STATUTE OF LIMITATIONS EXTENSION FOR INDIAN CLAIMS

HEARINGS

BEFORE THE

U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

ON

S. 1377

TO EXTEND THE TIME FOR COMMENCING ACTIONS ON BEHALF OF AN INDIAN TRIBE, BAND, OR GROUP

MAY 3, and 16, 1977

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U.S. Senate Select Committee on Indian Affairs

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STATUTE OF LIMITATIONS EXTENSION FOR INDIAN CLAIMS

TUESDAY, MAY 3, 1977

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10:07 a.m., in room 424, Russell Senate Office Building, Senator James Abourezk (chairman of the committee) presiding.

Present: Senator Abourezk.

Staff present: Alan Parker, chief counsel; Ella Mae Horse, professional staff member; Barbara Berger, professional staff member; and Ernie Ducheneaux, chief clerk.

Chairman ABOUREZK. The Indian Affairs Committee will come to order.

The purpose of this hearing before the Senate Select Committee on Indian Affairs this morning is to take testimony on a bill which would extend the time for commencing actions on behalf of an Indian tribe, band, or group. This bill would allow the United States, as trustee, an additional 10 years in which to bring all Indian claims for monetary damages which arose prior to the enactment of the original statute of limitations in 1966. Under existing law, the time in which the United States can file such claims expires on July 18, 1977.

In 1972, Congress amended 28 U.S.C. 2415 to allow the United States an additional 5 years in which to bring claims for money damages on behalf of the Indians. At that time, the Interior Department stated that it had not been able to perform the necessary work to identify all the wrongs and then develop the factual information necessary to institute litigation. The Department pointed out that it was attempting to obtain additional funds and personnel and further stated that the administration had proposed the creation of an independent Trust Counsel Authority to represent the resource rights of Indians free of any governmental conflicts of interest.

The Interior Department was optimistic that these improvements would ameliorate the investigation and prosecution of Indian claims. However, as we all know, the Trust Counsel Authority was never established, and the Rights Protection Unit of the BIA today receives only about 1 percent of the BIA's entire appropriation. Clearly, this lack of resources has severely hampered investigation and presentation of valid Indian claims.

In addition to the difficulties inherent in evaluating Indian claims, there are other factors which exemplify the need to extend the existing

statutory period. For example, the Indian Affairs Committee has received information from a number of tribes complaining of a lack of responsiveness on the part of the United States in investigating the Indians' claims. Failure to extend the period of limitations beyond July 18, 1977, could quite possibly expose the United States to liability to the tribes for claims which should properly be borne by third parties.

If the statute is allowed to lapse, it will bar monetary relief, although other elements of the Indian claims will not be affected. However, the money damages involved could amount to millions of dollars. Partly for this reason, the Government is presently preparing to file as many claims as possible.

The effect of this approach will undoubtedly result in economic hardship in many communities throughout the country due to the clouded titles which will follow the institution of these lawsuits. However, with respect to those large land claims which have recently received extensive public attention, particularly in the eastern seaboard States, the potential hardship has been somewhat alleviated due to settlement talks between the tribes and defendants initiated by the United States. In contrast, if the statute is allowed to lapse, these lawsuits will necessarily have to be filed, thereby severely limiting the potential for negotiated settlements.

S. 1377 and the Interior Department's report will be inserted in the record at this point.

[The material follows:]

95TH CONGRESS
1ST SESSION

S. 1377

IN THE SENATE OF THE UNITED STATES

APRIL 25 (legislative day, FEBRUARY 21), 1977

Mr. ABOUREZK introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

A BILL

To extend the time for commencing actions on behalf of an Indian tribe, band, or group.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the third proviso in section 2415 (a) of title 28, United States Code, is amended by deleting the words "eleven years" therein, and substituting the words "twenty-one years" in their place.

(b) The proviso in section 2415 (b) of title 28, United States Code, is amended by deleting the words "eleven years" therein, and substituting the words "twenty-one years" in their place.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable James G. Abourezk
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

MAY 2 1977

Dear Mr. Chairman:

This responds to your request for the views of this Department on S. 1377, a bill "To extend the time for commencing actions on behalf of an Indian tribe, band or group."

We recommend that the bill be enacted if amended as suggested herein.

The Act of July 18, 1966 (28 U.S.C. 2415) imposed a statute of limitations on tort or contract suits for money damages brought by the United States both on its own behalf and, in its capacity as trustee, on the behalf of Indians. The United States had six years from the date of enactment of the 1966 Act to file claims, on the behalf of Indians, that arose prior to the date of the Act. In 1972 Congress, in P.L. 92-485, amended 28 U.S.C 2415 to extend this statute of limitations five more years, to July 18, 1977. Indians have expressed serious concern that the present statutory limitation might bar them from recovering damages in numerous causes that arose before 1966 because many of their claims may not be processed before the statute of limitations runs out. Accordingly, we recommend that the statute of limitations in 28 U.S.C. 2415 be extended until December 31, 1981, for claims brought by the United States on the behalf of Indians where the cause of action arose prior to 1966.

Significantly, Congress recognized the unique nature of these suits and the peculiar difficulties in uncovering potential Indian claims and preparing them for litigation. In its report on the bill which became P.L. 92-485, the Senate Committee on Interior and Insular Affairs acknowledged

the difficulty in identifying all Indian claims, and noted that the Bureau of Indian Affairs and the Office of the Solicitor had not been able to discover all the wrongs and then develop factual information necessary to get litigation filed. (1972 U.S. Code Congress and Administration News, p. 3593)

The five year extension granted in 1972 did not solve the problem. Many of these claims go back to the 18th and 19th centuries, and it is difficult to estimate the number which remain unprocessed. For example, the Field Solicitor's Office in Phoenix, Arizona, has developed approximately 35 claims in their geographical area which they will attempt to process by July 18, 1977. The Twin Cities' Field Solicitor's Office, covering Minnesota, Iowa and Wisconsin, has developed 167 cases. The Office of the Solicitor estimates that there could be many pre-1966 claims as yet unidentified or still being asserted that would have to be filed by July 18. Nationwide the unprocessed cases could amount to well over 1,000. The major reason why the five year extension was insufficient is that many tribes have only become aware of their tort and contract remedies in the last few years and thus have not, until recently, had adequate procedures to document claims as they arose. Therefore, hundreds of the pre-1966 claims are still being researched and identified and cannot all be filed by July 1977.

Due consideration should be given to the hardship which will be worked on tribes all over the country if Indian claims arising before 1966 are permanently barred from suit by 28 U.S.C. 2415. Tribes would be foreclosed from recovering damages for past unlawful uses of Indian lands. However, instead of the ten years provided in S. 1377, we recommend that the statute of limitations be extended until December 31, 1981. This will provide adequate time to give these claims appropriate attention.

The Office of Management and Budget has advised that there is no objection to the presentation of this proposed report from the standpoint of the Administration.

Sincerely,

Leo Krulitz

Solicitor

Chairman ABOUREZK. I will call the first panel of witnesses: The Honorable Leo Krulitz, Solicitor, Department of the Interior; and the Honorable Peter Taft, Assistant Attorney General for Land and Natural Resources, Department of Justice.

Welcome to the Indian Affairs Committee. It would be helpful if you would submit your statement and just summarize what you think is important, and then we can ask questions.

STATEMENT OF LEO KRULITZ, SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. KRULITZ. Thank you Mr. Chairman.

It is a pleasure to appear today before this Select Committee on Indian Affairs.

Chairman ABOUREZK. Incidentally, this is the first hearing that this committee has held.

Mr. KRULITZ. I was wondering if that was the case.

I think it is fitting that this first hearing be on what is a very important matter. I am here today on behalf of the Secretary of the Interior to encourage this committee to support an extension of the statute of limitations, which will expire on July 18, 1977.

I have now been in office approximately 6 weeks, Mr. Chairman. During this time, I have become well acquainted with this statute and the problems which will be created if it is allowed to expire and is not extended.

I have had an opportunity to review where we stand with regard to filing of these claims. My attorneys, both in Washington and in the field, estimate there may be a total of 1,000 claims that could potentially be barred by this statute.

As I have looked at what progress we have made, in terms of preparing these matters for filing, what I am discovering is that the potential litigation involved is immensely complex. The land claims—at least the damage portions of those—would be barred. In many instances they involve literally thousands of potential defendants, all of which would have to be identified.

Chairman ABOUREZK. What are the nature of these claims, if you can categorize them at all?

Mr. KRULITZ. The claims subject to the statute are claims for money damages.

Chairman ABOUREZK. Based on the taking of land?

Mr. KRULITZ. There are a variety of them, Mr. Chairman. They do fall into several categories. Probably the largest and most complex are the land claims.

There are the claims of the Passamaquoddy and Penobscot Tribes in Maine, for example. They are claims which, in part, would be barred by this statute; at least the damage portion of those claims.

There are claims in the West with regard to water rights. The potential damage dimension of those claims, which could potentially be barred, is large.

In addition to that, there are a whole variety of other smaller trespass damage claims involved but which do not involve such large numbers.

Chairman ABOUREZK. I was under the impression that the Indian Claims Commission was the forum for filing of land claims and that the statute, as far as the claims before that Commission, had expired some time ago.

What I do not understand is the distinction between claims that go before the Indian Claims Commission and the kind of claims that you are talking about, as far as land taking is concerned.

Mr. KRULITZ. There is a difference. I may need to refer to Mr. Taft.

Mr. TAFT. Mr. Chairman, I would just point out that an Indian claim cannot be brought before the Indian Claims Commission in a situation where the claim is against a third party or a State. So, most of the ones we are concerned with here are suits against a third party or a State. In that instance, the claim could not have been filed under the Indian Claims Act.

Chairman ABOUREZK. Is that in every instance, or in most instances?

Mr. TAFT. I would say in every instance a third-party claim could not have been brought under the Indian Claims Act.

As for whether or not the United States could have been sued for breach of trust for failing to have acted against a third party—and, therefore, such a claim could have been brought against the United States under the Indian Claims Act—is a more complex issue. I believe that that issue really has not been ruled on or heard or even tried yet.

Chairman ABOUREZK. Is this the Associate Solicitor for Indian Affairs?

Mr. KRULITZ. Yes, sir.

Chairman ABOUREZK. Is he Indian?

Mr. KRULITZ. No, sir.

Chairman ABOUREZK. I thought you told me at one time you were going to hire an Indian.

Mr. KRULITZ. I have to correct my statement. This is the Acting Associate Solicitor for Indian Affairs.

I have not yet named an Associate Solicitor.

Chairman ABOUREZK. I see; he is not the permanent one.

Mr. KRULITZ. That is correct; but Bill has worked closely with me and has been acting in that capacity.

Chairman ABOUREZK. That was even before the administration changed?

Mr. KRULITZ. Yes.

Chairman ABOUREZK. Please proceed. I hope you do not mind if I interrupt periodically.

Mr. KRULITZ. Not at all, Mr. Chairman.

I would point out, in terms of the progress we are making, that our best effort so far has been concentrated in Phoenix—at the field office there—and in the Twin Cities area. Our attorneys and BIA officials in Phoenix have screened approximately 150 to 200 claims. They have worked that down to a list of 35 which they feel merit litigation. Those matters are now being prepared for litigation. Some of those water rights cases involve large numbers of defendants which need to be identified.

The Minneapolis office has reviewed and processed some 600 items and has narrowed that down to 167.

The plain truth is, Senator, that the work is far from done. There is no way, in my judgment, that we can effectively file all of the claims that need to be filed to protect against the running out of the statute. In the past, I think the resources that have been devoted to this effort in the Solicitor's office and, perhaps, in the BIA itself have not been adequate.

In addition to that, new law has been developed in the past years which increases the likelihood of success of some of these claims.

So, I think a great hardship and disadvantage and great injustice will be done to the American Indians if the statute is not extended.

We are proposing a change to the pending bill and are requesting an extension to December 31, 1981, which is about 4½ years. We would respectfully request your consideration of that.

Thank you.

Chairman ABOUREZK. In response to that, I will mark up the bill and offer an amendment to change it to that date.

I think we put in 10 years because it was an arbitrary figure and just grabbed it out of the air.

Let me ask you this. This is the second time that Congress is considering an amendment to the statute. I am concerned with whether or not the administration has the ability to comply with even a 4½-year extension.

Do you intend to try to augment your legal staff in order to try to catch up with these claims within that period of time?

Mr. KRULITZ. Mr. Chairman, we have in our budget requests for fiscal year 1978 requested funding for an additional 15 full-time positions within the Solicitor's Office. Part of those positions would be devoted to this effort.

The more critical area of need is within the BIA budget itself. Most of the investigative work is done by the Bureau of Indian Affairs. Their funding at this point has been inadequate in the past in terms of both dollars and manpower. Most of the litigation funds in BIA have been devoted to several complex cases. We need to beef up the effort there.

We will certainly make an effort to increase our emphasis and effort in this area. It will require the cooperation of the administration as well as the Congress to provide necessary manpower funding.

Chairman ABOUREZK. How much of the BIA budget goes toward funding the Rights Protection Unit in BIA? I would like it by percentage.

Mr. KRULITZ. Let me give you the number. It is a very small percentage.

For fiscal year 1977, the Indian Rights Protection budget is about $6.5 million.

Chairman ABOUREZK. What is the total BIA budget?

Mr. KRULITZ. Almost $600 million, I believe Mr. Chairman.

Chairman ABOUREZK. Then it is about 1 percent?

Mr. KRULITZ. Yes; it is very small.

I would prefer to get those accurate numbers for the record, if I might do that.

Chairman ABOUREZK. Would you furnish that, then; and just have somebody calculate the percentage when you send the numbers in?

Mr. KRULITZ. Yes, sir.

[The information follows:]

	Fiscal year 1977	Fiscal year 1978
Total BIA budget	$589,000,000	$842,000,000
Rights protection	$1,200,000	$1,900,000
Percent	0.002	0.002

Chairman ABOUREZK. Do you intend to increase that percentage then, if you are asking for additional funds?

Mr. KRULITZ. I will encourage and make every effort that I can to increase the funding for this particular problem. Whether or not that ought to be in addition to the other programs or in lieu of other programs, I certainly am not in a position to make that judgment today.

As you know, the budget provides for a great many needs of the American Indian. I am not in a position today to say that I would trade off those other needs for this. But we will make an effort to increase the funding.

Chairman ABOUREZK. We are looking for assurances that an extension of the statute and an increase in the budget will finish off these claims cases; then we will not have to have another extension at the end of 4½ years.

Mr. KRULITZ. I see.

Chairman ABOUREZK. I realize that in this Government there is no real continuity. You come on as Solicitor. You say that the other folks did not do it right. Then, 4½ years from now, when you are gone, somebody is going to come in and say that Krulitz did not do it right.

We have to try at this point to pin down almost exactly what you intend to do and how fast you intend to do it.

Mr. KRULITZ. Mr. Chairman, let me make this commitment to you. I will first define the need to get this job done in 4½ years, if that extension is granted by Congress. I mean both the need as it relates to the Solicitor's Office and the Bureau of Indian Affairs. I will do everything that I can to make sure that that funding is granted for this program and this program is carried out.

I personally view this as a matter of great importance to the American Indian. I am personally committed to this.

Chairman ABOUREZK. Do you think it is fair for the Congress to ask for a periodic progress report, then, from your Department and Justice?

Mr. KRULITZ. I think that would be absolutely fair.

Chairman ABOUREZK. Would you and Mr. Taft agree to report to this committee and to the House committee simultaneously every 6 months?

Mr. KRULITZ. I cannot speak for Mr. Taft.

If that is the wish of this committee, yes, sir.

Mr. TAFT. Yes; I would also agree to that.

Chairman ABOUREZK. I do not think that is an unreasonable request. I think it would be sufficient to jog your memories up there as to what has to be done.

If the statute is not extended and if you have a number of claims which have not been filed on behalf of the Indians, then is the United States subject to any legal liability for that failure?

Mr. KRULITZ. Mr. Chairman, let me defer to Mr. Taft on that.

There is a possibility that if we failed to file the various claims on behalf of the tribes that the Government, as trustee, could be charged with a breach of trust. I would expect that we would be. Those claims would then be prosecuted before the court of claims for final determination.

I would have to say that certainly there would be litigation. I would not be prepared to say whether or not it would be successful, but there certainly is a credible argument that we would be liable.

Chairman ABOUREZK. You would be liable for what: the potential damages that would have been obtained had the cases been filed?

Mr. KRULITZ. It would be for breach of trust. Whether or not damages would be precisely the same, I am not sure.

Chairman ABOUREZK. But it would be roughly the same?

Mr' KRULITZ. I would assume it would be.

Chairman ABOUREZK. I am given to understand——

Mr. TAFT. May I interrupt?

Chairman ABOUREZK. Yes.

Mr. TAFT. I think there is no question that we would be sued. I think that at that point we, of course, would oppose a suit and therefore, in the lawsuit, would oppose any grounds for recovery against us.

On the other hand, right now I could not give an opinion that that is the law. In fact, I could put arguments on both sides, I think, quite well.

There is a danger, therefore. I think two things could happen:

One, if we were not found liable in the lawsuit, we would then be importuned to pass a statute that would permit them at that point to have a suit just as, in the past, we have had suits where claims have gone by and either have been properly heard or even have been heard and which could be heard again.

So, I think, if not in the suit filed on the breach of trust, there would be new acts requested from the Hill to permit such suits to be filed.

I would point out one further thing. In some instances in lawsuits, we would have rights against third parties where they should bear the costs. In other words, I think we have instances where the parties that either have the land now or have the particular assets involved should have known that they were acting contrary to the rights of the Indians; and, therefore, those parties should pay the costs.

If we do not have the time to bring those suits, then the United States will be asked to pay for them either in a direct suit or through a new claims act. The third party would then get a windfall. They will, in effect, end up for all time with an asset that should belong to the tribe.

So, I think you have a situation where, ultimately, the United States will be asked to pay and where a third party, in many instances, will get away with a wind fall.

Chairman ABOUREZK. I understand your hesitancy to admit to any kind of liability on the part of the Government.

I have to say to you that it is a quandary that I am in and that I thing you are going to find yourselves in.

You obviously know that there is going to be resistance to the passage of this on the floor. I have not been threatened with it, but I think it makes political sense that the Maine congressional delegation resists extension of this claim.

If I am to defend this legislation on the floor of the Senate—and my counterpart in the House has to do so over there—I do not really think I can defend it against the kind of attack that I can foresee coming by saying, "Well, the administration does not really think that there is anything serious about it. They don't think there is much liability. There might be; however, on the other hand, there might not be."

I think I would have to have a little clearer statement from the administration on the potential liability to the U.S. Government. I think that will appeal, perhaps, more to the Senators voting on this issue than if I went over there and said that we ought to play it safe because there will be a tremendous attack on this extension.

Mr. KRULITZ. Mr. Chairman, I must say that in my mind I think there is a clear exposure and substantial risk of liability in this situation.

Chairman ABOUREZK. I think that statement is much better for our purposes of defending the legislation.

Would you submit for the record the claims that you have identified, which tribe against which defendant, and the potential amount of damages that you foresee? Of course, you understand that those damages will be estimates on your part.

I think that is going to be essential for our presentation of this bill on the floor of the Senate.

Mr. KRULITZ. Mr. Chairman, we will do our best to identify for you as many of them as we can.

I hope that you understand that part of our problem is that they all are not yet identified.

Chairman ABOUREZK. I understand that.

Please also indicate how many more, by numbers, there are, over and above the ones that you have already identified.

I think it will be necessary that we have that information available for the debate.

[The list of claims follows:]

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

Honorable James Abourezk
United States Senate
Senate Select Committee on
Indian Affairs
Washington, D. C.

Dear Mr. Chairman:

I am enclosing a list of claims which would be barred if the Statute of Limitations is not extended as provided in S. 1377. We have provided estimates of damages where we have them.

In reviewing the list of potential claims, you should understand that

- Damage estimates are "guestimates" at best. As claims are developed further, we will be in a better position to estimate the potential exposure.
- The listing of these claims is not, in effect, a commitment on the part of the Department to bring suit in every instance. Decisions to bring suit will be made only after a careful review of the legal basis of each claim.
- There may be other potential defendants with regard to these actions which are not known to us at this time.

If we can be of any further assistance please advise.

Sincerely yours,

Leo M. Krulitz

LEO M. KRULITZ
SOLICITOR

Enclosure

The following is a list of presently identified claims of probable validity which will be affected in whole or in part in the event 28 U.S.C. 2415(b) is not amended. Arranged by geographical area, the list identifies the tribe or individual on whose behalf the claim would be asserted, the probable defendant or defendants, the nature of the claim and an estimate of damages. The list includes more than 340 such claims, with an estimated value of perhaps several hundred million dollars.

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Aberdeen:

8 trespass cases on behalf of individuals for fencing and timber trespass on allotted lands.

Billings:

1. On behalf of: Fort Peck Reservation

   Claim: Mine tailings leading to pollution of reservation and reservation streams
   Defendant: Mining corporation
   Damages: $102,000.00

2. On behalf of: Fort Belknap Reservation
   Claim: homesite and agricultural trespass
   Defendant: Non-Indian individual
   Damages: $2500.00

3. On behalf of: Fort Belknap Reservation
   Claim: Agricultural trespass
   Defendant: Non-Indian individual
   Damages: $900.00

4. On behalf of: Fort Peck allottee
   Claim: trespass
   Defendant: private individual

5. On behalf of: Fort Peck allottee
   Claim: trespass
   Defendant: private individual

6. On behalf of: Fort Peck allottee
   Claim: Trespass
   Defendant: private individual

7. On behalf of: allottee
   Claim: trespass
   Defendant: private individual

8. On behalf of: individual
   Claim: trespass and deprivation of use
   Defendant: private individual

9. On behalf of: Fort Peck tribes
   Claim: Ejectment and trespass damages
   Defendant: private individual

10. On behalf of: Fort Peck tribes
    Claim: Encroachment from building construction on lands claimed by tribe

Sacramento:

1. Timber trespass

Riverside:

1. On behalf of:Torres-Martines Band
   Claim: innundation of reservation
   Defendant: private irrigation districts
   Damages: $1,000,000 (minimal estimate)

Window Rock:

1. On behalf of: Navajo tribe and individuals
   Claim: Illegal upstream diversion
   Defendants: private irrigation districts, Arizona cities, Salt River Project.

Albuquerque:

The Area Office has indicated that there are literally hundreds of trespasses of varying types and degrees in derogation of the rights of the eight Northern Pueblos. Identification and development of these claims cannot be undertaken absent massive financial and staff support assistance.

