. Speaker, I yield such time as he may consume to the gentleman from South Carolina [Mr. SPRATT], the principal sponsor of this legislation.

(Mr. SPRATT asked and was given permission to revise and extend his remarks.)

Mr. SPRATT. Mr. Speaker, I rise in support of H.R. 5566. I introduced this bill to avoid massive disruption in my congressional district. Disruption which would surely result if some 40,000 law suits were commenced against landholders in York, Lancaster, and Chester Counties, SC. To prevent the commencement of these suits, this bill must enacted before the recess in August. For that reason, I wish to express my gratitude to Chairman MILLER and Congressman YOUNG and Congressman RHODES for allowing this legislation to be considered on an expedited basis, as well as the gentleman from Minnesota [Mr. VENTO] and the gentleman from Wyoming [Mr. THOMAS].

The legislation is short and simple, but its background is long and complex. There is not enough time to cover it fully, but I need to give a summary to explain the purpose of this bill and why it is so urgent.

On October 28, 1980, a case entitled Catawba Indian Tribe of South Carolina versus State of South Carolina, et alia, was filed in the U.S. District Court for South Carolina. The plaintiff sued 76 defendants; alleging that a treaty made between the Catawbas and the State of South Carolina in 1840 was void under the Indian Non-Intercourse Act because it was never ratified by Congress. The treaty ceded 144,000 acres of land to the State of South CArolina, and 150 years later, the plaintiff seeks to recover the land and trespass damages. Among the 76 defendants are the State of South Carolina, local governmental entities, and major landholders. I was among the defendants named, because I then owned approximately 830 acres of land within the area claimed, and now own approximately 810 acres. When the suit was filed in 1980, the plaintiff moved to have the named defendants certified as a class representing not only their own interests but also the interests of all other landholders similarly situated in the claim area. The district court did not rule on plaintiff's motion for class action certification at the time, but instead granted the defendants' motion for dismissal. In 1986, the Supreme Court reversed the district court in part, but held that the land claim alleged by the plaintiff was subject to the statutes of limitation of State of South Carolina after July 1, 1962.

When the suit was finally remanded to the district court, the plaintiff renewed its motion for class action certification, which the court denied in February 1991. Because of the court's denial of class action certification, plaintiff's attorneys have announced that the plaintiff will have to sue an estimated 40,000 landowners in York, Lancaster, and Chester Counties, South Carolina. Attorneys for the plaintiff calculate that the 20-year period of limitations will run out on October 19, 1992; consequently, the plain-

tiff is preparing to file thousands of lawsuits by late August of this year.

The bill I am introducing would suspend the running of any period of limitations that has not already expired until October 1, 1993. Thus, it would grant both parties additional time within which to work out terms of settlement.

It goes without saying that 40,000 lawsuits would create chaos. Even though the vast majority of landowners would probably have a successful defense, they would have to retain an attorney to search their title, prepare affidavits, and file and argue a motion for summary judgment. All of this would be costly; and while the suits were pending, it would be difficult to transfer land and obtain title insurance.

Since the fall of 1989, Gov. Carroll A. Campbell, Jr., and I have sought to settle the entire suit out of court. We have made progress and narrowed the gap on most of the major issues. However, we have not yet reached full agreement; and even if we had, we would not be able to consummate a settlement agreement by enacting State and Federal legislation before October 19, 1992. At this point, the only way to avoid thousands of law- suits, and the disruption they would cause, is to give the parties more time to negotiate and implement a settlement agreement.

This is the sole purpose of this legislation. It would not prevent the plaintiff from bringing thousands of law suits before October 19, 1992, if it chooses; but it would give the plaintiff another option: not suing now and negotiating instead for settlement. The bill would suspend until October 1, 1993, only those periods of limitation that have not run out by the effective date of this act. It would not revive, renew, or extend any claim barred by any period of limitation or repose, or any other time bar, as of the effective date of this act.

Before preparing this bill, I, along with Senator THURMOND and Senator HOLLINGS, sent a proposed draft of it to the Attorney General for review. I am submitting for the record a copy of our letter to the Attorney General and a copy of the favorable opinion letter received from Assistant Attorney General W. Lee Rawls, on June 24, 1992. I request unanimous consent that these documents be included in the RECORD immediately following my statement.

In addition, I submitted the bill for review to our South Carolina attorney general, Travis Medlock; and to Hale and Dorr, the law firm representing the State of South Carolina in this suit. And in developing the bill, I have worked with the law firm representing the plaintiff, the Native American Rights Fund [NARF] of Boulder, CO. As I already mentioned, we submitted the draft legislation to the Attorney General for his review and opinion at the specific request of NARF. The draft of the bill I am filing today differs somewhat from the draft submitted to the Attorney General; but the changes were sought by the Native American Rights Fund in order to strengthen the bill. The Native American Rights Fund is satisfied that the bill, as drawn, protects their client's interests as much as legally possible.

I have made clear what this bill is intended to do. I also want to make clear what this bill is not intended to do. This bill is not intended to affect in any way the substantive claims or defense either side may assert should the Catawbas' land claim be litigated. In drafting this bill, it was explicitly agreed by the Catawbas and by the landowners' attorneys that this legislation would not touch the substantive merits of their claim, but would merely suspend any period or statute of limitations until October 1, 1993, so that there would be additional time to negotiate. No party or court should read into this legislation any other meaning. In summary, this legislation does not address or affect the substance of the Catawbas' land claim, or reflect, even implicitly, any congressional intent to modify the Catawbas' claim or any defenses landowners may have to such claim, other than to suspend for a fixed period of time statutory and common- law periods of limitation and repose that may apply to the claim.

In particular, H.R. 5568 does not state or imply whether the Catawbas are an Indian tribe today or were a tribe at any time relevant to their claim. Nor does the bill state whether any trust relationship ever existed between the Catawbas and the Federal Government. These are issues for a court to resolve if this land claim is litigated. Congress does not speak to these or any other such issues in this legislation.

I have disclosed to the House that I own land in the area claimed by the Catawbas and that I am a defendant in the suit now pending. I have a substantial interest in the outcome of this litigation. For the past 2 years, I have kept the House Committee on Official Standards of Conduct informed of my personal interest in the suit and my efforts to settle the claim. Within certain constraints, the committee has advised me that I may work for settlement of the claim, though I should not introduce settlement legislation. In regard to this bill, a staff attorney with the committee has advised me that since I am a named defendant already, this legislation will not affect my status in the pending suit, and I can introduce the bill and support its passage. To the extent that this bill allows more time for negotiation and settlement, it serves my personal interests, but it clearly serves the interests of some 30,000 to 40,000 constituents who own land in the area claimed by the Catawbas.

For the RECORD I include the correspondence referred to earlier.

HOUSE OF REPRESENTATIVES,
Washington, DC, June 15, 1992.

Hon. WILLIAM P. BARR,
Attorney General of the United States, U.S. Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL BARR: We are writing to request an opinion from the Justice Department as to the constitutionality of draft legislation affecting a claim by the Catawba Indian Tribe of South Carolina against approximately 27,500 landowners in South Carolina. A copy of the proposed legislation is enclosed.

In 1980, the Catawba Indian Tribe of South Carolina brought suit against 76 defendants alleging that a treaty made with the State of South Carolina in 1840 was void under the Indian Non-Intercourse Act because it was never ratified by Congress. The treaty ceded 144,000 acres of land to the State, and the Catawbas seek to recover the land. The Catawbas moved to have the named defendants certified as a class, but the district court denied their motion for class action certification. The Catawbas have, therefore, announced that the tribe will sue approximately 27,500 individual landowners in York, Lancaster, and Chester Counties, South Carolina. Lawyers for the tribe are convinced that the 30-year statute of limitations, applicable under South Carolina law, runs out October 19, 1992; consequently, they are preparing to file their suits by late August 1992. The draft legislation we are proposing would grant the Catawba Indian Tribe of South Carolina an additional eight months in which to sue.

Obviously, 27,500 lawsuits would create chaos. Even though the vast majority of landowners would have a successful defense, they would have to retain an attorney to search their title, prepare affidavits, and file and argue a motion for summary judgement. All of this would be costly; and while the suits were pending, it would be difficult to buy or sell land and virtually impossible to obtain title insurance.

Governor Campbell and Congressman John Spratt have been negotiating since the fall of 1989 to settle the entire suit out-of-court. They have made significant progress and believe that they are close to an agreement. However, they will not be able to settle the suit and have an agreement consummated by state and federal legislation by October 19, 1992. The only way to avoid some 27,500 suits is to extend the deadline for eight additional months. This is what the draft bill is designed to accomplish.

The South Carolina Attorney General's office, the attorneys representing the State, and attorneys for the title insurance companies have all reviewed the legislation and find it in acceptable form. Attorneys for the tribe have also reviewed the legislation. In principle, they do not oppose an extension and are willing to refrain from filing the suits if Congress extends the deadline.

The Catawbas' suit came before the Supreme Court in 1988 on appeal of an order of dismissal. The Court noted that the Catawbas' relationship with the federal government had been terminated as of July 1, 1962; and in the termination act, Congress provided that as of the date of termination "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens in their jurisdiction." Consequently, the Supreme Court held that South Carolina statutes of limitation as to suits for recovery of land applied to the Catawbas. As indicated above, the Catawbas' attorneys now believe that the applicable South Carolina statute will run on October 19, 1992.

There is no federal statute of limitation applicable to their claim; but the tribe's at-

torneys believe that Congress probably has the authority under the Constitution to extend the time for filing the individual suits. However, they are not convinced of this conclusion, and they are concerned that if Congress passed a law extending the statute, a court might find that the deadline remained October 18 because the law is unconstitutional. The tribe's attorneys have requested a letter opinion from the Department of Justice confirming Congress's authority to provide additional time.

As you will see, the draft legislation cites Congress's authority under the Commerce Clause. There is no question that the filing of these suits would cause a significant impact on commerce in the claim area of 225 square miles, and specifically on interstate commerce since York and Lancaster Counties lie on the North Carolina border. However, if necessary, the legislation could also cite Congress's plenary authority over Indian matters.

If we are to avoid the suits and gain time for negotiating settlement, this bill must be passed before the August recess. Therefore, time is of the essence. We would appreciate your response within a week, at the latest. Thank you very much for your assistance.

Respectfully,

STROM THURMOND,
U.S. Senate.
ERNEST HOLLINGS,
U.S. Senate.
JOHN M. SPRATT,
Member of Congress.

HOUSE OF REPRESENTATIVES,
Washington, DC, June 12, 1992.

Hon. WILLIAM P. BARR,
Attorney General of the United States, U.S. Department of Justice, Washington, DC.

DEAR MR. ATTORNEY GENERAL: In conjunction with the enclosed letter I have cosigned with Senators Thurmond and Hollings regarding draft legislation affecting the Catawba claim, I should disclose that I have an interest in the outcome of the suit.

I am one of approximately 75 defendants named in *Catawba Indian Tribe of South Carolina, Inc. vs. State of South Carolina*, Civil Action No. 80-2050, now pending in the District Court of South Carolina. The Catawbas intended for the named defendants to be constituted as a class representative of the 25,000-30,000 landowners in the claim area. The district court denied their motion for certification of the class, and the Catawbas have sought to have the Fourth Circuit Court of Appeals mandamus the court to certify the class. The Court of Appeals has not yet rendered a decision.

I own approximately 300 acres in the claim area. Along with about 56 other defendants, I moved for summary judgement, and the district court entered an order releasing my land from the suit and dismissing the suit as to me. However, the Catawbas have appealed the summary judgement orders issued by the district court. I expect my defense of title to prevail on appeal as in some 700 acres, but the Catawbas may obtain a reversal as to a tract of some 100 acres.

On October 16, 1990, I wrote the House Committee on Official Standards in order to present my situation and ask for guidance on how I could proceed. The Committee advised me not to introduce settlement legislation so long as I remained a defendant, but allowed me to engage in settlement negotiations with government officials and with the Catawbas, provided I disclosed my interest in the matter, which is the purpose of this letter.

Respectfully,

JOHN M. SPRATT, Jr.,
Member of Congress.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 24, 1992.

Hon. John C. Spratt,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN SPRATT: This is in response to your request for the views of the Department of Justice on the constitutionality of draft legislation affecting a claim by the Catawba Indian Tribe of South Carolina against approximately 27,600 landowners in South Carolina. The draft bill would have the effect of tolling the statute of limitations applicable to the Tribe's claims if the statute has not already run. We have briefly analyzed the draft bill in light of pertinent legal and constitutional issues. In our view, the legislation is constitutional.

The purpose of the proposed legislation is to preserve, for a brief period, the current legal status of the Tribe's claims under the applicable statute of limitations so that the parties have time to complete settlement discussions, and thereby avoid massive and burdensome litigation of the claims. The bill would provide that if the applicable statute of limitations has run by the date of its enactment, then all claims subject to it filed or unfiled, will remain barred. However, if the applicable statute of limitations has not run by the date of enactment, then

"* * * any action by a plaintiff shall be treated as commenced on the date of the enactment of this Act if such action is commenced on or before April 16, 1993[,] and any amendment to an existing claim, if otherwise permissible, shall be treated as if commenced on April 16, 1993."

The fundamental issue is whether Congress has the power to alter the statute of limitations applicable in this case. We would conclude that Congress has that power. First, the cause of action in the Catawba case is one "arising under" federal law for purposes of 28 U.S.C. 1331. The Fourth Circuit explicitly so held in *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (en banc), and the Supreme Court so stated in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 507 (1985), although the issue was not squarely before the Supreme Court.

The Supreme Court first squarely recognized the federal character of such Tribal land claims in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), and generally stated that the rules for decision of such claims were federal in character. *Id.* at 674. In a subsequent decision in that same case, the Court specifically ruled that state statutes of limitation do "not apply of their own force to Indian land title claims." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 n.13 (1985). Instead, such statutes are "borrowed and applied to the federal claim * * * if the application of the state statute is not inconsistent with federal law." *Id.* at 240.[1]

This conclusion would appear to resolve two potential constitutional issues. First, it makes clear that the draft bill would effect no violation of the Tenth Amendment or other principles of state sovereignty. Congress clearly has the power under the Commerce Clause of Article I to regulate in this area. Tolling the statute of limitations applicable in this case would be merely an exercise of that power. It would do nothing more than alter a "borrowed" statute of limitations that, absent congressional action, has served as the applicable bar. The bill thus neither commandeers state legislative processes nor contains a direct mandate to states. Compare *New York v. United States*, Slip Op. at 28-29 (Supreme Court, June 19, 1992) (invalidating federal statutory provision requiring states that do not provide for disposal of low-level radioactive waste generated in state to take title to and assume liability for that waste). Cf. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1900) (exercise of federal powers that preempt state law does not impermissibly intrude on state sovereignty).

