The original documents are located in Box 1, folder "Alaska Native Land Claims - S. 1469" of the Loen and Leppert Files at the Gerald R. Ford Presidential Library.

File
Alaska Native
Land Claims

MEMORANDUM

LEGAL ISSUES RAISED BY PROPONENTS OF § 15 OF S. 1824, THE PROPOSED TRESPASS CLAIMS EXTINGUISHMENT AMENDMENT

submitted

by

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

ARCTIC SLOPE NATIVE ASSOCIATION

ARCTIC SLOPE REGIONAL CORPORATION

September 22, 1975

Davis, Wright, Todd, Riese & Jones
4200 Seattle-First Nat'l Bank Bldg.
Seattle, Washington 98154

MEMORANDUM

LEGAL ISSUES RAISED BY
PROPONENTS OF § 15 OF S. 1824,
THE PROPOSED TRESPASS CLAIMS
EXTINGUISHMENT AMENDMENT

INDEX

MEMORANDUM

LEGAL ISSUES RAISED BY PROPONENTS OF § 15 OF S. 1824, THE PROPOSED TRESPASS CLAIMS EXTINGUISHMENT AMENDMENT

I. Summary

The proposal to extinguish the accrued trespass claims of Arctic Slope Eskimos through enactment of § 15 of S.1824 raises serious constitutional questions. Causes of action based on the common law, whether sounding in tort or contract, are property rights protected by the Fifth Amendment. Part II (A) infra.

Arguments by the State of Alaska that tort claims are not entitled to Fifth Amendment protection lack any legal merit, Part II (B) infra, and are, in any event, irrelevant because the Eskimos' most substantial damage actions will be quasi-contract claims which are conceded to be Fifth Amendment rights by the State. Part II (C) infra.

Enactment of § 15 of S.1824 might be a violation of the Fifth Amendment's requirement that private property may be taken only for public use. No public benefit would accrue to the American people from an act shifting substantial liability

for intentional tortious acts from the wrongdoers to the United States Treasury. If § 15 of S.1824 were not held to be unconstitutional, it would still impose a substantial obligation on the United States to provide "just compensation" for the taking of the Eskimo's property. Part II (D) infra. Settlement Act funds could not be used to satisfy this obligation. Part II (E) infra.

The United States did not incur liability for a taking of the Eskimos' trespass claims in 1971 when the Settlement Act became law because the Act did not extinguish them. Congress enacted the Settlement Act to clear up a cloud on title to Alaska's lands, Part III (A) infra, not to take the Fifth Amendment property rights of Alaska citizens. Part III (B) infra. Tort claims were expressly preserved. Part III (C) infra.

Arguments that Indian trespass claims have less constitutional protection than those of other American citizens are without merit. Until extinguished by Congress, Indians have the same rights to quiet enjoyment of their lands and the same rights to invoke judicial protection in aid thereof as do other American citizens. Part IV (A) infra. Indian possessory rights are based on the common law, Part IV (B) infra, and, like other Fifth Amendment rights, cannot be infringed by attempts to give ratification retroactive effect Part IV (C).

Arctic Slope Eskimos are not precluded from asserting their trespass claims by any rule of constitutional adjudication; Part V (A) infra. At no time have Arctic Slope Eskimos relinguished their trespass claims -- in exchange for enactment of the Settlement Act or anything else. Part V (B) infra.

The exclusively legal nature of the arguments made by the proponents of § 15 of S.1824, and the responses herein, show that the Edwardsen trespass claims are clearly a "case or controversy" within the meaning of Article III, § 2, Cl. 1, of the United States Constitution. Their resolution is within the exclusive jurisdiction of American courts. The dramatic intervention in the judicial process called for by § 15 of S.1824 would be a violation of the separation of powers and a most unfortunate congressional precedent.

II. A CAUSE OF ACTION FOR TRESPASSORY CONDUCT IS PROPERTY PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MAY BE TAKEN ONLY FOR PUBLIC PURPOSES AND WITH PAYMENT OF JUST COMPENSATION.

S.1824, § 15, seeks to extinguish accrued claims of Alaska Natives for trespass to lands held under aboriginal title prior to December 18, 1971, the effective date of the Alaska Native Claims Settlement Act. In written submissions to this Committee the State of Alaska and the Department of Justice have argued that such extinguishment would not be unconstitutional because claims for trespassory conduct are not protected by the Fifth Amendment to the United States Constitution. That contention is contrary to the virtually unanimous declaration of American courts that causes of action based on the common law, whether in tort or contract, are property protected by the due process and just compensation requirements of the United State Constitution.

A. Claims for Damage Based on the Common Law are Property Protected by the Constitutional Requirements of Due Process and Payment of Just Compensation.

A claim for damages, whether arising out of tortious conduct or breach of contract, is indisputably property.

> While by a "chose in action" is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in a breach of contract. A thing in action, too, is to be regarded as property.

City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N.E. 197 (Sup. Ct.), quoted with approval in Williams v. Atlantic Coastline R. Co., 69 S.E. 402, 403 (N. C. 1910); See Affiliated Ute Citizens of the State of Utah v. United States, 406 U.S. 128, 136-40 (1972) liquidated and unliquidated causes of actions treated as tribal assets).

"Property" subject to constitutional protection in the United States encompasses more than just tangible objects and includes interests and expectations of many kinds.

> "[P]roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules of understandings."

Perry v. Sinderman, 408 U.S. 593, 601 (1972) (expectency of re-employment is property subject to due process guarantees). Just as houses, land, automobiles and other property of United States citizens are protected by the Constitution, so too are claims for money damages.

> Hence it is that a vested right of action is property in the same sense in which tangible things are property, and it is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

Pritchard v. Norton, 106 U.S. 124, 27 L. Ed. 104, 107 (1882), accord, Gibbes v. Zimmerman, 290 U.S. 326, 333 (1933)

(dictum). Indeed, the proposition that causes of action are property protected by due process is so fundamental that it is black letter law in the legal encyclopedias. See 16 Am. Jur. 2d "Constitutional Law" § 424 (1964); 16A C.J.S. "Constitutional Law" § 599 at 698 (1956).

Ettor v. City of Tacoma, 228 U.S. 148, (1913), stands squarely for the proposition that a cause of action is a property right protected by the Constitution. The City of Tacoma graded a street and damaged abutting property at a time when a state statute required payment of compensation for such damage. After the damage had occurred, the state legislature repealed the statute. The court held that the subsequent repeal of the statute could not constitutionally extinguish the damage claim which had arisen while the statute was in force.

> The necessary effect of the repealing act as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, -- a right which was in every sense a property right.

228 U.S. at 156.

Ettor cannot be distinguished on the grounds that it applies only to damages for breach of contract. There was no contract in Ettor. The obligation to pay damages was imposed by the State in the form of a statute. By grading a street and

causing consequential damage to abutting property owners, the City of Tacoma gave no more a promise to pay damages than does a trespassor who enters the lands of another and causes damage.

The only difference between the damage claim asserted in Ettor and the trespass claims of Arctic Slope Eskimos is that the obligation to pay damages in Ettor was imposed by statute whereas the obligation to pay damages for trespass to Indian lands is imposed by federal common law. If this difference had any constitutional significance, it is that causes of action based on the common law are entitled to greater protection against uncompensated legislative extinguishment. See, e.g., State of Alaska, "Constitutional Issues Relating to the Extinguishment of Native Tresspass Claims," Hearings Before the Senate Committee on Interior and Insular Affairs, Amendments to the Alaska Native Claims Settlement Act, Part 2, at 74-78 (1st Sess. 1975) [hereinafter Extinguishment Ammendment Hearings].