Anadarko:

1. On behalf of: Sac & Fox Tribe
   Claim: Surface damage from oil and gas operations
   Defendants: private businesses

Pawhuska:

1. On behalf of: Osage Tribe
   Claim: water and mineral rights
   Defendant: Kansas (?)

2. Indeterminate number of grazing trespasses

Phoenix:

1. On behalf of: Ak Chin Indian Community
   Claim: off reservation pumping
   Defendant: 300 agricultural users

2. On behalf of: Ak Chin Indian Community
   Claim: Railroad trespass
   Defendant: Southern Pacific RR

3. On behalf of: Battle Mountain Colony
   Claim: Railroad trespass
   Defendant: Central Pacific RR

4. On behalf of: Chemehuevi Tribe
   Claim: trespass

5. On behalf of: Fallon Tribe
   Claim: Water rights adjudication

6. On behalf of: Fort McDowell Apache
   Claim: Powerline trespass
   Defendants: Salt River Project

7. On behalf of: Fort Mojave Tribe
   Claim: 4 separate trespasses

8. On behalf of: Gila River Pima-Maricopa Indian Community
   Claim: Drain trespass
   Defendant: Maricopa County

9. On behalf of: Gila River Pima-Maricopa Indian Community
   Claim: Off reservation groundwater pumping
   Defendant: San Carlos Irrigation and Drainage District

   Several other identical claims against individuals engaging in off reservation groundwater pumping

10. On behalf of: Gila River etc.
    Claim: flood damage

11. On behalf of: Kaibab Paiute
    Claim: pumping affecting flow of Mocassin Springs

12. On behalf of: Papago Tribe
    Claim: Mine tailings pollution
    Defendant: private corporation

13. On behalf of: Papago Tribe
    Claim: Off reservation pumping
    Defendant: Tuscon

14. On behalf of: Papago Tribe
    Claim: Off reservation pumping
    Defendant: Tuscon (?)

15. On behalf of: Papago Tribe et al.
    Claim: Water Rights adjudication
    Defendants: thousands unidentified

16. On behalf of: Salt River Tribe
Claim: off reservation pumping
Defendants: Municipal and industrial users

17. On behalf of: San Carlos Apache Tribe
Claim: illegal diversion of underflow of San Pedro River
Defendant: private corporation

18. On behalf of: San Carlos Apache Tribe
Claim: Water diversion and pumping

19. On behalf of: San Carlos Apache Tribe
Claim: Water diversion
Defendant: private corporation

20. On behalf of: San Carlos Apache Tribe
Claim: Water diversion
Defendant: Private corporation

21. On behalf of: San Carlos Apache Tribe
Claim: accounting and damages for failure to follow court decree regarding consumptive water use
Defendant: New Mexico

22. On behalf of: San Carlos Apache Tribe
Claim: Water diversions and pumping
Defendant: private corporation

23. On behalf of: San Carlos Apache
Claim: water rights adjudication concerning San Pedro River
Defendant: indeterminate number water users

24. On behalf of: Western Shoshone
Claim: Water rights adjudication concerning Bajoneta Springs
Defendant: State

25. On behalf of: Walker River Tribe
Claim: Upstream diversions

Twin Cities:

108 claims pertaining to individual allotments
102 tax forfeitures on behalf of individuals against state or county
40 trespass on reservation resulting from sand and gravel operations, grazing, fence and field encroachment

Defendants in above cases not identified
Damages not estimated

Alaska:

1. On behalf of: Kenaitze Tribe
   Claim: trespass
   Defendants: several oil companies

2. On behalf of: Chilkat Indian Village
   Claim: Trespasses
   Defendants: Alaska and its lessees and permittees

3. On behalf of: Kootznoowoo, Inc.
   Claim: Archaelogical excavation and destruction or removal of artifacts

4. On behalf of: allottee heir
   Claim: Timber and road trespasses across allotments
   Defendant: several oil companies

5. On behalf of: allottee
   Claim: road trespass across allotment
   Defendant: oil company

6. On behalf of: Kootznoowoo, Inc.
   Claim: trespass to lands individually held after Tlingit-Haida Settlement Act

7. On behalf of: Sitka Indian Village
   Claim: erroneous survey of Indian held lands

8. On behalf of: Sitka Village
   Claim: deprivation of use of tidelands
   Defendant: Alaska

9. On behalf of: Sitka Indian Village
   Claim: damages arising from purported transfer of school properties in 1950

10. On behalf of: Sitka Indian Village
    Claim: Improper transfer of tribal townsite land into individual ownership

11. On behalf of: Sitka Indian Village - individual member
    Claim: improper transfer of individually held property to city.

12. On behalf of: Sitka Indian Village - individual member
    Claim: improper transfer of individually held property to city.

Muskogee:

1. On behalf of: Choctaw Tribe
   Claim: recovery of surface and mineral interests interfered with by railroad right of way
   Defendant: Railroad Company

2. On behalf of: Choctaw Tribe
   Claim: Extraction of sand and gravel from Riverbed
   Defendant: Oklahoma and permittees

3. On behalf of: Choctaw Tribe
   Claim: illegal sale of tribal coal lands
   Defendant: Oklahoma

4. On behalf of: Creek Tribe
   Claim: deprivation of use of tribal property

5. On behalf of: Creek Tribe
   Claim: destruction of tribal cemeteries

6. On behalf of: Wyandotte Tribe
   Claim: Encroachment on Huron Cemetery
   Defendants: Kansas, Kansas City, et al.

7. On behalf of: Seneca Cayuga Tribe
   Claim: Trespass on tribal lands
   Defendants: private individuals

Portland:

1. On behalf of: Umatilla Tribe
   Claim: Quiet title to riverbed and damages for sand and gravel removal from bed of river within exterior boundaries of Umatilla Reservation
   Defendant: Riparian land owners
   Damages: $100,000.00

2. On behalf of: Umatilla
   Claim: Destruction of salmon runs by diversion of waters from Umatilla River
   Defendant: Various irrigation districts
   Damages: Estimated $500,000.

3. On behalf of: Umatilla Tribe
   Claim: Trespass to allotted lands. Void Condemnation
   Defendant: Pendleton, Ore.
   Damages: $50,000.00.

4. On behalf of: Swinomish Tribe
   Claim: Oil pipeline traversing reservation w/o benefit of right-of-way
   Defendant: Private Natural Gas Co.
   Damages: Estimated $100,000.

5. On behalf of: Swinomish Tribe
Claim: Trespass on tribal tidelands
Defendant: Burlington Northern RR
Damages: Estimated $600,000.00.

6. On behalf of: Skokomish Tribe
Claim: Ownership and boundary dispute and claim for unauthorized use of tribal tidelands
Defendant: State of Washington

7. On behalf of: Skokomish Tribe
Claim: Destruction of fishery by diversion of water for hydroelectric project on North Fork River
Defendant: City of Tacoma

8. On behalf of: Skokomish Tribe
Claim: Encroachment upon tribal lands by construction of school facility within boundaries of reservation
Defendant: Hood Canal School District
Damages: Estimated $10,000.00

9. On behalf of: Tulalip Tribe
Claim: Non-Indian trespass on tidelands secured to tribe
Defendant: A number of private individuals who have constructed summer homes on tidelands
Damages: Estimated $100,000.00.

10. On behalf of: Kalispel Tribe
Claim: Water fluctuation from Box Canyon Dam eroding easement lines on tribal and allotted lands causing waters to encroach upon tribal lands
Defendant: Pend Oreille County Utility District
Damages: Estimated $50,000.00.

11. On behalf of: Makah
Claim: Overburdening of access easement
Defendant: logging companies
Damages: Estimated $150,000.00

12. On behalf of: Shoshone-Bannock
Claim: Unlawful taking & trespass upon tribal lands by enlargement of reservoir
Defendant: Irrigation districts
Damages: Estimated $30,000.00.

13. On behalf of: Puyallup Tribe
Claim: Trespass to tribal lands by interstate freeway
Defendant: State of Washington
Damages: Estimated $50,000.00.

14. On behalf of: Individual Muckleshoot Owners
Claim: Trespass to allotted lands
Defendants: Tri-County Development Dist., City of Auburn, State of Washington and private corporation

Sacramento: (also, See page 3 infra)

1. On behalf of: Cuyapaipe Band of Mission Indians
Claim: Fence encroachment and illegal use of reservation lands
Defendant: Adjacent private land owner

2. On behalf of: Cuyapaipe Band of Mission Indians
Claim: Continuing cattle trespass
Defendants: Private ranchers

3. On behalf of: Cuyapaipe Band of Mission Indians
Claim: Trespass on reservation lands by County through construction of public road without valid easement
Defendant: County

4. On behalf of: Cuyapaipe Band of Mission Indians
Claim: Damages for diminishment of reservation water supply.
Defendants: Individual private water users and irrigation districts

Cases from different areas being handled by Washington Solicitor's Office:

1. On behalf of: Crow Tribe and individual members
   Claim: Violation of Crow Allotment Act
   Defendants: Individual landowners

2. On behalf of: Passamaquoddy and Penobscott Tribes
   Claim: Non-Intercourse Act claim for recovery of tribal lands
   Defendants: Maine and must join individual titleholders

3. On behalf of: St. Regis Mohawk Tribe
   Claim: Non-Intercourse Act claim for recovery of tribal lands
   Defendants: New York and individual titleholders

4. On behalf of Cayuga Tribe
   Claim: Non-Intercourse Act claim for recovery of tribal lands
   Defendants: New York

5. On behalf of: Oneida Nation of Indians
   Claim: Non-Intercourse Act claim for recovery of tribal lands
   Defendants: New York and individual titleholders

6. On behalf of: Oneida Nation of New York
   Claim: Non-Intercourse Act claim for recovery of tribal lands
   Defendants: 30 individuals

7. On behalf of: Catawba Tribe
   Claim: Non-Intercourse Act claims for recovery of tribal lands
   Defendants: South Carolina and individual titleholders

8. On behalf of: Wind River Reservation
   Claim: Upstream channel diversion
   Defendant: 1 Non-Indian landowner

9. On behalf of: Nez Perce Tribe
   Claim: Quiet title to riverbed;damages from sand and gravel removal
   Defendants: Idaho and state permittees
   Damages: $100,000.00.

Chairman ABOUREZK. I also understand that one of the sources of the problem is in the unresponsiveness on the part of tht BIA field offices. This is unresponsiveness to requests of the tribes to investigate and process claims.

Do you have any plans to improve this situation?

Mr. KRULITZ. Mr. Chairman, we are in the process of changing an administration. We hope we will have soon what will be an Assistant Secretary for Indian Affairs who will be responsible for the Bureau of Indian Affairs.

As you know, in government it is sometimes difficult to change direction. I guess what I can say at this time is that I will discuss this problem in depth with the new Assistant Secretary and ask him for his suggestions as to how we go about assuring the efforts and cooperation of the field offices in this effort. I think it has to have a priority.

At the moment, I have no firm plans in terms of how we might do that; but we will work on it.

Chairman ABOUREZK. I think, when we ask for your first semiannual report, we would hope that you have a plan formulated by that time.

In the short period of time that I have been dealing with Indian Affairs, the tradition is that, no matter what the immediate sense of urgency might be on any issue—such as this one—the tradition is "business as usual."

I would hope that you would not let that tradition prevail.

Mr. KRULITZ. Mr. Chairman, it may be that, if I could energize my own attorneys in the field, they in turn could bug the BIA to do well. It may be that that is the right way to come at this.

Chairman ABOUREZK. I think that this would be a good time to start letting your field people know that if they do not comply with your requests, they can be fired for cause. I do not think that has ever been done in the BIA, but I think it ought to start.

I know that it is very difficult in civil service to fire people, but it would seem to me that this is such a thing of urgency that, when you find unresponsiveness, you might start laying off a few people. I think it might be a good example for the others.

Mr. KRULITZ. It would be a way of getting their attention; yes, sir.

Chairman ABOUREZK. I do not think they are overworked terribly. I think they can probably comply with most of your requests if they are reasonable.

The investigation of water rights claims generally requires a long period of time, due to the extensive water inventories that are necessary. Have you considered this in your plans at all?

Mr. KRUELITZ. In the area of water rights, Mr. Chairman, we have to start with the understanding that the basic litigation regarding water rights is not an item that would be barred by this statute of limitations. It is where you wack on claims for damages, such as we have in the Pacific Northwest and elsewhere, that you get into the areas of potential barring of claims.

The inventoring of water rights for stream adjudications is a very necessary effort to go forward, no matter what. It is critical to both quantify the Indian water rights in the west—not only so they will know where they stand, but everybody else will know where they stand. This often is a long process.

We have to be prepared to commence the litigation at least within the time frame that we are dealing with here—to the extent that we are dealing with matters involving damage claims.

I would guess that what we ought to do is sort of put the first priority on those, if we can.

Once that litigation is commenced—I understand that water rights cases have gone on for 20 and 30 years.

Chairman ABOUREZK. Getting back to that list of claims, I wonder if it might be possible, in that list, to list the claimant, defendant, the estimated amount of the claim, and the nature of the claim. I think that would be very useful to the committee.

Mr. KRULITZ. I think we can identify the plaintiff very easily. Identifying the defendant is going to be very difficult in some instances.

Chairman ABOUREZK. If you can, that is fine.

Mr. KRULITZ. So, we would have plaintiff, defendant, nature, and amount.

Chairman ABOUREZK. Yes.

Then, if you could—as a bottom line—provide the committee with a total amount of potential claims that are to be filed, which will be the same amount as the potential risk to the Government in the event the statute is not extended.

Mr. Krulitz, your prepared statement will be placed in the record.

[The prepared statement follows.]

STATEMENT OF LEO H. KRULITZ, SOLICITOR, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1377, A BILL "TO EXTEND THE TIME FOR COMMENCING ACTIONS ON BEHALF OF AN INDIAN TRIBE, BAND, OR GROUP," MAY 3, 1977.

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before this Committee today to testify on S. 1377.

We recommend that S. 1377 be amended as suggested in our report.

The Act of July 18, 1966 (28 U.S.C. 2415) imposed a statute of limitations on tort or contract suits for money damages brought by the United States both on its own behalf and, in its capacity as trustee, on the behalf of Indians. The United States had six years from the date of enactment of the 1966 Act to file claims, on the behalf of Indians, that arose prior to the date of the Act. In 1972 Congress, in P.L. 92-485, amended 28 U.S.C. 2415 to extend this statute of limitations five more years, to July 18, 1977.

Indian representatives have expressed serious concern that the present statutory limitation might bar them from recovering damages in numerous causes that arose before 1966 because many of their claims may not be processed before the statute of limitations runs out. Accordingly, we recommend that the statute of limitations in 28 U.S.C. 2415 be extended until December 31, 1981 for claims brought by the United States on the behalf of Indians where the cause of action arose prior to 1966.

The Congress has recognized the unique nature of these suits and the peculiar difficulties in uncovering potential Indian claims and preparing them for litigation. In its report on the bill which became P.L. 92-485, the Senate Committee on Interior and Insular Affairs acknowledged the difficulty in identifying all Indian claims, and noted that the Bureau of Indian Affairs and the Office of the Solicitor had not been able to discover all the wrongs and then develop factual information necessary to get litigation filed.

The five year extension granted in 1972 did not solve the problem. Many of these claims go back to the 18th and 19th centuries, and it is difficult to estimate the number which remain unprocessed. For example, the Field Solicitor's Office in Phoenix, Arizona, has developed approximately 35 claims in their geographical area which they will attempt to process by July 18, 1977. The Twin Cities' Field Solicitor's Office, covering Minnesota, Iowa and Wisconsin, had developed 167 cases. We estimate that there could be many pre-1966 claims as yet unidentified or still being researched that would have to be filed by July 18. Nationwide the unprocessed cases could amount to well over 1,000.

The major reason why the five year extension was insufficient is that tort and contract remedies have become better defined by the courts in the last few years. We have not, until recently, had adequate procedures to document claims as they arose. Therefore, hundreds of the pre-1966 claims are still being researched and identified and cannot all be filed by July 1977.

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Due consideration should be given to the hardship which will be worked on tribes all over the country if Indian claims arising before 1966 are permanently barred from suit. Tribes would be foreclosed from recovering damages for past unlawful uses of Indian lands. However, instead of the 10 years proposed in S. 1377, we recommend that the statute of limitations be extended to December 31, 1981. This will provide adequate time to give these claims appropriate attention.

This concludes my prepared statement. I will be pleased to answer any questions you may have.

Chairman ABOUREZK. Do you have any other comments you would like to make?

Mr. KRULITZ. Let me say that it will take a little bit of time to pull the statement together, but we certainly will get working on it.

Chairman ABOUREZK. Do you have an estimate of how much time it will take? We have to do this long before July 18.

Mr. KRULITZ. Without checking with my people who are going to have this task, I am not sure. I will get back with an estimate rather than committing to a timetable.

Chairman ABOUREZK. If you cannot do it within a fairly reasonable amount of time so we can get ready to floor manage the bill, we will have to change the request and try to come up with some other estimate.

Mr. KRULITZ. I understand the problem; we will work with you.

STATEMENT OF PETER TAFT, ASSISTANT ATTORNEY GENERAL FOR LAND AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE

Mr. TAFT. Mr. Chairman, in addition to my prepared statement, I would like to emphasize two points, if I may.

First, I think it is terribly important that we set a program up, as you have suggested, in order to get these evolved and on their way before the 4½ years begins to come to an end.

Often, when a case is sent to us to file, it can still take up to 6 months while we discuss back and forth what we need to support the case and the theories in the case. Also, it may be that we feel that a lawsuit is not the right way to handle the problem.

The Maine case, I think, is a good example of that. That was sent to us with almost 7 months to go. Yet, 7 months is just not enough time, considering the number that we have to sue. Also, we feel that that is an instance where the proper way to solve the case is not in the courts but here on the Hill. To evoke that kind of process takes time.

So, unless we do have a good program to evolve these before the 4½ years begin to come to an end, I really do not think that we are going to be able to solve this both in the interests of the United States or the tribes.

For instance, the Maine case first came up 5 years ago. The United States got sued with only 6 weeks to run on the statute at that time. To protect ourselves, we filed a complaint against the State at that time. However, it is absolutely clear now that the action that we filed at that time, when the statute was about to expire—well, we had a very small part of the claim that we now have.

If we do proceed in the Maine case and file lawsuits in the next 2 months, then the defendants are going to include literally thousands of people who were not sued before. We could not have sued the State on the claim that we have against those third parties.

So, in a complex case—and the complex ones are the ones that we would be asked to bring, as opposed to having the tribe on their own—we need time. We may need a year from the time that the case comes to us before we file.

I think setting a program out, to find the cases, to prepare them, to finance the costs and to get them on file, has to start now. It has to be kept up with each year as we go.

My second point refers to what we have now in Maine. In the event we cannot solve the case on the Hill with the tribe and the State, and in the event the statute is going to run, we will have to, at that time, file the best case we can. The best case we can have will not be the kind of case that should be brought, in order to best solve this, in the courts.

You cannot bring a case against what may be 100,000 or more. You cannot file that kind of case and expect it to be manageable so that you can resolve it in a short period of time effectively.

Any case where you begin to get hundreds of parties can run 2 or 3 years just to set the procedure up without getting to the merits at all. The program that we have proposed to the court would avoid that.

In other words, what we propose to do, in the event we do have to sue, is to only sue a few at a time in the watersheds that are involved. If we sue, say, in the Penobscot or another watershed and we lose. If we only sue five, and we have been able to bring the case to trial in a short period of time, and we know it is defended well against us. If we lose on that watershed, we may not have to sue anybody else there.

On the other hand, if we win, we can then set the program up to proceed with our claims against the rest.

This is the only way in which you could reach the merits quickly on a well-tried case and, hopefully, to solve it and manage it in a way in which both the courts and we and the parties that we would sue would have any hope of having the merits heard as they should be.

So, unless an extension of the statute is passed, we are not going to be able to bring the right kind of lawsuit in the interests of all parties that would be involved. This, I think, will reflect on the State. It will reflect on those who must be sued. It will reflect on us. It will reflect on the tribes.

All of us will lose as a result of that. All of us will pay more, in effect. The chaos which you would have in the State of Maine, with a massive lawsuit filed in the next 2 months, I think would harm the State as much, or more, than if we won the suit.

Chairman ABOUREZK. How would it harm it?

Mr. TAFT. I think there is no question about the fact that it would put a cloud on titles up there. It would stop construction. It would stop mortgages. It might stop the ability of the timber industry up there to cut and sell the timber. As a result, I think it could economically bring the State to a halt.

When you look on this filing of a massive suit, which could take 2 or 3 years just to get the thing straightened out so you could begin to find out what is involved, I think you are talking about a lawsuit which is unmanageable.

To carry out the suits which have been referred to us and which we will have to proceed with if we cannot get a solution in the meantime, it is required that we have an extension of that statute. We would even propose that a special statute has to be passed for this particular case in the event that relief would not be granted across the board with respect to all claims.

Mr. KRULITZ. I would like to add something, Senator, just so you understand the gravity of the situation.

In our minds, if the statute is not extended, we will have no choice but to file this very massive lawsuit in Maine and perhaps similar ones in New York, which we are now working on.

Mr. TAFT. New York, I think, would be just as large in terms of how many you have to sue; it might be larger.

Chairman ABOUREZK. That is the *Oneida* case?

Mr. TAFT. Yes, the Oneida and the Mohawks. I do not think the land involved would be as large. But the number involved, in terms of trying to manage the lawsuit, of whom you are going to sue and how you are going to proceed in courts, would be as big, if not more so.

Mr. KRULITZ. The point is, given our trust responsibility, we have no alternative.

Chairman ABOUREZK. I have no more questions.

Mr. Taft, without objection, your prepared statement will also be inserted into the record.

[The prepared statement follows:]

Department of Justice

STATEMENT

OF

PETER R. TAFT
ASSISTANT ATTORNEY GENERAL
LANDS DIVISION

BEFORE

THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 1377 - EXTENDING THE STATUTE
FOR INDIAN CLAIMS

ON

MAY 3, 1977

The Department of Justice supports an amendment of the statute of limitations to extend the time in which the United States can bring damage actions on behalf of Indian tribes for claims accruing prior to July 18, 1966.

The Justice Department sues on behalf of Indian tribes only at the request of the Solicitor of the Department of the Interior. While a few of the matters already referred to us by Interior might be affected if the current statute of limitations were to remain in effect, the greater problem is with those claims which have not yet been unearthed by the Department of the Interior or which have not been investigated to the extent that they can be referred to the Justice Department for litigation.

It is our belief that an extension of the statute until December 31, 1981, if coupled with an effort by the Department of the Interior to find and investigate these claims, would be a fitting and appropriate action in view of the Government's traditional role of guardian and trustee for the Indian.

As noted above, some matters now pending in this Department are threatened by the statute of limitations.

These are the claims of the Passamaquoddy and Penobscot Indians involving violations of the Indian Trade and Intercourse Act. Because of the size of these claims, the title searches necessary to identify all the possible defendants are extraordinarily expensive and time-consuming. A complaint hastily drafted in order to meet the current deadline runs the risk of excluding legitimate defendants and including, through error, a number of people who should not be named. Also, if litigation is found to be the only method for resolving these claims, it will be necessary to devise a lawsuit which can be effectively managed so that a final decision on all major issues can be obtained as rapidly as possible. In order to reach that objective, the United States at this time contemplates a lawsuit against a limited number of major landowners; such litigation would permit the adjudication of all the major issues, factual and legal, with only a few parties with the resources to properly defend the case. The limited number of defendants would enable the case to proceed expeditiously. If the court denied a claim to a particular watershed, there might be no need to proceed against any other landholders in the same watershed. However, if a claim against major landowners in

a given watershed is upheld, we would thereafter proceed against the remaining landholders within the claim area in that watershed. This litigation program will require an extension of the current statute of limitations which expires on July 18, 1977.

The bill now before Congress would include both the Passamaquoddy and Penobscot claims, and if it were passed, specific legislation on behalf of those tribes would not be necessary. Enactment of the Administration's proposal providing for an extension until December 31, 1981, would also remove the need for specific legislation. We recommend enactment of the Administration's position. If, however, Congress is of the view that a general extension of the statute is unwarranted, an extension of the statutory period for the benefit of the Maine tribes should be enacted.

Chairman ABOUREZK. I want to express my thanks to you for your presentations and your appearance here. Thank you very much.

The second panel of witnesses are Tom Fredericks, Reid Chambers, and Charles Hobbs.

We welcome you to the Indian Affairs Committee.

I would ask if you would be willing to submit your statements for the record and just provide verbally the highlights of your testimony.

STATEMENT OF REID CHAMBERS, ATTORNEY, SONOSKY, CHAMBERS & SACHSE

Mr. CHAMBERS. Mr. Chairman, my name is Reid Chambers. As you know, I served as Associate Solicitor in the Interior Department for 3 of the last 5 years during which the statute had been extended.