Second, the bill does not appear to create separation of powers problems by interfering with the judicial function. By changing the applicable statute of limitations, Congress in the draft bill is compelling a change in the law, rather than a particular result or finding under old law. The Supreme Court has upheld this type of congressional action where it has been challenged as improperly affecting pending litigation. See *Robertson v. Seattle Audubon Society*, 112 S.Ct. 1407 (1992). In *Robertson*, the Court upheld a federal statute that altered the legal standard required under certain environmental statutes with respect to certain timber sales in the Pacific Northwest. The Court rejected the plaintiffs' claim that the provision at issue was an impermissible "statutory directive," holding that "[a] statutory directive binds both the executive officials who administer the statute and the judges who apply it in particular cases * * *. Here, our conclusion [is] that what Congress directed—to agencies and courts alike—was a change in the law, not specific results under old law." *Id.*, at 1414 (emphasis in original).

Because it is within Congress's plenary power to alter a federal statute of limitations, we do not believe that accomplishing that end through a "deeming" provision (such as proposed section 2(b) would interfere with judicial powers in violation of Article III of the Constitution. Since Congress could state that "any statute of limitations that has not expired on the date of enactment of this bill is extended to April 15, 1993," it would not be problematic for Congress to provide that any claims subject to such an unexpired statute of limitations on the date of enactment of the bill shall be treated as if filed before the date of enactment.

In conclusion, in our view the draft bill would not violate any applicable constitutional principles. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

W. LEE RAWLS,
Assistant Attorney General.

CATAWBA NATION,
Rock Hill, SC, July 13, 1992.

Re H.R. 5668.

Hon. GEORGE MILLER,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Longworth House Office Building, Washington, DC.

DEAR CONGRESSMAN MILLER: On June 5, 1992, the Executive Committee of the Catawba Indian Tribe of South Carolina met and voted unanimously to support legislation that would suspend the running of limitations periods applicable to the Tribe's land claim. The Catawba Tribe has, since it first undertook to resolve this claim in 1977,

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[1] The Supreme Court is a variety of contexts has held that state statutes of limitations are "borrowed" in cases where rules are left in federal law. These borrowed statutes of limitations thus apply as a matter of federal law, rather than of their own force and effect. The Supreme Court has applied this general "state borrowing" doctrine in countless cases, including the *Catawba* cases, 476 U.S. at 507 & n. 18 (citing cases). See also *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773, 2778-82 (1991) (recognizing borrowing rule but holding that state statute of limitations does not apply where Congress intended federal bar to apply); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158-63 1983) (same).

sought to avoid disruptive litigation in favor of a consensual settlement. Our attorneys have reviewed H.R. 5566 and are satisfied that it is drafted in such a way as to provide as much protection to our claim as can be provided. Our support for H.R. 5566 is based on our understanding that Congress does have the authority to enact such legislation. I will be happy to provide further information or comment if you desire. Thank you for your consideration.

Sincerely,

GILBERT B. BLUE,
Chief, Catawba Indian Tribe.

□ 1420

Mr. VENTO. Mr. Speaker, I thank the gentleman from South Carolina for his detailed explanation of this. I think all of us understand the year extension of time is modest, considering the time and the magnitude of the issue that is being resolved. We hope that this time will result in a settlement and a fair result for the native Americans and other title owners in South Carolina.

Mr. FALEOMAVAEGA. Mr. Speaker, I rise today in support of H.R. 5566, a bill to extend the statute of limitations regarding a land dispute involving the Catawba Indian Tribe over land in the State of South Carolina. It is my understanding that plaintiffs, defendants and potential defendants in the pending law suit are supportive of this legislation, and passage of this bill will increase the likelihood of consensual settlement of the litigation.

Mr. Speaker, while I support this legislation, I want to emphasize that I intend to continue my efforts to obtain passage of H.R. 5562, a bill to restore Federal recognition to the Catawba Nation. The two bills are independant of one another, and while Federal restoration may eventually be a part of the final settlement of the ongoing litigation, there is no reason for Congress not to restore recognition to these Indians, and every reason, including fairness and justice, that we do.

Mr. VENTO. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore (Mr. MCDERMOTT). The question is on the motion offered by the gentleman from Minnesota [Mr. VENTO] that the House suspend the rules and pass the bill, H.R. 5566.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

RAILROAD RIGHT-OF-WAY CONVEYANCE VALIDATION ACT

Mr. VENTO. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 711) to validate conveyances of certain lands in the State of California that form part of the right-of-way granted by the United States to the Central Pacific Railway Co., as amended.

The Clerk read as follows:

H.R. 711

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Railroad Right-of-Way Conveyance Validation Act".

SEC. 2. VALIDATION OF CONVEYANCES.

Except as provided in section 5, the conveyances described in section 3 (involving certain lands in Nevada County, State of California) and section 4 (involving certain lands in San Joaquin County, State of California) concerning lands that form parts of the right-of-way granted by the United States to the Central Pacific Railway Company in the Act entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and Other Purposes", approved July 1, 1862 (12 Stat. 489), hereby are legalized, validated, and confirmed, as far as any interest of the United States in such lands is concerned, with the same force and effect as if the land involved in such such conveyance had been held, on the date of such conveyance, under absolute fee simple title by the grantor of such land.

SEC. 3. CONVEYANCES OF LANDS IN NEVADA COUNTY, STATE OF CALIFORNIA.

The conveyances of land in Nevada County, State of California, referred to in section 2 are as follows:

(1) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and David G. 'Otis' Kantz and Virginia Thomas Bills Kantz, husband and wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15995 in the official records of the county of Nevada.

(2) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Antone Silva and Martha E. Silva, his wife, grantees, recorded June 10, 1987, as instrument number 87-16098 in the official records of the county of Nevada.

(3) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Charlie D. Roeschen and Renee Roeschen, husband and wife as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15997 in the official records of the county of Nevada.

(4) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Manuel F. Nevarez and Margarita Nevarez, his wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-15998 in the official records of the county of Nevada.

(5) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Susan P. Summers, grantee, recorded June 10, 1987, as instrument number 87-15999 in the official records of the county of Nevada.

(6) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and James L. Porter, a single man, as his sole and separate property, grantee, recorded June 10, 1987, as instrument number 87-16000 in the official records of the county of Nevada.

(7) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Robert L. Helin, a single man, grantee, recorded June 10, 1987, as instrument number 87-16001 in the official records of the county of Nevada.

(8) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Thomas S. Archer and Laura J. Archer, husband and wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-16002 in the official records of the county of Nevada.

(9) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Wallace L. Stevens, a single man, grantee, recorded June 10, 1987, as instrument number 87-16003 in the official records of the county of Nevada.

(10) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Sierra Pacific Power Company, grantees, recorded June 10, 1987, as instrument number 87-16004 in the official records of the county of Nevada.

(11) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Truckee Public Utility District, grantee, recorded June 10, 1987, as instrument number 87-16005 in the official records of the county of Nevada.

(12) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Dwayne W. Haddock and Bertha M. Haddock, his wife as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-16006 in the official records of the county of Nevada.

(13) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and William C. Thorn, grantee, recorded June 10, 1987, as instrument number 87-16007 in the official records of the county of Nevada.

(14) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Jose Guadelupe Lopez, grantees, recorded June 10, 1987, as instrument number 87-16008 in the official records of the county of Nevada.

(15) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Harold O. Dixon, an unmarried man, as to an undivided half interest, and Pedro Lopez, a married man, as to an undivided half interest, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-16009 in the official records of the county of Nevada.

(16) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Robert E. Sutton and Patricia S. Sutton, husband and wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-16010 in the official records of the county of Nevada.

(17) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Angelo C. Besio and Eva G. Besio, his wife, grantees, recorded June 10, 1987, as instrument number 87-16011 in the official records of the county of Nevada.

(18) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Lawrence P. Young and Mary E. Young, husband and wife, as joint tenants, grantees, recorded June 10, 1987, as instrument number 87-16012 in the official records of the county of Nevada.

(19) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and the estate of Charles Clyde Cozzaglio, grantee, recorded June 10, 1987, as instrument number 87-16013 in the official records of the county of Nevada.

(20) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Noel T. Hargreaves, an unmarried woman, as her sole and separate property, grantee, recorded June 10, 1987, as instrument number 87-16014 in the official records of the county of Nevada.

(21) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Athlesure Enterprises, Incorporated, a Nevada corporation, grantees, recorded January 24, 1969, as instrument number 89-01800 in the official records of the county of Nevada.

(22) The conveyance entered into between the Southern Pacific Transportation Company, grantor, and Richard Bwarie, a single man as to an undivided one-half interest, and

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ties. It is also a benefit already accorded to U.S. investors in Finland who are eligible for visas that offer comparable benefits to those that would be accorded nationals of Finland under E-2 visa status.

As I reaffirmed in my December 1991 policy statement, the United States has long championed the benefits of an open investment climate, both at home and abroad. U.S. policy is to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. Finland also provides an open investment climate. Visas for investors facilitate investment activity and thus directly support our mutual policy objectives of an open investment climate.

I recommend that the Senate consider this protocol as soon as possible and give its advice and consent to ratification of the protocol at an early date.

GEORGE BUSH.

THE WHITE HOUSE, *July 30, 1992.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Protocol to the Treaty of Friendship, Commerce, and Navigation between the United States of America and Ireland of January 21, 1950, signed at Washington on June 24, 1992. I transmit also, for the information of the Senate, the report of the Department of State with respect to this protocol.

This protocol will establish the legal basis by which the United States may issue investor (E-2) visas to qualified nationals of Ireland. The protocol modifies the U.S.-Ireland friendship, commerce, and navigation (FCN) treaty to allow for entry and sojourn of investors. This is a benefit provided in the large majority of U.S. FCN treaties. It is also a benefit already accorded to U.S. investors in Ireland who are eligible for visas that offer comparable benefits to those that would be accorded nationals of Ireland under E-2 visa status.

As I reaffirmed in my December 1991 policy statement, the United States has long championed the benefits of an open investment climate, both at home and abroad. U.S. policy is to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. Ireland also provides an open investment climate. Visas for investors facilitate investment activity and thus directly support our mutual policy objectives of an open investment climate.

I recommend that the Senate consider this protocol as soon as possible and give its advice and consent to ratification of the protocol at an early date.

GEORGE BUSH.

THE WHITE HOUSE, *July 30, 1992.*

AUTHORIZING EXTENSION OF TIME LIMITATIONS FOR A FERC-ISSUED LICENSE

Mr. FORD. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar 533, S. 2725, a bill to authorize extension of time limitation for FERC-issued license.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 2725) to authorize extension of time limitations for a FERC-issued license, which had been reported from the Committee on Energy and Natural Resources with an amendment; as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill to be inserted are shown in italic.)

S. 2725

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the time limitations of section 13 of the Federal Power Act, the Federal Energy Regulatory Commission, upon the request of the licensee of FERC project numbered [4652] *4656* (and after reasonable notice) is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend until March 26, 1999, the time required for the licensee to acquire the required real property and commence the construction of project numbered 4652. The authorization for issuing extensions under this Act shall terminate on March 26, 1999.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

The PRESIDING OFFICER. If there is no objection, the committee amendment is agreed to.

AMENDMENT NO. 2801

(Purpose: To make a technical correction.)

Mr. BOND. Mr. President, I send a technical amendment on behalf of Senator CRAIG to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Missouri [Mr. BOND], for Mr. CRAIG, proposes an amendment numbered 2801.

Mr. BOND. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 2, line 8 strike "4652" and insert in lieu thereof "4656".

Mr. CRAIG. Mr. President, this amendment would correct a drafting error in S. 2725 as reported by the Committee on Energy and Natural Resources.

At the committee business meeting, a technical change was made to S. 2725. However, that change was not made in both places in the bill as intended. Instead the change was made in only one place in the bill.

This amendment, that is purely technical in nature, would correct this problem.

The PRESIDING OFFICER. Without objection, the floor amendment is withdrawn.

The amendment (No. 2801) was withdrawn.

Later, the following occurred:

VITIATION OF EARLIER ACTION ON AMENDMENT NO. 2801

The PRESIDING OFFICER. If the Senator will suspend for a moment, if there is no objection, the action on amendment No. 2801 is vitiated, and the amendment will be considered agreed to prior to the passage of S. 2725.

The Chair hears no objection. The withdrawal is indeed vitiated.

The amendment (No. 2801) was agreed to.

The PRESIDING OFFICER. If there is no objection, the bill is deemed read a third time and passed.

The bill (S. 2725), as amended, was deemed read the third time and passed, as follows:

S. 2725

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the time limitations of section 13 of the Federal Power Act, the Federal Energy Regulatory Commission, upon the request of the licensee of FERC project numbered 4656 (and after reasonable notice) is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend until March 26, 1999, the time required for the licensee to acquire the required real property and commence the construction of project numbered 4656. The authorization for issuing extensions under this Act shall terminate on March 26, 1999.

Mr. FORD. Mr. President, I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

ADDITIONAL TIME TO NEGOTIATE SETTLEMENT OF LAND DISPUTE

Mr. FORD. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 5568, a bill to provide additional time to negotiate settlement of a land dispute in South Carolina, just received from the House; that the bill be deemed read three times, passed and the motion to reconsider laid upon the table; further, that a statement by Senator INOUYE and a colloquy between Senators HOLLINGS and THURMOND appear in the RECORD at the appropriate place.

The PRESIDING OFFICER. Without objection, it is so ordered.

So the bill (H.R. 5568) was deemed read three times and passed.

Mr. INOUYE. Mr. President, I rise today in support of H.R. 5568, a bill to provide additional time to negotiate settlement of a land dispute in South

Carolina. The dispute in question involves an action entitled "*Catawba Indian Tribe of South Carolina* v. *State of South Carolina, et al.*," Civil Action No. 80-2050 (D.S.C.). It was originally filed as a defendant class action, naming 78 defendants as representatives of a defendant class then estimated to number 27,500.

Among other reasons, the need for this legislation is necessitated by the slow movement of this lawsuit through the judicial system. The action was originally filed in 1980 and has barely progressed beyond the procedural stages—questions of standing to sue; questions of what law applies. The case has now been in litigation for 12 years. Even as we act, other procedural issues remain to be resolved, in particular a pending appeal on the question of certification of a defendant class. As a result of this slow movement in the courts, and the determination by the Supreme Court with respect to the application of the State statute of limitations, the Catawba Tribe fears that its right to bring actions against individual landowners within the claim area will expire on October 19, 1992, and intends to begin filing such claims in the immediate future.