An express holding that tort claims are protected by the Fifth Amendment occurred in Farbwerke, Meister, Lucius & Bruning v. The Chemical Foundation, 39 F.2d 366 (3d Cir. 1930), aff'd 283 U.S. 152. Farbwerke involved a claim for patent infringement which is a tort. Shillinger v. U.S., 155 U.S. 163 (1894). In Farbwerke certain German patent owners brought suit to recover royalties on certain patents which had

been taken from them during World War I and sold by the United States. The Farbwerke plaintiffs alleged that a subsequent statute enacted by the United States retroactively restored in them ownership of the royalties accruing on the patents. The Third Circuit held squarely that insofar as the statute did act to transfer the right to sue for accrued royalties from the present owners to other persons it was unconstitutional.

> The right to accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution.

39 F.2d at 371 (emphasis added).

Numerous state court decisions have also held that causes of action based on the common law, whether sounding in tort or contract, are protected by the due process and just compensation requirements of the United States Constitution.

> [The due process clause and the just compensation clause of the Fifth Amendment] prohibit the passage of a law depriving [a citizen] or authorizing the depriving him of his property, except through judicial sentence or upon just compensation. The right to damages, to be recovered in a civil action, for false imprisonment, is a chose in action -- is property -- and passes to one's representatives at death by the law of Indiana.

Griffin v. Wilcox, 21 Ind. 370, 373 (1863).

> A legal right to damage for an injury is property and one cannot be deprived of his property without due process. There can be no due process unless the party deprived has his day in court . . .

Rosane v. Singer, 112 Colo. 363, 149 P. 2d 372, 375 (1944); accord, Williams v. Atlantic Coastline R. Co., 69 S.E.2d 403 (N. C. 1910); Citron v. Mangel Stores Corp., 50 N.Y.S. 2d 416 (Sup. Ct. 1944).

Legislative extinguishment of a cause of action based on the common law has been almost uniformly held to be a violation of due process.

> The statute provides a rule of substantive law. The effect of the change, if given retrospective effect, would be to deprive plaintiff and others similarly situated of a right of action. This court has recognized that a common law right of action is property and entitled to protection.

Cusick v. Feldpausch, 259 Mich. 349, 342 N.W. 226, 227 (1932).

> This rule [that the legislature can abolish statutory remedies and therefore a cause of action at any time] only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case it is generally stated that the cause of action is a vested property right which may not be impaired by legislation.

Callet v. Alioto, 290 P. 438, 440 (Cal. 1930).

B. Both Tort and Contract Claims Based on the Common Law are Protected by Due Process and Just Compensation Requirements.

In its supplemental memoranda submitted to this Committee, the State of Alaska, conceding that claims based on contract

are protected by the Fifth Amendment, suggested that tort claims might not be accorded the same protection. Extinguishment Amendment Hearings, Part 2, at 71. However, the State cited no cases holding that tort claims are not protected by the Fifth Amendment. Indeed, in a later section of its brief the State conceded, in effect, that trespass actions are protected by the Fifth Amendment.

> A trespass action is, in essence, a means of making whole the owner of an interest in land where that interest has been wrongfully invaded and thereby diminished in value. Most interests in land, such as a fee simple, are themselves constitutionally protected from uncompensated governmental taking. To preserve those protected interests intact, it may be necessary to hold that an accrued trespass action, which would make whole the owner of the interest, is also constitutionally protected.

Extinguishment Amendment Hearings, Part 2, at 72.

This begrudging concession by the State obscures the fact that the vast majority of American courts have recognized that most interests protected by the sovereign are property subject to constitutional protections regardless of whether the remedy for interference with those interests sounds in tort or contract. None of the federal and state court decisions discussed above, which hold that causes of action are protected by due process, make any distinction between tort and contract claims. Indeed, many of those cases involve classic tort claims. Martinez v. Fox Valley Buslines, 17 F. Supp. 576

(N.D. Ill. 1936) (personal injury); Rosane v. Singer, 112 Colo. 363, 149 P. 2d 372 (1944) (medical malpractice); Williams v. Atlantic Coastline Ry. Co., 69 S.E.2d 402 (N.C. 1910) (wrongful ejectment from train); Griffin v. Wilcox, 21 Ind. 370 (1863) (false imprisonment).

The rule that an accrued cause of action based on the common law is a vested property right which may not be extinguished by the legislature has been expressly applied to tort claims.

> The rule that repeal does not operate to affect vested rights is applicable not only to those acquired under contract but also to vested rights of action to recover damages for torts.

Massa v. Nastri. 125 Conn. 144, 3 A.2d 839, 120 A.L.R. 939, 942 (1939) (citations omitted); accord, Pickering v. Peskind, 43 Ohio App. 401, 183 N.E. 301, 303 (1930); Callet v. Alioto, 290 P. 438 (Cal. 1930); County of Los Angeles v. Superior Court of Los Angeles, 43 Cal. Rptr. 392, 395 (Dist. Ct. App. 1965); Jones v. City of Los Angeles, 30 Cal. Rptr. 124, 125 (Dist. Ct. App. 1963).

Accrued causes of action based on the common law are protected by the due process and just compensation requirements of the United States Constitution whether sounding in tort or contract. The contention that a different rule applies to tort claims is a disservice to this Committee's effort to evaluate the constitutional consequences of § 15 of S.1824.

C. Trespassory Conduct Gives Rise to Claims for Damage Sounding in Both Tort and Contract.

The State of Alaska's attempt to draw a distinction between the constitutional protections afforded tort and contract claims is, in any event, irrelevant because the claims of Arctic Slope Eskimos against those parties who entered their lands without consent include claims arising in tort for trespass and claims arising in quasi-contract for the benefits obtained by the trespassers. The State has conceded that quasi-contractual causes of action are protected by the Fifth Amendment.

> [W]here the conduct of the parties gives rise to a quasi-contractual obligation, a cause of action founded in that obligation cannot be extinguished without compensation.

Extinguishment Amendment Hearings, Part 2, at 70.

It is a well settled rule of common law that when a trespasser enters onto the lands of another and uses those lands for his benefit or takes something of value from the lands, the possessor of those lands many waive the right to sue for the "naked trespass," and claim instead in quasi-contract for the value conferred on the trespasser for the use of the lands.

> An action will lie for recovery of the reasonable value of the use and occupation of real property irrespective of the question of whether or not the use thereof by the occupant was tortious or wrongful. In such a case the tort, if any, may be waived and an action based upon implied assumpsit is maintainable to recover the

> value of the use of the real property for the time of such occupation, where no special damages are sought.

Herond v. Bonsall, 140 P.2d 121, 123 (Dist. Ct. App. Cal. 1943), quoted with approval in Richard v. Mead, 297 P. 2d 600, 682 (Dist. Ct. App. Cal 1956), and Meyer v. Parobek, 259 P.2d, 948, 951 (Dist. Ct. App. Cal. 1953).

Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946), is a classic case illustrating the right of a plaintiff to recover in quasi-contract for the benefits obtained by a trespasser. In that case the defendant coal company secured an easement to haul coal across the plaintiff's land from one certain tract of land and then used the easement for transportation of additional coal from other tracts of land. The court held that the coal transported in excess of the easement was a trespass and that the plaintiff was entitled to recover damages from the defendant in the amount by which the defendant had been enriched by using the easement for transporting the additional coal. The court squarely rejected an argument that the quasi-contractual damages could not be awarded because the trespass did not cause physical damage to the plaintiff's land.

> To hold that a trespasser who benefits himself by cutting and removing trees from another's land is liable on an implied contract, and that another trespasser who benefits himself by the illegal use of another's land is not liable on an implied contract is illogical. The only distinction is that in one case the benefit he

> received is a diminution of another's property. In the other case, he still receives the benefit but does not thereby diminish the value of the owner's property. In both cases, he has received substantial benefit by his own wrong. As the gist of the action is to prevent the unjust enrichment of a wrongdoer from illegal use of another's property, such wrongdoer should be held on an implied promise in both cases.
>
> . . . .
>
> The illegal transportation of the coal in question across plaintiff's land was intentional, deliberate and repeated from time to time over a period of years. Defendant had no moral or legal right to enrich himself by this illegal use of plaintiff's property. To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just as much.