Let me try to summarize my statement this way. When the Congress extended the statute for 5 years, it was hoped that that would be sufficient time to bring all of the historic trespass, conversion, and contract claims on behalf of Indian tribes against third persons.

Those are not claims like the Indian Claims Commission Act against the United States, but claims where the United States is suing as trustee for the Indians against third persons.

We have brought a lot of actions. We did not bring all of the actions that could be brought. Let me try to suggest why that was so.

First of all, I accept the censure for my part in the failure of the Government. We would have liked to bring all of them. We tried to bring every case that came to our attention.

The problem is not insufficient time. It is a lack of resources. It is a lack of commitment in the system. The chairman brought out some of the reasons with the Government witnesses and some of the reasons the Government witnesses themselves brought out.

Let me try to be specific on this. One problem is that, when you get down to it, there are only so many lawyers in the Solicitor's Office, both in Washington and in the field. When I was Associate Solicitor, at the best of times I had 15 lawyers working for me.

It is the smallest division in the Solicitor's Office. It was the smallest division in 1972. It is the smallest division today in 1977. This is true even though it handles more cases than most of the other divisions and even though qualitatively some of those cases are enormous cases: The water rights cases; the *United States* v. *Washington Fishing Rights* case. There is protracted litigation that goes on for several years.

Similarly, the Justice Department, under Peter Taft's leadership, has established a separate Indian section, which you know about, Mr. Chairman. Under able and aggressive leadership, they have tried to bring these cases; but there are only 8 or 10 lawyers in that section.

There are far more lawyers, I might mention, in the section of the Justice Department that defends United States in Indian Claims Commission cases against the Indians.

As you know, Mr. Chairman, in your State of South Dakota, there is one field solicitor, who represents the interests of the whole Interior Department in South and North Dakota, where there are 12 Indian tribes, some of which my firm represents.

Chairman ABOUREZK. Does not he represent the whole area?

Mr. CHAMBERS. Yes, sir. And he also represents Fish and Wildlife Service in that area. This is one man.

A few field solicitors have been unusually aggressive: The Phoenix field solicitor; the Twin Cities field solicitor. Some of these cases in these areas come to light. But, in most areas, that has not happened.

The tribes that I represent, Mr. Chairman, the Standing Rock Tribe in your State, the Fort Peck Tribe in Montana, and the Shoshone Tribe of the Wind River in Wyoming have adopted resolutions endorsing the concept of the bill that you have introduced. They want to express their gratitude to you for introducing that bill, their gratitude to the committee on promptly holding hearings on the bill.

This is a matter of grave urgency for them. Their feeling is that there is nothing of greater importance in the field of Indian legislation before the Congress at this specific time; it is my feeling, too.

They do have a suggested amendment that I have included with my prepared testimony. They question whether the statute of limitations ought to be applied at all to Indian cases where the United States is suing as trustee, on behalf of Indian tribes, against third persons.

The reason they question this is that they think that the terrible shortages of manpower that have existed in the Solicitor's Office, that have existed in Justice, that have existed in the BIA—the chairman is well aware of those shortages; we do not need to go into that—those shortages are going to continue. Those resource shortages are going to continue.

If you extend the statute for 4½ years, they will be back pleading with you 4½ years from now to extend it again. If you extend it for 10 years, the same kind of thing will happen.

While it seems fair enough for the United States to have a statute of limitations dealing with its own citizens when it is dealing with land the United States owns itself, we think it is a mistake, given the other priorities for Indian litigation and given the other priorities for Indian people, to have that statute of limitations apply to Indian trust land.

If the statute is to be applied to Indian trust land, certain things should happen to make sure that Indians are not penalized and do not lose their property rights because the United States, as trustee, does not know what property it manages, it does not know what claims it has, or because it does not take action to learn and prosecute the claims.

Again, the chairman is well aware of the difficulty that sometimes goes into getting controversial lawsuits brought by the Justice Department, by the Interior Department. There is conflict of interest that often exists in those situations where other agencies of the Government do not want an Indian claim brought.

Before any statute of limitations becomes effective, it seems to my clients and to our firm that the following steps ought to be taken.

Tribes should be notified of all potential claims on their reservation that could be brought by the United States against third parties. Federal agencies have in their possession—and this is generally buried deep in some archives somewhere in a distant part of the country—papers, records, and accounts concerning Indian trust property. Indian tribes do not have those papers, documents, and accounts.

All of these records should be searched. The validity of each existing land use on Indian reservations should be analyzed tract by tract. Let me give you an example, and maybe Tom Fredericks can fill in on this.

Several years ago, attorneys for the Native American Rights Fund were out in Nevada in the Walker River Reservation. In doing other work, they happened to research the history of a right-of-way for the Southern Pacific Railway across that reservation.

They happened to discover that that right-of-way was granted under the wrong statute, a public lands statute rather than an Indian lands statute. The wrong procedures were followed by the Interior Department, which granted the right-of-way. The right-of-way was entirely void.

Because they discovered that situation just by chance, Interior asked Justice to bring a lawsuit. Justice did it. The Ninth Circuit Court of Appeals held in favor of the tribe. That tribe will recover a very substantial sum from the Southern Pacific Railway.

But that brings into question how many other rights-of-way on Indian reservations were invalid when granted. It would take months to search the legal titles to rights-of-way on any major Indian reservation.

When I was in Fort Peck in December, I raised this question. They gave me a thick computer printout containing pages and pages of rights-of-way. All of those ought to be searched. They ought to be searched by qualified title examiners.

The United States ought to do it. The tribes do not have the money to do it. The United States ought to do it before a statute of limitations is imposed on the Fort Peck Reservation. They ought to do that on every reservation.

They ought to do surveys of tracts of Indian land where you have a checkerboard land situation. We have discovered situations where non-Indians have built farm houses and barns encroaching on trust land. We have discovered those because the tribe happened to know about that encroachment.

What really ought to happen is that there should be aerial photographs of the reservations. They ought to be compared with metes and bounds descriptions and surveys.

In our opinion, a great number of encroachments will be found. But no one ever knows about them because the Bureau has not had the personnel over the years to aggressively and carefully manage Indian trust property.

Our feeling is that, as a prerequisite to having the statute of limitations apply against the Indians, the Indians should know and the Congress should know and the United States, as trustee, should know what land it manages and what claims it might have. That is a rather massive undertaking. It will take a great deal of resources.

That, then, for us raises the question of why there ought to be a statute of limitations on Indian land. My clients have no objection to a statute of limitations if that kind of undertaking is to be done on their reservations. But that will cost thousands of dollars; it will take a substantial amount of manpower.

It would be done in 4½ years if Congress wanted to appropriate the funds and the Interior and Justice Departments wanted to spend

them for that purpose. There is no question it could be done if a major effort was made. But that leads us to question whether, given the other enormous Indian priorities—the Indian needs for water rights litigation, the Indian poverty, Indian needs for education—whether Indian resources ought to be spent on this issue, which is really protecting non-Indian trespassers from the liability that we think they ought to properly assume.

Mr. Chairman, again, my clients support any legislation you can get through this Congress because this is a vital problem. But we do suggest that it may be inappropriate for the statute of limitations ever to have been applied to Indian claims.

Chairman ABOUREZK. What kind of an amendment do you think would be appropriate? Do you have in mind something like the tolling of the statute on behalf of each tribe until such time as an inventory of the claims has been made for that tribe by the Government?

Mr. CHAMBERS. We would certainly do that, Senator.

The amendment I had in mind was simply to provide that the statute of limitations would not apply to claims brought by the United States on behalf of Indians.

If the committee wishes, though, we could certainly submit language that would provide that the statute would not begin to run until a report was made to the tribe and the Congress of all claims that could be brought on behalf of a particular tribe. And then, let's say, the United States would have 2 years or some amount of time after it knew of what the claims were to bring those actions.

Chairman ABOUREZK. I wonder if you would be interested in submitting proposed language for such an amendment, with a 2-year statute beginning to run after the inventory has been made—or a 3-year statute?

Mr. CHAMBERS. Senator Abourezk. I would be happy to do that.

[The proposed amendment, submitted by Mr. Chambers, follows:]

AN ACT To amend 28 U.S.C. § 2415 to provide that the statute of limitations shall not apply to certain actions brought by the United States on behalf of Indians

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section 2415 of title 28, United States Code, is amended as follows.

§ 2415. *Time for commencing actions brought by the United States.* (a) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g), brought by the United States for or on behalf of any recognized tribe, band or group of American Indians, or on behalf of an individual Indian, whose land is in trust or restricted status, until three years from the date of publication in the Federal Register of notice that the Secretary of the Interior has completed an inventory. The inventory shall report on all contractual arrangements of any kind, express or implied, between persons or entities other than the United States and said tribe, band or group or individual Indian where (1) the contract concerns the cutting of timber, or (2) the contract concerns minerals and there has been production of oil, gas or any other minerals of any kind whatsoever including sand and gravel, or (3) the amount of the contract exceeds $5000. Said inventory shall conclude as to each such contract whether any reasonable claim may be made for breach of contract, stating specific reasons in support of the conclusion reached. The inventory shall, when completed, be submitted to the tribe, band or group. The Secretary of the Interior shall furnish to each individual Indian a copy of the portion of the inventory dealing with such contracts with such individual except where the Secretary cannot locate the individual after diligent search or where the indi-

vidual Indian is not legally competent, in which case the portion of the inventory shall be delivered to the agency superintendent. Every action for money damages brought by the United States or an officer or agency thereof concerning any contract covered by said inventory shall be barred unless the complaint is filed within three years of the date that the notice that said inventory is completed is published in the Federal Register.

(b) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on the date of enactment of this act in accordance with subsection (g), brought by the United States for or on behalf of any recognized tribe, band or group of American Indians, or on behalf of an individual Indian, whose land or property is in trust or restricted status, until three years from the date of publication in the Federal Register of notice that the Secretary of the Interior has completed an inventory. The inventory shall set forth in detail all uses of such lands and other property by persons or entities other than the United States and shall conclude in each instance whether any reasonable claim may be made that such use is unlawful, stating specific reasons in support of the conclusion reached. The inventory shall, when completed, be submitted to the tribe, band or group. The Secretary of the Interior shall furnish to each Indian owner a copy of the portion of the inventory dealing with such owner's trust or restricted property, except where the Secretary cannot locate the individual after diligent search or where the owner is not legally competent, in which case the portion of the inventory shall be delivered to the agency superintendent. Every action for money damages brought by the United States or an officer or agency thereof concerning any lands or property covered by said inventory shall be barred unless the complaint is filed within three years of the date that the notice that said inventory is completed is published in the Federal Register."

Chairman ABOUREZK. Thank you.

Without objection, your prepared statement will be inserted in the record.

[Mr. Chamber's prepared statement follows:]

STATEMENT OF REID PEYTON CHAMBERS
BEFORE THE SENATE COMMITTEE
ON INDIAN AFFAIRS
REGARDING S. 1377

May 3, 1977

MR. CHAIRMAN and members of the Committee, my name is Reid Peyton Chambers. I am an attorney in private practice here in Washington. My clients include the Standing Rock Sioux Tribe of North and South Dakota, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, and the Shoshone Tribe of the Wind River Indian Reservation in Wyoming. These tribes have adopted resolutions in support of the concept of S. 1377. The Tribes and I thank the Chairman for introducing this most important legislation, and thank the Committee for so promptly considering it. There is, in our judgment, no more important piece of Indian legislation before the Congress. The Tribes would support a ten-year extension of the statute of limitations, but have an additional proposal: that the statute of limitations not be applied at all to actions brought by the United States on behalf of Indians.

The need for this bill begins with the Act of July 18, 1966,[1/] which for the first time established a statute of

1/ Public Law 89-505, 80 Stat. 304, 28 U.S.C. 2415.

limitations upon certain actions commenced by the United States seeking money damages against private persons. The most important claims, for our purposes, covered by the statute were actions to recover damages for trespass to lands of the United States and for conversion of property of the United States. The original period of this statute was six years. And while the statute's intent was to subject the United States to a statute of limitations when suing to protect its own property interests, the 1966 Act also pertains to trespass to trust or restricted Indian lands.

This application of the statute to Indian claims went unnoticed by the Interior and Justice Departments and by Indian tribes and their lawyers until the six-year period was nearly up. Then, at the last moment, Indian groups, with Interior Department support, presented the problem to Congress, and Congress extended the statute for five additional years. This extension is up this July 18. S. 1377 would extend it for another ten years.

In 1972, it was hoped that five years would be sufficient time to investigate and bring all historic claims for trespass to Indian lands. A number of actions have been filed in the past five years, but by no means all that could be

brought. As you know, Mr. Chairman, I served as Associate Solicitor for Indian Affairs at the Interior Department during three of those five years, and I accept the censure due for my part in the failure of the Government to identify and prosecute all these potential claims. The problem, I submit, was not simply insufficient time--it has been an extreme lack of resources to service the immense needs, legal and otherwise, of American Indians.

Let me be more specific. Like the Civil Rights movement before them, Indians in this decade have looked chiefly to the courts to protect their rights. Litigation has rightly multiplied, and a broad range of Indian rights is being advocated and protected. There are five divisions in the Interior Solicitor's office in Washington--the Indian Division is the smallest now, as in 1972, although it handles a larger caseload (both quantitatively and surely in terms of the nature of its cases) 2/ than most other Divisions. During the past three years the number of cases filed by the United States as plaintiff and trustee to protect Indian rights at least doubled. A new section has been established in the

2/ Many of its cases, involving as they do the protection of natural resources, entail protracted and highly controversial litigation to adjudicate water rights (as at Pyramid Lake where we sued 14,000 defendants), or hunting and fishing rights (as in the major United States v. Washington case now in its seventh year).

Justice Department to prosecute these cases under able and aggressive leadership. But this section has far fewer lawyers than another Justice section charged with defending the United States in the Indian Claims Commission against the Indians.

In addition, as you also know, Mr. Chairman, there is frequent conflict and competition for natural resources within the Interior and Justice Departments between Indians and agencies like the Bureau of Reclamation, Bureau of Land Management, Forest Service, Army Corps of Engineers, and Fish and Wildlife Service. A great deal of lawyers' time is devoted to administrative controversies, and it is often no easy matter for tribes or for their advocates within the Government to get controversial cases filed. Legal manpower in the Solicitor's Office and Justice Department has been insufficient to meet all these needs--both in Washington and in the West. The same is true of the Bureau of Indian Affairs. The Tribes and I fear that these shortages of manpower and other resources will continue.

For these reasons, Mr. Chairman, the Tribes and I question the wisdom of having a statute of limitations apply at all to actions brought by the United States on behalf of Indians. We are submitting for your consideration language to amend 28 U.S.C. § 2415. If the statute is to be applied,

Indians should not be penalized and lose their property rights because the trustee did not know what property it manages and what claims it has, or because no action is taken by the trustee to learn and prosecute their rights. Before any statute of limitations becomes effective, the following steps should be taken. Tribes should first be notified of all potential claims by the United States. Federal agencies have in their possession (generally deep in archival vaults around the country) the papers, records and accounts concerning Indian trust property. These should be searched, and the validity of each existing land use on Indian reservations should be analyzed. As an example, several years ago attorneys for the Native American Rights Fund in researching 19th century documents happened to discover an invalid railroad right-of-way across the Walker River Reservation in Nevada. The United States and the Tribe brought suit against the railway, and with a favorable decision by the court of appeals, the Tribe stands to recover a substantial sum. The title to every right-of-way grant in Indian country should be similarly searched and reported to the tribes and their attorneys before any statute of limitations is imposed.

Reservation lands should be surveyed, tract by tract, to discover unlawful encroachments. Aerial photographs should be compared with section lines and metes and bounds descriptions.

We have recently discovered some such encroachments on a reservation we represent. In one situation, a farmer has built a farmhouse and barn occupying tribal property for thirty years without payment. The Tribe reported this problem when we asked for any instances of trespass to lands, but there are doubtless hundreds of such encroachments in Indian country undiscovered.

We suggest, Mr. Chairman, that a statute of limitations against the United States is eminently reasonable where only the property of the United States is involved, and the United States with all of its resources has slept on its rights. That is not the situation here. The United States is trustee for Indian property rights. The United States manages and administers the property. But the trustee has no inventory of the property it manages, reservation-by-reservation and tract-by-tract, or of the use of this property. It has never reported all possible reasonable claims to its trust beneficiaries. A statute of limitations in these circumstances shifts the loss from private trespassers to the Indians where the Indians have never been fully informed by their trustee. That the trustee has not had sufficient manpower or resources does not diminish the unfairness of making the Indians bear this loss.

To be sure, Mr. Chairman, all of the actions necessary to inform Indians of their claims could be taken by the United States during the next ten years if the

statute were extended. But given the other needs and priorities facing American Indians in the immediate future, the Tribes question the wisdom of having a statute of limitations applied at all to claims regarding Indian trust property and of utilizing the large amount of resources that would be necessary to make a complete parcel-by-parcel inventory of all uses of trust lands on Indian reservations, and report the findings of such an inventory to the tribes and to Congress. For this reason, we would prefer an amendment holding the statute inapplicable to Indians to the extension presently proposed in the bill. It goes without saying, however, that we greatly prefer a ten-year extension to the running of the statute in July.

Thank you, Mr. Chairman, for this opportunity to appear before this Committee.

An Act to amend 28 U.S.C. § 2415 to provide that the statute of limitations shall not apply to certain actions brought by the United States on behalf of Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2415 of title 28, United States Code, is amended as follows.

§2415. Time for commencing actions brought by the United States. (a) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians, or on behalf of an individual Indian whose land is in trust or restricted status."

(b) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians, or on behalf of an individual Indian whose land is in trust or restricted status."

STATEMENT OF THOMAS W. FREDERICKS, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND

Mr. FREDERICKS. Mr. Chairman, my name is Thomas W. Fredericks. I am the director of the Native American Rights Fund in Boulder, Colo.

We, too, support what Reid Chambers has just stated. Our organization supports any kind of extension that you can get through, although we fail to see why the Indian people should suffer these injustices as a result of the failure of the United States to really identify these claims.

As Reid pointed out, the Native American Rights Fund has identified a number of these claims and has been successful in getting the Interior Department and the Justice Department to bring some of these controversial claims.

I think it is important to point out that, as a result of our efforts in this particular area, we tend to use the same experts. They are experts outside of the Government. These experts become very familiar with the kinds of claims that may be brought on behalf of Indians.

It is not the efforts of the Native American Rights Fund per se, but it is some expert hired by NARF that is digging in the archives that recognizes that there is an invalid easement or that there has been some wrongdoing in the outlining of a particular reservation boundary.

The Swinomish case in the State of Washington is a case in point. We had an expert that we have used extensively in the Northwest researching the archives to try to find where the boundaries were in a slough area so that we could determine exactly where the reservation boundary was located and whether the Corps of Engineers had breached the rights of the tribe as a result of their dredging the particular slough area for navigation and so forth.

She came upon documents that showed quite clearly that the reservation boundaries were something other than is now recognized by the Interior Department as the reservation boundaries. It was just because of her knowledge of these kinds of cases that she was able to find this particular discrepancy.

This is the kind of expertise that we need within the Government if we are going to do these kinds of cases.

We feel, Mr. Chairman, that in most of our cases where we utilize the same experts extensively in conjunction with the Justice Department, we are able to rely on their expertise. The experts become knowledgeable about the particular claims. This is the problem that I see with a statute of limitations: We have no knowledgeable experts to identify the claims.

It has not been until just recently that we have been able to get the United States to act in any kind of fiduciary capacity, and now we are facing a statute of limitations that would cut us off. That is the real injustice.

These claims are complex. They require a great deal of study; Peter Taft made that quite clear. There are hundreds of thousands of acres of land involved.

Let me give you an example from my prepared statement. We represent the Crow Tribe in a Crow "section 2" case which restricts the

ownership of non-Indian land by individuals on the Crow Reservation. We have spent over 700 attorney hours over a 3½-year period asssisting the tribe in putting the claim together.

We submitted it to the Interior Department. It took them 2 years to send it over to Justice after all the work we had done on it. It has been in Justice since February of 1976. The case still is not yet filed.

I think it is just absolutely critical to approach this thing more along the lines suggested by Mr. Chambers.

I do not think that the Indian tribes and the administration are willing to commit the kinds of resources that it would take to bring all these claims before the 4½-year time period. The claims that we have been involved in have taken us 6 years to prepare, and they still have not been filed in most cases.

It is just an unreasonable request, I think, given the resources and even the expertise in the area that we would be relying on.

The other point I would like to make is this. Congress, in enacting acts like the McCarren amendment, for example, is causing a lot of litigation. They basically stimulated litigation. Congress has stated that it is good policy to litigate and adjudicate water rights in the West.

As a result, the tribes and the United States are being sued by the States and by the various water conservancy districts to adjudicate these streams. There is no discretion on the part of the agency, as far as allocating resources. They have to defend these water suits. They have to defend the diminishing cases.

I think every Indian tribe in the country would support the allocation of these resources for this purpose. That is our lifeblood out on the reservation.

In closing, we support the proposed amendment, S. 1377. But I think, on the point Mr. Chambers made, certainly that a naked extension may not be very significant, given the complexities of these cases and the substantial resources required to really identify the potential claims.

Thank you, Mr. Chairman.

Chairman ABOUREZK. Thank you. Without objection, your prepared statement will be made a part of the record.

[Mr. Fredericks' prepared statement and a supplement to his statement, submitted subsequent to the hearing, follows:]

Native American Rights Fund

STATEMENT OF THOMAS W. FREDERICKS BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, MAY 3, 1977, CONCERNING S.1377, A BILL TO EXTEND THE TIME FOR COMMENCING ACTIONS ON BEHALF OF AN INDIAN TRIBE, BAND OR GROUP

Mr. Chairman, Members of the Committee and staff, my name is Thomas W. Fredericks. I am the Directing Attorney of the Native American Rights Fund (hereinafter referred to as "NARF"), which is headquartered in Boulder, Colorado. NARF is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and Alaska Natives and providing legal representation and counsel in cases of major significance to Indians and Natives. Because of NARF's expertise in Indian law, we also provide counsel to legal services programs on Indian legal matters, under a contract with the Legal Services Corporation. NARF's emphasis is upon the preservation of Indian tribal existence, the protection of resources and the fulfillment of the nation's longstanding obligations to Indian people.

NARF represents clients in 40 states and is involved in many of the major cases having a substantial impact on Indian law. I submit the following statement, however, not on behalf of any single client or tribe, but because of the inherent injustices resulting to all tribes and Indian individuals if the statute of limitations were allowed to bar their otherwise valid claims. It is for these reasons, Mr. Chairman, that we strongly support S.1377 and encourage both the Committee and the Senate to take immediate action to extend the statute of limitations and allow the Indians' trustee to evaluate and prosecute the meritorious claims of Indian people. Immediate action is necessary so as to avoid the filing of numerous cases as a protective measure. To avoid this rush to the courts, a full extension of the statute must be enacted before mid-June at the latest.

At the outset, I would like to call to the Committee's attention the relative priority placed upon direct resource protection within the agency primarily charged with carrying out the fiduciary responsibilities of the federal government. In Fiscal Year 1977, as in previous years, approximately 70% of the Bureau of Indian Affairs' budget was allocated for education and social service programs, notwithstanding the ever-increasing demands of the Indian people that their trust resources be managed and protected in a prudent manner.

The low priority given resource protection issues stems from two factors: 1) the ease with which agencies can obtain Congressional authorization and funding for social service programs, and, 2) the controversy centering around the assertion of Indian claims regarding trust resources. I would respectfully submit, Mr. Chairman, that if Indian resource protection issues are to be given a higher agency priority consistent with the trust obligations of the United States, the direction and guidance must be provided by the Congress, not by the Bureau of Indian Affairs.