There have been ongoing negotiations with the State of South Carolina to resolve this claim since at least 1975. Substantial progress has been made in these negotiations, but significant issues remain to be resolved. Because this claim is founded on Federal Indian law, and because the Constitution vests plenary authority over Indian affairs in the Congress of the United States, this claim cannot be resolved without an act of Congress. Even if the parties were to reach full agreement in the immediate future, there would not be sufficient time to enact ratifying or confirming legislation and thus avoid the filing of claims against as many as 35,000 to 40,000 individual defendants.

I have read with care the floor statement of Representative JOHN SPRATT who represents this district and is the principal sponsor of this legislation in the House. It is a detailed statement that describes the background of this case and reviews the judicial history of this claim. I believe it is a very fair statement and accurately reflects this situation. I would particularly commend Representative SPRATT for his candor in pointing out the fact that as a landowner in the claim area, he himself is a defendant in this case.

Mr. President, as JOHN SPRATT emphasized, nothing in this bill is intended to affect in any way the substantive claims or defenses any of the litigants may assert should the Catawba's land claim be litigated. Its only effect is to extend the time for the filing of claims against individual defendants from October 19, 1992, to October 1, 1993.

I have only one concern with the statement of Representative SPRATT. He stated that this bill—

* * * does not state or imply whether the claimants, the Catawba Indian Tribe of South Carolina, are an Indian tribe today or were a tribe of South Carolina, are an Indian tribe today or were a tribe at any time relevant to their claim. Nor does the bill state whether any trust relationship even existed between the Catawbas and the federal government.

While I concur generally with Mr. SPRATT'S characterization of the measure, it does appear that at least one major contention relating to these issues has been resolved. That is the interpretation to be given to the 1959 Catawba Division of Assets Act (Public Law 87-322; 25 U.S.C. 931 et seq.). Initially the defendants in this case argued that the Division of Assets Act extinguished the existence of the Catawba Tribe and any claim it had prior to the enactment of the act.

In addressing this argument, the Supreme Court in *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498 (1986), stated:

We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe there-after had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. 476 U.S. at 510.

I do not know what issues remain to be litigated on the question of the tribe's existence or its trust relationship with the United States. But it is clear, and I fully agree with the sponsors of this legislation, that nothing in this bill is intended to affect in any way the substantive claims or defenses that may be asserted by any party.

I believe it is particularly important to note that in its letter of June 24, 1992, to Senator THURMOND, Senator HOLLINGS, and Representative SPRATT, the Department of Justice informed the Congress of its opinion that this legislation is fully within the constitutional authority of the Congress to enact. The Native American Rights Fund, which represents the Catawbas in this litigation, concurs in this result. Based on this analysis and these conclusions, the Honorable Gilbert Blue, Chief of the Catawba Indian Tribe, in a letter to me dated July 22, 1992, has expressed the tribe's support for this legislation. I ask unanimous consent that this letter be printed in the RECORD immediately following the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. INOUYE. Mr. President, the Select Committee on Indian Affairs has developed settlement legislation for many tribes. I refer particularly to settlement of the claims of the Passamaquoddy and Penobscot Tribes in Maine, the Narragansett Tribe in Rhode Island, the Mashantucket Pequot Tribe in Connecticut, the Gay Head Wampanoag Tribe in Massachusetts, the Seminole Tribe in Florida, and the Puyallup Tribe in Washington. I look forward to working with the South Carolina delegation, the Catawbas and the State of South Carolina in resolving this claim. The whole purpose of this bill is to allow adequate time for this to occur.

Mr. President, I urge my colleagues to give their favorable consideration to this measure.

EXHIBIT 1

CATAWBA NATION,
Rock Hill, SC, July 22, 1992.

Re: S. 2989.

Hon. DANIEL K. INOUYE,
Chairman, Senate Select Committee on Indian Affairs, Washington, DC.

DEAR SENATOR INOUYE: On June 3, 1992, the Executive Committee of the Catawba Indian Tribe of South Carolina met and voted unanimously to support legislation that would suspend the running of limitations periods applicable to the Tribe's land claim. The Catawba Tribe has, since it first undertook to resolve this claim in 1977, sought to avoid disruptive litigation in favor of a consensual settlement. Our attorneys have reviewed S. 2989 and are satisfied that it is drafted in such a way as to provide as much protection to our claim as can be provided. Our support for S. 2989 is based on our understanding that Congress does have the authority to enact such legislation.

I will be happy to provide further information or comment if you desire. Thank you for your consideration.

Sincerely,

GILBERT BLUE,
Chief, Catawba Indian Tribe.

Mr. HOLLINGS. Mr. President, I would like to take a moment to express the intent of Congress regarding passage of H.R. 5566. This bill is not in any way meant to affect the substantive claims or defenses of either the Catawbas or the landowners should the legal proceedings in the Catawba's land claim continue. During the drafting of this legislation, it was specifically agreed by both sides that this bill would not touch the substantive merits of their claims.

This legislation merely suspends any period or statute of limitations until October 1, 1993, thus allowing additional time for negotiations to proceed. No other meaning should be drawn from this legislation by any party or court. Particularly, H.R. 5566 does not state or imply whether the Catawbas are now or were an Indian tribe at any time relevant to their claim. In addition, the bill makes no comment on whether any trust relationship ever existed between the Catawbas and the Federal Government. Congress believes that such issues are for the courts to resolve and does not speak to these or any other such issues in this legislation.

I invite my friend and colleague from South Carolina to comment on the accuracy of these statements.

Mr. THURMOND. Mr. President, I am in accord with the comments made by my colleague, Senator HOLLINGS, concerning H.R. 5566.

Along with Senator HOLLINGS, I introduced an identical bill, S. 2989,

which would give the parties involved additional time to continue their negotiations.

Additionally, I ask unanimous consent that a letter which I received from the Department of Justice on this matter, stating that our legislation does not violate the principles of State sovereignty, separation of powers, or any other applicable constitutional principles, be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 24, 1992.

Hon. STROM THURMOND,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: This is in response to your request for the views of the Department of Justice on the constitutionality of draft legislation affecting a claim by the Catawba Indian Tribe of South Carolina against approximately 27,500 landowners in South Carolina. The draft bill would have the effect of tolling the statute of limitations applicable to the Tribe's claims if the statute has not already run. We have briefly analyzed the draft bill in light of pertinent legal and constitutional issues. In our view, the legislation is constitutional.

The purpose of the proposed legislation is to preserve, for a brief period, the current legal status of the Tribe's claims under the applicable statute of limitations so that the parties have time to complete settlement discussions, and thereby avoid massive and burdensome litigation of the claims. The bill would provide that if the applicable statute of limitations has run by the date of its enactment, then all claims subject to it, filed or unfiled, will remain barred. However, if the applicable statute of limitations has not run by the date of enactment, then "any action by a plaintiff shall be treated as commenced on the date of the enactment of this Act if such action is commenced on or before April 15, 1993[,] and any amendment to an existing claim, if otherwise permissible, shall be treated as if commenced on April 15, 1993."

The fundamental issue is whether Congress has the power to alter the statute of limitations applicable in this case. We conclude that Congress has that power. First, the cause of action in the Catawba case is one "arising under" federal law for purposes of 28 U.S.C. 1331. The Fourth Circuit explicitly so held in *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (en banc), and the Supreme Court so stated in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 507 (1986). Although the issue was not squarely before the Supreme Court.

The Supreme Court first squarely recognized the federal character of such Tribal land claims in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), and generally stated that the rules for decision of such claims were federal in character. *Id.* at 674. In a subsequent decision in that same case, the Court specifically ruled that state statutes of limitation do "not apply of their own force to Indian land title claims." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 n.18 (1985).[1] Instead, such statutes are "borrowed and applied to the federal claim [i]f the application of the state statute is not inconsistent with federal law. *Id.* at 240 [citations omitted].

This conclusion would appear to resolve two potential constitutional issues. First, it makes clear that the draft bill would effect no violation of the Tenth Amendment or other principles of state sovereignty. Congress clearly has the power under the Commerce Clause of Article I to regulate in this area. Tolling the statute of limitations applicable in this case would be merely an exercise of that power. It would do nothing more than alter a "borrowed" statute of limitations that, absent congressional action, has served as the applicable bar. The bill thus neither commandeers state legislative processes nor contains a direct mandate to states. *Compare New York v. United States*, Slip Op. at 28-29 (Supreme Court, June 19, 1992) (invalidating federal statutory provision requiring states that do not provide for disposal of low-level radioactive waste generated in state to take title to and assume liability for that waste). *Cf. Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981) (exercise of federal powers that preempt state law does not impermissibly intrude on state sovereignty).

Second, the bill does not appear to create separation of powers problems by interfering with the judicial function. By changing the applicable statute of limitations, Congress in the draft bill is compelling a change in the law, rather than a particular result or finding under old law. The Supreme Court has upheld this type of congressional action where it has been challenged as improperly affecting pending litigation. *See Robertson v. Seattle Audubon Society*, 112 S.Ct. 1407 (1992). In *Robertson*, the Court upheld a federal statute that altered the legal standard required under certain environmental statutes with respect to certain timber sales in the Pacific Northwest. The Court rejected the plaintiffs' claim that the provision at issue was an impermissible "statutory directive," holding that "[a] statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases. * * *. Here, our conclusion [is] that what Congress directed—to agencies and courts alike—was a change in the law, not specific results under old law." *Id.* at 1414 (emphasis in original).

Because it is within Congress's plenary power to alter a federal statute of limitations, we do not believe that accomplishing that end through a "deeming" provision such as proposed section 2(b) would interfere with judicial powers in violation of Article III of the Constitution. Since Congress could state that "any statute of limitations that has not expired on the date of enactment of this bill is extended to April 15, 1993," it would not be problematic for Congress to provide that any claims subject to such an unexpired statute of limitations on the date of enactment of the bill shall be treated as if filed before the date of enactment.

In conclusion, in our view the draft bill would not violate any applicable constitutional principles. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

W. LEE REWLS,
Assistant Attorney General.

[1] The Supreme Court in a variety of contexts has held that state statutes of limitations are "borrowed" in cases where gaps are left in federal law. These borrowed statutes of limitations thus apply as a matter of federal law, rather than of their own force and effect. The Supreme Court has applied this general "state borrowing" doctrine in countless cases, including the *Catawba* case. 476 U.S. at 507 n. 9, 510 (citing cases). *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778-82 (1991) (reexamining borrowing rule but holding that state statute of limitations does not apply where Congress intended federal bar to apply); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158-59 (1983) (same).

CHILD NUTRITION IMPROVEMENT ACT OF 1992

Mr. FORD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 2759.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 2759) entitled "An Act to amend the National School Lunch Act to improve the nutritional well-being of children under the age of 6 living in homeless shelters, and for other purposes", do pass with the following amendments:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Child Nutrition Amendments of 1992".

TITLE I—NUTRITION IMPROVEMENT FOR HOMELESS CHILDREN

SEC. 101. HOMELESS CHILDREN'S FEEDING PROJECTS.

(a) IN GENERAL.—Section 18(c) of the National School Lunch Act (42 U.S.C. 1769(c)) is amended—

(1) by inserting before "private nonprofit" each place it appears in paragraphs (2)(A), (2)(D), and (5)(A) the following: "State, city, local, or county governments, other public entities, or";

(2) in paragraph (3)(A), by adding at the end the following new sentences: "The projects shall receive reimbursement payments for meals and supplements served on Saturdays, Sundays, and holidays, at the request of the sponsor of any such project. The meal pattern requirements of this subparagraph may be modified as necessary by the Secretary to take into account the needs of infants.";

(3) in paragraph (5)(A), by striking "and not less than $350,000 in each of the fiscal years 1991, 1992, 1993, and 1994," and inserting "not less than $350,000 in each of fiscal years 1991 and 1992, not less than $650,000 in fiscal year 1993, and not less than $900,000 in fiscal year 1994;"; and

(4) by adding at the end the following new paragraph:

"(7) The Secretary shall advise each State of the availability of the projects established under this subsection for States, cities, counties, local governments and other public entities, and shall advise each State of the procedures for applying to participate in the project."

(b) OTHER MEANS.—(1) The Secretary of Agriculture may conduct demonstration projects other than those required under section 18(c) of the National School Lunch Act (42 U.S.C. 1769(c)) to identify other effective means of providing food assistance to homeless children residing in temporary shelters.

(2) None of the funds provided under section 18(c)(5)(A) of the National School Lunch Act may be used by the Secretary of Agriculture to conduct a demonstration project under paragraph (1) of this subsection.

TITLE II—BREASTFEEDING PROMOTION AND IMPROVEMENT OF OTHER CHILD NUTRITION PROGRAMS

SEC. 201. BREASTFEEDING PROMOTION PROGRAM.

The Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) is amended by adding at the end the following new section:

"SEC. 21. BREASTFEEDING PROMOTION PROGRAM.

"(a) IN GENERAL.—The Secretary, from amounts received under subsection (d), shall establish a breastfeeding promotion program to promote breastfeeding as the best method of infant nutrition, foster wider public acceptance of breastfeeding in the United States, and assist in

AMENDED
June 2, 1993

S. 608

Introduced by SENATORS Hayes, Gregory, Peeler and Short

S. Printed 6/2/93--H.
Read the first time April 28, 1993.

Exhibit P
July 2, 1993
House Hearings - H.R. 2399

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 16 TO TITLE 27 SO AS TO IMPLEMENT THE SETTLEMENT OF CATAWBA INDIAN LAND AND OTHER CLAIMS IN SOUTH CAROLINA.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 27 of the 1976 Code is amended by adding:

"CHAPTER 16

The Catawba Indian Claims Settlement Act

Section 27-16-10. This chapter is known as 'The Catawba Indian Claims Settlement Act'.

Section 27-16-20. The Legislature finds:

(1) The Catawba Indian Tribe has filed lawsuits in both the United States District Court for the District of South Carolina, claiming possessory rights to certain lands in South Carolina and trespass damages and in the United States Court of Federal Claims seeking monetary damages against the United States.

(2) The pendency of these lawsuits has resulted in severe economic and social hardships for large numbers of landowners, citizens, and communities in the State, and therefore for the State as a whole. If these claims are not resolved, further litigation involving tens of thousands of landowners would be likely.

(3) The Indian claimants and the State, acting through the Governor, have reached an agreement in principle to settle their differences which constitutes a good faith effort on the part of all parties to achieve a fair and just resolution of claims which, in the absence of this settlement, could be pursued through the courts for many years to the detriment of the State and all its citizens, including the Indians.

(4) The implementation of the settlement requires legislation by the Congress of the United States and by the General Assembly of South Carolina.

Section 27-16-30. As used in this chapter:

(1) 'Catawba Claim Area' means that area of approximately one hundred forty-four thousand acres in York, Lancaster, and Chester Counties claimed by the Catawba Tribe under the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763, and surveyed by Samuel Wylie in 1764, and ceded by the Catawba Indian Tribe to South Carolina by the Treaty of Nation Ford in 1840.