39 S.E.2d at 236-38 (emphasis added).

This implied promise to pay for the benefits received by a trespasser has been recognized by the Supreme Court. Lazarus v. Phelps, 152 U.S. 81 (1893) (recovery allowed in quasi-contract for benefit to defendant of grazing cattle on plaintiffs land), and by federal courts of appeal. See, e.g., Shell Petroleum Corp. v. Scully, 71 F2d 772 (5th Cir. 1934) (geophysical trespass gives rise to damage claim for benefit conferred on trespasser).

Although great physical damage was done to the land, homes, sacred places, and personal property of Arctic Slope Eskimos, the major damage claims to be brought on their behalf will be for the enormous benefits reaped by the oil company trespassers to the Arctic Slope prior to the extinguishment of the Eskimos' aboriginal title. Those trespasses generated geophysical information of enormous value and allowed certain oil companies to obtain leases worth millions of dollars. Other benefit was obtained by the extraction of oil, gas water, sand and gravel and through the use of many surface areas on the Arctic Slope for profit-making activities. The claims of Arctic Slope Eskimos for damages resulting from these activities will all sound in quasi-contract and are, as the State of Alaska concedes, fully protected by the Fifth Amendment against uncompensated legislative extinguishment.

D. Legislation Extinguishing the Trespass Claims of Arctic Slope Eskimos, if Constitutional, Would Subject The United States Treasury to Substantial Liability for the Taking of Those Claims.

The claims of Arctic Slope Eskimos for trespasses to the Arctic Slope prior to December 18, 1971, are property rights fully protected by the due process and just compensation requirements of the United States Constitution. Under those constitutional provisions, accrued causes of action may not be extinguished by the Congress of the United States except for a public use with payment of just compensation.

> Nor [shall any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment V. Enactment of any legislation which had the effect of preventing Arctic Slope Eskimos from presenting their damage claims for trespassory entries to the Arctic Slope to American Courts would, under the Fifth Amendment, either be unconstitutional or would subject the United States to liability for the full dollar value of the claims.

Because the major consequence of § 15 of S. 1824 would be to relieve certain private parties from liability for their willful trespasses on the Arctic Slope of Alaska, Arctic Slope Eskimos do not believe that a taking effected by this legislation would be for a "public use" within the meaning of the Just Compensation Clause of the Fifth Amendment. It would be a taking of property belonging to Arctic Slope Eskimos for the benefit of private tortfeasors which is constitutionally impermissable. Swan Lake Hunting Club v. United States, 381 F. 2d 238, 241 (5th Cir. 1967), citing O'Neill v. Leamer, 239 U.S. 244 (1915).

Even if extinguishment of damage claims against oil companies and their joint tortfeasors were found to be a taking for "public use" and hence constitutional under the Fifth

Amendment, the requirements of due process and just compensation would oblige the United States to pay Arctic Slope Eskimos the "full monetary equivalent" of their tort claims. United States v. Reynolds, 397 U.S. 14, 15-16 (1970). Just as the United Statespays a homeowner when his house is condemned to make way for a highway, it would be required to pay the Eskimos for its condemnation of their tort claims.

Although Congress might constitutionally effect a taking of Eskimo tort claims by enacting § 15 of S. 1824, it could not determine how much the United Sates would pay for them because the question of what constitutes "just compensation" is determined exclusively by the courts. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). Consequently, if § 15 of S. 1824 were not held to be unconstitutional, its effect would be to subject the United States Treasury to substantial liability in the courts for the taking of extraordinarily valuable property rights.

E. The Settlement Act Was Not "Just Compensation" For the Trespass Claims of Arctic Slope Eskimos

Recognizing that courts would hold the United States liable for a taking of the trespass claims of Arctic Slope Eskimos, the State of Alaska has argued that benefits given to the Eskimos by the Settlement Act would satisfy judicial requirements of "just compensation" for the extinguishment of those claims by § 15 of S. 1824. This argument would not satisfy judicial standards under the Fifth Amendment in four important respects.

First, as shown in Part III infra, Congress, when enacting the Settlement Act, did not intend to extinguish any rights which were protected by the Fifth Amendment. Believing that Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), did not require the payment of any compensation for the extinguishment of aboriginal title in Alaska, Congress viewed the monetary payments and land conveyances mandated by the Settlement Act as satisfying only the moral and political obligations of the United States to Alaska Natives. Certainly, there is no express declaration anywhere in the Settlement Act or its legislative history that Congress intended to take Fifth Amendment property or to provide compensation for such a taking.

Accordingly, Section 4(c) of the Settlement Act cannot be construed as extinguishing any Fifth Amendment rights. That construction must follow from the legislative history of the Act and from the constitutional rule that destruction of property rights by implication or ambiguity is not favored and will not be allowed by a court unless the implication is so clear as to be equivalent to an express declaration. Osbourne v. Nicholson, 80 U.S. (13 Wall) 654 (1872). The Settlement Act did not provide "just compensation" for the extinguishment of the trespass claims of Arctic Slope Eskimos for the simple reason that neither its language or legislative history are sufficiently clear to effect a taking to which its "settlement" could be applied.

Second, if, in 1975, Congress attempts to extinguish the trespass claims of Arctic Slope Eskimos by enacting § 15 of S. 1824 on the theory that a "settlement" in 1971 provided "just compensation," such legislation would be unconstitutional under the requirement that there be "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking. Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890), quoted with approval in Regional Rail Reorganization Act Cases, 419 U.S. 102 42 L. Ed. 2d 320, 343 (1974).

The likelihood that Arctic Slope Eskimos could obtain compensation from the Settlement Act for a taking of their trespass claims would be anything but "reasonable" or "certain." The disposition of funds and lands under that Act is governed by an intricate statutory scheme. The suggestion that a court would be willing to upset this statutory framework to satisfy the tort claims of a particular Native group defies rational belief. Absent specific legislation by Congress authorizing a redistribution of Settlement Act benefits and, in effect, enacting a new Settlement Act, it is inconceivable that any court would order diversion of Settlement Act funds to satisfy the trespass claims of Arctic Slope Eskimos.

Third, neither Congress nor the courts can withdraw the benefits of the Settlement Act from Alaska Natives for the

purpose of redistributing those benefits to others even where the new beneficiaries are a sub-group of the former. With passage of the Act, the funds and lands distributed by it became vested property rights in the recipient corporations, villages, and individuals. The United States can no more interferewith these Fifth Amendment property rights than it can the trespass claims of Arctic Slope Eskimos. Once given, even gifts become protected property. The suggestion that the United States can use the property of others to satisfy its own obligation to provide "just compensation" strains credulity to the breaking point. Extinguishment of trespass claims in 1975 would create a new obligation of the United States to pay just compensation. Past gifts or even past consideration cannot be used to satisfy that new debt.

Finally, even if the benefits of the Settlement Act to Arctic Slope Eskimos could be deemed to be a source of "just compensation" for takings of trespass claims in 1971 or 1975, those benefits would not be the "full monetary equivalent of the property taken." United States v. Reynolds, 397 U.S. 14, 15-16 (1970). Under the Settlement Act, Arctic Slope Eskimos received five million acres of land and the right to receive cash payments of approximately 48 million dollars.

Because land selections of the Arctic Slope Regional Corporation (ASRC) and its eight associated villages were, in important respects, such as mineral rights, confined to areas

outside Naval Petroleum Reserve No. 4, the Arctic National Wildlife Range, and previous land selections by the State of Alaska in Prudhoe Bay, the lands Arctic Slope Eskimos will receive under the Act have no known value. Moreover, seventy per cent of any proceeeds from the subsurface estate of the lands ASRC selects must be shared with other Alaska Natives pursuant to Section 7(i) of the Act. Thus, as "just compensation" for trespass claims of major magnitude, the lands given to ASRC under the Settlement Act are not "adequate" and since the ultimate value of those lands is wholly indefinite, they cannot satisfy the constitutional requirement of certainty of compensation.