This statement is not intended as an indictment of the Bureau of Indian Affairs. Rather, it is one of recognition of the dilemma confronting the agency. The Bureau of Indian Affairs is required to meet the educational and social welfare needs of the Indian community and, at the same time, satisfy the need to protect the trust resources. Yet, the agency does not have sufficient staff and fiscal resources to meet all of the important needs of Indian people. Unless resources are adequately appropriated and allocated to allow the Bureau to carry out its responsibility, the agency will continue to fail in its attempts to identify the important claims coming within the reaches of the statute.

When viewing the fact that insufficient resources are allocated for trust resource protection issues together with the ever-

increasing demands on the Bureau of Indian Affairs, the Solicitor's Office and the Justice Department to litigate current important issues, it is not surprising to find that the longstanding trespass claims of the tribes and individual Indians have been lost in the shuffle.

The increase in litigation stems primarily from two sources: 1) more active tribal governments requesting the assistance of the BIA, the Solicitor's Office and the Justice Department in bringing lawsuits on behalf of the tribes, and, 2) Congressional enactments that stimulate litigation. Congress, through the enactment of the McCarran Amendment 1/ in 1953, emphasized the importance of adjudicating western streams and rivers. As a result of this action of Congress, the United States has been joined as a party defendant in many general stream adjudications in the west. This fact alone has added a tremendous burden on the resources of not only the Justice Department, but the Bureau of Indian Affairs and the Solicitor's Office as well. To add further to this point, I would also like to mention the increasing number of diminishment cases that are being filed by the various states and counties to determine the legal effect diminishment statutes passed by Congress have had on particular Indian reservations in the west. 2/

In the diminishment and McCarran Amendment lawsuits, the aforementioned agencies must defend these cases. The agencies have no choice but to allocate substantial resources for this purpose. I don't have to tell you, Mr. Chairman, how complex and important these lawsuits are and what effect they have upon the continued existence of Indian

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1/ Act of July 10, 1952, c. 651, Title II, §208(a)-(c), 66 Stat. 560, 43 U.S.C. § 666.

2/ The National Indian Law Library's compilation of "Reservations: Diminished by Acts of Congress", 001021, et seq., containing 22 listed cases.

tribes and their peoples. The Indian governments would without question support the allocation of substantial resources to defend against such suits, even though, in the case of water adjudications, the suits tend to be 10-to-20-year undertakings.

By their very nature, many of the longstanding trespass suits require much historical research and some of them are enormously complex. An example is the Crow "Section 2" case which affects 300,000+ acres on the Crow Reservation in Montana. 3/ NARF has put in 700+ attorney hours over a three-and-one-half-year period developing the case and assisting the Interior and Justice Departments in preparation for filing, and the suit has not yet been brought.

The Crow Tribe's request for the United States to bring suit was pending before the Interior Department from February 21, 1974, to February 20, 1976. Since the latter date, the case has been under consideration within the Justice Department. I am not complaining, but I do wish to point out how difficult and complex many of these cases are and how long some of them take merely to complete the research to prepare the case for filing.

As a further illustration of the complexity of some of these cases, let me briefly describe the situation of another of our clients, the Swinomish Tribal Community of LaConner, Washington. The Swinomish Reservation is described in the treaty as a peninsula, but the boundaries of the reservation have never been determined formally. The question for

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3/ The Crow Tribe seeks enforcement of "Section 2" of the Crow Allotment Act of 1920, which prohibits substantial non-Indian land holdings within the reservation. NARF is requesting the United States to undertake a case to eject non-Indians from thousands of acres of land on the Crow Reservation who have violated the federal law prohibitions on excess acreage ownership by non-Indians contained in "Section 2" of the Crow Allotment Act.

decision is to where do the boundaries extend: low tide, mean low, high, mean high or other? Once that issue is resolved, it is still necessary to determine where the identified boundary lines are physically located. The answers to these questions depend in part on what uses the Indians were making of the tide lands at the time of the treaty and how essential they were to their way of life. Needless to say, these questions require a great deal of historical and anthropological research. If the statute is not extended, suit would have to be filed before all information is gathered, meaning the immediate naming of all potential defendants, with the elimination of improper parties occuring after suit is filed.

As illustrated by the Crow case, the Interior and Justice Departments carefully research these claims before suits are filed. As a result, the track record in the court is very good. But the result of failing to extend the statute of limitations necessarily would be to by pass the usual process. The result would be the filing of many suits that otherwise would not have been brought. This would further burden the federal courts and put the named defendants to unnecessary expense.

I submit, Mr. Chairman, that it is in everyone's interest to extend the statute of limitations. For example, in the Crow case there are several unsettled legal issues. Under our present plan, we would bring suit against one major landowner as a test case and not file other similar lawsuits until the unsettled legal issues have been determined. This procedure would be orderly and expeditious. If the statute is not extended, the cases could not be handled in this manner. Suit would have to be instituted immediately against all landowners with acreage in excess of that permitted under Section 2 of the Crow Allotment Act.

The eastern claims are yet another example. Most of these claims have not yet resulted in the filing of suits for ejectment or trespass damages. 4/ If the statute is not extended, the Tribes and Justice will be forced to file all of these land claims by July, thus casting a cloud on title to vast quantities of land held by innumerable individual landowners. This would complicate the settlement effort already underway, not to mention the unnecessary confusion and negative impact on the real estate transactions in the claimed area.

In closing, Mr. Chairman, we support and urge timely enactment of S.1377, as proposed. We would like to add, however, that because of the complex nature of longstanding trespass cases and the need for substantial fiscal and personnel resources to litigate these cases, we question the significance of a naked extension of the statute. We submit that a Congressional mandate, backed by appropriations, is necessary to eliminate the dilemma of the federal agencies involved and to make it possible for them to comply with the statute.

Thank you, Mr. Chairman, for the opportunity to appear before the Committee to testify on this very important piece of Indian legislation.

4/ MASSACHUSETTS: Wampanoag and Gay Head; RHODE ISLAND:Narragansett; CONNECTICUT: Schaghticoke and Western Pequot; NEW YORK: Oneida, Cayuga, and St. Regis; and SOUTH CAROLINA: Catawba.

Native American Rights Fund
1506 Broadway • Boulder, Colorado 80302 • (303) 447-8760

May 5, 1977

Senator James Abourezk
c/o Allen Parker, Counsel
Senate Select Committee on Indian Affairs
House Annex Building
Second and D Streets S. W.
Washington, D. C. 20515

Re: S.1377 - A Bill to Extend the Time for Commencing Actions on Behalf of an Indian Tribe, Band, or Group

Dear Senator Abourezk:

This will supplement my statement to your Committee on May 3, 1977, in support of S.1377, with particular reference to the liability of the United States for failure to timely file damage suits on behalf of Tribes in the event the statute of limitations is not extended beyond July 18, 1977.

In the exercise of its fiduciary duty to the Indian Tribes, the case law is clear that, the United States has an obligation of the "highest responsibility and trust" and that its conduct will be judged "by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Accord, Mason v. United States, 412 U.S. 391 (1973). At the minimum, the United States' trust obligation to the Tribes imposes a duty to adhere to at least as vigorous standards as a private trustee or "ordinary fiduciary." Menominee Tribe v. United States, 101 Ct.Cl. 10, 19 (1944).

The property rights encompassed within its trust protection include land, water, minerals, timber, trust funds, and hunting and fishing rights. E.g., United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941); Navajo v. United States, 364 F.2d. 320 (Ct. Cl. 1966); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D. D.C. 1972); Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Oregon, 302 F.Supp. 899 (D. Ore. 1969). The United States not only has an obligation to protect these property interests against future injury but also a duty to enforce reasonable damage claims for past injuries to such property rights which it holds in trust.

A trustee is chargeable with any loss resulting from his breach of trust. A breach of trust occurs when a trustee "violates any duty which he owes as trustee to the beneficiary." Scott on Trusts, Vol. 3, sec. 201, p. 1650. Therefore, if the United States negligently fails to timely file damage claims, and such claims are eventually barred by the statute of limitations the Government is liable for the loss incurred, plus interest.

> Where the claim could have been collected in full if he had taken proper proceedings to collect it and because of his delay the claim has become uncollectible, he is subject to a surcharge for the full amount of the claim and interest thereon. Thus he is subject to a surcharge where the claim was originally enforceable, but the obligor has subsequently become insolvent, or where the claim has subsequently been barred by the operation of a statute of limitations. Scott on Trusts, Vol. 2, sec. 177, p. 1424.

And even if a fiduciary contends that a claim is uncollectible, if he has made no effort to collect it the burden is upon him to show such effort would have been unavailing. Scott on Trusts, Ibid., p. 1426.

It is then, I submit, to clear for controversy, that the Government has a trust obligation to pursue damage claims on behalf of its tribal wards, for the breach of which it will be liable to the Tribes if the statute of limitations is not extended.

Sincerely yours,

Tom Fredericks by LAA

Thomas W. Fredericks
Director

TWF/LAA/tmws

STATEMENT OF CHARLES HOBBS, ATTORNEY, WILKINSON, CRAGUN & BARKER

Mr. HOBBS. Mr. Chairman, I am Charles Hobbs of the law firm of Wilkinson, Cragun & Barker.

Our firm represents the National Congress of American Indians and several individual Indian tribes as general counsel.

Speaking generally, our clients do support the proposed bill. If it must be amended down to 4½ years, they would support that, too, if that is the best that can be done.

We certainly concur with Mr. Chambers' concept and Mr. Fredericks' concept, to which they just testified. It is pretty difficult to justify applying the statute of limitations to cut off a claim that was never presented in court because the United States lacked the manpower to investigate it.

These claims almost always arose under the nose of the United States, so to speak. They occurred while the United States was in charge of the affairs and the development of the tribes and had agents present on the reservations. I am not saying that the United States was at fault for these claims, of course. But I am saying that these things occurred during the administration of the United States. The United States has a moral—and probably a legal—duty to get these things cleared up before there should be any consideration of starting the statute of limitations running.

However, as a political matter, it does appear that the statute is going to start to run anyway, either in 4½ years or 10 years or without any extension. That is even though we do not think it should be.

What will happen, once the final day comes when the statute of limitations runs out, you will find, as you heard from Government witnesses, Mr. Krulitz and Mr. Taft, the Indian tribes, when they discover their claims, which are now barred, are going to turn to the United States and sue the United States.

Chairman ABOUREZK. You say they are now barred?

Mr. HOBBS. No; once they become barred. Sooner or later, the statute is going to bar them, though we do not think it should. But, politically, it is realistic to expect that they will.

When that happens, then we say it is natural to expect that the tribes that have these claims—and individual Indians, too—will file them against the United States for having let the statute of limitations go by.

In our opinion, in many cases, a case of negligence is going to be made out where the United States will not be able to successfully plead that it did not have the manpower. That will not be a good excuse if that is all they can offer for not having filed a claim.

It will sort of be in the nature of a suit by a client against his lawyer for letting the statute of limitations run out on him. It is like a malpractice claim.

It is pretty tough to escape liability when it is your own fault that the statute ran out, assuming that you knew about the claim.

I do not think I would have much beyond that to add that does not duplicate what others have said.

We appreciate very much the opportunity to appear before you, Mr. Chairman.

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Chairman ABOUREZK. Thank you.

The strongest statement that the Government witnesses would make, as you heard, is that there is a substantial risk and danger to the U.S. Government if the statute is not extended; it would cost the Government a lot of money.

Can any of you or all of you make some kind of prediction as to what the risk might be if the statute is not extended?

Mr. CHAMBERS. It would mean hundreds of millions of dollars of liability to the U.S. Government.

I have no hesitancy in volunteering my private opinion that there is no sound defense to such a claim. Let's say no Passamaquoddy suit were brought and that the Justice Department just let the statute run on the Passamaquoddy and Penobscot suit.

The tribes would clearly have an action in the Court of Claims that that was a breach of trust.

Chairman ABOUREZK. How much would it cost the Government, as an estimate, if that were to be the case?

Mr. CHAMBERS. That case would be hundreds of millions of dollars. The measure of damages would be what the tribes would have recovered if the United States had brought a claim.

Chairman ABOUREZK. Is it not billions?

Mr. CHAMBERS. It may be. I think just that claim itself would be hundreds of millions.

There are other claims in New York and other places and the Crow section 2 case that Mr. Fredericks mentioned. I know from my dealing with that in the Interior Department that that runs into—how many acres, Tom?

Mr. FREDERICKS. It is 300,000 acres.

Mr. CHAMBERS. It is 300,000 acres out on the Crow Reservation in Montana. That is very good ranch land, grazing land, and farmland. That would be worth millions of dollars. That is just that case.

Chairman ABOUREZK. The Government used the term substantial risk. Do you have any other descriptive terms that you mght be able to put on the risk?

Mr. CHAMBERS. I think it is a clear liability of the United States. If this statute runs, Indian tribes will be able to bring successful actions against the United States for damage awards running into the hundreds of millions and maybe billions of dollars in the next 5 or 6 years.

The *Mason* case is another point. It makes it clear what the fiduciary standard is.

The United States, as trustee, has clear fiduciary responsibility to the Indian tribes to prosecute their reasonable claims against third parties. That is very clear from the Supreme Court's decision in *Mason* in 1974. This would be a liability for breach of trust that can be brought, and I am confident that it will be brought and brought successfully. It will be a lawyers' field day. But we are not interested in a lawyers' field day; we are interested in protecting the rights of these Indians.

Mr. HOBBS. I would add just this. I think there may be cases, such as *Mason*, where the United States could escape liability. *Mason* was very special. In that case, the United States relied upon a previous

Supreme Court ruling as its justification for failing to take a certain action to vindicate the Indians' rights.

In that case the United States had seen to it that the Indians paid over taxes to the State of Oklahoma. This 1948 ruling, the *West* case, had been overruled by implication by many, many cases, including one in the Supreme Court.

If the United States were to find a narrow situation like that, it might be able to avoid liability. Perhaps there might be others. But, in my opinion, in the great majority of cases the United States would not have a successful defense and would lose these cases.

Mr. FREDERICKS. I think the *Mason* case, Mr. Chairman, clearly sets out the fiduciary standards as that of a private trustee.

The Supreme Court relies on Professor Scott saying that a trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. It further goes on to say that, if the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill.

So, basically, what the court would be determining is whether they exercised the required care and skill.

I think where they know of claims and have failed to bring these claims and where there is no precedent—especially in the Supreme Court—there would be no problems in recovering from the trustee.

Chairman ABOUREZK. I have no more questions. Do any of you have any final comments in this whole situation?

Mr. FREDERICKS. I would like to add one thing.

I recognize the concern we have with the eastern cases; certainly the congressional delegation from the State of Maine is concerned. I think it is clear to us, as counsel for the tribes, that these cases will be filed whether or not the statute is extended.

In a great many of the cases we have already claimed the trespass damages in cases where we are suing on our own behalf and not joined with the Department of Justice. Mashpee is an example.

I think it is in everybody's interest that the statute be extended. As Mr. Taft pointed out in his testimony: If we have to sue just to get around the statute of limitations, we are going to be suing a lot of defendants unnecessarily. We are going to be requiring them to go to a great deal of expense. We are going to burden the Federal courts. The parade of horribles can go on and on.

For that reason, it is in everybody's interest to extend the statute.

Chairman ABOUREZK. Thank you all very much. We appreciate your appearance here.

Mr. Hobbs, your prepared statement will be made a part of the record.

[The prepared statement follows:]

Before The

Select Committee on Indian Affairs
United States Senate

Hearings on S. 1377

May 3, 1977

Statement of Charles A. Hobbs in Support of S. 1377, Submitted on Behalf of the National Congress of American Indians, Inc.; the Arapahoe Tribe of Indians of the Wind River Reservation, Wyoming; the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana; the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; and the Hoopa Valley Tribe of Indians of California.

My name is Charles A. Hobbs. I am a partner in the law firm of Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D.C., and this statement is submitted on behalf of the National Congress of American Indians, Inc.; the Arapahoe Tribe of Indians of the Wind River Reservation, Wyoming; the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana; the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; and the Hoopa Valley Tribe of Indians of California. We support enactment of S. 1377, a bill to amend section 2415(a) of Title 28, United States Code, by extending the time for commencing actions in federal court for monetary damages on behalf of recognized Indian tribes, bands or groups, and individual Indians.

July 18, 1977, is the current deadline for the filing of lawsuits by the United States on behalf of Indian tribes, bands or groups, and individual Indians, for monetary claims arising before July 18, 1966, and S. 1377 would extend that time for an additional ten years. A companion bill, H.R. 5023, also would extend the filing date for ten years.

Section 2415(a) of Title 28 was extended for a five-year period commencing in 1972, and the record in support of that initial extension supports the extension proposed in S. 1377.

The need for the extension of time is obvious to those of us who represent Indian tribes. Indian claims are often of a complex nature and Indian tribes and individuals, particularly those who lack legal counsel, are often unable to recognize causes of action they may have. Sometimes the government agencies responsible for protection of Indian property rights and even tribal attorneys may be unaware of them as well. If the causes of action were known, it would be the duty of the United States, acting through the Department of Justice, to determine their validity, and if valid, file suit against the wrongdoer.

The proposed extension of time for an additional ten years, in other words, will facilitate protection of the rights of American Indians, in keeping with the trust responsibility of the United States.

While the Bureau of Indian Affairs has been making a concentrated effort to aid and assist tribes and individual Indians in discovering such claims, the process is not complete and will not be complete for some time. We also, on behalf of our clients, have been working over the years to identify and analyze potential claims, and can testify to the difficulty inherent in the process. We are convinced that if the statute of limitations is not extended for another period, a significant

number of claims will be "lost" to individual Indians and Indian tribes, through no fault of theirs, and to the benefit of those who have wrongfully profitted from their actions. In light of this, we urge strongly that S. 1377 be enacted.

Chairman ABOUREZK. Thank you all.

The hearing is recessed subject to the call of Chair.

[Whereupon, at 11:20 a.m., the hearing recessed, subject to call of the Chair.]

STATUTE OF LIMITATIONS EXTENSION FOR INDIAN CLAIMS

MONDAY, MAY 16, 1977

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 1224, Dirksen Senate Office Building, Senator James Abourezk [chairman of the committee] presiding.

Present: Senator Abourezk.

Also present: Senator Edmund S. Muskie.

Staff present: Alan Parker, chief counsel; Barbara Berger, professional staff member; Ella Mae Horse, professional staff member; and Ernie Ducheneaux, chief clerk.

Chairman ABOUREZK. The Select Committee on Indian Affairs will come to order.

The purpose of this hearing before the Senate Select Committee on Indian Affairs this morning is to take testimony on a bill which would extend the time for commencing actions on behalf of an Indian tribe, band, or group. This bill would allow the United States, as trustee, an additional 10 years in which to bring all Indian claims for monetary damages which arose prior to the enactment of the original statute of limitations in 1966. Under existing law, the time in which the United States can file such claims will expire on July 18, 1977.

On May 3, 1977, we received testimony from the Departments of Justice and Interior as well as from three attorneys with expertise on the relevant legal issues. All those who testified supported an extension of the statute, although the administration recommended only a 4½-year extension. At that hearing, the Solicitor of the Interior Department stated that if the statute is not extended and if a number of claims have not been filed on behalf of the Indians, that the United States would be exposed to a substantial risk of liability to the tribes for breach of trust.

If the statute is allowed to lapse, it will bar monetary relief, although other elements of the Indian claims will not be affected. However, the money damages involved could amount to millions of dollars. Partly for this reason, the Government is presently preparing to file as many claims as possible.

The effect of this approach will undoubtedly result in economic hardship in many communities throughout the country due to the clouded title which will follow the institution of these lawsuits. However, with respect to those large land claims which have recently received ex-

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tensive public attention particularly in the eastern seaboard States, the potential hardship has been somewhat alleviated due to settlement talks between the tribes and defendants initiated by the United States. In contrast, if the statute is allowed to lapse, these lawsuits will necessarily have to be filed, thereby severely limiting the potential for negotiated settlements.

Representatives from the States of Maine, Massachusetts, and New York were invited to testify at the hearing today so they could express their views on the proposed extension and its potential impact on the land claims in those States.

The representatives from the State of Maine have decided to appear before the committee this morning to express their position.

I want to welcome all of the witnesses here this morning. One of my colleagues, Senator Muskie, is here to introduce the Governor of Maine. Senator, we welcome you, and we thank you for your continued interest in this matter.

STATEMENT OF HON. EDMUND S. MUSKIE, A U.S. SENATOR FROM THE STATE OF MAINE

Senator MUSKIE. Let me express my appreciation to you for the sympathetic understanding that you have given to us in dealing with, perhaps, one of the most complex and difficult problems in this area. You have been willing to discuss it with us. You have tried to understand our points of view. I want to say that I am most appreciative.

Second, it is my privilege to present the Governor of Maine. He is an unusual individual, politically as well as individually as a person. I thought that I had pulled a political miracle some years ago when I was elected Governor in a Republican State, but he proved that you don't need either Republicans or Democrats in order to get elected Governor of our State.

Chairman ABOUREZK. Maybe he proved that you need both. [Laughter.]

Senator MUSKIE. In any case, he is a man of great personal integrity and dedication to the public interest. Beyond that, he has demonstrated an ability to surface issues in which the average citizen is interested. I think that this is very unusual. He has maintained his hold on the public interest and the public imagination even though he has no political party in the State legislature and no political party in the field.

When Jim Longley speaks, he is always respected and listened to. It is my pleasure to introduce him.

Before I do that, I would like to say a word about Joseph Brennan who accompanies him. He is the attorney general of the State of Maine. In Maine, the attorney general is elected by the legislature. We have had few Democratic attorneys general because we have had few Democratic State legislatures over the last couple hundred years.

Joseph was elected after running for the Democratic nomination for Governor for the privilege of running against Jim Longley. He lost that privilege, but Joe has taken over the responsibilities of the attorney generalship of Maine and has performed in a way that has earned the support and the cooperation of the Governor, the respect

of the people of Maine, and the respect of the congressional delegation with whom he works.

It is a personal privilege to welcome Joe and John Paterson who is his righthand man in the attorney general's department.

With that, I think that maybe I have said more than I should have. It is a privilege to present the Governor of Maine, James Longley.

Chairman ABOUREZK. May I interject? Do you mean that as a Republican legislator, you were elected by a Democratic legislature?

Senator MUSKIE. We have a Democratic House, a Republican Senate, an Independent Governor, and a Democratic attorney general. It is a mixed bag. [Laughter.]

Chairman ABOUREZK. Governor Longley's miracle is not that of running as an independent, but his miracle is that he beat a Lebanese candidate. [Laughter.]

STATEMENT OF HON. JAMES B. LONGLEY, GOVERNOR, STATE OF MAINE

Governor LONGLEY. On that note, Mr. Chairman, I want to say that I appreciate Senator Muskie being here. I know how busy he is.

Actually, my introduction to public involvement was with a group of people in Maine years ago when we had one-party government in Maine. Many people thought that Ed Muskie was the sacrificial lamb, but those of us who knew Ed Muskie knew that when he ran or tried to do anything, he did it to succeed and to prove that we did, in fact, have the will of the people and that, given the choice, we would bring two-party government to Maine.

This is a great example to us young democrats. I am proud to say that. I had never run for public office before. The only two campaigns I was involved in were on behalf of Senator Muskie in 1968, when he was the vice-presidential candidate, and again in 1972. With all due respect to the people we have now in Washington, we think we proved in 1968 that we would have been better with our ticket. I cannot imagine anyone in the White House, even today, who could do better than Senator Muskie. I am very proud of the man.