(2) 'Catawba Indian Tribe,' 'Catawbas,' or 'Tribe' means the Catawba Indian Tribe of South Carolina as constituted in aboriginal times, which was party to the Treaty of Pine Tree Hill in 1760 as confirmed by the Treaty of Augusta in 1763, which was party also to the Treaty of Nation Ford in 1840, and which was the subject of the Catawba Indian Tribe of South Carolina Division of Assets Act, enacted September 29, 1959, codified at 25 U.S.C. Sections 931-938, and all predecessors and successors in interest, including the Catawba Indian Tribe of South Carolina, Inc.

(3) 'Claim' or 'Claims' means a claim which was asserted by the plaintiffs in either suit, and any other claim which could have been asserted by the Catawba Indian Tribe or a Catawba Indian of a right, title, or interest in property, to trespass or property damages, or of a hunting, fishing, or other right to natural resources, if the claim is based upon aboriginal title, recognized title, or title by grant, patent, or treaty, including the

Treaty of Pine Tree Hill of 1760, the Treaty of Augusta of 1763, or the Treaty of Nation Ford of 1840.

(4) 'Executive Committee' means the body of the Catawba Indian Tribe of South Carolina composed of the Tribe's executive officers as selected by the Tribe in accordance with its constitution.

(5) 'Existing Reservation' means that tract of approximately six hundred thirty acres conveyed to the State in trust for the Tribe by J.M. Doby on December 24, 1842, by deed recorded in York County Deed Book N, pages 340-341.

(6) 'Federal implementing legislation' means all appropriate federal legislation necessary to enact and effect the terms, provisions, and conditions of the Settlement Agreement.

(7) 'General Council' means the membership of the Tribe convened as the Tribe's governing body for the purpose of conducting tribal business pursuant to the Tribe's constitution.

(8) 'Internal Matters' or 'Internal Tribal Matters' are matters which include, but are not limited to, the relationship between the Tribe and one or more of its members, the conduct of Tribal government over members of the Tribe, or the Tribe's exercise of the power to exclude individuals from its Reservation.

(9) 'Member' means individuals who are members of the Tribe as determined in accordance with the federal implementing legislation.

(10) 'Reservation' or 'expanded reservation' means the existing reservation and lands added to the Existing Reservation pursuant to the federal implementing legislation which will be held in trust by the Secretary.

(11) 'Secretary of the Interior' or 'Secretary' means the Secretary of the Department of the Interior or his designee, and 'Department' or 'Department of the Interior' refers to the United States Department of the Interior.

(12) 'Settlement Agreement' means the written 'Agreement in Principle' reached between the State and the Tribe and attached to the copy of the act

enacting this chapter signed by the Governor and filed with the Secretary of State.

(13) 'State Government' or 'State' means South Carolina.

(14) 'Suit' or 'suits' means Catawba Indian Tribe of South Carolina v. State of South Carolina, et al., docketed as Civil Action No. 80-2050 and filed in United States District Court for the District of South Carolina; and Catawba Indian Tribe of South Carolina v. The United States of America, docketed as Civil Action No. 90-553L and filed with the United States Court of Federal Claims.

(15) 'Termination Act' means the 'Catawba Indian Tribe Division of Assets Act,' enacted September 21, 1959, 73 Stat. 592, 25 U.S.C. Section 931-938.

(16) 'Transfer' includes, but is not limited to, a voluntary or an involuntary sale, grant, lease, allotment, partition, or other conveyance; a transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and an act, an event, or a circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

(17) 'Tribal Trust Funds' means those funds set aside in trusts established by the Secretary for the benefit of the Tribe and its members pursuant to the federal legislation implementing the Settlement Agreement.

Section 27-16-40. The Catawba Tribe, its members, lands, natural resources, or other property owned by the Tribe or its members, including land, natural resources, or other property held in trust by the United States or by any other person or entity for the Tribe, is subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State, except as

otherwise expressly provided in this chapter or in the federal implementing legislation.

Section 27-16-50. (A) The General Assembly recognizes and acknowledges that the Settlement Agreement requires payment to the Catawba Indian Tribe of fifty million dollars of which thirty-two million dollars is to be contributed by the federal government. The State shall contribute twelve million, five hundred thousand dollars toward the settlement, which must be paid in five annual payments in the amount of two million, five hundred thousand dollars. The State's initial annual payment must be made within ninety days after the effective date of the implementing legislation, and the State's annual payments continue on the same day and month for four consecutive years, or at the option of the State, the remaining balance of the contribution may be paid in full at any time within five years of the effective date of this chapter.

(B) The State Treasurer shall collect all local and private contributions to settlement and forward them to the Secretary.

(C) Upon completion of all payments into the Trust Funds created by the federal implementing legislation and the Settlement Agreement, at least one-third of all state, local, and private contributions must be paid into the Education Trust Fund.

(D) Private payments made pursuant to Section 5.2 of the Settlement Agreement may be treated at the election of the taxpayer as either a payment in settlement of litigation or a charitable contribution for state income tax purposes.

(E) If the State's contribution of twelve million, five hundred thousand dollars, or any part of it, is not paid as scheduled, the Tribe, or the United States on behalf of the Tribe, has a cause of action against the State for the amount not paid when due. Suit on this cause of action may be brought, at the election of the Tribe, in the Court of Common Pleas of South Carolina or in the United States District Court for the District of South Carolina. Until the entire twelve million, five

hundred thousand dollars is paid, the State waives any Eleventh Amendment immunity which may bar a suit in the United States District Court for the District of South Carolina, but this waiver applies only to the cause of action referred to in this subsection.

(F) None of the funds, assets, or income from the Tribal Trust funds may at any time be used as a basis for denying or reducing funds to the Tribe or its members under federal, state, or state funded local program, and distributions from the Tribal Trust Funds may be used as matching funds for other state, local, or federal grants or loans.

Section 27-16-60. (A) Any transfer of land or other natural resources located anywhere within the State, from, by, or on behalf of the Tribe including, but without limitation, a transfer pursuant to a treaty, compact, or statute of any state, is deemed to have been made in accordance with the laws of the State.

(B) Any transfer of land or other natural resources located anywhere within the State from, by, or on behalf of a member of the Tribe or a person purporting to be a member of the Tribe including, but without limitation, a transfer pursuant to a treaty, compact, or statute of a state, is deemed to have been made in accordance with the laws of the State.

(C) By virtue of the approval and ratification of any transfer of land or natural resources affected by this section, all claims under a statute or the common law of a state against the United States, a state or subdivision of the United States, or another person or entity, by the Tribe, any of its members or any person purporting to be a member, or any predecessors or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving the land or natural resources, including without limitation claims for trespass damages, claims for use and occupancy, or claims for damages to property, are deemed extinguished as of the date of the transfer.

(D) Nothing in this section affects, diminishes, or eliminates the personal claim of an individual Indian which is pursued under a law of general applicability that protects non-Indians as well as Indians.

Section 27-16-70. (A) Except as provided in this section, South Carolina shall exercise exclusive jurisdiction over all crimes under the statutory or common law of this State.

(B) A constitution adopted by the Tribe may provide for a tribal court with criminal jurisdiction.

(1) If a tribal court with criminal jurisdiction is created, the territorial jurisdiction of the court both original and appellate must be limited to the Reservation; the jurisdiction of the court over persons must be limited to members of the Tribe; and the subject matter jurisdiction of the court is limited to crimes within the jurisdiction of the state magistrates' courts and to any additional misdemeanors and petty offenses specified in the ordinances or laws adopted by the Tribe. The fines and penalties for the offenses may not exceed the maximum fines and penalties that a state magistrate's court may impose.

(2) In all cases in which the tribal court has jurisdiction over state law, its jurisdiction must be concurrent with the jurisdiction of the magistrates' courts of the State; and defendants shall have the right to remove the cases to the magistrate's court or appeal their convictions in tribal court cases to the General Sessions Court, in the same manner that magistrate's court decisions may be appealed, or in accordance with procedures the General Assembly may provide. In cases where the tribal court is applying those additional ordinances or laws described in item (1), it shall have exclusive jurisdiction.

(C) For the purpose of enforcing the Tribe's powers provided by this chapter and the federal implementing legislation, the Tribe may employ peace officers.

(1) If the Tribe elects to employ peace officers, all tribal peace officers shall undergo and pass the same course of training required of sheriff's deputies by South Carolina.

(2) The State, the Counties of York and Lancaster, and the Tribe shall enter into a cross-deputization agreement whereby tribal law enforcement officers are authorized to enforce state, county, and tribal law within the Reservation against members and nonmembers of the Tribe, and state and county law enforcement officers are authorized to enforce state, county, and tribal law within the Reservation against members and nonmembers of the Tribe. However, if the reservation is located in only one of the two counties, only the sheriff of that county shall enter into a cross deputization agreement as provided in this section.

Section 27-16-80. (A) The Tribe may provide in its constitution for a Tribal Court having civil jurisdiction which may extend up to, but not exceed, the extent provided in this chapter and the federal implementing legislation. The Tribe may have a court of original jurisdiction, as well as an appellate court.

(1) With respect to actions on contracts, the Tribal Court may be vested with jurisdiction over an action on a contract:

(a) to which the Tribe or a member of the Tribe is a party, which expressly provides in writing that the Tribal Court has concurrent or exclusive jurisdiction.

(b) between the Tribe or a member of the Tribe and other parties or their agents who are physically present on the Reservation when the contract is made, and which is to be performed in part on the Reservation so long as the contract does not expressly exclude jurisdiction of the Tribal Court. For purposes of this section, the delivery of goods or the solicitation of business on the Reservation does not constitute part performance sufficient to confer jurisdiction.

(c) to which the Tribe or a member of the Tribe is a party where more than fifty percent of the services to be rendered are performed on the Reservation, so long as the contract does not expressly exclude jurisdiction of the Tribal Court.

(2) With respect to actions in tort, the Tribal Court may be vested with jurisdiction over an action arising out of:

(a) an intentional tort, as defined by South Carolina law, committed on the Reservation, in which recovery is sought for bodily injuries or damages to tangible property located on the Reservation.

(b) negligent tortious conduct occurring on the Reservation or conduct occurring on the Reservation for which strict liability may be imposed, excluding, however, accidents occurring within the right-of-way limits of a highway, road, or other public easement owned or maintained by the State or its subdivisions or by the United States, which abuts or crosses the Reservation. However, the action in tort involving a nonmember of the Tribe as defendant may be removed to a state or federal court of appropriate jurisdiction if the amount in controversy exceeds the jurisdictional limits then applicable to magistrate's court in South Carolina.

(3) The Tribal Court may be vested with exclusive jurisdiction over internal matters of the Tribe.

(4) The Tribal Court also may be vested with jurisdiction over domestic relations where both spouses to the marriage are members of the Tribe and both reside on the Reservation or last resided together on the Reservation before the separation leading to their divorce.

(5) The Tribal Court also may be vested with jurisdiction to enforce against a business located on the Reservation and members or nonmembers residing on the Reservation, tribal civil regulations regulating conduct on the Reservation enacted pursuant to Section 10.2 or 17 of the Settlement Agreement. The entity or person is charged with notice of the Tribe's regulations

governing conduct on the Reservation and is subject to the enforcement of the regulations in the Tribal Court unless the Tribe specifically has exempted the entity or person from any or all regulation or enforcement in Tribal Court.

(B) The original jurisdiction of the Tribal Court over the matters set forth in subsections (A)(1)(b), (A)(1)(c), (A)(2), and (A)(4) must be concurrent with the jurisdiction of the Court of Common Pleas of South Carolina, the Family Court, and the United States District Court for South Carolina. The original jurisdiction of the Tribal Court over the matters set forth in subsection (A)(1)(a) must be concurrent or exclusive depending upon the agreement of the parties. The original jurisdiction of the Tribal Court over matters set forth in subsection (A)(3) must be exclusive. The original jurisdiction of the Tribal Court over matters set forth in subsection (A)(5) must be exclusive unless the Tribe has waived exclusive jurisdiction as to any person or entity. As to all sections referred to in this subsection, jurisdiction over appeals, if any, must be governed by subsection (D).

(C) The Tribe may waive Tribal Court jurisdiction or the application of tribal laws with respect to a person or firm residing, doing business, or otherwise entering upon the Reservation or contracting with the Tribe. A member of the Tribe also may waive Tribal Court jurisdiction or specify in the contract the law of an appropriate jurisdiction to govern a commercial transaction or the interpretation of a contract to which the member is a party.

(D) (1) All final judgments entered in actions tried in Tribal Court are subject to an appeal to the Family Court, the Court of Common Pleas, or the United States District Court, depending upon whether that court would have had jurisdiction over the appealed matter had it been commenced in that court, if all of the following circumstances exist:

(a) A party to the suit is not a member of the Tribe;

(b) The amount in controversy or the cost of complying with an equitable order or decree exceeds the jurisdictional limits then applicable in the magistrates' courts of South Carolina;

(c) The subject matter of the suit does not fall within subsection (A)(1)(a) if jurisdiction is exclusive or subsection (A)(3) or (A)(5). The Tribe may enlarge the right of appeal to include other subject matters and members of the Tribe, subject to rules and procedures the applicable court and relevant state laws may provide.

(2) In an appeal, the court, as appropriate, may:

(a) enter judgment affirming the Tribal Court;

(b) dismiss the case for lack of jurisdiction of the Tribal Court, but only in those cases where the Tribal Court first has addressed the issue of its jurisdiction;

(c) reverse or remand the case for retrial or reconsideration in Tribal Court; or

(d) grant a trial de novo in its court.

(3) In an appeal, a trial, or a trial de novo, the reviewing court shall apply any regulation enacted pursuant to tribal authority.

(E) (1) In cases subject to subsection (A)(2) or (D), all final judgments of the Tribal Court must be given full faith and credit in the state court with appropriate jurisdiction, and the Tribal Court shall grant full faith and credit to state court final judgments.

(2) In those cases which are not subject to subsection (A)(2) or (D), the judgment must be reviewed by the state court in the manner provided in the Uniform Arbitration Act, Section 15-48-10 et.seq. or, if appropriate, by the federal court in the manner provided in the United States Arbitration Act, 9 U.S.C. 1 et. seq.

(F) (1) The Tribe may sue or be sued, in a court of competent jurisdiction. However, the Tribe enjoys sovereign immunity including damage limits and, except as provided in this subsection, immunity from seizure, execution, or encumbrance of properties, to the same extent as the political

subdivisions of the State as provided in the South Carolina Tort Claims Act, Chapter 78 of Title 15. With respect to nonconsumer liability based on contract, however, the Tribe, in a written contract, may provide that it is immune from suit on that contract as if there had been no waiver of sovereign immunity.