Monetary payments to be received by Arctic Slope Eskimos under the Settlement Act will not constitute adequate compensation for the taking of their trespass claims. On December 18, 1971, the value of the monetary payments promised to the Arctic Slope was approximately 22 million dollars based on a discount rate of 10%. By contrast, spokesmen for the State of Alaska and the oil industry have represented to Congress that their exposure to suits under the Edwardsen stipulations may literally exceed a billion dollars. Although that figure appears to be excessive, it is clear that those claims are worth far more than the 22 million dollars (or approximately $5500 per Eskimo) that the Arctic Slope received for Prudhoe Bay. Thus, even if the United States could somehow constitu-

tionally and morally take back its settlement with Arctic Slope Eskimos so as to give them nothing for the taking of some of the most valuable property in the world, that settlement would not be adequate compensation for the extinguishment of their trespass claims.

The suggestion that Settlement Act benefits should be applied by the courts as "just compensation" for the taking of the trespass claims of Arctic Slope Eskimos is dangerous. It is dangerous because it erroneously suggests that the Edwardsen problem can be taken care of "on the cheap," that the United States Treasury won't really be called upon to satisfy the enormous liabilities incurred by oil companies in the rush for Prudhoe Bay. It is dangerous because it invites dismembering of the Settlement Act in an effort to make it serve a purpose which its sponsors never intended. Most importantly, it is dangerous because it invites America to unilaterally alter its settlement with Alaska Natives, to make the last chapter of this Nation's history with American Indians "just another broken treaty."

III. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF DECEMBER 18, 1971, DID NOT EXTINGUISH TRESPASS CLAIMS OF ARCTIC SLOPE ESKIMOS

Proponents of § 15 of S 1824 have argued at great length to this Committee that § 4(c) of the Settlement Act extinguished, and was intended to extinguish, accrued trespass claims of Arctic Slope Eskimos. See, e.g., Extinguishment Amendment Hearings, part 2, at 110-148. That construction of § 4(c) is not supported by its language, its legislative history or any persuasive analysis of the type of claims Congress intended to extinguish on December 18, 1971.

A. The Congressional Purpose in Providing for a Legislative Settlement of Alaska Native Land Claims Was to Remove the Cloud on Title to Alaska Lands.

Although the land claims of Alaska Natives based on aboriginal use and occupancy have been the subject of several acts of Congress, including inter alia, the Organic Act of May 17, 1884, 23 Stat. 24 (Sec. 8), and the Alaska Statehood Act of July 7, 1958, 72 Stat. 339 (Sec. 4), it was not until the 1960's, when the State of Alaska began to make land selections under the Statehood Act, that the conflict between State and Native claims to land in Alaska became serious. An informal land freeze was instituted by Secretary of the Interior Udall in late 1966, and later formalized. P.L.O. No. 4582, (January 17, 1969). The issuance of mineral leases on federal lands and approvals and tentative approvals of state selections were suspended pending congressional determination of Native land rights.

The land freeze made a congressional settlement of land claims virtually mandatory. The only other alternative was extensive litigation over the title to lands in Alaska, which had already begun in State of Alaska v. Udall, 420 F. 2d 938 (9th Cir. 1969), and in which the court's ruling had the effect of barring further approval of state selections pending a determination of Native aboriginal land rights.

In the report accompanying S.35, the Senate Interior Committee's version of the Settlement Act, the problems raised by the Natives' outstanding and unextinguished aboriginal land claims were described as follows:

> As a result: (1) there is doubt about the authority of the Department of the Interior to grant to the State or other parties rights in, or patent to, public lands in Alaska claimed by Natives; consequently, almost all mineral leasing on the state selection of such lands have been brought to a halt; (2) the title to public lands or other property in Alaska transferred to the State or to private persons in the fact of a Native protest is seriously compromised; yet (3) Congress to date has granted no agency or court the jurisdiction to make a determination on their merits concerning Native claims in Alaska.

S. Rep. No. 92-405, 92d Cong., 1st Sess. 76 (1971) (emphasis added).

Later in the same report, the Settlement Act's congressional purpose as contained in § 2 of the Senate bill was explained as follows:

> . . . Congress finds that there is an immediate need for a fair, just, and final settlement of all Alaskan Native land claims; that these land claims constitute a legal (but judicially undetermined) cloud on the title to virtually all lands in Alaska; that the best interests of the Native people of Alaska, State of Alaska and the United States are served by a prompt and final legislative settlement; and that the effectuation of such a settlement is the purpose of the Act.

Id. at 108 (emphasis added). Although the "declaration of policy" section of the Settlement Act as finally enacted does not contain the emphasized language, the conference report makes it clear that "[t]he substance of the conference report language is the same as section 2 of the Senate Amendment." H. Rep. No. 92-746, 92d Cong., 1st Sess. 40 (1971).

That Congress saw the Settlement Act solely in terms of removing the cloud on title to virtually all the public lands of Alaska subject to Native claims is evidenced by the limiting effect of the extinguishment clause to challenges to land. By way of explaining the effect of § 4 of the Settlement Act, the conferees stated that

> It is the clear and direct intent of the conference committee to extinguish all aboriginal claims and all aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Id. (italics in original; emphasis added).

B. Congress Did Not Intend to Extinguish Property Rights Protected by the Fifth Amendment.

As demonstrated earlier in Part II supra, the accrued trespass claims of Arctic Slope Eskimos are property which cannot be extinguished without payment of compensation by the United States.

Nowhere in the entire legislative history of the Settlement Act is there any suggestion that Congress intended to provide compensation in it for the extinguishment of constitutionally protected rights. Throughout the Act's legislative history, it is clear that Congress intended to deal only with aboriginal title which it understood to be not compensable under the Fifth Amendment. See, e.g., discussion of impact of Tee-Hit-Ton Indians v. United States, supra, on Native rights in S. Rep. No. 92-405 at 86.

The clearest expression of what Congress saw its role to be in settling Alaska Native land claims is contained in Chairman Aspinall's opening statement during the May 1971 House hearings:

> [T]here should be no misunderstanding about the fact that Congress has sole power and responsibility for determining what is fair compensation for the extinguishment of aboriginal title. Congress is not bound by prior statutes or by judicial decisions. It is settled law that aboriginal title is not compensable under the due process clause of the Fifth Amendment, and that Congress can extinguish an aboriginal title without paying anything if it wishes to do so. The congressional policy to pay for aboriginal titles is just that -- a policy. When applying that policy, Congress is the sole judge of adequacy of the payment.

Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 before the Subcomm. on Indian Affairs of the House Common Interior and Insular Affairs, 92d Cong., 1st Sess. 65 (1971).

Congress, in Mr. Aspinall's view, was legislating not on constitutionally protected rights of Alaska Natives, but only with respect to their aboriginal title. Although Congress, consistent with Tee-Hit-Ton, could have extinguished aboriginal title without the payment of compensation, Congressman Aspinall also recognized the longstanding congressional policy not to extinguish aboriginal title without the payment of compensation. As he pointed out,

> [T]he United States is the only country in the world that pays for the extinguishment of aboriginal titles.
>
> [T]he amount of land to be granted, and the amount of money to be paid, will be based upon Congress' evaluation of Native needs, the role of the Natives in the present day affairs of the State, and the impact of the grant to the Natives on the economy of the State. The amount of the grant to the Natives should not be equated to the undetermined value of undetermined land and water areas, to which the Natives might be able to prove aboriginal title.

Id, at 66.