I am also very proud, Senator, of all the people of Maine.

Chairman ABOUREZK. Are you saying that the Georgia Governor is not alone in his criticisms?

Governor LONGLEY. Senator Muskie, of course, has the right to speak, but we are mostly proud of the people of Maine. As Governor, I have been through a difficult 6 months, or more, in which it would have been easy for the people to become divided in a country that in many ways we think, as much as we find fault, is the hope of the free world.

We cannot continue to be the hope of the free world unless we bury the prejudices and differences of the past and move on to tomorrow to correct the inequities that still exist rather than spending our time trying to redo old prejudices and resurrect old prejudices.

As Governor of Maine, I could not be more proud of the Indian citizens of our State as well as the non-Indian citizens of our State. In many countries of the world, and perhaps in some other States, there would not have been the constructive debate that we have had.

We have been disposed with the tribal governors in my State to allow legal counsel to discuss the differences. The tribal governors representing the tribes have come together with me and have had every opportunity. There is still one meeting pending this week to discuss our problems as citizens and to allow our attorneys to address our differences as citizens.

So, I appear before you today as Governor of all the people of Maine—Indian citizens as well as non-Indian citizens of Maine. I also appear before you as a Governor totally committed in the areas of human and equal rights for all citizens of Maine and not for one group to the detriment of any other group. That, in effect, is prejudice in reverse.

From the beginning, as I have already indicated, my posture as Governor has been to defer to the attorney general of our State as the properly constituted legal officer for all legal questions and to recognize that we do have courts and systems of jurisprudence in our society that are the proper forums to address grievances and correct wrongs.

So, my request to this committee is a simple one. I ask only that this committee, or any agency of the Federal Government, not take any action that would divide the people of Maine or of this country. We have seen too many unintentional actions that have divided Americans.

With all due respect to your Lebanese, he ran as an American citizen. I am sure you recognize that. It is most important in our society.

I ask you not to put us in a position in Maine where we would see seesaws of human rights. The scales of justice have been recognized for two centuries in this country to be balanced equally. A seesaw is hardly ever balanced. That has been the problem of equal rights because, as we extend preferential treatments or as nations of the world have dealt with such treatments, the seesaw goes down and suddenly someone gets off and we end up with not only misunderstanding but with subsequent conflict. I just do not want any misunderstanding in Maine if we can possibly avoid it, that is, from overbalancing the seesaw.

I would ask you to please not make present generations of Maine citizens pay an unfair price for something that might or might not have happened 200 years ago.

Equally important, we are asking people in Washington to please not do anything that would have future generations of Maine people—Indians and non-Indians—saying that the Federal Government of these United States took any action that failed to insure equal rights for all.

My only request is that Maine people not be placed on that human rights seesaw. The Indian community in Maine and the other citizens of Maine have attempted in every way to keep that seesaw equal from the standpoint of equal regard for each other. The only difference we have between us for the moment that concerns me is the possibility of upsetting a seesaw from the standpoint of any action that would not make certain that equal rights for non-Indians are every bit as important as equal rights for Indians.

So, Mr. Chairman, I think that we in this Nation cannot completely rewrite our history. We cannot tear up 200 years of transactions. As

Senator Muskie said so well—and I will reaffirm--there are no guilty parties now living in Maine.

So we cannot heal, we feel, the wounds of the past by placing penalties on a present generation which did not inflict the wounds. I also submit that we cannot erase the past by discrimination in reverse by taking away the rights of individuals in the present generation to remedy possible abuses of rights that might have occurred as much as 200 years ago.

While we can learn from the past, we must not allow our present actions to deepen prejudices and reopen old wounds to the extent that we attempt to correct past errors with present inequities.

So, I come before you as Governor to ask you to help us in Maine to continue to keep the balance of the seesaw for human rights equal for those who ride it now and try to keep it in balance for those who will ride it now and in the future. My deepest hope is that no Governor in the future will be faced with this type of problem. We are attempting so hard to make sure that equal rights are there for all people and are still trying to overcome any errors of the past.

Mr. Chairman, we are at a crucial point where I feel this Nation needs to be an undivided America. We must be an undivided America. Human and equal rights cannot be sliced and divided like a pie with one group getting a larger piece by taking a portion of that belonging to any other citizen or group of citizens.

If there is any unfair division of land or money in Maine, we will not achieve equal rights or even pay for any sins of the past. Such a decision would only keep the seesaw going up and down.

As I have already indicated, I have addressed these matters with our lawyers and our own attorney general—our properly constituted legal officer of the State of Maine, including the legislative and executive branches—to be the spokespersons for our citizens.

I am convinced, as Senator Muskie has already indicated, that the people of Maine share Senator Muskie's confidence and mine in the sense of equal rights and justice that our attorney general carries forward. I have never seen one iota in this difficult period of the past 6 months or more of evidence that in the attorney's general office, where it has been, other than deep concern for equal rights of the Indians, as well as the non-Indian citizens, of Maine.

I would ask the attorney general now to address the question from the standpoint of the legal subject before us today.

Thank you very much.

Chairman ABOUREZK. Governor, thank you very much for an eloquent statement. I appreciate it very much.

I might remind you that the Congress and this Committee on Indian Affairs has fairly well tried to stay out of this question. At least, I personally have. The trouble is that people on both sides of the issue have been coming to the Congress in different ways and at different times asking for a congressional solution.

As you know, there has been a bill introduced by members of the Maine delegation which is pending in this committee and on which we have taken no action yet. It would essentially ask the Congress to nullify whatever legal actions might be taking place up in Maine with regard to land. We have done nothing with that bill as of yet because that particular legislation is one side of the issue.

The President, as you well know, has appointed Judge Gunter whom he calls a mediator. Judge Gunter has yet to come to any final analysis or even intermediate analysis, as far as I am concerned, as to what is to be done in Maine. There is a sense on the part of the people in the administration to whom I have talked that in fact the State of Maine is not one of the proper parties of interest in this whole controversy. That in fact claims being made by the Indian tribes in Maine are being made against a few private landowners up there. Notably the timber companies.

It is felt that those people have taken to the trees and nobody has been able to see them yet. I don't know if that is true. That is what I am told by people in the administration. Somehow the Governor's office and the attorney's general office in Maine have been out front, as you should be. I think it is proper because you are the political representatives of the people, and you are out trying to seek a solution to it.

It is also my understanding that the Indian tribes have not laid hard claim against the populated areas of Maine. They understand the political problem in doing that. So, they have somehow backed away. I am not sure exactly how that has happened because I have not been in the middle of this thing as much as you have. The claims being made are against those areas which are not populated.

I wonder if you could respond—or maybe you would rather defer to the attorney general—perhaps you could tell the committee, as an ancillary issue, whether you believe the proper parties in interest have not yet gotten into this issue. I mean by that the private landowners.

Governor LONGLEY. Mr. Chairman, you have, in effect, asked three questions; or made one statement and asked two questions. Let me comment on each.

First of all, with regard to the congressional resolutions, I am sure that you are every bit as aware as I am as Governor—and perhaps more so as a Member of this body—that the Senators and Congressmen from Maine do not need anyone to defend what they have done. I came to them as Governor and addressed a request for some congressional resolution or assistance simply on one basis. Whether we want to or not, there are times in our lives when we all, because of acts of previous bodies, are involved. I came to the Congress—our delegation—asking for help because the Congress in 1820 made it possible for Maine to become a State. Since 1820, people have built on our land and moved into our society in Maine in reliance on an act of Congress and an act of the President which was one part of the case involved from the standpoint of the legal questions.

I would ask the attorney general to refer to them more specifically, so I would assume responsibility as Governor to come to the delegation and ask for their help and guidance and counsel. No Governor could have had more assistance than I have had on this and other questions.

The second point that you make about other people in Maine not coming forward leads me to say this: In our democratic society this might be a vote of confidence in the Governor and the delegation to some extent and also the action of the attorney general in recognizing that we are trying to do what we believe is right. They have not been pounding on my door or asking for special privilege or on anyone's

door in my State. We have had heavy mail expressing concern. A mother of seven children said every dollar she has is invested in her home and that is the only asset that she has. We have people who are working in our factories who are concerned that they might not be able to sell their homes. Now what happens to the mortgage payment when their only dollar savings is in their mortgage equity?

They have looked to us to protect their interests. So it might well be, Mr. Chairman, a vote of confidence in the method and manner in which we have tried to address the problem. I will not be presumptuous and say that there are not those who disagree with us. But the fact that others have not been down here beating a path might mean that they have been satisfied at this point with the approach that we have taken.

Finally, you make an excellent point with regard to the large unoccupied land. This raises a question—and I don't pretend to have the answer—but I have a question. The question is: Is land sacred in America? Does the fact that you own 1,000 acres and I own 1 acre or 1 square foot make your land less valuable than my land? I think that is the basic question that is addressed in the overall magnitude, as complex as it is.

I would like to think that we live in a society where the fact that you have invested in land and I might have invested in racetracks or gambling or beer parlors—and I have not developed the equity in land—looks at both equally in terms of value. In our State we think in terms of the heavy dependence for jobs on pulp and paper which, in effect, is a form of agriculture. We must recognize that when we talk about landowners that these landowners in our State provide jobs for a very, very heavy percentage of our people.

I did come to Washington to ask for help. I have had fair help for all the people of Maine. The position that I, as Governor, have taken and that others have taken is that we have areas of disagreement, but are not the courts of the country the proper place to resolve this disagreement?

As to the point about people not coming forward—I understand why you would wonder where they are—I would say that they are very much interested and very, very concerned. But, again in tribute to the Indian and non-Indian citizens of our State, they have been able to address this, almost without exception, on a positive basis which would allow the attorneys to resolve this matter in a properly constituted forum.

As to the question about land being sacred or not: I think it is. But is it anymore sacred because I own 1 square foot and you own 1,000 acres? I do not think that that makes your land, per square foot, any less valuable than mine or any more subject to barter.

I hope that I have answered the question.

Chairman ABOUREZK. Thank you.

Mr. Attorney General?

STATEMENT OF JOSEPH E. BRENNAN, ATTORNEY GENERAL, STATE OF MAINE

Mr. BRENNAN. Senator Abourezk, I appreciate the opportunity of appearing today before this committee to testify on S. 1377.

As this committee is no doubt well aware, the State of Maine is involved in complex litigation involving Indian tribal claims to 12 million acres of land in Maine—60 percent of the total land in the State. The State and the tribes are now engaged in discussion with and through Mr. William Gunter, special representative of the President. In the hope that either these talks, or some other congressional action, might eventually resolve this dispute, Maine is of the view that some extension of the statute of limitations would be prudent, since an extension would offer more opportunity to find a possible solution without litigation. The current deadline of July 18, 1977, is so close at hand that without an extension, a protective lawsuit, with all of its consequent harm, may be unavoidable.

Chairman ABOUREZK. May I interrupt you?

The Office of Management and Budget has recommended an approximate 4½-year extension until December 31, 1981. The Justice Department's original figure was 10 years. so we put it in the bill, they have since come back and said that OMB signed off on the 4½ years, that is, until that date I just mentioned.

Does that date do violence to you? You would not quarrel with that, would you?

Mr. BRENNAN. No; we would not quarrel with that.

For the reason I mentioned, Mr. Chairman, we recommend that the statute of limitations for the commencing of an action on behalf of an Indian tribe, band, or group be extended. However, in fairness to Maine, the extension ought to apply to all claims and not just to Maine. It would be most unfair to single out Maine citizens for an extension when the Solicitor of the Department of Interior has told this committee that there were "well over 1,000" other unprocessed Indian claims in this country.

Chairman ABOUREZK. This applies to all claims, not just Maine. We invited representatives of New York State and Massachusetts, as I mentioned, who were also involved in similar type plans, to testify, but they declined.

Mr. BRENNAN. We are aware of that, but the Justice Department had indicated that if they could not get it for all claims, then they would like to get it just for the State of Maine.

Chairman ABOUREZK. Thank you.

Mr. BRENNAN. Having stated our basic position, however, I have several other comments and suggestions about the bill which I believe the committee should consider. As this committee well knows, the current statutes impose a limitation on the bringing of any action by the United States Government in its capacity as a trustee on behalf of an Indian tribe, band, or group. That is in 28 United States Code, section 2415. This limitation requires that an action for damages, whether arising out of tort or contract claims, be brought by the United States no later than July 18, 1977.

This limitation period has already once been extended by Congress from the original termiation date of July 1972. I refer you to Public Law 92–485. Several observations should be made with respect to this statute of limitations and the proposed extension in S. 1377.

First, the limitation is only applicable to actions for money damages. Section 2415 expressly provides that there be no statute of limi-

tations on an action for the recovery or use of lands. S. 1377 does nothing to clarify this omission. Regardless of whether S. 1377 were enacted, therefore, there may still be no limitation on the Federal Government's right to bring an action to evict private citizens from their lands at any time in the future.

Second, the limitations in section 2415 apply only to an action brought by the United States on behalf of Indians. The limitation in section 2415 does not apply to an action either for damages or ejectment brought by an Indian tribe. Again, therefore, regardless of whether S. 1377 be enacted, there is no Federal statutory provision to prevent a tribe, band, or group of Indians from filing a claim at any time in the future for either money damages or eviction of persons who are alleged to wrongfully occupy Indian tribal lands.

As the chairman so correctly noted in his opening statement on May 3, 1977, pending litigation has resulted in "economic hardship" and "clouded titles" in areas subject to claims. S. 1377 does not address these problems in section 2415 noted above, nor does it eliminate the possibility of "economic hardship" or "clouded titles," 10, 15, 20, or 50 years from now arising out of Indian claims.

I believe that the failure to include a general statute of limitations for all causes of actions on both the United States and the Indians is a major omission in section 2415. It should be clear to all concerned that Indian land and water rights claims will have major economic and social consequences on people of all regions of our country. These claims are not mere academic exercises.

Whereas in the past the principal defendant was the U.S. Government, defendants in pending and future cases will be homeowners, businesses, and municipalities. The claims will be predicated on, in some cases, centuries old claims that have been recently discovered by the Indian tribes.

I am most familiar with claims being brought under the Trade and Intercourse Act—25 U.S.C., section 177—of which there are now claims pending in Maine, Massachusetts, Rhode Island, Connecticut, New York, and South Carolina. In all those cases, real people are threatened with possible loss of their lands.

I also have reason to believe that there are other claims in other eastern seaboard States that have yet to be asserted. In addition, I have been advised of or have read about water rights cases in areas such as the Columbia River Basin, the Colorado River Basin, and the Arkansas River Basin.

These river rights cases will have serious consequences for major metropolitan areas and agricultural interests in the Western States. Leo H. Krulitz, Solicitor of the Department of Interior, indicated before this committee on May 3, 1977, that there were 35 cases in the Phoenix office and 167 cases in the Twin Cities office of the Department of Interior under evaluation and that there were "well over 1,000" unprocessed Indian claims pending in the Department of Interior. These cases will affect real people and will seek to change longstanding land ownership patterns on the basis of wrongs alleged to have been perpetrated by past generations.

I might add at this point that Mr. Krulitz' statement did not provide any details on the nature or scope of these 1,000 claims. I do

not know if more details were discussed in questioning of Mr. Krulitz during the last hearings. However, I believe that before the Congress acts upon the request for a change in the statute of limitations it ought to inquire into the consequences for its citizens. Whose rights will be changed? Who will be affected, and to what extent? What kind of relief will be sought?

The omission of a general statute of limitations for Indian claims is unique in Anglo-American jurisprudence. Indians appear to be the only group in this country that can bring a suit against other citizens for damages, to recover use or ownership of land or to control water rights based on ancient legal claims without any limitation of time for the bringing of such suits.

Chairman ABOUREZK. May I stop you right there?

I would like to make an attempt to correct the record on that. I don't think that that just applies to Indians alone.

Land claims—at least the ones that we are dealing with right now—deal with fifth amendment taking of land, whether it be 100 years ago or 200 years ago. To impose a statute of limitations for anybody—Indian or non-Indian—along with such taking would be a violation, that is, that statute would be a violation of the Constitution because you would allow the taking of land, no matter how long ago, without due process of law. That due process is guaranteed by the fifth amendment.

Mr. BRENNAN. If I may comment on that, we have the concept of adverse possession in our system of jurisprudence whereby somebody does gain full control, full title to land. I think in our State it is after 20 years, once he has held it openly, adversely, hostilely, notwithstanding the fifth amendment.

Chairman ABOUREZK. That may be a State provision, but I don't believe that is a Federal provision.

Mr. BRENNAN. The statute of limitations, at least in our experience, has withstood constitutional attack as far as extinguishing claims, but we would be glad to take a look at it further, Senator.

While I recognize that the U.S. Government has a trust obligation to its Native Americans, I also believe that the United States has an obligation to protect its other citizens. I do not believe that a claim, regardless of its nature or the group or individuals to whom it belongs, should have an indefinite life. It is a basic tenet of our system of justice that at some point in time a claim must expire.

The concept of a limitation of time to assert a claim, whether statutory or in common law—laches, estoppel, adverse possession—pervades our legal system. This concept is presumably predicated upon the belief that a stable society and system of justice ought not to consider and attempt to remedy "old wrongs."

I believe that a principle of law which has such widespread acceptance and such uniform application ought to apply to all of our citizens, Indians and non-Indians alike.

If an Indian were to occupy your land for 40 years, he would acquire title to it by adverse possession. The converse does not appear to be true. We, therefore, appear to be developing separate principles of property law and tort law that preserve for Indians rights not protected for our non-Indian citizens.

I must also comment on the irony of this bill. By enacting S. 1377, the Federal Government will extend the period for the bringing of suits by the Federal Government against its citizens to correct alleged wrongs for which the Federal Government is in truth responsible.

If the statute of limitations were to expire on July 18, 1977, and if the United States had failed to bring all suits to protect the Indians by that date, the agencies of the United States might be liable to the tribes for failure to meet their fiduciary obligation to the tribes.

By extending the statute of limitations, the United States is reducing its own liability and extending the liability of its citizens. Put quite simply, the extension takes the U.S. Government off the hook at the expense of its citizens. Rather than shouldering the responsibility in Washington for the failure to enforce the Nonintercourse Act, to honor treaties and to protect water rights, the United States would apparently rather sue innocent citizens for damages and eject them from their lands.

Indeed, the Justice Department itself has characterized Maine citizens living in the so-called plains area as innocent.

As I said at the outset, I favor an extension of the limitation because of the practical consequences for Maine people. We really have no choice; but our position should not be construed as an approval of the Federal Government's treatment of the citizens of Maine.

I recognize that our national history in the treatment of our Native Americans has not been a proud one. But in recent years, our Nation, and certainly the State of Maine, have made great strides in trying to remedy the economic and social inequities in our society. The State of Maine alone provides extensive social, welfare, and educational assistance to the tribes of our State.

The Department of Interior provides no benefits to the tribes. Maine spends two or three times as much per pupil on the education of Indian children as it does on non-Indians; provides nearly $2,000 per year more welfare benefits to an Indian family than to a non-Indian family; and provides State aid for the construction of tribal housing. That effort must continue.

I do not believe, however, that the creation of a general statute of limitations for all Indian claims is inconsistent with the notion of social justice and equality of economic opportunity. Moreover, I suggest that it may be an even greater injustice to permit unasserted tribal claims to live indefinitely and be asserted against future generations, particularly claims which involve the potential removal of current occupants of land.

The plight of the Indians throughout the Nation is not at present a happy one. But I do not believe that the solution lies in the open-ended potential for endless lawsuits against ourselves, our children, and their children. I believe that the solution can and should come about through continued and increased Federal assistance to the Indians for social, medical, educational, and other programs. At some point we must decide that after hundreds of years of reliance by individual citizens, ancient claims should be put to rest. We must still continue our efforts to make ours a just society, but we ought not litigate forever these claims which arise out of the actions of our forebears.

I have submitted with my remarks a proposed redraft of S. 1377 which would accomplish the objectives that I have outlined in my remarks.

Chairman ABOUREZK. Without objection, that proposed redraft will be placed in the record at this point.

[The proposed redraft of S. 1377 follows:]

PROPOSED REDRAFT OF S. 1377

A BILL TO CLARIFY THE PROVISIONS OF 28 U.S.C. 2415 FOR THE BRINGING OF ACTIONS BY OR ON BEHALF OF AN INDIAN TRIBE, BAND OR GROUP

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that Section 2415 of Title 28, United States Code, is amended as follows:

Section 1. The second proviso in section 2415(a) of Title 28 United States Code is repealed and the following enacted in place thereof:

> "Any and all actions brought by the United States for or on behalf of the recognized tribe, band or group of American Indians shall be barred unless the complaint is filed within six years and 90 days after the right of action accrued:"

Section 2. The third proviso in section 2415(a) of Title 28, United States Code, is repealed and the following enacted in place thereof:

> "That any and all actions which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians or on behalf of an individual Indian whose land is held in trust or restricted status shall be barred unless the complaint is filed within 21 years after the right of action

accrued or more than 2 years after a final decision has been rendered an applicable administrative proceeding required by contract or by law, whichever is later."

Section 3. The proviso in section 2415(b) of Title 28, United States Code, is repealed and the following enacted in place thereof:

"That an action to recover damages resulting from trespass on lands of the United States; an action to recover damages resulting from fire to such land; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that any and all actions for or on behalf of a recognized tribe, band or group of American Indians, including actions related to trust or restricted Indian lands, may be brought within 6 years and 90 days after the right of action accrues, except that any and all actions for or on behalf of a recognized tribe, band or group of American Indians, including actions related to trust or restricted Indian lands, or on behalf of an Indian whose lands is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within 21 years after the right of action accrues.

Section 4. Section 2415(c) of Title 28, United States Code, is amended by adding the following:

"Provided, that no such action may be brought by the United States for or on behalf of a recognized tribe, band or group of American Indians more than 6 years and 90 days after the right of action accrues, except that such actions for and on behalf of a recognized tribe, band or group of American Indians, including actions related to the alloted trust or restricted Indian lands or on behalf of an individual Indian whose land is held in trust or restricted status, which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within 21 years after the right of action accrues.

Section 5. Section 2415 of Title 28, United States Code, is amended by the addition of subsection (i) to read as follows:

"(i) Every action for money damages or to establish the title or right of possession of real or personal property brought by any tribe, band or group of American Indians shall be barred unless the complaint is filed within 6 years and 90 days after the right of action accrued, provided that any and all such actions which accrued on the date of enactment of this Act in accordance with subsection (g) shall not be barred unless the complaint is

filed more than 21 years after the right of action accrued or more than 2 years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later."

Mr. BRENNAN. Thank you, Mr. Chairman, for the opportunity to appear before you today to testify on this important piece of legislation.

If I might take 1 minute to comment about the paper companies, I would like to say this. There has been some talk by the representatives of the Indians that they do not want to file suit against the small landowners and the homeowners. If they can substitute an appropriate sovereign for money damages, then they might want to file a suit against the large landowners, principally the paper companies. However, I would submit that in the context of this case that the paper companies are just as innocent as the other innocent citizens so characterized by the Justice Department.

The further fact is that the paper companies happen to be the core of what I believe is somewhat of a marginal economy in Maine. It is the big guy who happens to provide the jobs for the little guy. This affords him an opportunity to support his family. So, in this context I believe that the big guy—the paper company—is just as innocent as the smallest landowner.

Chairman ABOUREZK. I don't think anybody is talking about anybody living today being at fault. I tend to agree with that.

Let me ask this. You are not contending that if the Indian tribes took over some of that timber land out there that there would be a decrease in the amount of jobs for the production of paper; are you?