(2) Notwithstanding the provisions of this subsection, the Tribe is subject to suit as provided in Section 27-16-120(B).

(3) The Tribe shall procure and maintain liability insurance with the same coverage and limits as required of political subdivisions of the State by Section 15-78-140(b).

(4) An action alleging tortious conduct by an employee of the Tribe acting within the scope of his duties which seeks money damages against the Tribe must name only the Tribe as a party defendant.

(5) A settlement or judgment in an action or a settlement of a claim filed with the Tribe constitutes a complete bar to further action by the claimant against the Tribe by reason of the same occurrence.

(6) A claimant may file a verified claim for damages with the Tribe before filing suit but is not required to file the claim as a prerequisite to filing suit.

(a) The claim must set forth the circumstances which brought about the loss, the extent of the loss, the time and the place the loss occurred, the names of all witnesses, if known, and the amount of the loss sustained.

(b) The Tribe shall designate an employee or office to accept the filing of claims. Filing may be accomplished by receipt by the Tribe's designee of certified mailing of the claims or by compliance with the provisions of law relating to service of process.

(c) If filed, the claim must be received within one year after the loss was or should have been discovered.

(d) The Tribe has one hundred eighty days from the date of the filing of the claim in which

to determine whether the claim is allowed or disallowed. Failure to notify the claimant of action upon the claim within one hundred eighty days after the filing of the claim is considered a disallowance of the claim.

(e) While the filing of the claim is not required as a prerequisite to suit, if a claimant files a claim, he may not institute an action until after the occurrence of the earliest of one of the following three events:

(i) passage of one hundred eighty days from the filing of the claim with the Tribe;

(ii) Tribe's disallowance of the claim;

(iii) Tribe's rejection of a settlement offer.

(7) The provisions of the following sections of the South Carolina Tort Claims Act apply to the Tribe to the same extent as they apply to the State and its political subdivisions:

(a) Section 15-78-100(c), joint tortfeasors;

(b) Section 15-78-110, statute of limitations;

(c) Section 15-78-170, survival actions;

(d) Section 15-78-190, applicability of uninsured or underinsured defendant insurance.

(8) If the Tribe's insurance coverage is inadequate or unavailable to satisfy a judgment within the limits of the Tort Claims Act, neither the judgment nor any other process may be levied upon the corpus or principal of the Tribal Trust Funds or upon property held in trust for the Tribe by the United States. However, the Tribe or the Secretary of Interior shall honor valid orders of a federal or state court which enters money judgments for causes of action against the Tribe arising after the effective date of this chapter, by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment or payments of income from the Tribal Trust Funds.

(G) The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., applies to Catawba Indian Children as set forth in the federal implementing legislation.

(H) If no Tribal Court is established by the Tribe, the State shall exercise jurisdiction over all civil and criminal causes arising out of acts and transactions occurring on the Reservation or involving members of the Tribe. If the Tribe does establish a Tribal Court pursuant to Section 27-16-70(B) or 27-16-80(A), Section 27-16-70(B)(2) or 27-16-80 (B) governs whether jurisdiction is exclusive or concurrent.

Section 27-16-90. (A) The State, after obtaining any necessary judicial approval, may convey the Existing Reservation to the United States of America.

(B) An Expanded Reservation shall be created in the manner prescribed by the federal implementing legislation and the Settlement Agreement. This Expanded Reservation must be joined with the Existing Reservation to form the new tribal Reservation.

(1) (a) The total area of the Reservation is limited to three thousand acres, including the Existing Reservation, but the Tribe may exclude from this limit up to six hundred acres of additional land if the land is:

(i) within rights-of-way for public roads or public utilities rendered unusable for development by the easement or right-of-way;

(ii) within the one hundred-year flood plain of the Catawba River as defined by the Federal Emergency Management Agency, or its successor;

(iii) nondevelopable wetland defined or restricted by law or regulation so that buildings, structures, and other improvements are prohibited;

(iv) park or recreational land accessible to the public and dedicated permanently to public use.

(b) After completion of a comprehensive development plan the Tribe may seek to have the permissible area of the Expanded Reservation enlarged to a maximum of three thousand, six hundred acres, plus up to six hundred acres of land as described in subitem (a). Expansion must be

approved first, however, by the Secretary and then by ordinance of the county council governing the area where the additional lands are to be acquired and by a law or joint resolution enacted by the General Assembly and signed by the Governor of South Carolina.

(2) Before placing a noncontiguous tract in Reservation status, the Tribe, in consultation with the Secretary, shall submit to the county council in a county where it proposes to purchase noncontiguous tracts for Reservation status a Noncontiguous Development Plan Application. As used in this item 'application' is as described in the Settlement Agreement.

(3) The Tribe shall present its application to the county council of each county in which the Secretary proposes to purchase noncontiguous tracts to be placed in Reservation status. The county council shall make findings on the extent to which the application has met the criteria set forth in the Settlement Agreement and recommend to the Governor whether or not the application should be approved. After receiving the county council's recommendation, the Tribe may modify its application and resubmit it to the county council or present it to the Governor for approval. Giving due deference to the recommendation of the county council, the Governor shall review the application and decide whether to approve or disapprove it on the basis of the criteria set forth in the Settlement Agreement. Neither the county council's approval nor the Governor's approval may be withheld unreasonably. The Governor's final action must be accompanied by a written statement of reasons and is reviewable under the laws of the State.

(4) Upon approval by the Governor of the Tribe's Application, the Secretary, in consultation with the Tribe, may proceed to place noncontiguous tracts in Reservation status in accordance with the application, this chapter, and the terms of the Settlement Agreement.

(C) The Secretary and the Tribe shall endeavor at the outset to acquire contiguous tracts for the

expanded Reservation in the area referred to in the Settlement Agreement as the 'Primary Expansion Zone'. The Primary Expansion Zone lies within the area bounded by S. C. Highway No. 5 on the south running northwesterly to its intersection with Springdale Road on the west and northeasterly to the Catawba River along Sturgis Road; east along the Catawba River to its confluence with Sugar Creek; north along Sugar Creek to its intersection with S. C. Highway No. S-29-41, Doby Bridge Road; with S. C. Highway S-29-41 to its intersection with U.S. Highway No. 521; with U.S. Highway No. 521 in a southerly direction to its intersection with S. C. Highway No. S-29-55, Van Wyck Road, on the east; with S. C. Highway No. S-29-55 to its intersection with Twelve Mile Creek on the south; and with Twelve Mile Creek to S. C. Highway No. 5 on the south. This area is known as the 'Catawba Reservation Primary Expansion Zone.'

(D) The Secretary, in consultation with the Tribe, may elect to purchase contiguous tracts in an alternative area described in the Settlement Agreement as the Secondary Expansion Zone, under the conditions provided in subsections (B)(2) and (3). The Secondary Expansion Zone consists of the area bounded by Sugar Creek on the west; the Catawba River on the south extending to the Norfolk Southern Railway trestle on the west; northerly with the railroad right-of-way to its intersection with S.C. S-46-329, Brickyard Road; east to S.C. S-46-41, Doby Bridge Road; easterly along S.C. S-46-41 to its intersection with Sugar Creek. This area is known as the 'Catawba Reservation Secondary Expansion Zone'.

(E) The Primary and Secondary Expansion Zones in subsections (C) and (D) are the preferred and only approved zones for expansion of the Reservation. However, after completing a comprehensive plan of development, the Tribe may propose different or additional expansion zones. The zone first must be approved by the Secretary, then by ordinance of the county council where the zone is located, and by law or joint resolution enacted by the General Assembly of South Carolina and signed by the

Governor. The combined area of all land acquisitions, including land in specially approved zones, may not exceed the limits imposed by this section.

(F) Before the Tribe's comprehensive planning process, the South Carolina Department of Highways and Public Transportation shall consult with the Tribe about planned and proposed major highways within the Primary and Secondary Expansion Zones in the manner described in the Settlement Agreement.

(G) Before the Tribe's comprehensive planning process, the South Carolina Department of Health and Environmental Control shall consult with the Tribe about the location of future sewage treatment facilities that may serve the Primary and Secondary Expansion Zones in the manner described in the Settlement Agreement. The Tribe is responsible for the design, construction, operation, and maintenance of its own sewage collection system and for the cost of constructing an extension line and tap to the transmission line. The Tribe also is subject to fees for use of the treatment system and transmission line and subject to all regulations imposed on users of the system. The Department of Health and Environmental Control shall endeavor to ensure that the fees, charges, and rules are the same as those applied to municipal users of the system. If the Tribe is required to construct an extension line to connect with a transmission line, the Tribe may charge non-Reservation users along the extension line reasonable tap and user fees.

(H) Except as provided in this subsection, the power of eminent domain must not be used by a governmental authority in acquiring parcels of land for the benefit of the Tribe, whether or not the parcels are to be part of the Reservation. All purchases may be made only from willing sellers by voluntary conveyances, except if the ostensible owner agrees to the sale, the Secretary may use condemnation proceedings to perfect or clear title and to acquire any interests of putative defendants whose addresses are unknown or the interests of unborn heirs or persons subject to mental disability. For South Carolina income tax

purposes, the conveyance must be treated in the manner provided by Internal Revenue Code Section 1033 if the federal implementing legislation provides for that treatment under federal law. Filing and recording fees, all documentary tax stamps, and other fees incident to the conveyance of real estate are payable in connection with the purchases regardless of whether the property is purchased by the Tribe or by the United States in trust for the Tribe. Real property taxes levied for the year of closing must be prorated and paid at closing, or if the amount of property taxes to be due then cannot be calculated, property taxes must be estimated and escrowed at closing.

(I) The purchase of land specially assessed as agricultural use property by York or Lancaster County shall not result in a rollback of property taxes if the property is placed by the Tribe in Reservation status within one year of the date of purchase. If specially assessed land is acquired and not made part of the Reservation within one year, deferred or rollback taxes are due and payable without interest to the county treasurer.

(J) The acquisition of lands for the expanded Reservation may not extinguish easements or rights-of-way then encumbering the lands unless the Secretary or the Tribe enters into a written agreement with the owners terminating the easements or rights-of-way. The Secretary, with the approval of the Tribe, has the power to grant or convey easements and rights-of-way for public roads, public utilities, and other public purposes over the Reservation. Unless the Tribe and the State agree upon a valuation formula for pricing easements over the Reservation, the Secretary is subject to proceedings for condemnation and eminent domain to acquire easements and rights-of-way for public purposes through the Reservation under the laws of South Carolina in circumstances where no other reasonable access is available. With the approval of the Tribe, the Secretary also may grant easements or rights-of-way over the Reservation for private purposes, and implied easements of

necessity apply to all lands acquired by the Tribe, unless expressly excluded by the parties.

(K) Only land made part of the Reservation is governed by the special jurisdictional provisions set forth in this chapter and in the federal implementing legislation.

Section 27-16-100. (A) The Tribe may acquire parcels of real estate outside the Reservation in the manner provided by the federal implementing legislation and the Settlement Agreement. These parcels must not be part of the Reservation, governed by the special jurisdictional provisions set forth in this chapter, or subject to other special attributes on account of their ownership by the Tribe as a corporate entity or by the Secretary as trustee for the Tribe, except as provided in this section.

(1) If the ownership of the properties by the Secretary or the Tribe or a subentity of the Tribe removes the property from ad valorem taxation, payments must be made by the Tribe in lieu of taxation that are equivalent to the taxes that otherwise would be paid if the property were subject to levy.

(2) The Tribe may lease, sell, mortgage, restrict, encumber, or otherwise dispose of non-Reservation lands in the same manner as other persons and entities under state law. The Tribe as landowner shall be subject to the same obligations and responsibilities as other persons and entities under state and local law, including local zoning and land use laws and regulations.

(B) All non-Reservation properties and all activities conducted on the properties shall be subject to the laws, ordinances, taxes, and regulations of the State and its political subdivisions, except as specifically provided in this chapter and the federal implementing legislation. This general jurisdictional principle shall extend to non-Reservation properties held by the Tribe as a corporate entity and to properties held in trust by the United States designated as non-Reservation property when acquired. The laws,

ordinances, taxes, and regulations of the State and its subdivisions shall apply to non-Reservation properties in the same manner as the laws, ordinances, taxes, and regulations apply to other properties held by non-Indians located in the same jurisdiction.

Section 27-16-110. (A) Except as specifically provided in the federal implementing legislation and this chapter, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gambling or wager by the Tribe on and off the Reservation.

(B) The State shall govern the conduct of bingo under Article 23, Chapter 21 of Title 12, Regulation of Bingo Games, including regulations or rulings issued in relation to that article, except as provided by the special bingo license to which the Tribe is entitled in accordance with this section if it elects to sponsor bingo games under the special license.

(1) For purposes of conducting the game of bingo, the Tribe is deemed a nonprofit organization under Article 23, Chapter 21 of Title 12.

(2) If the Tribe elects to conduct the game of bingo either on or off the reservation, the Tribe shall obtain a license from the South Carolina Tax Commission. Based on the Tribe's election, the Tribe may be licensed by the South Carolina Tax Commission to conduct games of bingo under a regular license allowed nonprofit organizations or under the special license provided by this section.

(C) The Tribe may apply to the South Carolina Tax Commission for a special bingo license in lieu of licenses authorized by Article 23, Chapter 21 of Title 12. A special or regular license must be granted if the Tribe complies with licensing requirements and procedures. The special license is identical in all respects to the class of license permitting the highest level of prizes allowed by law and carries the same privileges and duties as the class of license permitting the highest level of prizes provided by law, except:

(1) The frequency of the sessions must be determined by the Executive Committee but must be no more frequent than six sessions a week, with sessions on Sundays prohibited unless state law otherwise expressly allows Sunday sessions.

(2) The amount of prizes offered each session must be determined by the Tribe, but must not be greater than one hundred thousand dollars for any game.

(3) The Tribe shall pay, in lieu of an admission, a head, a license, or any other bingo tax, a special bingo tax equal to ten percent of the gross proceeds received during each session. No other federal, state, or local taxes apply to revenues generated by the bingo games operated by the Tribe. All revenues derived from the special bingo tax must be collected by the South Carolina Tax Commission and deposited with the State Treasurer for the benefit of the General Fund of South Carolina.

(4) At least fifty percent of the gross proceeds received by the Tribe during a calendar quarter must be returned to the players in the form of prizes. For purposes of this section, 'gross proceeds' does not include the ten percent special bingo tax.

(5) The Tribe is entitled to two bingo licenses, and these licenses may be used to operate at two locations only. They are not assignable to any other entity or individual.

(6) The net proceeds derived by the Tribe from the conduct of bingo may be used for any purpose authorized by the Tribe.