As the Chairman of the House committee responsible for the drafting of the Settlement Act and the House-Senate Conference Committee on the Act, Chairman Aspinall's view of its purpose is entitled to great weight. His views on this point are wholly consistent with the Eskimos' position that Congress in the Settlement Act did not intend to extinguish Fifth Amendment property rights.

It is also clear that Congress did not attempt to determine the question of compensation under the same standards a court would have employed if constitutionally protected rights had been involved. In justifying the $925 million provided as the cash component of its settlement bill, the House Committee said;

> The $925,000,000 figure is an arbitrary one. It is not intended to be related to the value of the land claimed by the Natives under the doctrine of aboriginal title.
>
> . . . . The figure chosen by the Committee . . . is based on the following considerations: the extreme poverty and underprivileged status of the Natives generally, and the need for adequate resources to permit the Natives to help themselves economically.

H. Rep. 92-523, at 5-6.

Not only were the cash grants made to the Natives under the Settlement Act "arbitrary," but the allocation formula which Congress used demonstrates that no effort was made to place a value on the aboriginal titles of each regional group of Alaska Natives. All Native groups -- Indians, Eskimos and Aleuts -- were treated alike without regard to the extreme differences in value of the lands taken from them. Cash distributions under the Settlement Act are on a per capita basis, i.e. tied to the number of Native enrolled in each region. By failing to undertake a valuation of the claims involved and by using a per capita formula for distributing the cash payments under the Act, Congress was undeniably engaged in a political settlement of the Native aboriginal claims which could not --

and did not -- obviate constitutionally protected rights. Congress made no attempt to provide the "just compensation" to Arctic Slope Eskimos required by the Fifth Amendment. The fairness of the Settlement Act could be the subject of endless debate; that constitutionally protected claims were outside its purview is beyond doubt.

As the State of Alaska has conceded:

> We believe that the Congress could not and did not intend -- simply because it could not do it -- reach constitutionally protected rights of action.

Extinguishment Amendment Hearings, Part 1, at 75.

A written statement, submitted to this Committee by Senator Stevens in conjunction with his oral testimony, also lends considerable credence to the fact that Congress did not intend, by its passage of the Settlement Act in 1971, to extinguish claims protected by the Fifth Amendment. He noted that "there would be no extinguishment of rights in those cases where there was a disturbance of physical possession by one acting without color of law," Id. at 39, and then stated:

> I wish to make absolutely clear that neither the Settlement Act itself nor any amendment which I would support would affect in any way the rights of an Alaskan Native or any other citizen to recover for actual damages where he suffered a personal tort or his physical possession of a parcel of land was improperly disturbed. Our focus in 1971 was, very properly, on claims that were based on alleged aboriginal title; any claims based on that title or the like were extinguished. But one need not have a claim of title to recover damages for personal injuries or for interference with any actual, substantial and continuous occupancy of land. If

> anyone destroyed a Native's dwelling or farm land, or was guilty of a personal tort, the claim of that Native is totally unaffected by the Settlement Act. No one would deny his right to recover his actual damages, regardless of whether he was Native or not.

Id. at 40. As shown in Part IV (A) infra, the rights of American Indians to protection of their right of quiet enjoyment to lands held under aboriginal title is exactly the same as the right of all American citizens to quiet enjoyment of their dwellings, farm lands and other property rights. American Indians, and all American citizens, are entitled to seek judicial relief from the courts for all interferences with these rights. The right to seek such relief -- a cause of action -- is property protected by the Fifth Amendment whether the interference is with aboriginal possessory rights or with the right of possession to patented farm land. Accordingly, if the Settlement Act did not, and was not intended to, extinguish the latter, as Senator Stevens contends, it did not, and was not intended to, extinguish the former. If a trespass claim for "disturbance of physical possession" survived the Settlement Act, so did trespass claims for disturbance of aboriginal possession. The Fifth Amendment does not discriminate.

C. The Language and Legislative History of Section 4(c) Expressly Preserve Tort Claims of Alaska Natives and Provide No Persuasive Support For the Proposition that the Act Extinguished Accrued Trespass Claims.

Any analysis of what Congress intended to accomplish through the extinguishment provisions of the Settlement Act must begin with the statutory language of § 4:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

In its memoranda submitted to this Committee, Extinguishment Amendment Hearings, Part 2, at 112-15, the State of Alaska engages in an analysis of § 4 that strains to create a logical framework for extinguishing the trespass claims of Arctic Slope Eskimos. That analysis begins with § 4(b) and works outward to § 4(a) and (c) to find Congressional intent.

It is clear that § 4(b) extinguishes, as of December 18, 1971, "all aboriginal titles . . . and . . . claims of aboriginal title." What then, did Congress accomplish by including §§(a) and (c) in the extinguishment clause?

Subsection 4(a) provides that "prior" conveyances of interests in public lands of Alaska, including tentative approvals under the Statehood Act, "shall be regarded as an extinguishment of the aboriginal title thereto, if any." The State of Alaska asserts that 4(a), by validating the tentative approvals and conveyances issued prior to December 18, 1971, also extinguished aboriginal titles to the affected lands on the dates those approvals and conveyances were issued. Thus the State asserts that § 4(a) did extinguish a large class of the Native trespass claims, presumably those for trespasses occurring on lands selected by and tentatively approved to the State of Alaska prior to the Settlement Act.

However, as shown in Part IV (C) infra, § 4(a)'s ratification of prior conveyances and tentative approvals could not extinguish the Native's aboriginal title. In the absence of express language to the contrary, a conveyance of the United States' fee interest in lands does not extinguish Indian possessory rights. See, e.g. United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347 (1941); Buttz v. Northern Pacific R.R. Co., 110 U.S. 55, 30 L. Ed. 330, 334 (1886).

Thus, what § 4(a) accomplished was not extinguishment of aboriginal title, but instead validation of leases among various oil companies and confirmation of the State's title to the lands it had selected. Without such validating action those lands would have remained in the public domain, possibly

available for selection by Alaska Natives under the Settlement Act. See Edwardsen v. Morton, 369 F Supp. 1359, 1377-78 (D.D.C. 1973). Section 4(a), consistent with the purpose of the Settlement Act, removed the clouds on the State's title to tentatively approved lands and the oil companies' leases. It did not extinguish aboriginal title and therefore had no effect on Eskimo trespass claims.

The overriding purposes of § 4(c), by its terms, was to extinguish claims for compensation for the taking of aboriginal title. Stated differently, while § 4(a) validated state tentative approval and federal conveyances and § 4(b) extinguished the underlying aboriginal title of Alaska Natives, the purpose of § 4(c) was to preclude any pending or future claims against the United States, the State of Alaska, or third parties arising out of the taking or loss of aboriginal title.

As set forth above, the State's statutory analysis of § 4 presents no persuasive support for their assertion that "all claims" in § 4(c) "obviously" included claims for trespass to aboriginal land as well as claims for the taking of aboriginal land. In fact, "all claims" means aboriginal claims for "land", "hunting", "fishing" and "water." See Extinguishment Amendment Hearings, Part 1, at 99-101.

Moreover, contrary to the State's argument, tort claims were expressly preserved by § 4(c). This reading of § 4(c) is supported by the language of the report accompanying S.35, as sent from committee to the Senate floor:

Section 4 declares the terms of the settlement set forth in this Act, describes the claims which are extinguished or preserved by the Act and sets up procedures for a report by the Secretary of the Interior on the future management and operation of Federal programs in Alaska primarily designed to benefit Alaska Native people.

Section 4(a)

Subsection 4(a) declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extinguishment [sic] is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act. Specifically included, and dismissed and extinguished under the terms of this Act, are all claims pending before the Indians Claims Commission and any court, Federal or State, which are based upon a claim of aboriginal right, title, use or occupancy . . .