Mr. BRENNAN. I am not sure what would happen. I know this. The paper companies right now control much of the land which is the core of the economy in that State. It is predictable what they would do as long as they control the land, but the only point that I am trying to make is that the paper companies—which I think might be a convenient target, particularly during some years of the environmental craze when they were exploiting the rivers and the like—are just as innocent and should be treated just as innocently because they do provide the jobs we need so badly in the State of Maine.

Chairman ABOUREZK. But would you disagree with the idea put forward that the Indian tribes, if they are successful in obtaining some of that timber land, would provide just as many jobs because they have to have that kind of an agricultural base themselves? Certainly they have to hire loggers, and it would be that kind of work continuing for people up there.

Mr. BRENNAN. I think it is possible, but it would be speculative on my part to say what would be done. Land would still be there. The trees would still be there. The appropriate use for the land is the lumber industry alone.

Chairman ABOUREZK. You would not rule it out; would you?

Mr. BRENNAN. No; I would not rule it out.

Chairman ABOUREZK. I have another comment. A large part of your testimony was directed toward the social welfare benefits directed toward the Indian tribes. Would it not be better if the Indians had an agricultural or industrial base so that they could, on their own initiative, restore themselves to some sort of dignity without having to live on social welfare?

As you recognize, the unique position of the Indians today is as a result of the loss of the land over the last 200 years. They have a special

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relationship to the land—much more so than other ethnic groups in this country.

The loss of the land that was their land base over the last couple of centuries has almost forced them onto welfare in a great many cases. They have been unable to adjust to the situation that has been forced upon them.

Mr. BRENNAN. I would answer that this way. It would be obviously good if all groups—whether Indian, Irish, Franco-American, or Lebanese—had sufficient land base to do what they wanted in order to more fully develop themselves.

But the important point is this. When we are talking about something 2 centuries old, then whatever the people are they are equally innocent right now. I guess the concern I have is visiting any injustice on innocent people. I think that is what the U.S. Government has been doing by asserting and recommending action against 350,000 innocent citizens in the State of Maine.

Chairman ABOUREZK. Do the Indian tribes propose ejecting 350,000 people?

Mr. BRENNAN. We are dealing with the Department of the Interior. The Department of the Interior released a litigation recommendation which recommended bringing an action of ejectment in the claimed area where 350,000 citizens live.

After that recommendation was made, maybe 2 or 3 months later, the Justice Department, along with the Indians and the Department of the Interior, scaled down their claim and talked about the possibility of not bringing actions against small landowners and small homeowners, as long as they could substitute an appropriate sovereign as a defendant.

I am not saying that the Indians have not been conscious of doing harm to innocent people. I think they have been, to a certain extent. But when you try to get at the paper companies, then that could do a lot of damage to innocent people if some problems happened as a result of that. Of course, the paper companies are a capital-intensive type industry. If they had trouble raising money as a result of claims against them, then that would result in unemployment.

Chairman ABOUREZK. It is my understanding that the Indian tribes—in fact, I have had a representative of the tribes sort of indicate—that they are not out to displace any small landowners, families, and so on. If they did pursue the claim against the timber companies and if the timber companies were adequately compensated, then where is the injustice?

Mr. BRENNAN. I say that the owners of the timber companies are just as innocent. I think anytime you bring action against innocent people, whether it be the smallest landowner or a timber company, it is an injustice. In this case, if there were any wrongdoing, it would have been due to irresponsibility or the lack of responsibility on behalf of the U.S. Government. The U.S. Government should not be suing innocent people, whether it is the paper company or the smallest landowner. I think that is an injustice just to bring an action against an innocent party.

Chairman ABOUREZK. I do not quite see where the injustice lies, if they are adequately compensated. Of course, the timber companies

don't live on that land. The people who own those companies don't live on that land. They are not going to be deprived of a home. They are not being deprived of any money because they would be compensated. I frankly don't see the injustice.

Mr. BRENNAN. They need the land to operate the paper company mills. They need that certain land base.

Chairman ABOUREZK. Yes; but could they not buy timber? If the Indians did own that timber as a result of the court action, couldn't they continue to operate?

Mr. BRENNAN. That is possible.

Chairman ABOUREZK. There is no real economic hardship against those innocent parties; is there?

Mr. BRENNAN. If they are compensated, I suppose there would not be an economic hardship. I suppose it would be lack of equal protection of the law, however. A small landowner is off the hook. A small homeowner is off the hook. If you are a large landowner, then you are on the hook and you can't keep your land.

Chairman ABOUREZK. As I see what you are proposing then, everybody would come out whole, except the Indian tribes, under this whole thing.

Mr. BRENNAN. Not in any way. We would like to see the Indians litigate their case. We would like to see them get their case heard.

We think the U.S. Government is the one responsible party. If they get money, which is interchangeable with land, then over 100,000 acres a year is sold up in the timber areas just on the open market. So, if they were successful in proving their case in the courts in this country and if they got the money damages from the U.S. Government, then they could purchase the land.

Chairman ABOUREZK. Senator Muskie, did you want to say something?

Senator MUSKIE. I want to raise a couple of questions, Mr. Chairman.

In the first place, the Indians indicated a willingness to relinquish claims for land against small property owners and homeowners on the condition that an appropriate sovereign be substituted. They have made it very clear that they still insist upon the $25 billion in damages. Presumably a major portion of that would have to be assumed by the proper sovereign, whoever that may be.

It is conceivable, I suppose—and that is a mind-boggling figure—that if there is such a substitution, then the Federal Government, with the approval of Congress—and if Congress is willing to accept that kind of a liability—could make it so that the small landowners would be free of the possibility of suits. Although there would be some kind of extinguishment of those claims that would have to take place. But, until that is done, an extension of the statute of limitations could of course, keep alive the possibility of suits against the small landowners and the homeowners until that substitution is effected.

But effecting that substitution is going to be very complicated. It is my impression that is a difficult thing to do. That is the problem in which Justice Gunter finds himself at the present time. I have no signal that suggests to me that he has found an easy solution.

Chairman ABOUREZK. I do not think so.

Senator MUSKIE. But on the legal question of the statute of limitations—and I have listened to the attorney general with a great deal of interest because he made some points I had not thought of before—the continuation of the life of these claims, not against the Federal Government but against others, is, I think, a serious question.

I had not focused on this. I do not have my own answers on it at this time, but I appreciate the raising of the question by the attorney general.

If it works out that that part of the problem is extinguished by substitution of the United States, for instance, as responsible for it, then that, of course, would simplify the problem in Maine. You would still have the rest of it.

Whether or not keeping alive claims against the land and the big paper companies or the other big landowners would not be disruptive economically, is a very nice question. I would not dismiss it one way or the other. It is a very nice question. Those paper companies which have acquired that land over the years at bargain prices have acquired it not only from the Indians but from non-Indians. I am quite frank here.

They have erected plants on the basis of that economy. If that land is taken from them and if they are required to purchase it at today's land prices with a great deal of interest in recreational development in that area now, then I don't know what will happen to those paper companies.

There is great pressure upon those wild lands. There is 12 million acres in wild lands, I do believe.

Mr. BRENNAN. Yes; approximately.

Senator MUSKIE. There are very few public roads. There are a lot of lakes and streams. It is very attractive to recreational development. The pressures for that kind of development, once yielded to, could result in an escalation of land values that would make continuation of the paper companies pretty much of a moot point. So, I would not guess about that, Mr. Chairman. I really would not guess about that.

The argument that you presented as having been advanced to you by the Indians is an argument. But I think it is more complicated than that. What we are really worried about in Maine is the economic uncertainties that have been generated by this controversy and the question of how we can minimize or eliminate those uncertainties while the merits of these cases are being decided.

The attorney general has made it very clear that he would prefer to have the judicial process completed, but that would be a matter of 5 to 10 years. The Indian representatives have indicated a preference for a negotiated settlement. But you are talking about negotiating a claim of $25 billion and 12 million acres of land.

Even if you talk about negotiating a 10 percent settlement, that is $2½ billion and 1,200,000 acres of land. Even at 10 percent, when you think of a State like Maine and its economy, you are talking about mind-boggling numbers. So, you get down to 1 percent. Then you are so far out of the ballpark that I presume from the Indians' point of view there is no basis for negotiation.

So, the question of how you get from here to there [indicating] and how you reduce a $25 billion claim and 12 million acres of land is really something. You have to consider the point of view of the

small property owners, the big property owners, the economy of 60 percent of the State, and even the economy of 100 percent of the State. Then, you have to persuade the Congress to move in to pick up a substantial portion of that claim so that the Indians will feel that they have been given justice. This is a mind-boggling problem.

I would not know, if I were a member of the negotiating teams, what first offer to make in order to bring the whole problem into the ballpark where people can comprehend the outlines of a solution. It is a difficult problem.

But that is apart, in a way, from some of the legal questions that are involved in this question of extending the statute of limitations.

Chairman ABOUREZK. I personally prefer that Congress not be involved in this. That is my first preference. Obviously, we are being dragged in by degrees through one means or another. I would much prefer a negotiated settlement between the parties involved.

Senator MUSKIE. The State has no way of paying $25 billion or 10 percent of $25 billion.

Chairman ABOUREZK. That may be true, but that is not to say that the Congress cannot come in after a negotiated settlement or as part of a negotiated settlement and say, "Perhaps it is the Government's responsibility."

I recognize some sort of responsibility on the part of the Federal Government because I think over the years the Federal Government has handled this whole question very badly, as you probably agree.

My question now is to any of the three of you. What is the bar to a negotiated settlement right now? The Indians have indicated that they want a negotiated settlement. Who does not want to negotiate? Who is opposed to it?

Senator MUSKIE. Nobody is opposed to negotiating. Let me put it this way. The attorney general and the Governor have taken the position that they prefer to go by judicial rule. The Indians prefer negotiation. Justice Gunter was appointed not as a mediator or as a negotiator but as a catalyst to try to create an environment to make a solution possible.

But the position of the State of Maine still is that they would prefer that judicial rule unless the Federal Government is willing to accept the full responsibility for the final settlement.

With the magnitude of the claims now being asserted, if the State has to assume the responsibility for it, then the State has no option but to insist on what it believes to be its view of the merits. There is no way for the State to stand by itself to meet a claim of $25 billion on 12 million acres. There is absolutely no way.

If the Congress or the President, or a combination of the two, do not in some way help to share the burden, then the State has no way. It is fighting for its economic life. So I can understand the position of the Governor and the attorney general. They are fighting for the economic life of the State against claims of unprecedented magnitude.

Chairman ABOUREZK. Is the State authorized to negotiate on behalf of all of the landowners involved?

Mr. BRENNAN. The State, of course, represents the State interests. We are not authorized to represent all the landowners involved, but we have had a lot of discussions with regard to this case. I think our position is well known. We have said time and again that if the matter

goes to trial, then we believe we could successfully defend. I would not want to get into too much detail with it. We are trying to work with Judge Gunter to resolve the matter.

The thing that I would like to comment on is this: There is the question of the statute of limitations. In our society should there be a period when claims can no longer be brought? That is virtually the situation, as far as I know, in about every other situation in our system of jurisprudence, that is, that titles can be stabilized and that people can know that that title is unassailable. I think that is the real problem.

At some time this country will have to address that problem about a line being drawn beyond which claims cannot be brought.

As a former prosecutor, I had a hard time proving cases when things were a year old, with people remembering what took place. How can you meet the problems of proof in testimony when you are dealing with something two centuries old? Some of the evidence in this case may involve evidence that is two-and-a-half centuries old. It gets to be impossible.

Governor LONGLEY. Mr. Chairman, you asked a couple of questions earlier, more economic than legal and more sociological perhaps. I have no concern if the claimants—any claimant—or the purchaser of a pulp mill does so within the law. If the court says that this land is his or her land, or if there is an arms-length transaction from the standpoint of purchase, then I would presume that they would operate the forest land in our State as well as our present pulp companies do.

The Attorney General has already made reference to the fact that we are a marginal State from the standpoint of the economy. We are a struggling State. We are trying very hard to bring quality jobs to our State. There are not many higher paying jobs for the people than in our pulp and paper industry. I am not saying that they are overpaid, but I think our pulp and paper industry in our State have tried very hard to pay an honest day's pay for an honest day's work. Many of my friends and family are in some of these mills.

By and large, compared to the rest of the State and the economy of the State, they feel that they are treated quite fairly. So, my concern would be, whatever the subsequent ownership might be, that it would be properly developed by a court of law with established legal procedures of purchase awarded by the courts.

If we reach a point in our society where either through leverage or economic pressure land or pulp mills become at the mercy of an out-of-court settlement or negotiation that would not stand on its merits in court, then I would think that we are in trouble as a society. I would submit that we would no longer have a free enterprise society, at least in name. Who would want to buy land? We would have people who would continue to negotiate on that outside of a courtroom.

As Governor, I have been faced with 350,000 families who are not guilty and who have been faced with the threat of maybe being unable to sell their homes or being unable to recapture the equity in their homes.

I took some measure of relief when counsel suggested that this could be reduced from 350,000 to 90,000, but that was only a matter of seconds until I concluded that if you or I were one of the 90,000

whose homes were adversely impacted, then we would indeed be every bit as much concerned as if we were one of the 350,000.

You should know that I did plead for counsel, separate and apart from the attorney general——

Chairman ABOUREZK. Which counsel?

Governor LONGLEY. Legal counsel for the Indian tribes. I pleaded with them to give us some relief to allow homeowners to be able to transfer the properties. I pleaded with them from the standpoint of selecting commercial developments so that the streams of commerce could be kept open. We had serious problems with school districts and sewer districts impacting on all of our citizens. There was tremendous economic leverage and pressure.

Thanks to some dedicated citizens of Maine, we were able to overcome this and move once again back to the bonding market. So, we have been subjected to tremendous pressure. I do not think that this has always been in the interest of what is fair for all citizens of Maine. So, I am pleading, obviously, with the Congress to either recognize what they did to us in 1820 or to provide a forum for a resolution; or beyond that, to the courts.

If Congress or the courts sit back and say to any claimant in this country, "Go home and solve your own differences," the persons with the most pressure and the most clout are going to prevail, particularly to the extent that we allow unstructured, uninhibited clouds on titles.

So, all I am saying is that, as Governor, I want the Indian citizens of our State to get everything that is coming to them, but I do not want the non-Indian citizens of our State to be deprived of anything that they are legally entitled to hold.

I think we have a system of justice in this country. We will either abandon it, or it will prevail.

It would be—and I have said this repeatedly—as unfair for me, as Governor, to allow any non-Indian citizens in our State to apply leverage and attempt to move people off the reservations in our State in a negotiated settlement outside of the courtrooms as it would be for me to allow Indian legal counsel to continue to apply leverage to our non-Indian citizens.

So, from a sociological and humanitarian standpoint, even my liberal friends—who say, "Why don't you do something?" until I say to them "What would you do if your home were impacted?"—must admit at that point that it is a different story.

I want justice. I want fairness, whether it is liberal or nonliberal in philosophy.

From an economic standpoint—and I am not addressing the legal question now—I think there has been a tremendous economic leverage which we have overcome, and we are now in a proper position to let the courts and Congress resolve it.

Chairman ABOUREZK. We are at kind of an impasse, as I see it, after listening to your statements this morning. The Indians are willing to go through the lawsuits. The State says they ought to go through the lawsuits. The Indians say that they will negotiate if somebody will negotiate with them. The State cannot negotiate because the State is not a proper party in interest. They are not authorized to represent a proper party in interest.

I know that this hearing is not for this purpose, but it is a good place to discuss it. What are we going to do now?

Mr. BRENNAN. The State is the proper party in interest, Senator. The State feels it can successfully defend the case. Certainly there are other parties that may or may not be brought forward whenever the Federal Government amends the claim.

Chairman ABOUREZK. What would happen if we continue with this impasse, as I see it, is that the Federal Government, with this extension of the statute of limitations, will prepare its lawsuits against landowners. There will be further clouds on titles and on mortgages and on bonding of municipalities and so on. The court case will proceed through to whatever point it goes. Who knows how far it will go?

Mr. BRENNAN. Right now, there are discussions going on with Judge Gunter who is going to make some recommendations to President Carter in June. President Carter then may or may not make certain recommendations to Congress. It is somewhat difficult for us to discuss the precise aspects of our discussions with Judge Gunter in order to be faithful to what Judge Gunter asked us to keep in confidence. There are some discussions going on.

Senator MUSKIE. With respect to the suit, Mr. Chairman, if the parties proceed through the judicial process, then I take it there are 350,000 defendants, or some portion of that, who will be named, if judgment is to be directed against land. So, I assume every one of them would have to be made parties to the suit, not just the big paper companies.

If they are not made parties to the suit and if the statute of limitations does not run to extinguish claims against those small parties, then presumably they are always open, at some time in the future, to subsequent suits. That is part of the problem with the statute of limitations. There has been no offer on the part of anybody to extinguish those claims except as a proper sovereign substitute.

But if the Congress is not willing to go that route and if the State of Maine is unable to go that route, then presumably those people are still going to be subject to cloud which raises problems of the value of their homes. If they die, then what rights do the children get? What rights do their heirs get? All of those questions can be left hanging out there in the open. It is a complicated business.

Justice Gunter, I hope, has the wisdom of Solomon, and he will require the patience of Solomon.

Chairman ABOUREZK. It is the patience of Job, Senator.

[Laughter.]

Senator MUSKIE. I am sorry. The chairman's memory goes back farther than mine. [Laughter.]

Chairman ABOUREZK. I am much more biblical than you are, Senator. [Laughter.]

It seems to me that we come down to this. The real pressure is upon President Carter and his representative, Judge Gunter, to come forward with some kind of solution. It appears that we will have to bide our time to see what happens.

I am personally, as chairman of the Indian Affairs Committee, as anxious to see this whole matter brought to a close as anyone. Well,

maybe I am not quite as anxious as you are, but I am anxious and would, nevertheless, like to see it brought to a close. I think it is a very difficult question.

The question of justice is one that I think we all have to be concerned about.

Senator Muskie?

Senator MUSKIE. One further question that probably would arise at some point is this. If we are asked to consider the proposed solution by the President, for example, or by anybody else—but let's use the President inasmuch as that is the one that is under development—there is the question as to whether or not the Maine claim ought to be separated from the other Indian claims. That will have to be considered by the Congress.

I would assume that if a solution that would appeal to people as a reasonable and just solution would be offered to the Congress, then are other States going to want to ride on that legislative vehicle to get their claims settled at the same time? Or are Members of Congress going to be willing to provide the kind of money that conceivably could involve the settlement of the other claims? In other words, is there a prospect for that?

Suppose that Justice Gunter can actually bring the parties together to agree on a solution. I don't know whether that is in the ball park or not, but suppose that were to happen. Could we nail down that only by congressional action? You have to extinguish titles. You have to finally get to that point. At some point the settlement is going to involve congressional action, if we do not go the judicial route.

If and when that comes before Congress, then the question that the Congress will have to decide is whether the majority of each House is going to be willing to support a solution of the Maine question standing alone and independent of other claims still pending and unresolved.

I don't know what the answer to that is.

Chairman ABOUREZK. I think that is a bit clearer. Unless the other claims, which are not nearly as large as the Maine claims, are ready to be brought to resolution, then I don't see anybody who would be willing to allow other claims to be piggybacked on the Maine claims, if it were brought to Congress.

Senator MUSKIE. Suppose it involved $10 billion. The Congress would be asked to provide $10 billion to satisfy the Maine claim. Can you envision Congress approving a $10 billion settlement of the Maine claim with the precedent that that might set for all the other claims hanging around? I can see problems.

Chairman ABOUREZK. That is a good question. It would depend on the circumstances of the claim and the settlement.

Governor LONGLEY. As has already been referenced by the attorney general, in my short term as Governor, I have not ever seen greater discrimination against people. How would you feel if you were Governor of a State that was defended by the Department of Justice? They then lose the case for you, and turn around and become a party to suing you. How would you feel if you are dealing with, admittedly a year prior to now, the Department of the Interior and the Department of Justice as the Governor and find that your own attorney general and your own office of Governor have difficulty simply getting information from the two Departments of the U.S. Government?

On a positive note, I want to particularly applaud and commend President Carter for stepping in. As Senator Muskie has indicated, hopefully Judge Gunter will have the wisdom of Solomon and the patience of Job. But it is a very difficult situation. When you talk about discrimination, we could bankrupt America on the basis of $10 billion or $25 billion per State.

Chairman ABOUREZK. I don't think you will be involved in many more States for claims like that. I guess you know that the Nonintercourse Act claims are only restricted to a very few States because the Congress was involved in every land-taking after what happened in the original 13 colonies.

Senator MUSKIE. The Congress was a bigger thief than the 13 colonies in terms of land grabbing.

Chairman ABOUREZK. Yes; but they made it legitimate.

[Laughter.]

Senator MUSKIE. That is another point. It is conceivable that the treaties in the Maine case were equitable at the time that they were negotiated. It is conceivable. If they were not, then there are an awful lot of treaties in the West that the Congress approved that were at least as inequitable. So, if you are going to redress the historical wrongs in this fashion, claims far in excess of $25 billion could be sent out.

Chairman ABOUREZK. I don't think you can raise that specter because there is a big difference. As my colleague, Senator Hayakawa, said, "Most of the land was stolen fair and square from the Indians because Congress ratified, out in the West, each and every one of those."

[Laughter.]

Senator MUSKIE. One of the arguments for the Indian claims is the historical one. Does history judge only us? Should history judge the rest? I would think so. What kind of uneven justice is there?

Then the Governor is absolutely right here. It was the Justice Department that defended against the Indian case and lost the case, and then decided not to appeal it to the Supreme Court; and now has become the advocate on the other side of the case against Maine. This is all in the name of historic injustice.

The people of Maine have a legitimate feeling that they are being asked to correct this historic injustice for which all of the American people ought to be accountable, only because of a technicality in the Nonintercourse Act which makes it applicable to them as of 1972.

But for almost 200 years the Nonintercourse Act was dealt with as though it were inapplicable to the original 13 colonies. Now we have decided to turn it around, and Maine, because it has the biggest block of land, is being asked to make retribution for the historic injustice which is written into American history. It is there. Nobody denies that. But we are going to be asked to pay. We don't have the money. It has been suggested that the land be taken away from us. But we have to pay for that injustice.

You, yourself, Mr. Chairman, were saying that the people in the West would be immune because the Congress ratified those treaties, however unjust they were. But because Congress did not ratify this one—and Congress probably would have if it had occurred to someone to bring those treaties down here—we have this fix. If someone had brought those treaties down here in the 1790's for ratification, I have no

doubt in my mind but that the Congress would have ratified them. But because it did not occur to anybody at that time that ratification was needed or necessary, then it was not done.

Now, 180 years later, we are being asked to pay the price. It is a hard one to buy.

Chairman ABOUREZK. What you have just said is an eloquent argument which I hope you will preserve in the record or somehow so that we can use it on the floor when the time comes.

Senator MUSKIE. I am rehearsing it constantly. [Laughter.]

Chairman ABOUREZK. That is a good argument.

None of what we have said today precludes the fact that there is a high potential for valid claim on the part of the Indians, whether or not it was through a technicality or whatever. There have been a great many bad things and good things done on the basis of legal technicality. That is something that we cannot ignore, in any event.

Senator MUSKIE. That is a little far afield from the legislation before us, but it has given us a very appropriate and welcome opportunity to discuss some of the broader questions.

Chairman ABOUREZK. I appreciate that. It is good to get into this question, no matter how we get into it.

I want to express my thanks to all of you. This has been a good discussion. We will go ahead with this legislation, I think with everybody's approval, whether you all are in accord or not. We will try to get the extension of the statute of limitations extended so that we do not throw things into a bigger uproar in Maine and in the other States. I am sure that we will be dealing with each other again on this issue.

I want to thank you all very much.

Governor?