(D) The Tribe may elect to operate one of the games under a special bingo license off the Reservation and not within the one hundred forty-four thousand acre Catawba Claim Area, but before doing so, it first must obtain the approval of the governing authority of the county and any municipality in which it seeks to locate the facility. If the Tribe elects to operate one or both of the games off the Reservation but within the one hundred forty-four thousand acre Catawba Claim Area, it shall do so in an area zoned

compatibly for commercial activities after consulting with the municipality or county where a facility is to be located.

(E) The sponsor and promoter of the bingo games is the Catawba Indian Tribe, and all profits gained from the enterprise accrue to the Tribe. The South Carolina Tax Commission, or its regulatory successor, has the power to administer, oversee, and regulate all bingo games sponsored and conducted by the Tribe, audit and enforce the operation of the games, and assess and collect taxes, interest, and penalties in accordance with the laws and regulations of the State as they apply to the Tribe. The South Carolina Tax Commission, or its regulatory successor, has the right to suspend or revoke the Tribe's bingo license or special bingo license if the Tribe violates the law with regard to conducting the game. However, the Tax Commission, or its regulatory successor, first shall notify the Tribe of violations and provide the Tribe with an opportunity to correct the violations before its license may be revoked. Failure to pay bingo taxes, interest, or penalties may be grounds for license revocation.

(F) A license of the Tribe to conduct bingo must be revoked if the game of bingo is no longer licensed by the State. If the State resumes licensing the game of bingo, the Tribe's license or special license must be reinstated if the Tribe complies with all licensing requirements and procedures.

(G) The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The Tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license

requirements, regulations, and fees governing electronic play devices provided by state law.

(H) If the Tribe elects to sponsor and conduct games of bingo under a regular license allowed nonprofit organizations under Article 23, Chapter 21 of Title 12, the Tribe must be taxed as a nonprofit corporation under that article.

Section 27-16-120. (A) The Tribe shall incorporate by reference and adopt the York County Building Code and may contract with York County for the services necessary to enforce, inspect, and regulate compliance with its code. The services must be provided at no charge by York County as an in-kind contribution toward settlement. In addition, those local jurisdictions which exact a fee, a permit, or inspection services shall waive the fees otherwise charged for building permit or inspection services on the Reservation. The Tribe is empowered, but not required, to adopt building code provisions to be applied on the Reservation in addition to, but not in derogation of, the York County Building Code.

(B) All state and local environmental laws and regulations apply to the Tribe and to the Reservation and are fully enforceable by all relevant state and local agencies and authorities. Similarly, all requirements that a license, permit, or certificate be obtained from a state or local agency also apply to the Tribe and to the Reservation. This provision extends without limitation to all environmental laws and regulations adopted in the future.

(1) The Tribe, the Executive Committee, and all members of the Tribe have the same status as other citizens or groups of citizens to contest, object to, or intervene in a proceeding or an action in which environmental regulations are being made, adjudicated, or enforced or in which licenses, permits, or certificates of convenience and necessity are being issued by an agency of the State or a local government and no special or preferential status under any laws.

(2) The Tribe has the authority to impose regulations applying higher environmental standards to the Reservation than those imposed by state law or by local governing bodies. However, tribal regulations apply only to the Reservation and not to property surrounding the Reservation or non-Reservation property or to the use of the Catawba River. Tribal regulations also do not apply to activities or uses off the Reservation, even if those activities affect air quality on the Reservation.

(3) The Tribe is not authorized to invoke sovereign immunity against a suit, a proceeding, or an enforcement action involving state or local environmental laws or regulations and is subject to all enforcement orders, restraining orders, fees, fines, injunctions, judgments, and other corrective or remedial measures imposed by the laws. This section does not impose different standards or requirements on the Tribe or the Secretary, when acting on the Tribe's behalf, than would be applied to a private corporation.

(C) With respect to a land use regulation within the Reservation, the Tribe has the power to adopt and enforce a land use plan after consultation with York and Lancaster Counties for those parts of the Reservation located in those respective jurisdictions. The Tribe and the affected governing bodies shall follow the substantive considerations and consultative procedures described in the Settlement Agreement.

(D) All public health codes of South Carolina and any county in which the Reservation is located are applicable on the Reservation.

(E) Hunting and fishing, on or off the Reservation, must be conducted in compliance with the laws and regulations of South Carolina. Members of the Tribe are subject to all state and local regulations governing hunting and fishing on and off the Reservation. However, for ninety-nine years following the effective date of this chapter, members of the Tribe are entitled to personal state hunting and fishing licenses without payment of fees. The Tribe and its members are subject to the

same fees and requirements as all other citizens of the State in applying for and obtaining commercial hunting and fishing licenses. The Tribe has the authority to impose hunting, fishing, and wildlife rules and regulations on the Reservation that are stricter than those adopted by the State.

(F) The littoral and riparian rights of the Catawba Indian Tribe in the Catawba River or in other streams or waters crossing their lands do not differ in any respect from the rights of other owners whose land abuts nontidal bodies of water or nontidal water courses in South Carolina. The rights and obligations covered by this subsection include, but are not limited to, those described in the Settlement Agreement. These qualifications apply to the Existing Reservation, lands acquired for the Expanded Reservation, other lands acquired by or for the benefit of the Tribe, and non-Reservation lands.

(G) Alcohol is prohibited on the Reservation unless the Tribe adopts laws or ordinances permitting the sale, possession, or consumption of alcohol on the Reservation. If the Tribe adopts the laws or ordinances, they must incorporate all state standards and regulations regarding hours, sales to minors, employment, consumption, possession, and standards for licensing. However, the Tribe may impose stricter standards and regulations than those prescribed by state law. If beer, wine, and alcoholic liquor are sold on the Reservation, licenses must be issued by the State in accordance with South Carolina law, and all beer, wine, and alcoholic liquor taxes must be paid to the State in accordance with South Carolina law.

Section 27-16-130. (A) The Tribe, its members, the Tribal Trust Funds, and other persons or entities affiliated with or owned by the Tribe, members of the Tribe, or the Tribal Trust Funds, whether a resident, located, or doing business on or off the Reservation, are subject to all state and local taxes, sales taxes, real and personal property taxes, excise taxes, estate taxes, and all other taxes, licenses, levies, and fees, except as

expressly provided in this section or the federal implementing legislation. Any other person or business entity which locates, operates, or does business on the Reservation is subject without exception to all state and local taxes, licenses, and fees, unless otherwise expressly provided in this chapter. To the extent the Tribe may be subject to taxes under this section, the Tribe must be taxed as if it were a business corporation incorporated under the laws of South Carolina unless otherwise expressly provided.

(B) If the Tribe elects to sponsor and conduct games of bingo under the special bingo licenses under Section 27-16-110, (C) the gross revenues generated by the bingo games must be subject to the ten percent tax levy specified in that section exclusively, and no other federal, state, or local taxes apply to revenues generated by the bingo games which are received by the Tribe.

(C) (1) Income of the Tribe, subdivisions and governmental agencies of the Tribe, including entities owned by the Tribe or the federal government on behalf of the Tribe, the Tribal Trust funds, and tax revenues collected by the Tribe by levy or assessment which are nontaxable for federal income tax purposes because of the Tribe's status as a recognized or restored Indian tribe also are nontaxable for purposes of state income taxes or local income taxes.

(2) Members of the Tribe are liable for payment of state and local income taxes to the same extent as any other person in the State, except income earned by members of the Tribe for work performing governmental functions solely on the Reservation is exempt for ninety-nine years from the effective date of this chapter. Income earned by members of the Tribe from the sale of Catawba Indian pottery and artifacts, on or off the Reservation, which are made by members of the Tribe are exempt from state and local income taxes. No funds distributed pursuant to the Per Capita Payment Trust Fund created by the federal implementing legislation are subject at the time of distribution to state or local income taxes.

However, income subsequently earned on shares distributed to members of the Tribe is subject to the same state and local income taxes as other persons in the State pay.

(3) A person or other entity not exempt from income taxes under items (1) and (2) are liable for all federal, state, and local income taxes otherwise due regardless of whether or not they are doing business on the Reservation.

(D) (1) All lands held in trust by the United States for the Tribe as part of the Reservation, all nonresidential buildings, fixtures, and real property improvements owned by the Tribe or held in trust by the United States for the Tribe on the Reservation are exempt from all property taxes levied by the State, a county, a school district, and a special purpose district. If the Tribe owns a partial interest in property or a business, the property tax exemption provided in this section is applicable to the extent of the Tribe's interest.

(2) (a) Single and multi-family residences, including mobile homes, situated on the Reservation are exempt from all property taxes levied by the State, a county, a school district, and a special purpose district if all the following apply:

(i) They are owned by the Tribe, members of the Tribe, or Tribal Trust Funds.

(ii) For single family residences, if they are occupied by a member of the Tribe or the surviving spouse of a deceased member of the Tribe.

(iii) For multifamily residences:

(a). If the property is valued on a per unit basis, those units which are occupied by a member of the Tribe or the surviving spouse of a deceased member or are unoccupied are exempt from property taxes. All other occupied units are subject to property taxes to the same extent that similar property is assessed and taxed elsewhere in the same jurisdiction. Occupancy is determined on the assessment date for the property.

(b). If the property is not valued on a per unit basis, the property is exempt from property taxes based on the percentage of units which are occupied by a member of the Tribe or the

surviving spouse of a deceased member of the Tribe, and the property is subject to property taxes to the same extent that similar property is assessed and taxed elsewhere in the same jurisdiction based on the percentage of units not so occupied. In calculating the value, unoccupied units must not be considered. Occupancy is determined on the assessment date for the property.

(iv) Rental property constructed by the Tribe on the reservation through an Indian Housing Authority which is financed by HUD is exempt from all property taxes. In lieu of the taxes, the authority may agree to make payments to the county or a political subdivision for improvements, services, and facilities furnished by the county or political subdivision for the benefit of the housing project. However, the payments may not exceed the estimated cost to the county or political subdivision of the improvements, services, or facilities furnished.

(c) For purposes of this section, residential property is deemed to be owned by a member of the Tribe if the member or the surviving spouse of a member owns at least a one-half undivided interest in the property, and a unit is deemed occupied by members of the Tribe if at least one member or the surviving spouse of a member is living in the single-family residence or in a unit of a multi-family residence.

(3) All buildings, fixtures, and real property improvements located on the Reservation which are not exempt from real property taxes under items (1) or (2) are subject to all property taxes levied by the State, a county, a school district, a special purpose district, and any other political subdivision to the same extent that similar buildings, fixtures, or improvements are assessed and taxed elsewhere in the same jurisdiction. However, the underlying land or leasehold in the land is not subject to real property taxes. All buildings, fixtures, and improvements subject to real property taxes are eligible for a tax abatement or temporary exemption allowed new business investments to the same extent as similar

properties qualify for exemption or abatement in the same county.

(4) The Tribe is authorized to levy taxes on buildings, fixtures, improvements, and personal property located on the Reservation, even though the properties may be exempt from property taxation by the State or its subdivisions, and may use the tax revenues for appropriate tribal purposes. The Tribe also may exempt or abate the taxes. York and Lancaster Counties and the South Carolina Tax Commission shall provide the necessary assistance to the Tribe if the Tribe chooses to assess tribal real property taxes as if they were property taxes imposed by a political subdivision.

(5) Real property and improvements owned by the Tribe or by members of the Tribe, or both, and not located on the Reservation are subject to all property taxes levied by the State, the county, the school district, special purpose districts, and any other political subdivisions where the property is located.

(6) To the extent that any non-Reservation real property held in trust by the Secretary is not taxable for property tax purposes, it is subject to the payment of a fee or fees by the Tribe in an amount equivalent to the real property tax that would have been paid to the applicable taxing authority if the property had not been held in trust.

(E) (1) All personal property owned by the Tribe during ninety-nine years from the effective date of this chapter and used solely on the Reservation is exempt from personal property taxes levied by the State, a county, a school district, a special purpose district, and any other political subdivision. However, motor vehicles owned by the Tribe during the ninety-nine-year period are exempt from personal property taxes even if used off the Reservation.

(2) All personal property owned by members of the Tribe is subject to personal property taxes levied by the State, a county, a school district, a special purpose district, and any other political

subdivisions where the property is deemed to be located.

(3) All personal property located on the Reservation which is not exempt from personal property taxes under item (1) is subject to personal property taxes levied by the State, a county, a school district, a special purpose district, and any other political subdivision encompassing the Reservation to the same extent that similar personal property is assessed and taxed elsewhere in the jurisdiction.

(4) For purposes of subsection (D) and this subsection, the determination of whether the Tribe is the owner of property must be made in the same manner as for other taxpayers for South Carolina property tax purposes.

(F) Subject to perfected security interests, if a taxpayer subject to property taxes under subsections (D) and (E) fails to pay the taxes, the appropriate taxing authority for the county or other political subdivision has the power to levy against personal property subject to personal property taxes owned by the taxpayer within the county, on or off the Reservation, in order to satisfy the taxes due.

(1) If this levy against the personal property is not sufficient to satisfy the tax lien, the county or other political subdivision may certify the deficiency to the State, and the State shall levy against other taxable property of the taxpayer in the State and remit proceeds to the county or appropriate taxing authority which is owed the tax.

(2) If the county or other political subdivision cannot satisfy its lien, the county or appropriate taxing authority may require the Tribe to cease allowing the taxpayer to do business on the Reservation.

(3) If the taxpayer is in bankruptcy, the bankruptcy statutes apply to this section.

(4) The State or any political subdivision may not seize real property located on the Reservation.

(G) The Tribe and its members are subject to all license and registration fees and requirements, all periodic inspection fees and requirements, and all fuel taxes imposed by the State and local governments on motor vehicles, boats, airplanes, and other means of conveyance.

(H) The Tribe, its members, and the Tribal Trust Funds are liable for the payment of all state and local sales and use taxes to the same extent as any other person or entity in the State, except as specifically provided as follows:

(1) Purchases made by the Tribe for tribal government functions during ninety-nine years from the effective date of this chapter are exempt from state and local sales and use taxes.

(2) Catawba pottery and artifacts made by members of the Tribe and sold on or off the Reservation by the Tribe or members of the Tribe are exempt from state and local sales and use tax.

(3) During ninety-nine years from the effective date of this chapter, the sale on the Reservation of all other items, made on or off the Reservation, are exempt from state and local sales and use taxes but are subject to a special tribal sales tax levied by the Tribe equal to the state and local sales tax that would be levied in the jurisdiction encompassing the Reservation but for this exemption.

(a) The South Carolina sales and use tax laws, regulations, and rulings apply to the special tribal sales tax, and the special tribal sales tax must be administered and collected by the South Carolina Tax Commission.

(b) The South Carolina Tax Commission separately shall account for the special tribal sales tax, and the State Treasurer shall remit the special tribal sales tax revenues periodically to the Tribe at no cost to the Tribe.