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, including lands tentatively approved to the State shall, pursuant to this section, be regarded as a full and final extinguishment of any and all Native claims thereto.

S. Rep. No. 92-405, at 110 (emphasis added). This language, part of a section-by-section analysis of S.35, makes it clear that it was the intent of the framers of the extinguishment clause of S.35 (which, denominated as § 4(a) in the Seante bill, was very similar to 4(c) as it was finally adopted by the House-Senate conferees) to specifically exclude tort claims, such as those for trespass, from extinguishment.

The State of Alaska asserts that the emphasized passage represents an unchanged explanation of an earlier version of the Senate bill's extinguishment clause and is therefore of dubious value. This argument must also fall when relevant bill and report language as they developed during the Senate committee's consideration are subjected to more critical analysis.

As introduced by Senator Jackson early in the 92nd Congress, the extinguishment clause of S.35 provided as follows:

> The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State, and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas, both inland and off shore, and including any aboriginal hunting or fishing right that may exist) by any Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 24), or the Act of June 6, 1900 (31 Stat. 32]), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all land claims (but not claims based on

> grounds other than loss of original Indian title land) pending before any court or the Indian Claims Commission on the effective date of this Act.

(Emphasis added).

The extinguishment clause remained in this form in committee prints through early October 1971. Although the Edwardsen suit was filed on October 5, more significantly the House Committee had by that time reported out its version of the settlement legislation. The House committee bill, H.R. 10367, made provison for extinguishment in § 4:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All alleged aboriginal title and claims of aboriginal title in Alaska based on use and occupancy, including any alleged aboriginal hunting and fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on alleged aboriginal right, title, use or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Alaskan Native use and occupancy, including any such claims that are pending before any court or the Indian Claims Commission, are hereby extinguished.

When the Senate bill was reported out of committee on October 21, it was closer in form to the House version. As reported, § 4(a) of S.35 had been changed to delete the bracketed words and to add the underscored words:

> The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas,

> both inland and off shore, and including any aboriginal hunting or fishing rights that may exist) by an Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 State. 24), or the Act of June 6, 1900 (31 Stat. 321), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all [land] claims [(but not claims based on grounds other than loss of original Indian title land)] based upon aboriginal right, title, use or occupancy pending before any court or the Indian Claims Commission on the effective date of this Act. All prior conveyances of public land and water areas in Alaska, or any interests therein, pursuant to Federal law, including tentative approvals pursuant to section 6(g) of the Alaska Statehood act, shall be regarded as an extinguishment of any and all Native claims thereto.

Notwithstanding the changes made in the revised version, the Committee report retained the following language in its description of the claims extinguished or preserved:

> Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealing clause of the Indian Claims Commission Act.

S. Rep. No. 92-405 at 110 (emphasis added).

The State of Alaska argues that the foregoing statement is of little consequence because the paragraph in the report is identical to that contained in the 1970 Senate report describing the extinguishment clause before it was revised. In the haste of completing its massive report, it is contended the

draftsman overlooked the language change in § 4(a). There are two reasons why this is not persuasive in diminishing the significance of the report language on the question of intent. First, it should be noted that the other late change made in § 4(a) of S.35, i.e., the additional provision for validating prior conveyances and State tentative approvals, was explained in the Senate report. If the Senate committee intended to attach any importance to the deletion of the word "land" before "claims" and the elimination of the proviso for claims other than those based on loss of aboriginal title, why did the committee not take the same opportunity to revise the report language as it did in adding a new paragraph in the report referring to the validation of prior conveyances and tentative approvals?

Second, the language changed to conform the Senate bill's extinguishment clause more closely to that of the House committee is not inconsistent with the preservation of claims based upon grounds other than the taking or loss of aboriginal title. By their terms, there is nothing in § 4 of S.35, § 4 of H.R. 10367, or § 4 as it emerged from the conference committee that would preclude the continued existence and maintenance of claims, such as the accrued trespass claims of Arctic Slope Eskimos, that are based on grounds other than the taking or loss of aboriginal title. The Senate report language explaining the intent of the Senate on the question of the scope of the extinguishment clause is entitled to great weight for in describing § 4 in their report, the House-Senate conferees

declared "[t]he conference report language is, in substance, the same as the language of the Senate amendment." H. Rep. No. 92-746 at 40.

Attempting to support their assertions that § 4(c) was intended to extinguish accrued trespass claims, Senator Stevens and the State of Alaska dwell at length upon the fact that Edwardsen v. Morton was pending prior to enactment of the Settlement Act, and most critically, was filed before the late-October 1971 change in the Senate bill's extinguishment clause. The Edwardsen case, however, was clearly perceived by all as a challenge to Alaska's title to lands on the Arctic Slope:

> In addition,litigation has in recent weeks been initiated by the Arctic North Slope Native Association against the State of Alaska over the title to Prudhoe Bay.

S. Rep. No. 92-405 at 98 (emphasis added).

Even the leading proponent of the oil industry's position, a representative of the Western Gas and Oil Association, who suggested an amendment in committee to § 4(a) of S.35 which would have expressly named the Edwardsen case as being subject to the extinguishment clause, viewed the case solely as a challenge to the State's land title. In an explanation submitted with the suggested amendatory language, the Edwardsen suit was described as:

> requesting that (a) all tentative approvals granted by the Secretary of the Interior to land selected by the State on the Arctic Slope be canceled, (b) that the Secretary be enjoined from granting any further tentative approvals, and (c) that an accounting be made to the [Arctic Slope Native] Association.

This explanation also asserted that § 4(a), as then drafted, was ambiguous as to whether the Edwardsen suit -- even as a challenge to title -- would be extinguished. It argued that the suggested amendment was necessary to remove the "cloud it [Edwardsen] poses for tentatively approved State selections."

This deficiency in Alaska's title was what Congress wished to remove. Section 4 of the Settlement Act was designed to extinguish all claims representing a challenge to title including those then viewed by Congress as being asserted in Edwardsen. Trespass claims were not considered.

In summary, Congress enacted the Settlement Act to remove a cloud on Alaska land title. Congress did not intend to extinguish vested property rights. It expressly preserved tort claims of Alaska Natives. It never considered trespass claims.

On the basis of a fair reading of the language, purpose and legislative history os § 4, Congress did not intend to extinguish accrued trespass claims of Arctic Slope Eskimos.

IV. ARGUMENTS BY THE STATE OF ALASKA THAT THE FIFTH AMENDMENT DOES NOT APPLY TO THE PROPERTY RIGHTS OF INDIANS HAVE NO BASIS IN AMERICAN LAW.

In it supplemental submission to this Committee, the State of Alaska set forth several arguments which suggested, in effect, that, while the Fifth Amendment might protect trespass claims generally, it does not protect the trespass claims of American Indians. Extinguishment Amendment Hearings, Part 2, at 71-80. None of these arguments would be upheld in a court of law.

A. The Argument That Indian Possessory Rights Are Inferior To Those of The White Man

In its supplemental memorandum the State argued that trespass claims of Arctic Slope Eskimos are not protected by the Fifth Amendment because Congress has the power to extinguish the possessory rights from which those claims arise without payment of just compensation. See Extinguishment Amendment Hearings, Part 2, at 71-74. Because the trespass claims of other American citizens are fully protected by the Fifth Amendment, Part II supra, the State's position is nothing more than a statement that the right of Indians to seek relief from American courts for third-party interference with their quiet enjoyment of their lands is less than that of whites.

If the State's argument means that Indians have fewer rights in the courts than whites, it violates fundamental

principles of equal protection. Even the tort claims of aliens who have entered the United States illegally are constitutionally protected.