Governor LONGLEY. Thank you, Mr. Chairman, on behalf of the people of Maine. I want to again indicate that I would hope that if we would do nothing more than spare future Governors and future attorneys general and Senators and Congressmen this problem, then I think we will have done something.

Again, I think the courts of this country—I don't always agree with their decisions—have the right to make these decisions, and I hope that judicial determination will do more to arrest and eliminate the need for any future Governor to be concerned about discrimination resurrecting its ugly head.

Let us avoid a situation 50 or 100 years from now where Indian or non-Indian citizens are saying, "A deal was made." I have great faith in the Congress and great faith in the judicial system. That is one of the reasons, sir, why I am pleading that we resolve this and do it equitably and legally within the system of justice so that this question of who won and who lost 50 or 100 years from now does not divide people.

Thank you very much.

Chairman ABOUREZK. Thank you.

A number of statements, resolutions, and letters have been received concerning this legislation. They will appear in the record at the conclusion of the testimony.

The hearing is adjourned.

[Whereupon, at 11:20 a.m., the hearing was adjourned.]

[The statements, resolutions, and letters referred to follow:]

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 19, 1977

Honorable James Abourezk
United States Senate
Select Committee on Indian Affairs
Washington, D.C.

Re: S. 1377

Dear Senator Abourezk:

I would like to thank you for the opportunity of appearing before the Committee on May 16 to discuss the above bill. I think it was a useful opportunity to share with you our thoughts on the bill and the litigation in Main. Although most of the discussion following my testimony centered on the land claims case, I trust that the comments I offered on the bill, and particularly the need for a general statute of limitations on all Indian claims in 28 U.S.C. § 2415, were not overlooked.

I thought also that it might be useful for me to follow up on several of your questions and comments by way of this letter. In particular I have the following additional remarks on the subject of the hearings.

1. Is a general statute of limitations in Indian Claims of all kinds constitutional?

I know of no case that has held a statute of limitations unconstitutional, whether that limitation applies to assertion of claims against the sovereign or other persons. Statute of limitations do not constitute a deprivation of property without compensation. Rather, they are merely time limitations for the raising of claims. The best illustration of the constitutionality on a time limitation is by way of analogy to the law of eminent domain. When a sovereign acquires land by condemnation, whether with or without compensation, nearly all statutes on the subject prescribe a limited period of time within which the sufficiency of the compensation may be appealed.

If an appeal is not timely taken, then the persons whose land was condemned loses his right forever to challenge the amount of compensation. By analogy the same holds true for other acts of a sovereign. It may establish reasonable time periods for the assertion of claims against it, which time periods are constitutionally permissible.

Moreover, my testimony and suggested amendment of S. 1377 does not even raise this issue. Our proposal would not create a time limit for the bringing of claims against the United States by Indians, but rather would create a cutoff for the bringing of claims against other persons. This latter suggestion seems to us to be fair and equitable. I cannot imagine that Congress really intended the American people to go on litigating Indian claims for untold generations in the future. The prospect of never ending litigation, and all its consequent bad feelings and disruption, does not seem to be desirable. Just as we are desirous of achieving justice, so must we also be anxious to promote reasonable social stability.

2. Is a general statute of limitations on all Indian claims fair?

Although I addressed that question at some length in my prepared remarks, one additional observation is necessary. The idea of a general statute of limitations on all claims is consistent with the government's policy in the handling of Indian claims against the United States. I believe the life of the Indian Claims Commission is scheduled to expire in about two years. In view of the apparent willingness of the federal government to put a limit on claims against itself, fairness and equity would argue for the imposition of some kind of limit on claims against others.

3. Would the awarding of paper company lands to the Tribes in Maine be an appropriate settlement of this case?

In addition to the answers we provided to this question during the hearing, several additional points should be made.

The question as generally posed by you in the hearings included the assumption that any person whose lands were awarded to the Tribes by way of settlement would be compensated for the value of the lands.

Assuming further that although the Tribes do not want to dispossess small homeowners but would accept a cash value for such lands from some "appropriate sovereign" in lieu of actual possession, the actual cost involved in compensating paper companies and paying cash to the tribes in lieu of individual homes and businesses would be staggering.

The current assessed value of all lands in the claim area (12 million acres) is roughly $3,000,000,000. Put another way, if the Indians were awarded paper company lands, and someone paid the paper companies for those lands; and if the Tribes were paid the cash equivalent of all other lands in lieu of dispossessing homeowners and businesses, someone would have to be prepared to pay $3 billion. It seems self-evident that the State of Maine has not the resources to pay that amount nor even 1% of that amount, given that it is one of the more economically depressed states in the entire nation. I assume that Congress might also be reluctant to pay such amount. I trust that those figures therefore help place the Indians' "compromise" solution in some kind of perspective.

Moreover, as I stated in the hearings, if one accepts the principle that it is unjust to attempt to redress old alleged wrongs, at the expense of this generation of landowners, then that principle must be equally applicable to all current landowners. I do not subscribe to the belief that there are different standards of law or morality for corporations and individuals, or that long-standing ownership of land is any less valid because the owner happens to be wealthy.

4. Would not the condition of the Maine tribes be better if they had a land base sufficient to make them independent of state and federal aid?

Undoubtedly any person or ethnic group, including Indians, would benefit from a land base of sufficient size to make them self-sustaining. However, several observations must again be made about this case.

First, the assumption that the American Indian, because of his ancient connection to the land, has a deeper feeling for land than non-Indians is an assumption I do not accept. Ancient customs and lifestyle have changed. Indians, like other Americans, are 20th century people, albeit with their own special traditions and cultures. But those ancient traditions and cultures which grew out of a life-style that, in Maine at least, no longer exists, give to the American Indian no greater moral or economic claim to the land than the farmer in Aroostook County who has for generations depended upon the productivity of the soil for his very existence or the woodlot owner who manages the land for his own needs. Moreover, I suggest that many modern American Indians have adopted values and lifestyles which bear no relationship to that of their ancestors. The sacredness of land to the ancient Indian tribes was in large measure a result of their dependence on land for their very survival. With the change in lifestyle, the status of land in the Indian community has changed.

Indian lands throughout the United States are mined, drilled, subdivided and developed for the economic betterment of the Tribes. Thus, I disagree with the suggestion that ancient tribal cultural values are relevant to resolution of these modern claims.

Second, if the Tribes are interested in economic self-sufficiency, there are better investments to be made than timberland. Current reliable figures indicate that in Maine, a dollar invested in a savings account will yield more income than a dollar invested in timberland (assuming that the investment in timberland is not for development or speculation). That being the case, it hardly seems to make economic sense to discuss tribal financial self-sufficiency in terms of land. If any compensation is made at all to the tribes, some form of monetary compensation seems to be far more sensible than land.

5. Should Maine negotiate directly with the Tribes?

As I said during the hearing, we believe we have good and valid defenses to the claims and that we will prevail in the case. Enclosed are copies of several memoranda on the subject of the Indian claims that we would like to share with you and the Committee. The memoranda discuss (1) whether the Nonintercourse Act is applicable in territory outside "Indian Country" which country did not include any of the States in New England, and (2) whether in admitting Maine to the Union in 1820, with knowledge of the treaties between Massachusetts and the Tribes in Maine, Congress impliedly ratified those treaties under the Nonintercourse Act. Both of those subjects are treated in detail in the memoranda. Because of our legal research, part of which is set forth in the enclosed memoranda, and because of our view that present-day Maine citizens owe no moral duty to grant to the Maine tribes any land or money for alleged wrongs perpetrated on their ancestors, we believe it would be unfair to the one million non-Indian citizens of our state to negotiate away state resources or money to settle these 200 year old claims.

I hope that the above discussion has helped to amplify my remarks at the hearing on the 16th of May. I think that it should be clear that the legal, moral and economic issues in this case are not as simply resolved as might be thought.

The Maine case aside, however, I sincerely hope that the Committee will consider my suggestions about S. 1377 and the statute of limitations in general.

I would appreciate it very much if this letter could be added to the record of the hearings so that our remarks might be complete.

Again, thank you for your consideration. If I can provide you with any further information, please do not hesitate to advise me.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB:mfe

Enclosures

cc: Members of the Committee
Maine Congressional Delegation
Honorable James B. Longley
Honorable Alan Parker, Committee Counsel

STATEMENT OF FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, SUBMITTED TO THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1377, "A BILL TO EXTEND THE TIME FOR COMMENCING ACTIONS ON BEHALF OF AN INDIAN TRIBE, BAND, OR GROUP," ON MAY 20, 1977.

Mr. Chairman and Members of the Committee:

We in Massachusetts have witnessed the hardships which result from the assertion of stale Indian claims. We have seen the economic dislocation caused by an action which has placed a cloud upon the titles to virtually all real estate in one of our municipalities. I refer to the federal court action entitled Mashpee Tribe v. New Seabury Corp., et al., in which the plaintiff seeks to establish a right of possession to almost all land in the Town of Mashpee. Additionally, plaintiff has recently moved to amend its complaint to add a claim for damages in the amount of $500 million.

Mashpee is a small town; it has a population of approximately 2500 people. And as a result of the commencement of this lawsuit in August, 1976, these people have suffered terribly. The real estate market in the Town closed with the filing of the lawsuit; economic development has ceased; businesses have closed; unemployment has risen; real estate tax payments have declined; the continuation of municipal services is threatened. And, Mr. Chairman, I must add--with due deference--that contrary to the suggestion in your Opening Statement, the President's appointment of a Special Representative to investigate the Mashpee and Maine cases, while certainly welcome, has not alleviated these hardships at all.

91-407 O - 77 - 8

All of these hardships have resulted from the assertion of a claim which, under plaintiff's theory, is more than one hundred years old.

I submit that if the experience of the Town of Mashpee demonstrates anything, it is the need for the extinguishment of stale Indian claims.

This Committee is presently considering S. 1377, a bill which would extend the time for the commencement of actions by the United States for or on behalf of Indian tribes. The scope of 28 U.S.C. §2415, as it relates to Indian claims, is unclear. However, it is likely that neither that statute nor S. 1377, if enacted, will affect the present action concerning the Town of Mashpee. Nonetheless, I oppose the enactment of S. 1377. I recommend that the Congress not extend the current statute of limitations because our experience in Massachusetts has demonstrated that ancient claims should be extinguished, not resurrected, and because the reasons advanced for enactment of S. 1377 I find unpersuasive.

In the testimony supporting enactment of the bill, three reasons have been advanced for extending the statute of limitations. The first is the disruptive effect of "proctective" suits. One witness cited as an example nine (9) eastern claims, stating that most of these claims have not yet resulted in the filing of suits. In fact, Mr. Chairman, of the nine (9) claims identified, six (6) have already resulted in litigation. As to these types of claims in the East, the disruption has occurred and continues. Enlarging the time for

the assertion of ancient and unexpected claims can only result in an increase in the number of claims asserted and thus an increase in the resulting disruption.

The second reason is that unknown "valid" claims may be lost. This assertion ignores the fact that the law does not consider stale claims to be valid and that putting an end to old claims is the very purpose of a statute of limitations. If this were an acceptable rationale, there would not be any statutes of limitations. These statues do exist, however, because the law values finality. It does not encourage searching the history books for ancient claims. The fact that all Indian claims are not subject to general statutes of limiations is an anomaly; it is a distortion in the law which should not be enlarged.

Mr. Chairman, to this second reason, you have added a third, namely, that if the United States as trustee does not prosecute all claims in a timely fashion it may expose itself to liability for breach of its fiduciary duties. I submit that if the United States has breached its fiduciary duties by not protecting Indian lands, then the United States should be held liable. Surely, it should not avoid this liability by the obvious conflict of interest in enlarging a statute of limitations for its own benefit. Such action seems particularly inappropriate in view of the fact that the United States has by Section 12 of the Indian Claims Commission Act barred pre-1946 Indian claims against itself.

Mr. Chairman, I readily admit that I am not familiar with Indian claims in the western part of our country. It may be that as to Indian tribes specifically recognized as such by the Federal Government in treaties and statutes who are the recognized owners of specific acreage, actions for trespass should be brought, notwithstanding the passage of time. I submit, however, that there is a qualitative difference between a case involving encroachment on an Indian reservation whose boundaries have been defined and recognized by the United States and a case, such as ours, involving a claim by a group not recognized by the United States as an Indian tribe to land which has never been considered by the United States to be an Indian reservation, Indian trust land, or restricted Indian land.

S. 1377 makes no distinction between these types of cases and for that reason should not be enacted.

Mr. Chairman, I thank you for the opportunity to submit this statement.

STATEMENT OF THE
NATIONAL TRIBAL CHAIRMEN"S ASSOCIATION
TO THE
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
EXTENSION OF THE TIME
FOR COMMENCING ACTIONS ON BEHALF
OF INDIAN TRIBES

May 11 , 1977

On July 18, 1977, the statutory limitation on commencement of actions by the United States on behalf of Indian tribes provided in 28 U.S.C. § 2415 will run. With its expiration untold numbers of just but untried Indian claims would likewise disappear and the strict trust obligations of the United States with respect to those claims would go unfulfilled. This must not occur, not only because of the manifest injustice it would perpetrate against Indian tribes and people, but because of the predictable adversary relationship between the tribes and their trustee, the United States, this event would likely create.

The National Tribal Chairmen's Association, an association of the elected or appointed chairmen, presidents, governors, and chiefs of 192 of America's federally recognized Indian tribes, including the presidents of the Alaska regional native corporations, strongly supports enactment of an extension of the statute of limitations now set to expire in July.

Indian tribes and the United States have in recent years identified numerous tribal legal claims (Interior Solicitor Krulitz estimates the number at 1000) but few have been brought or prosecuted. Investigation and development efforts have proved painfully slow owing chiefly to inadequate federal allocation of

resources to such undertakings. It is a case of too little manpower and too low a priority. As a result cases referred to Interior and Justice more than three years ago have not been filed. We do not care to assign any particular blame for this state of affairs, but the responsibility clearly is one belonging to and accepted by the United States. And it is likely that if put to the test, U.S. adherence to the requisite standard of care in this matter would be found lacking.

NTCA repeatedly has stated before the committees of Congress that Indian natural resource protection is of the highest concern. Without a secure and viable land base Indian tribes cannot be self-determining. Without protection of trust resources the tribal future is ambiguous.

If the statute of limitations is allowed to expire this summer, Indian tribes will be deprived of substantial resources directly through the inaction of the Departments of the Interior and Justice. In many cases tribes would find it necessary to seek recovery from the trustee. This, of course, would represent a grossly unfair redistribution of claims liability from the actual wrongdoer to the American public. NTCA and its 192 constitutent tribes seek to avoid such a major, unnecessary dislocation with all of its damaging implications for the federal/tribal relationship. Furthermore, we think that the spate of incompletely researched and precipitous litigation which surely must come this June and July if the statute is not extended will not serve the best interests of Indian people. It will be unnecessarily costly for all concerned, grossly inefficient, and unduly burdensome for the courts.

NTCA, therefore, calls for quick passage of an extension

of the statute of limitations on pre-1966 claims. We support S. 1377 or any bill embracing a sincere intent to bring all legitimate Indian claims to court. We add the foregoing qualification in recognition of the past failures of simply extending the statute for a period of years. Past extensions have not fostered progress because there has been no directive to the Executive Branch to allocate sufficient resources to the job. At the very least Congress should require of the responsible Departments periodic reporting to Congress concerning the investigation, development, filing, and litigation of all pre-1966 Indian tribal claims so that if more stringent legislative directives are necessary they may be accomplished in a timely fashion.

Mr. Chairman, and members of the Committee, the National Tribal Chairmen's Association acclaims the urgency of the situation and calls for a meaningful extension of the statute of limitations contained in 28 U.S.C. 2415.

We thank the Committee for the opportunity to present our views.

1977-307

RESOLUTION

WHEREAS, the deadline, for the filing of lawsuits by the U. S. on behalf of Indian governments and individual Indians for monetary claims arising before 18 July 1966, expires 18 July 1977, and

WHEREAS, the current statute requires that all claims be identified, investigated, evaluated and reported for their referral to the Justice Department, which must then prepare and file the cases prior to the deadline of 18 July, 1977, and

WHEREAS, there are some 700 cases being so processed and are yet to be declared "claims", and

WHEREAS, without doubt there remains many wrongs that have yet to be identified, and

WHEREAS, the expiration of the statute of limitations on Indian Claims, would thus result in considerable loss to Indians through no fault of their own, and

WHEREAS, H. R. 5023 to extend statute of limitations filing date for ten years, was introduced by U. S. Congressman Risenhoover in March 1977, was referred to the House Judiciary Committee where it awaits action in the subcommittee on administration law and governmental relations, and

WHEREAS, a similar bill will be introduced on the Senate side where it may be taken up by both the Judiciary Committee and the Indian Affairs Committee, and

WHEREAS, it is the recommendation, of the Planning Committee, of the Business Council, that, the Colville Confederated Tribes support H. R. 5023.

THEREFORE, BE IT RESOLVED, that we, the Colville Business Council, meeting in SPECIAL Session, this 2nd day of May, 1977, at the Colville Indian Agency, Nespelem, Washington, acting for and in behalf of the Colville Confederated Tribes, do hereby approve the recommendations of the Planning Committee of the Business Council.

The foregoing was duly enacted by the Colville Business Council by a vote of 13 FOR 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:

Mel Tonasket

Mel Tonasket, Acting Chairperson
Colville Business Council

RESOLUTION NO. 77-05-441

REC'D MAY 24 1977

Resolution urging Congress to extend the Statute of Limitations provisions in 28 U.S.C. 2415.

WHEREAS, the Swinomish Indian Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS, the Senate is aware that the statute of limitations as provided in 28 U.S.C. 2415 for the filing of lawsuits by the United States on behalf of Indian governments and individual Indians for monetary claims arising before July 18, 1966, will run out on July 18, 1977; and

WHEREAS contrary to the April 7, 1977, report of the U. S. Department of Justice which lists only two potential claims for the entire Portland area, the Swinomish Indian Tribal Community alone has a minimum of twelve cases that would have to be filed by the limitations period if the statute is not extended; and

WHEREAS accomplishing such a task in a legally comprehensive and responsible fashion is virtually impossible.

NOW THEREFORE BE IS RESOLVED by the Swinomish Indian Senate in session this 3rd day of May, 1977, with a quorum present, that the people of the Swinomish Indian Reservation urge the House of Representatives to pass H.R. 5023 and the U. S. Senate to enact similar legislation to extend the deadline for filing lawsuits by the United States on behalf of Indian governments for monetary claims arising before July 18, 1966, beyond July 18, 1977, as presently provided in 28 U.S.C. 2415.

Chairman Landy James
Swinomish Indian Senate

Helen Ross, Secretary
Swinomish Indian Senate

C E R T I F I C A T I O N

As Secretary of the Swinomish Indian Senate, I certify that the above resolution was adopted at the Regular Meeting of the Swinomish Indian Senate, held on the 3rd day of May, 1977, at which time a quorum was present and vote was 9 For and 0 Against.

Helen Ross, Secretary

SKOKOMISH TRIBAL COUNCIL

RESOLUTION NO. 77-5

March 7, 1977

WHEREAS, The Skokomish Tribal Council is the governing body of the Skokomish Indian Tribe and is empowered by Article VI, Section 1 of the tribe's constitution and by-laws to advise and consult with representatives of the U.S. Interior Department on matters affecting the tribe, to employ legal counsel for the advancement of tribal members' rights, and to safeguard the general welfare of the Skokomish Tribe by regulating the use and disposition of property in the Skokomish Indian Reservation; and

WHEREAS, The welfare of the Skokomish Tribe and its members is dependent upon continuing protection and preservation of the rights, property, and other resources reserved to the tribe by the Treaty of Point No Point nad/or held in trust by the United States Government for the tribe and its members; and

WHEREAS, Since the establishment of the Skokomish Reservation the rights of the tribe and its members have on occasion been violated and property and other resources reserved to Skokomish Indians have on many occasions been taken or damaged without compensation or other redress; and

WHEREAS, The United States Department of the Interior, as trustee for the tribe and its members, is the appropriate party to seek redress for wrongs done to its wards; and

WHEREAS, Congress has enacted a statute of limitations on all claims for damages brought by the U.S. Government on behalf of Indians (28 U.S.C. 2415), and that statute bars all claims for damages arising before July 18, 1966 and filed after July 18, 1977; and

WHEREAS, Grievances of the Skokomish Tribe and its members described in the attached list arose before 1966 and may be grounds for legal claims by the United States on the Indians' behalf; now therefore

BE IT RESOLVED, that the Skokomish Tribal Council requests that the Commissioner of Indian Affairs investigate the matters described in the attached list and prosecute lawsuits on the injured parties' behalf where necessary and appropriate; and

BE IT FURTHER RESOLVED, that the Skokomish Tribal Council recognizes that the Commissioner is likely to receive similar requests from many other Indian tribes and may be unable to

honor all such requests by July, 1977; and in that event the Skokomish Tribal Council would support BIA efforts to obtain from Congress an extension of the deadline on actions for damages to Indians, as long as such extension were no greater than that necessary to permit the BIA to complete its investigation and prepare necessary litigation on all pending Indian claims.

CERTIFICATION

I certify that the preceding resolution was adopted at a regular meeting of the Skokomish Tribal Council on March 7, 1977 at which a quorum was present, by a vote of 5 for and 0 against.

Gary W. Peterson
Gary W. Peterson, Secretary
Skokomish Tribal Council

ATTEST: [signature] Vice Chairman pro tem
William L. Smith, Chairman
Skokomish Tribal Council

POSSIBLE DAMAGE CLAIMS TO BE INVESTIGATED

1. The Skokomish Tribe claims that tidelands adjoining those reservation lands which border on Hood Canal were included in the reservation and still belong to the tribe. Shortly after statehood, Washington State divided and sold the tidelands. In 1948 the tribe sued in federal court to quiet title to the tidelands. The 9th Circuit Court of Appeals upheld a District Court decision against the tribe. The United States was not a party to that suit and was not bound by it. In 1974 the tribe formally asked the Interior Department Solicitor to investigate the possibility of a U.S. suit to establish U.S. title to the tidelands. The Solicitor's Office is still investigating this. Tribal staff members have furnished information showing that a new lawsuit could have a different result than the first one did. Although the tribe puts priority on regaining the tidelands, damages are a possible form of relief in this case.

2. At the time the tribe sued to quiet title to the tidelands, there was pending in Mason County court a quiet title and boundary determination case involving part of the same tidelands. That state court case had been brought by Charles Wright, an owner of land east of the reservation and adjoining the reservation tidelands. The Skokomish Tribe was named as a defendant in that suit, and plaintiff took a default judgment against the tribe. Because tribal staff discovered this information just recently, we have not had an opportunity to check the court files to determine what effect the judgment in this case has or purports to have on the tribe's claim to reservation tidelands.

3. In 1921 the City of Tacoma got a judgment in Mason County court approving its condemnation of land and water rights necessary to the construction and operation of a hydroelectric project on the North Fork of the Skokomish River. The case was City of Tacoma vs. Funk, Cause No. 1651. Among the land condemned was Indian land from the following Skokomish Reservation allotments: Jennie Pulsifer (9B), Joseph Pulsifer (31B), Old Hehe (40), Wilson Waterman (42), and Charles Frank (11A). In addition, Tacoma purported to condemn water and riparian rights to all reservation land bordering on the Skokomish River. This included nineteen allotted tracts then in Indian ownership. Although a BIA official later approved the awards made to Indian land owners, the United States was not a party to the county court action. The county court did not have jurisdiction to approve the condemnations. Power lines are now maintained on the land condemned. And two thirds of the flow of the Skokomish River's North Fork is diverted out of the river instead of contributing to the flow of the main channel which runs past the reservation. Damages stemming from the power project include severe losses to the tribe's traditional fishery.