(c) The tribal sales tax does not apply to retail sales occurring on the Reservation as a result of delivery from outside the Reservation when the gross proceeds of sale are one hundred dollars or less. If it does not apply, the state sales tax applies.

(d) The Tribe shall impose a tribal use tax on the storage, use, or other consumption on the Reservation of tangible personal property purchased at retail outside the State when the vendor does not collect the tax. However, use taxes collected by a vendor which is not located in the State are subject to state use taxes, and the use tax must be remitted to the State and not the Tribe. Use taxes not collected by the vendor and remitted to the State are subject to the tribal use tax and must be collected directly by the Tribe.

(I) The Tribe shall pay a fee in lieu of school taxes. That fee must be determined by the school district in the same manner and must be the same amount paid by students from outside the county entering schools in the county.

(1) The fee payable by the Tribe must be reduced by funds received by the government for Impact Aid under Sections 20 U.S.C. 236 et seq. or other federal funds designed to compensate school districts for loss of revenue due to the nontaxability of Indian property.

(2) A fee paid on behalf of a child under this section must be excluded from state income of the child or his family for state income tax purposes.

(J) Members of the Tribe are liable for payment of all estate and inheritance taxes, except the undistributed share of a member in the Per Capita Payment Trust Fund established by the federal implementing legislation and the Settlement Agreement are exempt from state estate and inheritance taxes.

(K) The Indian Tribal Government Tax Status Act, 26 U.S.C. Section 7871, applies to the Tribe and its Reservation for South Carolina income tax purposes to the same extent as provided in the federal implementing legislation.

Section 27-16-140. (A) The provisions of a federal law enacted after the date of enactment of the federal law implementing this agreement shall not apply in the State if the provision materially affects or preempts the application of the laws of

the State, including application of the laws of the State to lands owned by or held in trust for Indians, Indian Nations, Indian tribes, or bands of Indians. However, the federal law shall apply within the State if the State grants its approval by a law or joint resolution enacted by the General Assembly of South Carolina and signed by the Governor.

(B) If the entire federal implementing legislation is rendered invalid by a court, this chapter is invalid.

(C) Whenever possible, this chapter must be construed in a manner consistent with the Settlement Agreement. If there is a conflict between this chapter and the Settlement Agreement, this chapter governs. The Settlement Agreement must be maintained on file and available for public inspection in the Office of the Secretary of State and in the offices of the Clerks of Court for York and Lancaster Counties. Copies must be made available upon request upon the payment of reasonable and normal copying fees."

SECTION 2. This act takes effect when the Governor certifies that the Counties of York and Lancaster have taken all actions required of them by the Settlement Agreement. However, the Governor may not make the certification until the Congress of the United States has passed and the President of the United States has signed into law federal implementing legislation which he also certifies as consistent with the Settlement Agreement.

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INTRODUCED
April 29, 1993

S. 695

Introduced by SENATORS Hayes, Gregory, Peeler, Short, J. Verne Smith and Drummond

S. Printed 4/29/93--H.
Read the first time April 29, 1993.

STATEMENT OF ESTIMATED FISCAL IMPACT

1. Estimated Cost to State-First Year $see below
2. Estimated Cost to State-Annually Thereafter $see below

Senate Bill 695 is a Joint Resolution that provides for payment of the Catawba Indian Land Settlement Claim. The bill provides for transfer from the Insurance Reserve Fund of $12.5 million to the General Fund of the State. This transfer would take place during the current fiscal year and must be held by the State Treasurer in a special account to be paid out in five annual installments to the Secretary of the United States Department of the Interior. Interest on the money held in the special account is to be credited to the General Fund. After final payment of the claim, a total of five payments of $2.5 million must be transferred from the General Fund to the Insurance Reserve Fund.

The primary impact to the Insurance Reserve Fund would be approximately $3,125,000 ($12.5 million x 5% x 5 years). An additional $1.2 million - $1.6 million in interest loss would be realized by the Insurance Reserve Fund during payback, depending on the payback schedule. According to Insurance Reserve Fund officials, this loss of interest could be significant enough to cause insurance premium adjustments to all who participate in the Insurance Reserve Fund which includes state agencies, school districts, and local governments until such

payments are made to the Insurance Reserve Fund. Further, the earnings on interest to the General Fund would not equal to the loss to the Insurance Reserve Fund because of the payout schedule and the potential for pooled investments.

This is a preliminary impact estimate. The Insurance Reserve Fund actuary is in the process of determining actual impact on the premium structure.

Prepared By:
K. Earle Powell
State Budget Analyst

Approved By:
George N. Dorn, Jr.
State Budget Division

[695-2]

A JOINT RESOLUTION

TO PROVIDE FOR PAYMENT OF THE CATAWBA INDIAN LAND SETTLEMENT CLAIM.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. There is transferred from the Insurance Reserve Fund two and one-half million dollars to the General Fund of the State for the current fiscal year which must be held by the State Treasurer in a special account and paid to the Secretary of the United States Department of the Interior for a portion of the settlement of the Catawba Indian Land Claim. Interest earned on monies held in the special account is credited to the Insurance Reserve Fund. Each fiscal year for a total of five years beginning after the payment provided in this section, five hundred thousand dollars plus interest must be transferred from the general fund to the Insurance Reserve Fund. The interest paid to the Insurance Reserve Fund must be charged from the date of the payment provided in this section at a rate determined by the State Treasurer.

SECTION 2. This act takes effect upon approval by the Governor.

-----XX-----

Jay Bender
Attorney At Law
P.O. Box 1927
Columbia, SC 29202-9571

Forward and Address Correction Requested

VOID

CONFIDENTIAL

U.S. Court Documents Enclosed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Rock Hill Division

Civil Action No. 0:92-2450

NOTICE

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA INDIAN NATION OF SOUTH CAROLINA,

Plaintiff,

v.

Defendants.

TO:

The enclosed Summons, Complaint, Answers to Local Rule 7.05 Interrogatories, Lis Pendens and Order of August 13, 1992 are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender. The completed form must be received by the sender no later than 20 days from the postmarked date of this notice.

If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

You must sign, print your name and date the acknowledgement.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the Complaint by September 2, 1993. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

The Catawba Claim Committee of the York County Bar Association has established

the Catawba Litigation Center at 123 Elk Ave., Rock Hill, to answer your questions and to assist you in procuring counsel in regards to this lawsuit. You may call the center at (803) 325-1600 or the South Carolina Bar's referral service at 1-800-868-2284.

I declare under penalty of perjury, that this Notice and Acknowledgement of Receipt of Summons, Complaint, Answers to Local Rule 7.05 Interrogatories, Lis Pendens and Order of August 13, 1992 will have been mailed on: December 31, 1992.

Date

Jay Bender, I.D. No. 1294
BAKER, BARWICK,
RAVENEL AND BENDER

December 31, 1992
Date of Signature

ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS, COMPLAINT, ANSWERS TO LOCAL RULE 7.05 INTERROGATORIES, LIS PENDENS AND ORDER OF AUGUST 13, 1992

I declare, under penalty of perjury, that I received a copy of the summons, the complaint, the lis pendens, answers to local rule 7.05 interrogatories and order of August 13, 1992 in the above-captioned manner at:

Place:_____

Date of Receipt:_____

CONFIDENTIAL

Signature

Print Name

Relationship to Entity/Authority
to Receive Service of Process

Date of Signature

AO 440 (Rev. 1/90) Summons in a Civil Action

ORIGINAL FILED

SEP 2 1992

ANN A. BIRCH, CLERK
COLUMBIA, S.C.

United States District Court

DISTRICT OF South Carolina
Rock Hill Division

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA INDIAN NATION OF SOUTH CAROLINA,
Plaintiff,

V.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: 0:92-2450

(See reverse side for Tax Map No.), et al.,*

TO:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY

Jay Bender, I.D. No. 129
BAKER, BARWICK, [illegible] AND BENDER
P.O. Box 192
1308 La[illegible] Street
Colu[illegible] 29202-9571
803/79[illegible]

CONFIDENTIAL

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

* A complete list of defendants is maintained by the Office of the Clerk of Court, U.S. District Court for the District of South Carolina.

UNITED STATES DISTRICT COURT
ANN A. BIRCH
DISTRICT OF SOUTH CAROLINA

ANN A. BIRCH

BY DEPUTY CLERK

September 2, 1992
DATE

Y039876

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Rock Hill Division

Civil Action No. 0:92-2450

COMPLAINT

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA INDIAN NATION OF SOUTH CAROLINA,

Plaintiff,

Defendants.

* A complete list of defendants is maintained by the Office of the Clerk of Court, U.S. District Court for the District of South Carolina.

NATURE OF THE ACTION

1. This is a civil action seeking a declaration of the ownership and right of possession of the Catawba Indian Tribe to the lands within its 1763 Treaty reservation in York, Lancaster and Chester Counties, South Carolina, which lands are or have been subject to restrictions against alienation under federal law. The Catawba Tribe also seeks to be restored to possession of its reservation lands and seeks historic trespass damages for the period of its dispossession.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 1362.

3. Plaintiff's claims for relief arise under the 1760 Treaty of Pine Tree Hill; the Proclamation of October 7, 1763; the November 10, 1763 Treaty of Augusta, Article I sections 8 and 10 and Article VI of the United States Constitution; the federal common law; and the Indian Nonintercourse Act, 25 U.S.C. § 177.

DESCRIPTION OF THE SUBJECT LAND

4. From time immemorial to the time of the acts complained of herein, the Catawba Tribe owned and occupied a tract of land roughly 15 miles square, or 144,000 acres, which land was surveyed and set aside for their exclusive use and occupancy pursuant to two treaties with the British Crown in 1760 and 1763. The reservation was surveyed by Samuel Wyly and a copy of his map of the reservation, dated February 22, 1764, is annexed hereto as Exhibit A. The boundary of the reservation begins at the confluence of Twelve Mile Creek and the Catawba River and continues along Twelve Mile Creek in a northeasterly direction to the point where Twelve Mile Creek intersects the present boundary between North and South Carolina. From there, the reservation boundary follows the boundary between North and South Carolina to the northwest approximately fifteen miles and then to the southwest at an angle of 90 degrees, approximately seven and one-half miles to the Catawba River. From there, the boundary between the states separates from the reservation boundary, the reservation boundary continuing in a straight line approximately an additional seven and one-half miles to a point west of the present city of Rock Hill, South Carolina. From there, the boundary continues at an angle of 90 degrees in a straight line to the southeast for a distance of approximately fifteen miles to a point south of the City of Rock Hill and thence in a northeasterly direction to the point of origin at the confluence of the Catawba River and Twelve Mile Creek. Exempted from the subject lands are the lands described in Paragraphs 16, 17 and 18 of this Complaint and any lands that are subject to Plaintiff's claim in Civil Action No. 80-2050, filed October 28, 1980 in the United States District Court for the District of South Carolina.

5. Plaintiff Catawba Indian Tribe of South Carolina is a tribe of Indians which has resided on lands currently within the State of South Carolina since time immemorial. The

Tribe presently resides on approximately 630 acres outside the City of Rock Hill, South Carolina, which lands are held in beneficial trust for the Tribe by the State of South Carolina. Plaintiff Catawba Indian Tribe was signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

6. Plaintiff is informed and believes that the defendants, and each of them, claim an interest in and title to certain of the lands which are the subject matter of this litigation, which lands are identified in the caption by Tax Map Number and incorporated herein by reference, and may claim some right, title and/or interest in or lien upon other of the subject lands.

7. Any defendant who claims any portion of the subject land purporting to act as an officer of the State of South Carolina, does so in excess of such defendant's authority as an officer of the State of South Carolina and in violation of 25 U.S.C. § 177, Article I, sections 8 and 10, and Article VI of the Constitution of the United States, and the federal common law.

8. The defendants John Doe and Richard Roe are fictitious names used to represent and designate any interested parties, but whose names are unknown to the Plaintiff, including any person or persons who claim to have any right, title, estate or interest in or lien upon the real estate described in paragraph 4, any heirs or devisees of any defendants , known or unknown, who may now be deceased and all minors, persons in the military forces, insane persons and all other persons under any other disability who may claim any right, title, estate or interest in or lien upon the real property described in the complaint herein.

FACTS OF THE CLAIM

9. In 1760, the Honorable Edmund Atkin, Esq., His Majesty the King of England's Agent to and Superintendent for Indian Affairs in the Southern District of North America, negotiated a Treaty with the Catawba Indian Nation whereby the Catawba Nation agreed to surrender its claims to a tract encompassing all lands within a 30 mile radius of the Catawba towns, which tract had been recognized as Catawba Indian Country by the Colony of South Carolina, in return for being permanently and quietly settled on a tract of land fifteen miles square which was to be surveyed to prevent intruders and upon which a fort was to be built for the Catawba's protection. This treaty is known as the Treaty of Pine Tree Hill.

10. On October 7, 1763, King George III of England issued a Proclamation which ordered that no warrants of survey or patents be issued upon any lands which had been reserved to the Indians and further forbade private purchases of lands from the Indians and settlement upon Indian lands.

11. On November 10, 1763 the Governors of the Southern Colonies, including South Carolina, and His Majesty's Superintendent for Indian Affairs in the Southern District, John Stuart, negotiated the Treaty of Augusta with, among others, the Catawba Indian

Nation, which Treaty provided that the Catawba Nation would remain satisfied with the agreement contained in the 1760 Treaty of Pine Tree Hill and the Governors and Superintendent on their part promised that the terms of the Treaty of Pine Tree Hill would be fulfilled.

12. On July 22, 1790, Congress enacted the Indian Trade and Intercourse Act, presently codified at 25 U.S.C. §177, which provided then as it does now that no interest of any kind may be acquired in the lands of any Indian tribe other than by treaty or convention entered into pursuant to the Constitution, to which the United States is a party. Any interest acquired in violation of 25 U.S.C. §177 is void in law and equity.

13. On March 3, 1840, the State of South Carolina, without the consent and participation of the United States, concluded the Treaty of Nation Ford between the State and the Catawba Indian Tribe, whereby the State purported to extinguish the Indian title of the Catawba Tribe to the entire 15 mile square tract secured to the Tribe in the 1760 and 1763 Treaties described in paragraphs 9 and 11 above. In return, the State promised to purchase for the Catawbas, at a cost of $5,000, a tract of land either in Haywood County, North Carolina or in a similarly mountainous and unpopulated area in South Carolina and in addition agreed to pay the Tribe $2,500 cash and $1,500 per year for nine years.

14. On December 18, 1840, the Legislature of the State of South Carolina enacted legislation ratifying and confirming the March 3, 1840 State treaty, which Act provided for the conveyance of the title and interest purportedly acquired by the State of South Carolina in Catawba Reservation lands to the non-Indian lessees of such lands upon the application and payment by the lessees of certain fees or taxes.