> One injured as a result of negligence of another has a right of action against that other to recover damages sustained by reason of such injury. That right of action is property.
>
> . . . .
>
> While an alien is permitted by the Government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his right of person and property. He is entitled to the benefits of the Fourteenth Amendment.
>
> . . . .
>
> Congress, had it seen fit to do so, might have provided that an alien making an illegal entry into the country should be denied all civil rights, and the protection of the Fourteenth and Fifth Amendments. Congress has not so acted . . . . It is not for the court to add to these penalties by depriving him of his property. In this case the right to recover damages for the injury inflicted by defendant.

Martinez v. Fox Valley Buslines, 17 F. Supp. 576, 577 (N.D. Ill. 1936). Presumably the rights of American Indians to seek relief from the courts for torts to their property are at least as great as those of illegally-entered aliens.

If, on the other hand, the State's argement means that Indian rights of exclusive possession confer less protection against third-party interference with quiet enjoyment than do white property interests, it overlooks the very essence of the United State's guarantees to American Indian's respecting their aboriginal lands and its fiduciary duty to enforce them.

Courts have repeatedly reaffirmed the principle that the right of American Indians to the exclusive possession of their lands is entitled to the same sovereign protection as the rights of whites.

> One uniform rule seems to have prevailed from [the Europeans'] first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of the individuals located on particular spots.
>
> Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.
>
> . . . .
>
> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.
>
> . . . .
>
> Such, too, was the view taken by this court of Indian rights in the case of Johnson v. McIntosh, (8 Wheat. 571, 604), which has received universal assent.
>
> The merits of this case do not make it necessary to inquire whether the Indians

> within the United States had any other rights of soil or jurisdiction; It is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee simple of the whites. (5 Pet. 48).

Mitchel v. United States, 34 U.S. (19 Pet.) 711, 745-46 (Marshall, C.J.; emphasis added). In 1974 the Supreme Court once again affirmed Chief Justice Marshall's declaration that Indian occupancy rights are equivalent to those of whites.

> In United States v. Santa Fe Pacific R. Co. 314 US 339, 345, 86 L Ed 260, 62 S Ct 248 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:
>
> > "unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 US 219, 227, 67 L ed 622, 625, 43 S Ct 342. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. (US) 543, 5 L ed 681, and has been repeatedly reaffirmed. Worcester v. Georgia, 6 Pet. (US) 515, 8 L ed 483; Mitchel v. United States, 9 Pet. (US) 711, 1 L ed 283; Chouteau v. Malony, 16 How. (US) 203, 14 L ed 905; Holden v. Joy, 17 Wall. (US) 211, 21 L ed 523; Buttz v. Northern P. R. Co. 119 US 55, 30 L ed 330, 7 S Ct 100 supra; United States v.

> Shoshone Tribe, 304 US 111, 82 L ed 1213, 58 S Ct 794. As stated in Mitchell v. United States, supra (9 Pet. (US) 746, 9 L ed 296), the Indian "right of occupancy is considered as sacred as the fee simple of the whites."

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668-69 (1974).

The State of Alaska's argument that Indian possessory rights are inferior to those of whites because the former are not protected by the Fifth Amendment is especially strange in view of the United States' fudiciary duty to American Indians. Since the inception of our Nation's history, the United States has acted as a trustee or guardian for the real property interests of American Indians to protect the interests against white interference or exploitation. The Supreme Court has characterized the United States' trust responsibilities as involving "moral obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 297 (1942); and as binding the United States "by every moral and equitable consideration to discharge its trust with with good faith and fairness." United States v. Payne, 264 U.S. 446, 448 (1924). The United States' fiduciary duty requires it to take affirmative measures to prevent interference with quiet enjoyment of Indian lands or to seek compensation for such interference once it occurs. In view of this special relationship between American Indians and the United States which

guarantees not only a remedy in the courts to protect Indians' quiet enjoyment of land but also the active intervention of the federal government on their behalf, the state of Alaska's argument that Indian possessory rights are inferior to those of whites defies rational belief.

In terms of protection of property from unconsented interference, there is only one difference between Indian possessory rights and white property interests. In 1955 the Supreme Court decided that Congress may prospectively extinguish Indian possessory rights "without any legally enforceable obligation to compensate the Indians." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). Under that decision Indians holding land under unrecognized aboriginal title do not have property rights of perpetual quiet enjoyment as against the United States because Congress may extinguish prospectively those rights at any time. As to the rest of the world, however, Indian possessory rights are property fully protected by the Constitution. Congress alone, not oil companies, federal officials or the State of Alaska, has the power of prospective extinguishment. Until such time as Congress exercises that power, those rights are protected by the United States against all intrusion by third parties, Tee-Hit-Ton, supra at 279, just like white property interests.

The failure to distinguish between the interest of Arctic Slope Eskimos in perpetual quiet enjoyment of their lands as

against the United States and the interest of Arctic Slope Eskimos in quiet enjoyment of their lands as against third parties lies at the heart of the State's erroneous "the greater includes the lesser" argument. See Extinguishment Amendment Hearings, Part 2, at 71-74. The two interests are entirely different. Under Tee-Hit-Ton the sovereign makes no guarantee of protection respecting the first but explicitly guarantees the second until such time as Congress lawfully enacts a prospective extinguishment. The assertion that Congress can extinguish trespass claims because it can extinguish aboriginal title completely overlooks this distinction and belittles the guarantee of quiet enjoyment of land given by the United States to American citizens -- whites, Indians and all others alike.

B. The Argument that Indian Possessory Rights May be Extinguished Because They are Based on Statutory Rights

The State of Alaska has also suggested to this Committee that trespass claims filed under the Edwardsen stipulations may be extinguished without offending the Fifth Amendment because that Amendment does not protect causes of action created by legislative enactment. See Extinguishment Amendment Hearings, Part 2, at 74-78. This suggestion is without merit.

Even if this rule existed, it would not apply to Indian possessory rights because those rights are not dependent on statutes.

> [A] tribal right of occupancy, to be protected, need not be "based upon treaty, statute, or other formal government action."

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974) quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941). Oneida holds squarely that a claim for interference with Indian possessory rights arises under federal common law. 414 U.S. at 674.

> The proposition that a tribe needs no grant of authority from the Federal Government in order to exercise its inherent power of excluding trespassers has been repeatedly affirmed by the Attorney General.

F. Cohen, Handbook of Federal Indian Law 306 (1945).

Like other common law causes of action, the trespass claims of Arctic Slope Eskimos are fully protected by the Fifth Amendment.

C. The Argument that Congress can Retroactively Ratify Trespasses to the Arctic Slope

The State's final argument that the Fifth Amendment does not apply to trespass claims of Arctic Slope Eskimos is that those claims can be extinguished through retroactive ratification because Congress could have authorized the trespasses at the time they occurred. Extinguishment Amendment Hearings, Part 2, at 78-80. This argument fails in several respects.

First, ratification assumes there is an act to ratify. For extinguishment of aboriginal title in 1975 to relate back through ratification, assuming arguendo that such ratification is constitutional, there must have been some act of a federal official which, though unauthorized by Congress, purported to extinguish the aboriginal title of Arctic Slope Eskimos. As the State of Alaska well knows, no official act of any federal officer ever attempted such an extinguishment. Section 15 of S. 1824 cannot accomplish under the guise of ratification what it can not constitutionally do directly because there is nothing to ratify.

Ratification of the acts of federal officials which purported to convey oil leases or other uses of Arctic Slope lands or of the various tentative approvals given by the Secretary of the Interior to land selections of the State of Alaska would not extinguish Eskimo trespass claims. If lawfully ratified, the legal consequence of those acts would only be to validate retroactively transfers of the United States' underlying fee interest. The Supreme Court has repeatedly held that such transfers of the United States' fee interest in public lands does not extinguish or even affect Indian possessory rights which survive the transfer and remain as an encumbrance on the fee.

> The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the Act of July 2, 1864, was passed, the title of the Indian Tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it . . . .