4. In 1929 the City of Tacoma obtained a judgment against Ellen M. Rudy (Cause No. 2281, Mason County Court) condemning land on the Skokomish Reservation for construction of a power house. This land was the allotment of Mamie Wilbur (Haitwas), No. 3-B. The land may have been in trust or restricted status at the

5. In 1965 the Hood Canal School District (an independent school district formed pursuant to Washington State law) built a school at the intersection of highways 101 and 106, within the Skokomish Reservation. In 1976, after it commissioned a survey of the tribal property near the school, the tribe learned that a portion of the school was located on tribal land. An area approximately 12 feet by 30 feet within the tribal cemetery is now occupied by the school building.

6. The Skokomish River, which forms the southern and eastern boundary of the reservation, has been diked and perhaps diverted since establishment of the reservation. Tribal members believe that in at least one case a local non-Indian land owner's actions have resulted in or contributed to a permanent change in the river's course and perhaps increased flooding of land downstream from his. The non-Indian land owner, named Bourgault, has put car bodies and other material in the river. Downstream Indian land owners Sarah Johns and Emily Estrada (located on the Curley allotment, No. 3) believe that his actions have contributed to increased flooding of their property. Also contributing to this flooding, which occurred four times in the winter of 1975-76, may be improvements made to a county road along the south bank of the river during the past two years.

7. Whatever the cause, the Skokomish River south of the Andrew Johnson allotment (No. 2) changed course in the first two decades of this century. The river moved south, adding approximately sixty acres of land to the area between the river and the original surveyed boundaries of the Andrew Johnson and Old Tom allotments. Because they have considered the south bank of the river to be the reservation boundary, tribal members believe that the added sixty acres are part of the reservation. Principal non-Indian land owner in that area, Bourgault, denies that his land is within the Skokomish Reservation.

8. The State of Washington has issued numerous water use permits to non-Indian land owners within the Skokomish Reservation. These include permits to use river water for irrigation purposes and ground water permits for domestic and other uses. Tribal staff members have not yet been able to determine how many permits have issued and for what quantity of water. It is possible that state regulated non-Indian water use interferes with Skokomish reserved rights. This needs further investigation.

9. Tribal member Doris Miller owns approximately 4½ acres of land within the reservation. She has always paid state property tax on this land, believes that the family member from whom she inherited the property also paid taxes. The property is part of the Billy Adams allotment (No. 26). As far as Doris Miller can tell, the property has never been out of Indian hands. She does not know when or why the property was placed on county tax rolls. She has also been unable to obtain records on the property to show the chain of title. Her attempts to have the land put in

10. Tribal staff members learned very recently that a Mason County court order of September 23, 1928 purported to establish the east boundary of a lot (No. 2) within the southern portion of the old McKinney Pulsifer allotment (No. 9B). Although this tract was by then alienated fee land, the court's action would relate to the boundary of the Skokomish Reservation, since the Skokomish River lies along the eastern edge of the Pulsifer allotment. This needs further investigation.

11. There are numerous transactions in reservation land which should be investigated. For example, many tribal members believe that some of the tracts which now make up the so-called Nalley Estate on the Skokomish River delta were included in that estate only after questionable transactions between Marcus Nalley and the land's original Indian owners. It is frequently said that Nalley arranged for nearby Indian owners to become indebted to him and then negotiated an acquisition of their land when they could not repay him. This needs further investigation.

Gregory R. Dallaire
Director

LEGAL SERVICES CENTER
BALLARD OFFICE
5308 Ballard Avenue N.W.
Seattle, Washington 98107
(206) 464-5921

March 14, 1977

Mr. Richard Neely
Regional Solicitor
Bureau of Indian Affairs
P. O. Box 36121
Portland, Ore. 97208

Re: July 1977 Statute of Limitations on money damages suits brought by the U.S. on behalf of Indians or Indian tribes; 28 USC §2415

Dear Mr. Neely:

As attorney for the Nooksack Indian Tribe, I am writing to strongly urge that you press for the elimination of Indian claims from the deadline imposed by 28 USC §2415. The period of time prior to July, 1977, is grossly inadequate to thoroughly investigate all the colorable claims which tribes and individual Indians can identify that would be barred by this statute of limitations.

It is my belief that Congress should not only eliminate Indian claims from this statute, but should also appropriate funds for the resolution of these claims pursuant to a specific plan which would insure that the claims be fully investigated by the Bureau and litigated by the U.S. if necessary. The deadline imposed by §2415 has been extended once already and the bulk of these claims are still outstanding. Congress should be urged to do more than merely extend the deadline again.

The following list is a brief summary of potential claims for damages which should be investigated by the Bureau prior to the deadline imposed by 28 USC §2415. Some of the claims have already been researched extensively by the tribal historian, Allan Richardson, and some have simply been identified by preliminary research as claims which at least merit more investigation.

The trust parcels identified by number in the following outline are described more fully on the accompanying list which refers to the original homestead allottee and the homestead certificate number. All of the lands were originally acquired as Indian homesteads and they are not presently within the exterior boundaries of a reservation, although they are still held in trust by the U.S.

1. Invalid Right-Of-Way of Bellingham Northern Railroad:

   Quiet title and damages claim against railroad for right-of-way invalidly acquired prior to the issuance of trust patent under Indian Homestead Act of 1884. Right-of-way crosses trust parcels #6, 7, 8, 9, 10, 14, and 15. Damages for past rent are necessary in order to set off the cost to the tribe of constructing an access road across the railroad tracks to the tribe's new housing project. The railroad has demanded that the tribe obtain an easement and pay for the construction of the crossing.

2. Illegal Removal of Gravel by Cowden Gravel Company:

   Claim against gravel company for trespass on Indian Homestead #19, and money damages for gravel removal. Also, action against State Department of Natural Resources to recover money paid to it by the gravel company instead of the Indian owner.

3. Erroneous and Invalid Cancellations of Trust Patents of Homesteads #1, 3, and 34:

   Quiet title, ejectment and claim for past rent based on highly suspect transactions involving the cancellation of these trust patents, the issuance of fee patents and the subsequent alienation of the land.

4. Breach of Timber Removal Lease:

   Money damages from lessee timber company for failure to restore Homestead #24 to a usable condition after timber removal.

5. Invalid Northern Pacific Railroad Right-Of-Way:

   Quiet title and damages for past rent on rights-of-way illegally acquired across Homesteads #20, and 26.

6. Claims Arising From Changes in the Course of the Nooksack River:

   A. Damages claim against Whatcom County and U.S. Army Corps of Engineers for damage to Indian land caused by riprapping installed on non-Indian riparian land, causing change in river channel and increased erosion of Indian land which was not riprapped.

   B. Quiet title, ejectment and back rent in the following boundary disputes which have resulted from the river's change in course:

      - #28 - East one-third of lot 5, section 18.

      - #16 - Northeast portion of lot 11, section 6.

- #10 - East one-half of lot 11, section 7.

- #12 - East two-thirds of entire allotment has become part of riverbed and wash, possibly due to dike installed by county upstream.

- #13 - Ownership of river wash, lot 12, section 17.

- #20 - West bank of river adjoining lots 2 & 9, section 6.

- #27 - East bank of river, lot 2, section 8.

7. Whatcom County's Invalid Acquisition of Abandonned Railroad Right-Of-Way:

   Quiet title and damages for adverse use of abandonned railroad right-of-way on Homestead #20.

8. Investigate the Manner In Which the Following Parcels Were Alienated:

   A. Cancellation of School George homestead in section 33, T40N, R4E;

   B. Cancellation of Jasper Scamalan homestead in section 32, T40N, R4E;

   C. Acquisition of fee patent of Charley Lewiston homestead in section 29, T40N, R4E;

   D. Acquisition of fee patent of George Oloogeus homestead in section 31, T40N, R4E.

9. Investigate Non-Indian Claim to Parcel Adjoining Homestead Number 21:

   Lots 2 and 9, section 6, T38N, R5E is a parcel owned by a non-Indian which tribal members believe may once have been part of Homestead #21.

10. Illegal Tax Foreclosures and Forced Sales by State Welfare Officials:

    Investigate the possibility of instances of loss of trust land due to illegal county action. One example involves homestead #30, ten acres of which were retained for the Indian owner's widow after the rest had been sold, but was subsequently lost due to potentially illegal tax sale.

I hope that you will utilize this list in your effort to persuade Congress that meeting the 28 USC §2415 deadline is an infeasible

task and that, as applied to Indian claims, it should be amended.

Sincerely,

Emily Mansfield/jpj

Emily Mansfield
Attorney at Law

EM:jpj
enc:
cc: Sharon Thompson
Milton Williams

COX AND COX
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I. SIMPSON COX
L. J. COX, JR.
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LORNA E. LOCKWOOD
OF COUNSEL

L. J. COX (1904-1948)
ALFRED C. LOCKWOOD
(1902-1965)

April 30, 1977

Senator James Abourezk, Chairman
Select Committee on Indian Affairs
Room 3158 HOB 2
2d and D Street SW
Washington, D. C. 20515

Re: Statute of Limitation barring trustee's recovery for Indians.

Dear Senator Abourezk:

Public Law 89-505 (28 U.S.C. §2415) became law without clearing Congressional committees dealing primarily with Indian affairs. Neither the Indians nor even the Bureau of Indian Affairs became aware of the limitations until 1971, shortly before the statute was to run in 1972. On August 24, 1971, the acting Associate Solicitor for Indian Affairs notified the Commissioner of Indian Affairs that the statute had been adopted July 18, 1966, and that Indians should be notified.

Notice to recognized tribes brought demands for actions by the United States as trustee. For example, on December 6, 1971, Gila River Indian Community notified the Bureau of Indian Affairs:

> The State of Arizona obtained rights-of-way and constructed Interstate Highway No. 10 across the Gila River Reservation from Sec. 5, T 2 S, R 4 E, to Sec. 9, T 5 S, R 6 E, G&SRB&M. Except for interchanges at the Maricopa Road, Riggs Road, Casa Blanca Road, and Highway No. 187, Interstate Highway 10 cut off ingress to and egress from the tribal and allotted lands on both sides of the freeway over then-existing Indian trails and roads. Rights-of-way on section lines established prior to granting the right-of-way for I-10 were cut off. Many parcels of tribal and allotted land were left completely landlocked by the construction of I-10. We believe the records of the Bureau of Indian Affairs show the roads, trails and rights-of-way so cut off and show the lands which were affected thereby. Actions against the State of Arizona for taking of these rights-of-way and damages to the property affected should be instituted immediately.

Arid, irrigable lands on the Gila River Indian Reservation are being deprived of the use of water from the Gila River by upstream lands and uses under color of water rights which are junior and inferior to those of the lands on the Gila River Indian Reservation. Action should be instituted for damages for the value of the water so used.

Arid, irrigable lands on the Gila River Indian Reservation are being deprived of the use of water from the Salt River by upstream lands and uses under color of water rights which are junior and inferior to those of the lands on the Gila River Indian Reservation. Action should be instituted for damages for the value of the water so used.

Prior to and during the sovereignty of Spain and Mexico the Pima-Maricopa Indians owned all of the Gila and Salt River valleys in central Arizona and irrigated their lands with waters from these rivers. Spain and Mexico recognized the property rights of these Indians to the land and water. At the time of and prior to American sovereignty the Pima Indians were irrigating 50-60,000 acres with waters of the Gila River and its tributaries. The confederated Maricopa Indians downstream to the west were also irrigating large areas. The United States acknowledged that it was obligated under the Treaty of Guadalupe Hidalgo and the Gadsden Treaty to protect these property rights. Present reservations are but a small part of Pima-Maricopa land at the beginning of American sovereignty and were set aside to protect against non-Indian encroachment and to assure continued successful agriculture based economy. These Indians reserved to themselves all of the water necessary to irrigate fully all of the practicably arable reserved land. In our opinion these Indian rights are even prior to the rights reserved by the United States when it set aside the Gila River Indian Reservation.

Damages which the Pima-Maricopa people on the Gila River Indian Reservation have suffered, and are continuing to suffer due to wrongful upstream uses of water, were foregold by United States agent Sylvester Mowry in his December 26, 1859, letter to the Commissioner of Indian Affairs:

> [A]ny extensive cultivation above the Indian fields will cause trouble about the water for irrigation ....

Department of the Interior records from 1868 to date are replete with studies, reports and promises of action on causes of action arising from wrongful use by others of water rightfully belonging to Pima-Maricopa Indians. Department of Justice records show studies, reports and promises of protection without any follow-through, i.e., see Department of Justice file No. 469-03, History of Litigation, by E. T. Burke.

Representatives of Gila River Indian Community, after numerous conferences with personnels of Interior and Justice Departments, were informed orally that complaints had been prepared and the Department of Justice would file actions immediately if authorized to do so by the Interior Solicitor. The Interior Solicitor wrote authorizing and requesting such actions conditioned upon Congress not passing legislation then before it to extend the statute of limitations. Congress passed and the President signed the legislation. The Solicitor's authority and request was automatically withdrawn before the letter was delivered to the Department of Justice. The actions have not been filed to date.

For more than 100 years Pima-Maricopa Indians orally, by letters and formal resolutions have urged the United States as trustee to bring actions to obtain judicial relief for damages, injunctive relief and other remedies necessary for the Indians to re-establish their agriculture based economy.

In our opinion failures of the government in the past to take indicated actions and the present continued failure to act is costing Gila River Indian Community and its members in excess of $146,600.00 per day. Similar losses are faced by other Indians throughout the United States.

We urge Congress to protect Indian rights by amending 28 U.S.C. 2415 to allow reasonable additional time for the United States to bring actions for and on behalf of Indians. In our opinion the enclosed suggested amendments would accomplish this and would also encourage the Interior and Justice Departments to fulfill trust obligations of the United States to the Indians.

Very truly yours,

COX and COX

Z. Simpson Cox
Chief General Counsel for
Gila River Indian Community, Arizona.

ZSC:ME

Enc. 1

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians or individual members thereof shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: ~~*Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.~~

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians or individual members thereof including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, ~~except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.~~

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any

Note 1

claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act: Provided, That any right of action for or on behalf of a recognized tribe, band or group of American Indians or individual members thereof which accrued prior to July 18, 1977, shall, for the purposes of this section, be deemed to have accrued on July 18, 1977.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

(i) Nothing in this Act shall impose any limitation on any action brought be a recognized tribe, band or group of American Indians.

(j) Each right of action on which action may be properly brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall be reported by the Secretary of the Interior on or before December 31, 1977, and annually thereafter to such tribe, band or group, to the Attorney General and to Congress.

(k) On or before January 31, 1978, and annually thereafter the Attorney General shall report to each recognized tribe, band or group of American Indians, to the Secretary of the Interior and to Congress as to actions taken and progress in actions for or on behalf of such recognized tribe, band or group of American Indians.

NEW YORK IROQUOIS CONFERENCE, INC.

"Native Americans for Unity and Involvement"

P. O. Box 280 • Ellicott Station • Buffalo, New York 14205

April 29, 1977

Honorable James Abourezk
Chairman, Senate Temporary Select Committee on Indian Affairs
Second and D Streets, S. W.
Room 3158
Washington, D. C. 20515

Dear Sir: Re: H. R. 5023

The general membership of the New York Iroquois Conference and its Board of Directors -- by this letter -- wish to submit their support for the immediate consideration of H.R. 5023 and its passage through the Congress of the United States.

H.R. 5023 would amend the statute of limitations in section 2415 of title 28, U.S.C., by providing an extension of ten years on Indian Claims. Right now the deadline is July 18, 1977, for the filing of lawsuits by the Federal Government on behalf of Indian governments and individuals for monetary claims arising before July 18, 1966.

The Department of Interior is nowhere near completion of its process of identification, investigation, and evaluation of some 700 Indian Claims.

Native Americans throughout the country have been patient for many years awaiting judgment on their land claims. Here in New York State there are three (3) such cases pending -- one for the Cayugas, one for the St. Regis Mohawks, and one for the Oneidas.

The New York Iroquois Conference membership supports such legislation on behalf of all Native American people that are affected by these pending claims. To leave these claims unsettled would be as great a wrongdoing as the loss suffered when our ancestors originally lost their lands!

Sincerely yours,

B. Marlene Johnson

B. Marlene Johnson
Chairman, Board of Directors

BMJ/ts

cc: All Board Members
All New York Iroquoian Tribal Leaders

The Houma Alliance, Inc.
Rt. 6,Box 88 B
Houma, Louisiana 70360
May 12,1977

James Abourezk
Senate Temporary Select Committee on Indian Affairs
Second and D Streets, S.W., room 3158
Washington, D.C. 20515

Dear Senator Abourezk,

As a governing body for the Houma Indians of Southeastern Louisiana it has come to the attention of the Houma Alliance Inc. that on July 18,1977 the statute of limitations provisions in section 2415 of title 28, U.S.C. involving the filing of lawsuits by the United States on behalf of Indian governments and individual Indians for monetary claims arising before July 18,1966 will expire. We are writing in support of HR5023 and S. 1377 which would extend the outside filing date for ten years.

The Houma Indians have been isolated in the southern-most reaches of Louisiana for years. Having only received State recognition in 1974 we are still in the beginning processes of organizing to define needs and identify possible claims. Because public education was denied to us for so long we have for the most part remained in a low economic position. Without the ten year extension it would be extremely difficult, if not impossible, for the Houma Indians to pursue our rights as Indians in the United States.

On behalf of the Houmas and all other Indian tribes we strongly urge you to take direct and favorable action in support of this legislation HR 5023 and S. 1377 before the statute of limitations expires.

Thank you for your continued interest.

Sincerely,

Howard J. Dion

Howard Dion, Chairman

SMALL TRIBES ORGANIZATION of WESTERN WASHINGTON

P. O. Box 578/Sumner, Washington 98390/(206) 593-2894

May 18, 1977

Mr. Tony Strong
Senate Select Committee
on Indian Affairs
U. S. Senate
Washington, D.C. 20202

Re: Expiration of the Statute of Limitations contained in 28 USC §2415

Dear Tony:

The Chairperson of the Lower Elwha Tribe, Patti Elofsen, recently contacted me and requested assistance in drafting testimony of the Lower Elwha Tribe to be used in hearings concerning an extension of the above statute of limitations. I am currently researching such testimony. The purpose of this letter is to express a broader concern.

Last summer our legal program expanded and assigned attorneys to individual tribes to provide a broader spectrum of legal services to the member tribal governments of STOWW. This program got fully underway by mid-fall and during the late fall and early winter of 1976 we began to be concerned that various client tribes, and their members, might have claims which are subject to the July 18, 1977 deadline. Some tribes, those which are most completely organized or which are not otherwise preoccupied with myriad problems related to treaty fishing rights, have been able to research and identify possible claims. Other tribes have begun to expend considerable time and effort in researching their claims but at the present have not completed the process. If the situation continues in its present undecided state through July 18, there will be many adverse consequences:

1. There are a considerable number of Indian tribes in Western Washington and a fairly large portion of these are our client tribes. Many of these tribes are as of yet unrecognized; of those that are recognized many have only recently begun to achieve the sort of organization necessary to sort out treaty rights and other claims which have accumulated after more than a century of neglect on the part of the federal government. It appears that there may well be several claims within each tribe which must, in the interests of trust responsibility and of justice and legal advocacy, be prosecuted. When the statute was

last extended the Bureau of Indian Affairs was to have take-action to identify these sorts of claims. For one reason or another the Bureau's approach has been disconcertingly passive and I understand that our area office is submitting very few claims for Justice Department review. It appears the Department of Interior has done little more than send written inquiries to tribes asking whether they have any claims which they wish to have litigated. This is unrealistic, considering the lack of ability of many tribes to perform the necessary legal and factual investigations. I think the result will be a minor scandal. In many cases land which is still owned by the United States and money which has never been paid for the exploitation of trust assets may be rendered unrecoverable if this statute expires.

2. Apparently Congress extended the statute the last time at the eleventh hour. If this occurs again, a considerable portion of all attorney time available to client tribes will be totally consumed in attempting to identify, research and prepare a long list of law suits by July 18. If the statute is then extended, a considerable amount of time will have been wasted. Fear of this flood of litigation is not an argument for letting the statute run, since extension would allow the elimination of unfounded claims and the negotiated settlement of many others.

3. A great number of suits will probably be filed in the Northwest as well as in other areas. This in itself will of course place a heavy burden on local federal courts, especially the already overworked district courts, in Washington. The fact that many of these suits might otherwise be settled without being filed and the fact that many of them will be hastily forced into the pre-trial process will increase this burden.

4. As tribal and individual claims are investigated, in many instances for the first time--but at the last minute--it becomes increasingly apparent that there has been a serious breach of trust responsibility too extreme to be excused as discretionary. To the extent that tribal and individual trust rights are lost because the Bureau has failed to act and to the extent that Justice Department and Interior Department lawyers have not engaged in vigorous advocacy, the Indian people involved certainly have a cause of action against their trustee.

5. Some examples: During the depression, and perhaps at other times, Indian homesteads and allotments which were held in trust by the United States seem to have been sold for taxes after State court proceedings; this is, of course, illegal. At other times individual and tribal land and water rights were improperly taken, sold or otherwise interfered with without any action on the part of the trustee. For instance, there is some indication that large stands of timber were cut without compensation being paid. Other types of claims are being researched.

There are, of course, other injustices inherent in the present situation. I think that if the statute is allowed to expire, it will be perpetuating the violation of human righs and the atmosphere of injustice already too prevalent throughout the history of the federal government's dealings with Indian people.

During the years since the last extension of this statute, affected tribes and individuals have not been inactive. On the contrary, they have been quite active in seeking and obtaining federal recognition, in litigating and exercising treaty fishing rights and other treaty rights, and in developing strong and viable tribal governments. They should not be penalized for delays on the part of the federal government. I am enclosing various items of correspondence for your use.

Sincerely yours,

Russell Busch/jc

Russell Busch
Managing Attorney
STOWW Legal Affairs Department

RB:jc

Enclosures

WICHITA STATE UNIVERSITY

WICHITA, KANSAS 67208
PHONE 316 / 689-3715

INDIAN AMERICAN
STUDENT ASSOCIATION

May 23, 1977

Dear Sir,

As representatives of the Indian American Student Association, we urge the passage of HR 5023. This extension of the filing date is imperative, in our minds, as the minimum amount of time needed.

Many Indian people are unaware of this statute of limitation and can only suffer further if it is not extended. We trust your consideration will reflect the will of the Native Peoples of this country.

Peace,

Indian American Student Assoc.

Chuck Love
Chuck Love

Carol White
Carol White

CL;cw

KEN HOLLAND
5TH DISTRICT, SOUTH CAROLINA

COMMITTEE:
WAYS AND MEANS

Congress of the United States
House of Representatives
Washington, D.C. 20515

May 17, 1977

Honorable James Abourezk
Chairman
Select Committee on Indian Affairs
House Office Building, Annex #2
Room 3158
Washington, D.C. 20515

Dear Senator Abourezk:

This is to request that you insert in the record from the hearings on S. 1377 my support of an extension of the time for commencing actions on behalf of an Indian tribe, band or group.

You may or may not be aware that there is a rather substantial land claim being made in my Congressional District in South Carolina by the Catawba Indians. I understand it to be the third largest claim on the East Coast. We are currently engaged in amicable negotiations and an out of court settlement is anticipated. However, should the statute of limitations on Indian claims not be extended a reasonable length of time, the Catawbas may have no recourse but to seek a court settlement. Therefore, in our case, an extension of the July 18th deadline is needed and I would appreciate your noting my strong support of S. 1377.

Thanking you for your consideration, I am

Sincerely yours,

Ken Holland

KH:tw