15. The Congress of the United States has never ratified or otherwise consented to the alienation of the Catawba Indian Reservation as required by 25 U.S.C. §177 and federal common law. The title or right of possession to the Catawba Indian Reservation lands which are the subject of this suit thus remains in the Catawba Indian Tribe and the subject land is not and never has been the property of any other person or party. The Tribe's right and title to these lands is now and has since 1790 been protected by the Fifth Amendment to the United States Constitution.

16. The State did not purchase a new reservation for the Catawba Tribe in North Carolina or in South Carolina as required by the 1840 Treaty. Instead, in 1842 the State of South Carolina purchased for the Catawba Tribe a tract of 630 acres, more or less, located within the boundaries of the 1763 reservation which the Tribe purportedly ceded in the 1840 Treaty, for the sum of $2,000, which tract remains to this day the only lands actually occupied and enjoyed by the Catawba Tribe and these lands are exempted from this claim.

17. In 1943, the Catawba Tribe, the State of South Carolina, and the United States Department of the Interior entered into a Memorandum of Understanding whereby 3,434 acres of land, more or less, all of which was within the boundaries of the 1763 Treaty reservation, was acquired and taken into trust by the Secretary of the Interior for the Catawba Tribe. In 1959, Congress enacted the Catawba Division of Assets Act, Public Law 86-322, 73 Stat. 592, 25 U.S.C. §§931-8, which act lifted federal restrictions on alienation to the 3,434 acres, more or less, acquired for the Tribe pursuant to the 1943 Memorandum of Understanding and those lands are exempted from this claim.

18. In a Consent Order and Release, filed in the United States District Court for the District of South Carolina on December 13, 1989, plaintiff released its claim to 453.78 acres, more or less, claimed by Crescent Resources, Inc., and those lands are exempted from this claim.

CLAIM FOR RELIEF

19. The 1840 transaction between the State of South Carolina and the Catawba Indian Tribe, known as the Treaty of Nation Ford, was void for violation of the 1760 Treaty of Pine Tree Hill, the Proclamation of 1763, the 1763 Treaty of Augusta, the Indian Nonintercourse Act (25 U.S.C. § 177), Article I, sections 8 and 10 and Article VI of the United States Constitution and the federal common law, and any right, title, or interest purportedly acquired pursuant to the 1840 Treaty of Nation Ford is likewise void.

20. Plaintiff is informed and believes that the defendants, and each of them, claim an interest in or ownership to a portion of the subject lands and are keeping plaintiff out of possession of its lands in violation of the 1760 Treaty of Pine Tree Hill, the 1763 Treaty of Augusta, the Proclamation of 1763, the Indian Nonintercourse Act, 25 U.S.C. § 177, the federal common law, Article I, sections 8 and 10 of the United States Constitution and Article VI of the United States Constitution. Such violations infringe upon plaintiff's title and right of possession to the subject lands, protected by federal law and keep plaintiff out of possession of its lands to plaintiff's great injury.

21. Defendant State of South Carolina, by entering into the 1840 transaction, known as the Treaty of Nation Ford, with the Catawba Indian Tribe and thereby purporting to acquire the right, title and interest of the Catawba Tribe in its treaty reservation without the consent or participation of the United States, violated the provisions of the Nonintercourse Act, presently codified at 25 U.S.C. §177, the federal common law, and Article I, sections 8 and 10 and Article VI of the United States Constitution. Such violations infringe upon plaintiff's title and right of possession to the subject lands, protected by federal law and keep plaintiff out of possession of its lands to plaintiff's great injury.

WHEREFORE, plaintiff prays that this Court:

1. Declare that plaintiff has the right to possession of every portion of the subject land which is claimed or possessed by any defendant;

2. Order that plaintiff be restored to immediate possession of all portions of the subject land which are claimed in whole or in part by any defendant, described in paragraph 4 of this Complaint, except that plaintiff does not request such relief with respect to the lands described in paragraphs 16, 17 and 18 of this Complaint or any lands which are claimed by a member of plaintiff Catawba Indian Tribe.

3. Declare that plaintiff is entitled to receive trespass damages, including the amount of the fair rental value and profits, for each portion of the subject land claimed by any defendant, for the entire period of plaintiff's dispossession; and determine the amount of such damages and profits.

4. Award plaintiff the costs of this action and attorneys fees; and

5. Award such other and further relief as the Court deems just.

Columbia, South Carolina

September 2, 1992

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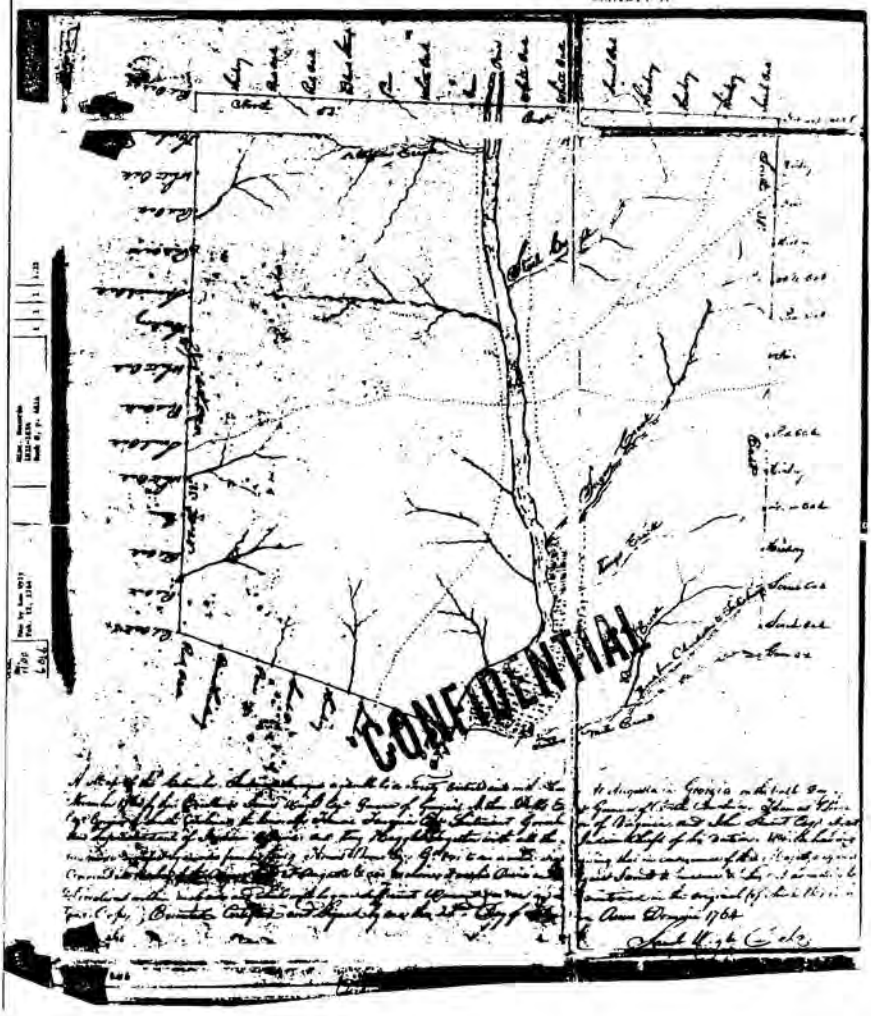
EXHIBIT A



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Rock Hill Division

Civil Action No. 0:92-2450

LIS PENDENS

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA INDIAN NATION OF SOUTH CAROLINA,

Plaintiff,

v.

Defendants.

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending upon Complaint of the above-named Plaintiff, claiming ownership and right of possession of the subject property, seeking ejectment and trespass damages. The premises covered and affected by this land action consists of a tract of land roughly fifteen (15) miles square, or 144,000 acres, which is shown and delineated on a map prepared by Samuel Wyly, dated February 22, 1764, a copy of which is attached to the Complaint and made a part hereof by reference, and which tract of land is located within the Counties of York, Lancaster and

* A complete list of defendants is maintained by the Office of the Clerk of Court, U.S. District Court for the District of South Carolina.

Chester. The boundary of the said tract of land begins at the confluence of Twelve Mile Creek and the Catawba River and continues along Twelve Mile Creek in a northeasterly direction to the point where Twelve Mile Creek intersects the present boundary between North and South Carolina. From there, the reservation boundary follows the boundary between North and South Carolina to the northwest approximately fifteen (15) miles and then to the southwest, at an angle of 90 degrees, approximately seven and one-half (7 1/2) miles to the Catawba River. From there, the boundary continues in a straight line approximately an additional seven and one-half (7 1/2) miles to a point west of the present City of Rock Hill, South Carolina. From there the boundary continues, at an angle of 90 degrees, in a straight line to the Southeast for a distance of approximately fifteen (15) miles to a point south of the City of Rock Hill and thence in a northeasterly direction to the point of origin at the confluence of the Catawba River and Twelve Mile Creek; LESS AND EXCEPTING THEREFROM, a 630 acre tract of land actually occupied by the Catawba Tribe, 3434 acres of land acquired and taken into trust by the Secretary of the Interior pursuant to a 1943 Memorandum of Understanding and which parcels were the subject of the 1959 Catawba Division of Assets Act, Public Law 86-322, 73 Stat. 592, 25 U.S.C. Sections 931-8, any lands claimed by members of the Catawba Indian Tribe, and 453.78 acres, more or less, that were the subject of a Consent Order and Release filed December 13, 1989 in the United States District Court for the District of South Carolina.

Columbia, South Carolina

September 2, 1992.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ROCK HILL DIVISION

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA INDIAN NATION OF SOUTH CAROLINA,	CIVIL ACTION NO. 0:92-2450-
Plaintiff,	
vs.	ORDER
THE CITY OF ROCK HILL, et al,	
Defendants.	

The plaintiff claims title to approximately 144,000 acres of land measuring approximately 15 miles square and located in the counties of York, Lancaster and Chester in the State of South Carolina. The defendants, now estimated to be 60,000 in number, are alleged to be in possession of said land, and this action was instituted[1] to eject the defendants and award plaintiff damages for trespass. Upon being recently advised that the plaintiff anticipates instituting this case on or about September 2, 1992, this court began looking into the matter for the purpose of preparing for this action when and if the same is filed. The court conferred with all the attorneys known to be involved in the case and discussed the matter in great detail. As a result of that process, the court has reached the following conclusions:

1. Plaintiff contends that the applicable limitations period requires this action to be instituted on or before October 19, 1992, [2] and plaintiff, therefore, plans to file the complaint in

[1] This order has been prepared and executed in anticipation of the filing of this action but is not to be filed until that event takes place.

[2] Rule 3 of the Federal Rules of Civil Procedure provides that "a civil action is commenced by filing a complaint with the court."

#1 of 3
CWA.

this action on or about September 2, 1992.[3]

2. This is only one case, but the fact that it involves approximately 60,000 individual defendants and the land they each presently possess could cause its impact upon the District of South Carolina to equal that of 60,000 separate cases. Since this district now has pending only 3586 regular civil cases, one can easily calculate the devastating effect the filing of this case may have on the federal court of this state.

3. Upon learning that the filing of this action was imminent, the Honorable Falcon B. Hawkins, Chief Judge of the District of South Carolina, advised the Administrative Office of the United States Courts in Washington, D.C., and the Fourth Circuit Court of Appeals in Richmond, Virginia, of the nature of the problem and requested that they furnish the additional space, equipment and personnel the district anticipated it would need to properly manage this case.[4] The court has not received a response to these requests and does not know when it will. It is not reasonable to assume that any action will be taken before the beginning of the new fiscal year on October 1, 1992, and it will almost certainly be several months thereafter before the court can realistically expect any of its aforementioned requests to be fulfilled.

4. There is a strong possibility that this case will be settled by payments being made to the plaintiff by the State of South Carolina and the federal government. The court is advised that an offer of settlement is to be made on August 22, 1992, and that the plaintiff is to meet on August 29, 1992, to consider the same. Even if a settlement in principle is reached prior to October 19, 1992, however, it could not be finalized until sometime after January 1, 1993.

5. The large number of defendants in this case substantially increases the cost and difficulty involved in communicating with the defendants and makes it desirable that the court maximize the efficiency of each contact.

6. Rule 12(a) of the Federal Rules of Civil Procedure provides, generally, that a defendant shall have 20 days after service to answer a complaint. The court anticipates that a large number of the 60,000 defendants will request extensions of time to

CONFIDENTIAL

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[3] The President of the United States has now signed into law a bill extending the time for bringing this case until October 1, 1993. Since the applicable limitations period may be established by South Carolina law, passage of the aforementioned federal extension will probably not alter the plan of the plaintiff to commence this action before October 19, 1992.

[4] These requests were based upon the assumption that there would be approximately 40,000 defendants named in this case and the best estimates of the court as to what its needs would be. Counsel for plaintiff now says that the number of defendants has risen to the 60,000 range.

#2 cont.

file their answer, and it will be impossible to properly process those requests in the time frame required.

7. Confusion on the part of the defendants will be reduced, and the efficient, proper management of this case will be promoted by the court furnishing to the defendants at the time the complaint is served as much information as possible concerning the management of the case.

8. If service of this action is enjoined by the court, the plaintiff is concerned that in order to protect its rights under the applicable limitations period it will be required to institute the same case in state court.

9. The large number of defendants expected to be joined in this case makes it extremely likely that most, if not all, of the judges in the District of South Carolina will be disqualified from handling the same, and someone from outside the State of South Carolina will have to be designated to do so.

District courts possess the inherent power to manage "their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630 (1962). In view of the facts hereinabove set forth, this court is convinced that the proper exercise of that power requires the issuance of this order. It is, therefore,

ORDERED that the plaintiff is enjoined and restrained from serving the summons and complaint in this action on any of the defendants for a period of 120 days from the date on which it files the complaint; that after the expiration of said 120 day period it shall have the full 120 day period provided by Rule 4(j) of the Federal Rules of Civil Procedure to perfect service of the summons and complaint on the defendants; and that the plaintiff is also enjoined and restrained from instituting this action in any other court.

IT IS FURTHER ORDERED that the time for all defendants to answer the complaint is extended until September 2, 1993; and that plaintiff is relieved from complying with Rule 7.00 of the local rules of this court at the time of filing its complaint.

AND IT IS SO ORDERED.[5]

CONFIDENTIAL

CHARLESTON HOUCK
UNITED STATES DISTRICT JUDGE

August 13, 1992
Florence, South Carolina

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[5] This order is being issued at the direction of the judges of the District of South Carolina, and the undersigned is acting pursuant to that authority. No decision has yet been made which of the judges, if any, will be responsible for the handling of this case after it is commenced.

#3
Cook

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