Buttz v. Northern Pacific R.R. Co., 110 US. 55, 30 L Ed. 330, 334 (1886); accord, United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941); Beecher v. Wetherby, 95 U.S. 517 (1877). The rule is well-settled that, in the absence of express language to the contrary, a federal conveyance of public lands does not constitute an extinguishment of Indian possessory rights. Santa Fe, supra at 354-55, 359-60, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546, (1832); Beecher v. Wetherby, supra, Chouteau v. Molony, 57 U.S. (16 How.) 203, 239 (1853).

Until the Alaska Native Claims Settlement Act, became law no lease, tentative approval or other conveyance by the United States contained any express language which purported to extinguish the aboriginal title of Arctic Slope Eskimos. Ratification of those prior conveyances by Congress would not extinguish aboriginal title effective at any time prior to December 18, 1971. Even if such ratification effectively validated those conveyances, the possessory rights would remain as an encumbrance on the fee until December 18, 1971. Because the trespass claims of Arctic Slope Eskimos all relate to acts committed before that date, ratification by § 15 of S. 1824 would not affect suits under Edwardsen.

Second, because there were no acts of federal officials which Congress could now ratify which would have the effect of extinguishing trespass claims, the only other possibility would be ratification of the trespasses themselves. That cannot be done, however, because ratification occurs only in the context of a principal-agent relationship. No responsible person has ever suggested that the oil company trespassers to the Arctic Slope were acting on behalf of the United States at the time the trespasses occured.

Third, even if ratification could somehow be effected, the result would be assumption by the United States of joint and several liability with the trespassers. Through ratification

a principal assumes liability for the otherwise unauthorized acts of an agent. Restatement (Second) of Agency §218 (1957). Until aboriginal title was extinguished on December 18, 1971, agents of the United States had no more right to commit trespass on the Arctic Slope than did the oil companies. The State's citation to United States v. Northern Paiute Nation, 490 F. 2d 954 (Ct. Cl. 1974), for the contrary proposition is wholly in error. The Court of Claims assumed in that case that any effective ratification of torts by the United States would make it directly liable to the Northern Paiutes. 490 F. 2d at 958. Thus, ratification would not serve to extinguish trespass liability but only to impose it on the United States.

Extinguishment of trespass claims by ratification is impossible because there were no acts of lawful agents of the United States which could be ratified to achieve the desired effect. Even if ratification were possible, it would not serve to extinguish trespass liability but only to shift it from the oil companies to the United States. Ratification is not a cure for the Fifth Amendment infirmities in legislation extinguishing accrued trespass claims of Arctic Slope Eskimos.

V. ARCTIC SLOPE ESKIMOS ARE NOT BARRED FROM RAISING THEIR DAMAGE CLAIMS FOR TRESPASSORY CONDUCT BY ACCEPTING BENEFITS UNDER THE SETTLEMENT ACT AND HAVE NOT RELINGUISHED THOSE CLAIMS.

The State of Alaska has suggested to this Committee that even if the trespass claims of Arctic Slope Eskimos are protected by the Fifth Amendment and are actionable, those claims may not be raised because the Eskimos have accepted the benefits of the Settlement Act or because they voluntarily relinquished those claims. Extinguishment Amendment Hearings, Part 2, at 81-87. Neither argument has merit.

A. No Acceptance of Benefits Rule Applies

The State's claim that Arctic Slope Eskimos cannot challenge the constitutionality of the Settlement Act because they have accepted its benefits wholly misapprehends the Eskimo's legal position and the opinion of the Court in Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). Judge Gasch did not rule that § 4(c) of the Settlement Act was unconstitutional. He ruled that as a matter of statutory construction, it did not extinguish pre-Act trespass claims. 369 F. Supp. at 1379.

Arctic Slope Eskimos agree with Judge Gasch. Because Congress did not intend to extinguish their Fifth Amendment rights and § 4(c) did not extinguish them, there is no reason to challenge the constitutionality of the Act. The State's acceptance of benefits argument is a classic "red herring."

Even under the rule as it appears in the State's own cases, Arctic Slope Eskimos would not be barred from chal-

lenging the Settlement Act's constitutionality. Contrary to the State's assertion, Arctic Slope Eskimos did not support final passage of the Settlement Act. During the closing months of congressional deliberation on the Act, when it appeared to the Eskimos that, in their judgement, the legislation would not deal fairly with their land claims, Edwardsen v. Morton was filed to assert their land rights. Arctic Slope Eskimos cast the lone dissenting vote against a resolution of the Alaska Federaltion of Natives resolution endorsing the Act. After the Act was passed by Congress, Arctic Slope Eskimos sent a telegram to President Nixon stating at length their reasons for opposing it and urging a veto.

After the Settlement Act became law -- despite their opposition -- Arctic Slope Eskimos had no choice but to comply with its terms. The language of all of its key provisions is injunctive: "the State of Alaska shall be divided... into twelve geographic regions" [§ 7(a)], "Five incorporators within each region . . . shall select" [§ 12(a)(1)], etc. Arctic Slope Eskimos had no greater discretion to disobey these positive provisions of law than any other law of the United States. No court would even suggest that Arctic Slope Eskimos had any choice but to comply with the mandate of the Alaska Native Claims Settlement Act, particularly in view of dramatic penalty for failing to select land within the time limitations imposed by § 12.

Finally, if there were ever any question regarding acceptance of benefits, Arctic Slope Eskimos would be more than willing to agree to a rescission of the Settlement Act and a restoration of the status quo ante as of December 17, 1971.

B. Arctic Slope Eskimos have Never Relinguished Their Damage Claims for Pre-Settlement Act Trespasses.

Based on its explication of United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941), the State of Alaska has argued that claims for past trespasses are extinguished by a settlement of the question of aboriginal title. The issue of relinguishment in Santa Fe, however, was a question of fact. After a careful view of the record, Justice Douglas concluded that the Walapais request for a reservation, their perceived need for an area secure from white penetration to keep them from losing all their lands, and their acceptance of the reservation created at their request amounted in fact to a relinquishment of their claims to lands outside the reservation. 314 U.S. at 356-58.

Subsequent decisions following Santa Fe have underscored the factual basis of its holding.

> Another principle of the Santa Fe opinion is that Indian settlement on a reservation should be seen as an abondonment of claims only when the specific circumstances warrant that conclusion. Santa Fe involved two reservations. The first, created by an act of Congress, was construed not to effect an extinguishment of Indian title. The rule of construction

> affirmed by the Court was that "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." 314 U.S. at 354, 62 S. Ct. at 255. In this light, the Court considered the establishment of the first reservation as merely an offer by Congress to resolve Indian land claims, which offer was never accepted by conduct or otherwise. It was only the second reservation, established by Executive Order, that led to extinguishment of aboriginal title, and the Court was careful in phrasing its conclusion to indicate that the specific facts justified this result: . . . .

Turtle Mountain Band of Chippewa Indians v. United States, 490 F. 2d 935, 946 (Ct. Cl. 1974) (emphasis added). In Turtle Mountain, itself, the Court of Claims refused to find that the creation of a reservation for the Chippewa Indians was a settlement of their overall land claims.

> The Commission did find that in 1876 the Chippewa Indians in this area petitioned Congress to establish a reservation for them. But we have been shown no evidence indicating that this Executive Order reservation fulfilled the Indians' request or that the reservation was ever "accepted" by the Chippewas as a settlement of their land claims.

490 F. 2d at 947

As the State of Alaska well knows, Arctic Slope Eskimos never agreed to the Settlement Act as a settlement of their trespass claims. No member of Congress, prior to the passage of the Settlement Act ever stated that it had been accepted by Arctic Slope Eskimos as a settlement of their trespass claims or was so intended by Congress itself. Relinquishment is a question of fact. There are no facts to show that Arctic Slope Eskimos have ever relinquished their trespass claims--in exchange for enactment of the Settlement Act or otherwise.